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VOLUME 190

PERMANENT EDITION

COMPRISING ALL THE CURRENT DECISIONS OF THE
SUPREME AND APPELLATE COURTS OF ARKANSAS
KENTUCKY, MISSOURI, TENNESSEE
AND TEXAS

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

AND A TABLE OF WRITS OF ERROR DENIED, DISMISSED, OR GRANTED
BY THE SUPREME COURT OF TEXAS IN CASES IN
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- Crowder v. Stine, 189 S. W. 925.
 Evansville Rys. Co. v. Ligon's Adm'r, 189 S. W. 898.
 Home Ins. Co. v. Bridges, 189 S. W. 6.
 Tudor v. City of Louisville, 189 S. W. 456.
 Williams v. Eagle Bank, 189 S. W. 883.

WRITS OF ERROR

APPLICATIONS FOR WRITS OF ERROR WERE GRANTED, REFUSED, OR DISMISSED
IN THE FOLLOWING COURT OF CIVIL APPEALS CASES

BY THE SUPREME COURT OF TEXAS

PRIOR TO FEB. 7, 1917

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Amend v. Jahns (7th) 184 S. W. 723, Jan. 17, 1917.
Angelina Lumber Co. v. Hines (9th) 184 S. W. 596, Jan. 10, 1917.
Biswell v. Gladney (7th) 183 S. W. 1168, Dec. 20, 1916.
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Ferrell-Michael Abstract & Title Co. v. McCormac (2d) 184 S. W. 1081, Jan. 17, 1917.
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THE SOUTHWESTERN REPORTER

VOLUME 190

STATE v. FLEETWOOD. (No. 19711.)
(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. HOMICIDE \Leftrightarrow 158(1)—**EVIDENCE.**

In a homicide case it was not error to sustain an objection to a witness' testimony that just before making threats against defendant deceased "had some whisky and we took a dram," where it did not appear that such testimony was material.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 293; Dec. Dig. \Leftrightarrow 158(1).]

2. CRIMINAL LAW \Leftrightarrow 696(5)—**RECEPTION OF EVIDENCE—MOTION TO STRIKE.**

Where a witness in a homicide case had answered a question before objection was made, it would have been proper for the state to have requested that the answer be stricken out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1640; Dec. Dig. \Leftrightarrow 696(5).]

3. HOMICIDE \Leftrightarrow 840(4)—**HARMLESS ERROR—INSTRUCTIONS.**

Where defendant was convicted of manslaughter in the fourth degree, an erroneous instruction that murder in the second degree may be presumed from the fact of an intentional killing with a deadly weapon was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. \Leftrightarrow 840(4).]

4. CRIMINAL LAW \Leftrightarrow 1064(7)—**MOTION FOR NEW TRIAL—INSTRUCTIONS.**

Where accused desires to complain that the court failed to instruct on all the law involved in the case, he should advise the trial court in his motion for new trial in what particular point the instructions given were lacking.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2688; Dec. Dig. \Leftrightarrow 1064(7).]

Appeal from Circuit Court, Ozark County;
John T. Moore, Judge.

Andrew Fleetwood was convicted of manslaughter in the fourth degree, and appeals. **Affirmed.**

Defendant was prosecuted in Ozark county for murder in the second degree, based upon the charge that he had shot and killed one Jim Degase. Having been found guilty of manslaughter in the fourth degree, he was sentenced to two years' imprisonment in the penitentiary. From that finding and the sentence bottomed thereon he has (after the usual motions) appealed.

The homicide on which the prosecution herein is bottomed occurred on the 29th of December, 1914. The facts thereof run briefly thus: Deceased and defendant at a time

prior to the homicide had been brothers-in-law, in that defendant had married a sister of deceased, who had died prior to the time of the killing. There was living with deceased and a brother (called in the record Pone Degase) another sister, one Maud Stanley, widowed, seemingly by divorce. This sister, on the afternoon preceding the night on which the killing occurred, had gone to the village of Noble, and had failed to return when night came on. Deceased and his brother, Pone, becoming, it seems, apprehensive about her for some reason, started on horseback, accompanied by one Charles Ross and a certain Hiram Lewis, to look for her. At a point on the public road they met the defendant, Maud Stanley, and defendant's brother Frank, together with one Manda Lewis and a small girl, one Eva, the daughter of defendant. Maud Stanley and defendant were riding on the same horse; defendant riding behind Maud. On meeting defendant and Maud, deceased called twice to her to stop and get off the horse. She did not immediately obey. Thereupon deceased dismounted and came toward her, upon which, and on deceased's either pulling or helping her from the horse, or reaching toward her as if to do so, she dismounted. At the same time defendant slipped from the horse.

So far there is no substantial conflict between the testimony for the state and that for defendant. Touching the subsequent events the stories told by the respective sides are conflicting. According to the testimony on the part of the state defendant, immediately upon dismounting, ran his hand into his bosom and drew or started to draw a pistol therefrom, whereupon Pone Degase, seeing, as he testified, the pistol, struck defendant with his fist and either knocked him down or staggered him till he partially fell. Defendant rose and started toward deceased, who grappled with him and endeavored to take the pistol from him. While defendant and deceased were struggling for the possession of the pistol, defendant fired twice; one of the shots striking deceased in the stomach and producing the wound from which he died a few days later.

The testimony on the part of the defendant

touching the occurrences at the instant before the shooting tends to show that when defendant dismounted from the horse he backed away several steps, but made no effort to draw any weapon at that time; that Pone Degase advanced on him and struck him in the face, partially knocking him down; that while he was recovering from this assault both deceased and Pone Degase again advanced on him and assaulted him; and that thereupon, and in order to protect himself from the combined assault of the Degases, he fired twice, without, he swears, intending to kill either of them, and without specially aiming at either of them.

Threats are shown to have been made by deceased against defendant and by defendant against deceased. These however, are so shadowy and far-fetched as not to produce an abiding conviction of their verity, since there is proof on both sides tending to show that deceased and defendant had been and were friendly and in the habit of visiting each other.

Such further facts as may be necessary to indicate the nature of the alleged errors which are called to our attention will be set forth in connection with the discussion thereof.

Stewart & Luna, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

FARIS, P. J. (after stating the facts as above). [1, 2] I. Defendant complains in his motion for a new trial (he has not favored us with a brief, nor is he represented in this court by counsel) of the exclusion by the court of competent testimony offered by him. We have gone painstakingly over the entire record, and find but one single instance of the exclusion of any evidence offered by defendant which is properly preserved for our review by a ruling and by exceptions taken to such ruling. That instance, is, to wit: One Cobb, called by defendant for the purpose of proving threats by deceased, was engaged in detailing the place and circumstances of the making thereof. So setting the stage for the threats, the witness said, *inter alia*, that deceased "had some whisky and we took a dram." The state at this juncture objected generally, and the court sustained the objection. It is to be surmised that the state's objection went to that part of the witness's answer noted above, and in substance that deceased had some whisky, and that he and the witness drank thereof. The state's objection was general, as stated, and not specific, but was bottomed probably upon the view that the fact of the deceased having whisky

and the act of his taking a dram therefrom were so far afield from the fact of his subsequent threats as to be irrelevant and immaterial thereto. If the objection and the ruling were bottomed on the immateriality of the facts stated, we are constrained to agree that the facts elicited were immaterial. Furthermore, the witness had answered before the objection was made, and the proper request would have been to strike the answer out. Upon either ground we think that the objection must be disallowed.

[3] II. Further complaint is made that the instructions given by the court do not properly declare the law. We have gone over these instructions with much care, and, save and except an instruction given as to an alleged presumption of murder in the second degree to be deduced by the jury from the fact of an intentional killing with a deadly weapon, we find no valid ground of complaint in them. This instruction, numbered 4 in the record, is, we think, erroneous. But since defendant was not convicted of second degree murder, but of manslaughter in the fourth degree, he is in no position to complain. *State v. Colvin*, 228 Mo. 446, 126 S. W. 448; *State v. Green*, 229 Mo. 642, 129 S. W. 700; *State v. Webb*, 216 Mo. 378, 115 S. W. 998, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518; *State v. Finley*, 245 Mo. 465, 150 S. W. 1051; *State v. Wilson*, 250 Mo. 323, 157 S. W. 313.

[4] III. Upon the alleged failure of the court below to cover by his instructions all the law of the case, defendant's assignment of error runs thus:

"The court erred in failing to instruct the jury on all the law necessary to a proper determination of the case when requested by the defendant to instruct further on the law."

Neither in the exception taken nor in the assignment found in the motion for a new trial is any specification to be found wherein it is averred in what respect the court failed to instruct upon all of the law. It was, we think, the duty of the defendant to advise the trial court in his motion for a new trial in what particular behalf or point the instructions given by the court were lacking. *State v. Levy*, 262 Mo. loc. cit. 190, 170 S. W. 1114; *State v. Sykes*, 248 Mo. loc. cit. 712, 154 S. W. 1130; *State v. Dockery*, 243 Mo. 592, 147 S. W. 976; *State v. Chissell*, 245 Mo. loc. cit. 554, 150 S. W. 1066; *State v. Horton*, 247 Mo. loc. cit. 663, 153 S. W. 1051; *State v. Gifford*, 186 S. W. 1056.

We have examined the whole record with much care, and, except as above noted, find no matters deserving attention. The proof is ample to sustain the conviction.

Let the case be affirmed. All concur.

WILSON et al. v. McDANIEL et al.
(No. 17618.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916.)

1. HUSBAND AND WIFE §119(5) — CONVEYANCES—RIGHTS AND INTEREST ACQUIRED.

Where a husband and wife deeded land to a third person, who reconveyed to the wife, she owned a fee-simple legal estate and not a separate estate nor one acquired with her separate means, and her subsequent deed to the husband was a nullity, passing neither legal nor equitable title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 428; Dec. Dig. §119(5).]

2. ESTOPPEL §68(3) — PLEADINGS IN OTHER CAUSE—EFFECT OF WITHDRAWAL.

Where plaintiffs in a will contest alleged title in the testator, they were estopped in a subsequent action of ejectment to question his title, though the allegation of title in the will case was withdrawn prior to rendition of judgment, after which the trial proceeded upon the same theory.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 166, 168; Dec. Dig. §68(3).]

3. WILLS §281—CONTEST—PLEADING—SUFFICIENCY.

The petition in a will contest may refer to lands devised in a general way without particular description.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 639; Dec. Dig. §281.]

4. WILLS §255—CONTEST—JURISDICTION OF PROPERTY.

A will cannot be contested unless the property devised and its ownership are before the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 590; Dec. Dig. §255.]

5. JUDGMENT §743(2) — CONCLUSIVENESS — RES JUDICATA.

A judgment in a contest of a will which purported to devise lands is as conclusive of title in the testators as against the parties thereto, as a judgment in a suit to test the validity of a deed to land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284; Dec. Dig. §743(2).]

Blair, J., dissenting in part.

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Ejectment by Ida Wilson and others against John H. McDaniel and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

This is an ejectment suit to recover certain lands described in the petition, which was in the usual form. The answer consisted of a general denial and a plea of estoppel, and the reply was a general denial. The trial was before the court, and the findings and judgment were for the plaintiffs. The defendants duly appealed the cause to this court.

The facts are few and practically agreed to, which are as follows:

On the 8th day of October, 1861, and prior thereto, Milton McDaniel was the owner of the above-described land. At that time the Civil War was impending. Mr. McDaniel

was a strong Southern sympathizer, and, fearing confiscation of his property, on the 8th day of October, 1861, conveyed said real estate to one George W. Davis for a purported consideration of \$1,200, and said Davis thereafter, for a purported consideration of \$1,300, conveyed said real estate to Sarah McDaniel, who at the time was the wife of Milton McDaniel. The purpose of thus placing the title to the land in Sarah McDaniel was to prevent its confiscation and secure the enjoyment of it to his family. This stands admitted by the agreed statement of facts.

Antecedent to, and contemporaneous with, the execution of the aforesaid deeds, it was agreed and understood between Sarah and Milton McDaniel that she would reconvey the land to him at any time he desired her to do so. Milton McDaniel continued to reside on the land with his family, the title remaining in Sarah McDaniel until the 16th day of December, 1882, on which date she reconveyed the same to Milton. Milton McDaniel died on the 17th day of March, 1906; His wife, Sarah McDaniel, predeceased him about five or six years. Milton, after the death of his wife, continued to reside upon the land until his death.

On the 7th day of January, 1898, Milton McDaniel executed his last will and testament, whereby he gave to all of his children, except his sons, John M. and James F., the sum of \$1 each. All the rest of his estate, real and personal, he gave by said will to his two sons, John M. and James F., which will was duly filed, proved, and admitted to probate by the probate court of Livingston county, Mo.

At all times the land in controversy was recognized and treated by the parties to this suit as the land of Milton McDaniel. He owned no other property at the time of his death upon which his will could operate. The plaintiffs in this cause, recognizing and treating the land as the property of the said McDaniel at the time of his death, and admitting that his will operated on this land and directed its course of descent, if valid, brought against the defendants a suit returnable to the September term, 1907, of the circuit court of Livingston county, Mo., to contest, annul, and set aside said will, and to recover their alleged interest in the land as heirs at law of the said Milton McDaniel, deceased. In their petition in the case to contest the will, they alleged and admitted that the land in controversy was the property of Milton McDaniel at the time of his death, as will be seen from the following allegation from the petition in that case:

"At the time of the death of the said Milton McDaniel, deceased, he was the owner of the east half (½) of the northeast quarter (¼) and thirty-four (¾) acres off of the east side of the west half (½) of the northeast quarter (¼); all in section twenty-six (26), township fifty-six (56), range twenty-two (22), in

Livingston county, Missouri, which real estate was then and there of the fair, reasonable value of fifty-five hundred (\$5,500.00) dollars, and which was, by said alleged and pretended will, given to said John M. McDaniel and James F. McDaniel in equal shares."

The will-contest case was tried at the January term, 1909, of the Livingston circuit court. The jury, at the said January term, 1909, of the Livingston circuit court, returned a verdict sustaining the will. After unsuccessful motions for a new trial and in arrest of judgment, the plaintiffs were granted an appeal in said cause to the Supreme Court. After obtaining a favorable judgment in this cause in the trial court, plaintiffs made no further appearance in this court (Supreme Court) in the will case, but suffered the judgment in the case to be affirmed by this court.

F. S. Hudson and John H. Taylor, both of Chillicothe, and Jones & Conkling and G. C. Jones, all of Carrollton, for appellants. J. M. Davis & Son and Frank Sheetz, all of Chillicothe, for respondents.

WOODSON, J. (after stating the facts as above). I. Upon this state of facts counsel for defendants state their position as follows:

"As we view it, there are two propositions to consider in this case: First, the effect of the deed of Sarah McDaniel to Milton McDaniel made in 1882, by which the said Sarah McDaniel reconveyed the land in controversy to Milton McDaniel. Second, the effect of bringing said suit to contest the will of Milton McDaniel and thereby to recover the alleged interest of the plaintiffs in said land as heirs at law of Milton McDaniel, deceased."

We will consider those propositions in the order stated by counsel.

Attending the first: While counsel for defendants practically concede that the deed from Sarah McDaniel to Milton McDaniel, her husband, dated December 16, 1882, purporting to convey to him the land in controversy, is at common law null and void, yet they contend that in equity the deed was sufficient to convey to him the equitable title to the land, which should be recognized and enforced in favor of the defendants. In support of that contention we are cited to the following cases: *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319; *Morrison v. Thistle*, 67 Mo. 597; *Chapman v. McIlwraith*, 77 Mo. 38, 46 Am. Rep. 1; *Tennison v. Tennison*, 46 Mo. 81; *Rice Stir v. Sally*, 176 Mo. 107, 75 S. W. 398; *Grimes v. Reynolds*, 184 Mo. 685, 68 S. W. 588, 83 S. W. 1132; *Glascok v. Glascok*, 217 Mo. 362, 117 S. W. 67; *O'Day v. Meadows*, 194 Mo. 614, 92 S. W. 637, 112 Am. St. Rep. 542; *Bower v. Daniel*, 198 Mo. 320, 95 S. W. 347; *Evans v. Morris*, 234 Mo. 177, 136 S. W. 408. We have carefully read all of these cases, and after due deliberation are of the opinion that none of them is applicable to the facts of this case.

[1] In this case, Sarah McDaniel, at the time she attempted to convey the land to Milton McDaniel, owned a legal estate there-

in, and not a separate estate; nor did she acquire it under the statute with her separate means, etc. That by the conveyance from Milton McDaniel and Sarah, his wife, dated October 8, 1861, conveying to George W. Davis the land in question, and also the deed from George W. Davis and Mary Ann, his wife, dated December 14, 1861, conveying said land to Sarah McDaniel, placed in Sarah McDaniel a full, complete, fee-simple legal title. Revised Statutes of Missouri 1855, c. 32, § 35.

All the cases cited by counsel for defendant show one of three things: First; that the husband conveyed the land to the wife; second, that the wife, after the passage of the Married Woman's Act, conveyed the land to her husband; or, third, that the wife owned a sole and separate estate in the lands conveyed. Under the first state of facts, the husband had the legal capacity to convey the land to his wife by deed; but she being a feme covert, and not capable of contracting, a court of equity gave her an equitable estate in the lands. In the second case, both the husband and wife were capable of contracting, and, of course, the deed of either to the other would and did, at least, convey the equitable title. And, in the third, courts of equity have from an early period recognized the authority of the wife to convey her sole and separate estate to her husband or to any one else she might choose.

From these brief observations, it is clearly seen that none of the cases cited have any application to this case, where Sarah McDaniel had only a legal estate therein; but, upon the other hand, the authorities in this state are uniform in holding that the deed from Sarah McDaniel to Milton McDaniel dated September 16, 1882 (they being husband and wife), was an absolute nullity. *Huff v. Price*, 50 Mo. loc. cit. 229; *Bland v. Windsor & Cathcart*, 187 Mo. loc. cit. 136, 86 S. W. 162; *R. S. of 1879*, § 669; *Reaume v. Chambers*, 22 Mo. 37; *McReynolds v. Grubb*, 150 Mo. 352, 51 S. W. 822, 73 Am. St. Rep. 448.

We are therefore of the opinion that the deed from Sarah McDaniel to her husband did not convey either the legal or equitable title to the land in controversy to him.

[2] II. The second contention of counsel for defendant is that the judgment of the circuit court of Livingston county, rendered in the case brought by these same plaintiffs to contest the will of Milton McDaniel, constitutes an estoppel against them.

Counsel for defendants state their position regarding this proposition in the following language:

"Plaintiffs, having recognized that Milton McDaniel, their father, was the owner of the land at the time of his death, and electing to so treat it, and bringing the suit to vacate his will and to recover any interest they had in said land as heirs at law of the said Milton McDaniel, deceased, are bound by such election and by such action are hereby estopped, barred, and precluded from prosecuting this action."

In support of the latter proposition we are cited to the following authorities: *Lilly v. Menke*, 143 Mo. 187, 145, 147, 44 S. W. 730; *Knoop v. Kelsey*, 102 Mo. 291-298, 14 S. W. 110, 22 Am. St. Rep. 777; *McClanahan v. West*, 100 Mo. 309-322, 13 S. W. 674; *Bensieck v. Cook*, 110 Mo. 173-182, 19 S. W. 642, 33 Am. St. Rep. 422; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; *Tower v. Compton Hill Imp. Co.*, 192 Mo. 379-393, 91 S. W. 104; *Johnson v. Railroad*, 136 Mo. 349 (erroneous citation); *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287; *MacMurray v. St. Louis*, 138 Mo. 608, 39 S. W. 467; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Kennedy v. Thorp*, 51 N. Y. 176; *Terry v. Munger*, 121 N. Y. 167, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *Botts v. Ferguson*, 46 Hun (N. Y.) 131; *In re Garver*, 176 N. Y. 386-394, 68 N. E. 667; *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; 15 Cyc. A. 259; 15 Cyc. B. 259; 15 Cyc. C. 259; 15 Cyc. 262.

In the case of *Lilly v. Menke*, 143 Mo. 187, 44 S. W. 730, this court held that, where a party elected to take property under a will, he will not subsequently be permitted to claim the property independent of the will. In *Knoop v. Kelsey*, 102 Mo. 298, 14 S. W. 110, 22 Am. St. Rep. 777, it was held that, where a party sold the equity of redemption in certain real estate, he would not thereafter be heard to question the validity of the deed of trust existing against the land at the time of selling of the equity. In *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674, it was held that a party to a suit in partition could not accept the proceeds of the sale of the land and then be permitted to recover the land, etc. In *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, it was held that, where a person by plea assumed the role of a party to a suit, he would not thereafter be permitted to say he was not a party. In *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531, this court held that, where a person proved up a claim against the estate of another for goods converted, he would not thereafter be permitted to recover the goods. In *Tower v. Compton et al., Co.*, 192 Mo. 393, 91 S. W. 104, this court held that, where one of the parties to a contract had violated its terms, he would not thereafter be heard to say the other party violated it in the same matter. In *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287, it was held that, where one accepts a legacy under a will, he will thereafter be estopped to contest the validity of the will. And in *MacMurray v. St. Louis*, 138 Mo. 608, 39 S. W. 467, it was held that a person would not be permitted to sue for damages done his property by grading and in the

same suit restrain the city from doing the damage sued for. The other cases cited announced the same general rule. But I am somewhat surprised that cases more analogous cannot be found. However, in our opinion, those cited in principle and by analogy govern this case.

The petition in the will case, as well as the will itself, particularly described the land here in controversy, and the former alleged that Milton McDaniel owned and died seised of it, and that he devised it to the defendants in this case. The fact that the plaintiffs in that case, prior to the rendition of the judgment, dismissed the petition as to the paragraph describing the land and alleging that Milton McDaniel was the owner thereof, in no manner affects the question of estoppel. This is made clear by the plaintiffs' own conduct, in that they dismissed as to that paragraph, and proceeded with the trial as if it had never been made a part of the petition in the beginning. It follows as a necessary sequence, that, if the suit could properly progress after the dismissal as to that paragraph, then it was not necessary to allege it in the petition in the first place. In either event, the validity of the will would have been legally established.

[3] Moreover, the will itself need not have described the land devised, for the reason, as shown by all the authorities, that a general devise of all of one's property will convey the title thereto, without a particular description. That being true, why could not the petition proper allege the bequest in general terms? The answer must be: It could.

Some point is made about the petition having been dismissed as to that paragraph alleging that Milton McDaniel was the owner of said real estate.

[4] Regarding that matter, it is sufficient to state that the paragraph containing that allegation was the same as the one which described the land; and it is perfectly clear that plaintiffs, by the dismissal of that paragraph, did not undertake and did not understand that they were dismissing the entire suit or denying that the testator owned the land described in the will. This is made plain by the fact that they proceeded thereafter with the trial unto judgment, and thereafter appealed the cause to this court. Besides that, a will cannot be contested without the property and its ownership are before the court; otherwise, it would be a moot case. Clearly that was not the intention of the parties to that suit.

[5] We have digressed somewhat. Returning to the will which was contested in that case: It was a monument of title to the land involved in the will suit, and its validity was questioned therein, and was adjudged valid. Did not that adjudication as completely estop the plaintiffs therein, as if McDaniel had executed a deed to the land in-

stead of the will, and that that suit had been to test the validity of the deed instead of the will? Clearly so in my opinion; I can see no distinction in principle.

Counsel for plaintiffs do not seem to question the soundness of the legal proposition just announced, but seek to evade the effect thereof by insisting (quoting) that:

Before estoppel can be pleaded, it must appear: First, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."

In support of this insistence we are cited to the following cases: Words and Phrases, 2498; Boggs v. Merced Min. Co., 14 Cal. 279, 366, 367; Bader v. Chicago Mill & L. Co., 134 Mo. App. 135, 145, 113 S. W. 1154; Rosencranz v. Swofford Bros. D. G. Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609; Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510; Acton v. Dooley, 74 Mo. 63.

The cases cited correctly announced an abstract legal proposition, but it does not apply to this case. Here the title to the land was necessarily involved in the suit to contest the will, and all the deeds mentioned, as well as the will, were in the chain of title, the existence of all of which, under the law, they were bound to take notice.

For the reasons stated in the second paragraph of this opinion, the judgment is reversed, and the cause remanded, with directions to the circuit court to enter judgment for the defendants in conformity to the views herein expressed. All concur, except BLAIR, J., who dissents as to paragraph 2 and result.

CONNOR REALTY CO. et al. v. SPARLIN. (No. 17963.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. ADVERSE POSSESSION ⇐115(6)—TRIAL—QUESTION FOR JURY.

In suit in ejectment, the evidence being conflicting as to whether those under whom defendant claimed had occupied the land under a claim of right or as squatters, whether defendant's grantor had acquired title by adverse possession at the time of her deed to defendant *held* for the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 698; Dec. Dig. ⇐115(6).]

2. DEEDS ⇐120—PROPERTY CONVEYED—INTENT OF PARTIES.

If the grantor of land at the time of executing the deed had acquired title to the land by adverse possession, her title would pass to the

grantee regardless of what either party thought about the effect of the transfer.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 395; Dec. Dig. ⇐120.]

3. ADVERSE POSSESSION ⇐13—ELEMENTS—PRUDENCE.

If there has been an actual, open, notorious, continuous, hostile, exclusive possession of land under claim of right, the question whether one in possession has acted with ordinary prudence in the matter is not involved or an element to be considered by the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. ⇐13.]

4. ADVERSE POSSESSION ⇐116(1)—INSTRUCTIONS.

In a suit in ejectment, an instruction on adverse possession of defendant and those under whom he claims *held* unintelligible and properly refused.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. ⇐116(1).]

Appeal from Circuit Court, Newton County; Carr McNatt, Judge.

Suit in ejectment by the Connor Realty Company and another against Halley Sparlin. Judgment for defendant, and plaintiffs appeal. Affirmed.

This is a suit in ejectment for the northeast fourth of the southeast quarter of section 19, township 25, range 33, in Newton county, and was begun on March 18, 1912. The answer is a general denial. There was a verdict and judgment for defendant, and the plaintiffs have appealed.

About 1868, Anna Bard, a widow with several children, built a log house and a barn on the land and cleared and inclosed about 13 acres of it. She lived on the land until March 28, 1890, when she conveyed it by warranty deed to her son Clay Bard for the expressed consideration of one dollar, she having previously married Mr. Wacaser. That deed was promptly recorded. Clay Bard lived on the land until his death in 1894. He left a widow, Mattie Bard, and four small children. Mattie Bard continued to reside on the land until she conveyed it to the defendant by quitclaim deed dated December 16, 1905, for the expressed consideration of \$150. Defendant lived on the land from that time until the institution of this suit. During all the time from 1868 to the filing of the petition herein the defendant and those under whom he claims have lived on the land, cultivating the inclosed portion. The remainder of the land is on the bluff, fit only for timber and grazing. The evidence shows that the land in that locality is very rough and broken, and that after the War many persons "squatted" on land there, having and claiming no title to the land on which they lived. It is conceded that the plaintiffs have the documentary title to the land and are entitled to recover unless the defendant has acquired ti-

tle by the adverse possession of those under whom he claims.

There is evidence on both sides of the question as to whether the Bards claimed to own the land, or whether they were mere squatters, and as to whether their possession was open, notorious, actual, exclusive, and adverse. Mattie Bard during the 12 years from her husband's death in 1894 to the time of her conveyance to defendant paid no taxes on the land. Whether her husband or his mother or the plaintiffs herein or those under whom they claim ever paid any taxes on the land does not appear. Mattie Bard testified that she and her husband lived on the land with his mother from 1887 until the mother conveyed to the son in 1890; that the mother claimed to own the land, and her husband claimed to own it after he got his deed; and that she claimed that she and her children owned it after her husband's death. She testified that they were not squatters.

The plaintiffs, in contradiction of her, read in evidence her deposition, in which she testified that both her husband and she, during the time they held the land, were intending to get the title from the government. She further stated in such deposition that she only sold the improvements and a cow and calf to Sparlin, and not the land. On her cross-examination at the trial she testified as follows:

"Q. During your husband's lifetime did he ever intend to get a title from the government? A. Yes, sir; he was working at it all the time. Q. From whom was he trying to get a title? A. I don't know. Q. He thought this was government land, did he? A. I don't know whether he did or not. Q. Why was he trying to get a title from the government? Mr. Ruark: She didn't say he was trying to get it from the government. Witness: I didn't say that he was trying to get a title from the government. I said he was trying to get it all the time. Mr. Cravens: Q. You have said it heretofore, that he was trying to get it from the government? A. No, sir."

Plaintiffs read in evidence a deposition of the defendant in which he, in effect, admitted that he only bought the improvements on the land from Mattie Bard, and that he did not claim the land under her deed until afterward when he found that she had a deed to the land.

At the close of the evidence, the plaintiffs asked an instruction in the nature of a demurrer to defendant's evidence. It was refused. The court also refused plaintiffs' first, second, and third instructions. The first and second required the jury to find for the plaintiffs unless they found that the defendant and those under whom he claims acted with reference to the land as a person of ordinary prudence would have done. The third was as follows:

"If defendant, and those under whom he claims, entered and continued on the land in question as squatters when they so entered and occupied, the amount of improvements, the period during which extent of possession and period during which it is held, and their failure, if any, to pay taxes after they obtained deeds from one

who had no title, if such be the fact, and with knowledge of such fact, then there is and can be no occupancy of the land in good faith relying upon alleged color of title deeds as being a legal title to the land in dispute."

O. L. Cravens, of Neosho, for appellants.
Horace Ruark, of Neosho, for respondent.

ROY, C. (after stating the facts as above).

[1] I. Most of the points mentioned in appellants' brief were raised by their demurrer to defendant's evidence. We think that instruction was properly refused. True, there are serious difficulties with defendant's case. It does not appear that the Bards ever paid any taxes on the land. Mattie Bard testified both ways on the question as to whether they claimed to own the land or were intending to get the title from the government. On the other hand, so far as outward appearances were concerned, the Bards from 1888 to 1905 were in possession of the land, living on it, and cultivating all that was subject to cultivation; such part being inclosed. From 1890 to 1905 Clay Bard and his widow had a clear color of title, a warranty deed from the former possessor, Anna Bard (Wacaser). Though Mattie Bard contradicted herself by her deposition, yet on the trial she testified that she and her husband and his mother claimed the land as theirs. That is sufficient evidence to go to the jury as to whether Mattie Bard, at the time of her deed to the defendant, had acquired title by adverse possession.

In Perkins Lumber Co. v. Irvin, 200 Mo. loc. cit. 491, 98 S. W. 580, there was evidence both ways on the question as to whether the party having color of title claimed thereunder or admitted that the title was in the county. It was held that it was a question for the jury. So it is here.

[2] Though defendant admitted in his deposition that he supposed that he was only buying the improvements when he got his deed from Mattie Bard, yet that does not defeat him if as a fact Mattie Bard had at that time acquired the title by adverse possession. If she then had the title, it passed by her deed to the defendant, regardless of what either or both of them thought about the effect of the transaction. No point was made in the trial court or here on the question as to what, if any, interest Mattie Bard's children have in the land, or the effect of such interest, if any, on the issues here involved. We therefore leave such question out of consideration.

[3] II. The first and second instructions asked by plaintiffs and refused by the court were properly refused. The question as to whether one obtaining title by adverse possession has acted with ordinary prudence in the matter is not an element to be considered by the jury. The plaintiffs have cited no authority upholding their contention in that respect. If there has been actual, open, notorious, continuous, hostile, exclusive posses-

sion under claim of right, the question of prudence is not involved.

[4] III. Plaintiffs' third instruction was properly refused. By some oversight it was so written as to be unintelligible and was properly refused for that reason. We call attention to it as set out in the statement.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court.

STATE v. McFARLAND. (No. 19669.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

SEDUCTION \Leftrightarrow 45—CRIMINAL RESPONSIBILITY—EVIDENCE—SUFFICIENCY.

In a prosecution for seduction under promise of marriage, evidence held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 80-82; Dec. Dig. \Leftrightarrow 45.]

Appeal from Criminal Court, Buchanan County; Thomas F. Ryan, Judge.

William McFarland was convicted of seduction under promise of marriage, and he appeals. Reversed and remanded.

John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for the State.

WALKER, J. An information filed by the prosecuting attorney of Buchanan county charged defendant in two counts: (1) For seduction under promise of marriage; and (2) for carnal knowledge. He was convicted under the first count and sentenced to two years in the penitentiary. The prosecutrix testified: That the first time she met defendant was in February, 1914. Thereafter they were frequently together. That they became engaged about the middle of the following March. A short time thereafter defendant secured some sort of a certificate, which purported, according to prosecutrix's testimony, to show that she and the defendant had been married. That she believed they had been married, although no ceremony had been performed. In the latter part of March or the first of April she went with defendant to a room he had rented on Frances street in the city of St. Joseph and had sexual intercourse with him. Despite the purported marriage certificate, and her belief that she was married to defendant, she says she submitted to his embraces because he had promised to marry her. Her language relative thereto is as follows:

"Well, when we were doing this, he promised he would marry me, and we would go to the minister that very night and get married. He promised to marry me, but he never did."

Further testifying, she says she thought at the time she was married, but she was single; that at one time she had the so-called marriage certificate in her possession, but does not know what became of it. It was destroyed some way. Subsequent to this meeting at the room on Frances street, she met defendant, sometimes in the afternoon, and at other times at night, until he went away in August of that year.

After a prolix cross-examination, which incumbers the record with a mass of irrelevant and oftentimes trivial matter, the prosecutrix, somewhat more in detail than heretofore, stated:

"That there had been improper relations between herself and the defendant prior to the night of April 1, 1914, when she went with him to the room on Frances street. That he had asked her two or three times, but she had refused him, and he said, if she would, they would get married, and so on April 1st she did, and he showed her the marriage certificate, and said they would get married that night, after they got through."

Following this her testimony is contradictory as to whether defendant had promised to marry her prior to their meeting on the night of April 1st, or at that time. She subsequently declared to the mother of defendant that she was not married to the latter. Prosecutrix, on further cross-examination, stated: That she went with defendant to the room on Frances street about half past 9 o'clock p. m., and remained until half past 1 o'clock a. m. After describing the location of the furniture in the room, she said defendant told her he would marry her, and after showing her the certificate of marriage said they would go to the preacher after having sexual intercourse and get married. If they were married, she does not know why they wanted a preacher. That they had intercourse on the bed. That defendant just grabbed her, and pulled her over on the bed, and held her, and forced her. That she could do nothing at the time. That she could have "hollered," but did not. That he told her to keep still; that people in the next room would hear them and might find it out. That she kept still, and defendant reached over on a dresser near the bed, and got a small bottle of chloroform, and told her to smell it for her headache. That she did so, and went to sleep, and did not know that defendant had intercourse with her until she awoke. That she did not submit to defendant. That the marriage certificate had something to do with it before defendant gave her the chloroform for her headache. Before this defendant had done nothing to the prosecutrix, except to ask her to have intercourse with him. That they laid down on the bed, and thereafter defendant got the chloroform bottle, she smelled of it, and remembers nothing more. There was no light in the room, defendant having turned it out some time before, except light from a hall

across a court; but prosecutrix saw the label "Chloroform" and "Poison" on the bottle, which defendant held to her nose. When prosecutrix awoke, she found she had been ravished. Defendant was scared. He thought prosecutrix was not going to awake. He opened one window, and then another, to give her more air. Prosecutrix never consented to the intercourse, but defendant did promise to marry her before he gave her the chloroform and stuff. In response to his offering to marry her, she did not have intercourse with him, because he effected his purpose by chloroforming her, and she knew nothing about it until about 1 o'clock in the morning, three or four hours afterwards. The second night after that she had intercourse with him again, and frequently thereafter until August, 1914.

Defendant's testimony is to the effect: That the third night after he was introduced to the prosecutrix he rented a room on Frances street, St. Joseph, took the prosecutrix there, and they had sexual intercourse. That several times thereafter, upon retiring from his work as a bell boy at the St. Francis Hotel, he found prosecutrix waiting for him at the room, and they had sexual intercourse. That he had the room about a week. That he never at any time discussed marriage with her, except on the way home with her the night or morning after their first indulgence. That the conversation did not result in any agreement as to marriage, but that she said she was pregnant by another man, and wanted a bogus marriage to fool her home folks. That he got a blank form, gave it to prosecutrix, and she filled it out. She told him she was going to date it back, and he said he did not care. To carry out the scheme, they told prosecutrix's mother they were married. That he bought medicine for prosecutrix. This was the substance of his testimony.

A Mrs. Rhode, from whom defendant rented the room where the parties met, stated that when defendant talked to her about the room he said he wanted it for himself and wife. The clerk of the St. Francis Hotel said at one time defendant introduced him to a girl as his wife; that the girl resembled prosecutrix. Defendant denied the statement of Mrs. Rhode.

Various errors are assigned by defendant, but under our view of the testimony it is unnecessary to review them. The inconsistencies in the statements of the prosecutrix (upon whose testimony the state relied to convict) are so glaring and in ill accord with reason that we feel justified in holding that it is not sufficient to sustain a conviction. If defendant is guilty, it is of another and more heinous crime than that for which he was tried. However loath we may be to disturb the verdict of a jury, if sustained by any substantial evidence, we feel impelled in this case, after a careful review of the en-

tire record, to reverse and remand it; not that defendant may be again tried upon the charge preferred, but that the state may take, if it seems proper, such further course in the premises as the facts warrant. All concur.

TENNISON et al. v. WALKER et al.

(No. 17896.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916.)

1. REMAINDERS ¶17(2)—RIGHT OF ACTION.

If a deed conveyed a life estate, with remainder over to grantee's children in fee, a cause of action against a grantee of the mother would not accrue until the termination of the life estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 13; Dec. Dig. ¶17(2); Limitation of Actions, Cent. Dig. § 231.]

2. DEEDS ¶93 — CONSTRUCTION — INTENTION OF GRANTOR.

To properly construe a deed, the court must look at its entire face and ascertain the grantor's intention from all the language used therein.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. ¶93.]

3. DEEDS ¶127(2)—CONSTRUCTION—CONVEYANCE TO BODILY HEIRS.

Under Rev. St. 1909, § 2872, a conveyance to the grantee "and her bodily heirs," creating an estate tail at common law would have given to the grantee a life estate and the heirs of her body the remainder in fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 420; Dec. Dig. ¶127(2).]

4. TRUSTS ¶86 — CONSTRUCTION — PRESUMPTIONS.

The presumption that a person who purchases and pays for real estate purchases it for his own use, although title be taken in the name of a third party, in which case the law creates an implied trust, although subject to exceptions in case the grantee is a wife or child, should be construed in connection with other circumstances in the construction of a deed, which is ambiguous as to the estate created and the persons to whom title is conveyed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. ¶86.]

5. DEEDS ¶109—CONSTRUCTION—PURCHASE.

Where the grantee purchases the property and it is not a gift by the grantor, it will not be presumed the latter intended to make the same circumscribed limitations against the former's right of alienating the property as if the property had been a gift by the grantor to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 239, 280, 598-600; Dec. Dig. ¶109.]

6. DEEDS ¶93 — CONSTRUCTION — TECHNICAL MEANING OF WORDS.

While the courts must read a deed as they find it, and must not reconstruct it or give it a meaning different from what appears upon its face, yet in construing the deed which on its face bears evidence of ignorance of the writer, the courts should not adhere too strictly to the technical meaning of technical words used by him, but should recognize his unskillfulness, and gather the true intention of the grantor from the entire instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. ¶93.]

7. DEEDS. ¶124(4)—CONSTRUCTION—BODILY HEIRS—"ASSIGNS."

Where a deed in the granting clause gave land to grantees and "her bodily heirs and assigns, but in the habendum clause and other parts of the instrument used the words "and unto their heirs and assigns forever" and in other parts of the instrument "and unto her heirs and assigns, forever," the word "her," where used, having been substituted for the word "their," originally written, the word "assigns," meaning those to whom property shall have been transferred, having as well-defined a meaning as the words "her bodily heirs," and to be given effect when the intention of the grantor is sought, and it appearing that the grantee dealt with the land as if she had full title, in view of the ambiguous meaning of the granting clause, the evident intention of the grantor, as expressed clearly in the habendum clause and other parts of the instrument, to grant a fee to the grantee, to his daughter, who paid full value, will be given effect.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 416-423, 434, 435; Dec. Dig. ¶124(4).

For other definitions, see Words and Phrases, First and Second Series, Assigns.]

Appeal from Circuit Court, Maries County; J. G. Slate, Judge.

Ejectment by J. E. Tennison and others against J. Ellis Walker and others. Judgment for plaintiffs, and defendants appeal. Reversed and rendered.

This is a suit in ejectment, brought by plaintiffs against defendants to recover the possession of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, all in section 14, township 40, range 7 W., situate in the county of Maries, state of Missouri. The petition was in conventional form, and asked for damages for the detention of the property and the monthly rents and profits thereof. The answer consisted of a general denial, and the 10 and 24 years' statutes of limitation. The reply was as follows:

"Plaintiffs, for reply to the new matter in defendant's answer, and to the plea of the statute of 10 years' limitations and the statute of 24 years' limitations as a bar to their action, state that Thomas J. Johnson, who was the patentee of the lands described in plaintiffs' petition on the 20th day of February, 1875, conveyed a life estate in the premises described in plaintiffs' petition to Narcissus Tennison, remainder over to these plaintiffs; that Narcissus Tennison died on or about the ____ day of ____, 1905, at which time her life estate ceased and the remainder vested in these plaintiffs, and that plaintiffs' cause of action did not accrue until the said ____ day of ____, 1905, and alleges that by reason of these premises their right of action is not barred, either by the 10 or the 24 years' statute of limitations."

The trial resulted in a judgment for the plaintiffs, and the defendants appealed the cause to this court.

The facts are as follows: The plaintiffs are the children of Narcissus Tennison, who died in the year 1905. The suit was instituted in September, 1912, and the evidence for the plaintiffs showed: That Thomas J. Johnson patented the land from the United States, and that on February 28, 1875, in consideration of \$400 paid to him therefor

by Narcissus Tennison, his daughter, he conveyed the land to her by a general warranty deed, which reads as follows:

"This indenture, made on the 20th (twentieth) day of February, A. D. one thousand eight hundred and seventy-five (1875), by and between Thomas J. Johnson and Patsy Johnson, husband and wife, of the county of Maries and state of Missouri, parties of the first part, and Narcissus Tennison of the county of Maries in the state of Missouri, party of the second part: Witnesseth: That the said parties of the first part, in consideration of the sum of four hundred dollars, to them paid by the said party of the second part, the receipt of which is hereby acknowledged, doth, by these presents, grant, bargain and sell, convey and confirm, unto the said party of the second part, and her bodily heirs and assigns, the following described lots, tracts or parcels of land lying, being and situate in the county of Maries and state of Missouri, to wit: All of the south half of the southeast quarter. Also east fourth ($\frac{1}{4}$) of southwest quarter, section fourteen (14), township forty (40), range seven (7) west, containing one hundred and twenty (120) acres, more or less. To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging, or in any wise appertaining, unto the said party of the second part, and unto their heirs and assigns forever; the said Thomas J. Johnson and Patsy Johnson hereby covenanting that they are lawfully seised of an indefeasible estate in fee, in the premises herein conveyed; that they have good right to convey the same; that the said premises are free and clear of any incumbrances done or suffered by them or those under whom they claim; and that they will warrant and defend the title to the said premises unto the said party of the second part, and unto her heirs and assigns forever, against the lawful claims and demands of all persons whomsoever. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written."

That upon the receipt of this deed Narcissus Tennison and her husband took possession of the land sued for and resided thereon until October 27, 1892, when by a general warranty deed, in consideration of \$1,100, they sold and conveyed to Wm. R. Walker, his heirs and assigns, the following described land:

"All of the south half of the south east quarter and the east quarter of the south west quarter section (14) fourteen, township (40), range (7), west, containing (120) one hundred and twenty acres, more or less."

The foregoing misdescription of the land is given for the reason that the plea of the statutes of limitations is based upon it. Through mesne conveyances, on May 22, 1908, the defendants acquired the property in controversy for the sum of \$3,200. While Narcissus Tennison was in possession of the land she and her husband used and occupied it as a home and farm, and mortgaged it two or three times to secure borrowed money, all of which loans were paid by her. Wm. R. Walker, upon receiving the deed from Narcissus Tennison, took possession of the 120 acres of land sued for; and he and those who claim title thereto under him have had possession of the same ever since.

Frank H. Farris and J. Ellis Walker, both of Rolla, for appellants.

J. J. Crites and C. C. Bland, both of Rolla, for respondents, cited: Bain et al. v. Tye et al., 160 Ky. 408, 169 S. W. 843; Warne v. Sorge, 258 Mo. 162, 167 S. W. 967; Davis v. Hess, 103 Mo. 31, 15 S. W. 324; Reynolds v. Lawrence, 147 Ala. 218, 40 South. 576, 119 Am. St. Rep. 78; Burnett v. McCluey, 78 Mo. 676; Prior v. Scott, 87 Mo. 303; Wolfe v. Dyer, 95 Mo. 545, 8 S. W. 551; Chambers v. Ringstaff, 69 Ala. 140; Barrett v. Kansas & Texas Coal Co., 70 Kan. 649, 79 Pac. 150; Ellmaker v. Ellmaker, 4 Watts (Pa.) 89.

WOODSON, J. [1] I. There are but three legal propositions presented to this court for determination, viz. the character of the estate, the deed from Johnson and wife conveyed to Narcissus Tennison in the land sued for, and the sufficiency of the description of the land in the deed from Narcissus Tennison and husband to Wm. R. Walker, and the admission of testimony regarding adverse possession, etc. But from the view we take of the case, it is only necessary for us to decide the first, namely, What estate or estates in the land did the deed of Johnson and wife to Narcissus Tennison convey? Counsel for plaintiffs contend that it conveyed a life estate to Narcissus and the remainder in fee to her children; the defendants, on the contrary, contend that the deed conveyed the entire fee to Narcissus Tennison. If it be true that said deed only conveyed a life estate to Narcissus, with the remainder over, then under our statute (section 2872, R. S. 1909), as amended in 1865 (R. S. 1865, p. 442), her children took the remainder in fee. In that case, of course, the plaintiffs should recover for the reason their cause of action did not accrue until the termination of the life estate of their mother, caused by her death in 1906; while, upon the other hand, if the deed to Narcissus conveyed to her the fee, then her deed to Wm. R. Walker disposed of the entire estate in the land, and when she died neither she nor the plaintiffs had any interest or estate therein to convey.

This brings us to construction of the deed. By reading the deed it will be seen that it describes the Johnsons as "parties of the first part, and Narcissus Tennison as party of the second part"; that the consideration clause reads that * * * "In consideration of the sum of four hundred dollars, to them paid by the said party of the second part"; that the granting clause conveys "unto the said party of the second part *and her bodily heirs and assigns*," the land mentioned; that the habendum clause reads, "to have and to hold the premises, etc., unto the said party of the second part, *and unto their heirs and assigns forever*"; and the warranty clause reads, "and they will warrant and defend the title to the said premises unto the said party of the second part, *and unto her heirs and*

assigns forever," etc. The italics are ours. In short, the deed uses the words "her bodily heirs" but once, which are coupled with the words "and her assigns," and are found in the granting clause, while it uses words "party of the second part," or the *party of the second part and her heirs and assigns forever*, five times, as before stated.

[2] This deed, upon its face is clearly ambiguous and uncertain in meaning. In order to properly construe the deed, we must look at its entire face and glean the grantor's intention from all the language used therein.

[3] If we should read the granting clause alone, there would still be doubt as to its meaning. Note the language, do " * * * convey and confirm, unto the said party of the second part *and her bodily heirs and assigns*," etc. If the words "and her assigns" were eliminated, it would create at common law an estate tail in Narcissus Tennison and the heirs of her body, which, under the statute before mentioned, would have given her a life estate and the heirs of her body the remainder in fee; but do those words import the same meaning when read in connection with the words "and assigns" contained in the same clause and the various other causes of the deed bearing upon the same subject? This question, in my opinion, must be answered in the negative; and I will proceed to state my reasons for so holding. But before doing so, a foreword regarding the designations of the various clauses of a deed. At common law they were known as the premises, the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants and the conclusions, each and all of which were intended to serve a separate and a more or less independent purpose in a deed, assisting in the aggregate, "but little in severalty" in ascertaining the real intention of the grantor as to the character of the estate he conveyed thereby; but, as was said by Judge Marshall in the case of Utter v. Sidman, 170 Mo. loc. cit. 294, 70 S. W. 705:

"The modern rule, which prevails in this state, is much simpler and much more calculated to carry out the wishes of the grantor. The intention of the grantor, as gathered from the four corners of the instrument, is now the polestar of construction. That intention may be expressed anywhere in the instrument, and in any words, the simpler and plainer the better, that will impart it, and the court will enforce it no matter in what part of the instrument it is found."

This language was quoted with approval in the case of Howell v. Sherwood, 242 Mo. 536, 147 S. W. 810, which shows that the intention of the grantor must be gleaned from the entire deed, not from scattering parts thereof.

[4, 5] Returning to the point of digression: Keeping in mind the general rule that the intention of the grantor is to be gathered from the face of the entire deed and not from a single clause thereof, it should be noted that this deed, from the beginning, describes Nar-

cissus Tennison as *party of the second part*, not mentioning her husband or any one else in that connection. It is also shown by the deed that the land was not a gift by the father to the daughter, but a purchase, and that she paid him \$400 therefor, presumably its full value at that time, while the various deeds read in evidence shows that the land increased in value as the years passed, selling the last time for the sum of \$3,200. Ordinarily the law presumes that when a person purchases real estate and pays for it, he or she purchased it for his or her own use, and this is true even though the title to the same could be conveyed to a third party, in which case the law will create an implied trust in favor of the purchaser, and declare the third person a trustee to hold the title thereto for the use of the purchaser. This presumption has certain well-known exceptions, as where the conveyance is made by a husband to the wife, or parents to children, etc.; but these exceptions do not militate against the general presumption mentioned, which should be considered and weighed in connection with all the other facts and circumstances in evidence, in the construction of a deed, which is ambiguous as to the character of the estate created and the parties to whom the title thereto is conveyed. Moreover, as in this case, where the grantee purchases the property and it is not a gift by the grantor, it will not be presumed the latter intended to make the same circumscribed limitations against the former's right of alienating the property as if the property had been a gift by the grantor to the grantee. In discussing this question, this court, in the case of *Wood v. Kice*, 103 Mo. loc. cit. 335, 15 S. W. 624, said:

"A donor has the right to impress upon his gift such conditions as he sees fit, but when one buys and pays for property it is his in equity, even before he gets a deed for it, and the grantor's right to fetter its alienation is more limited than in the other case, if allowed at all. The tendency has been in England, and especially in the United States for the last hundred years, to make the interchange of property, both real and personal, as free as possible, reducing the restraints upon its alienation to the minimum."

Again, the granting clause of the deed, to wit, "grant, bargain," etc., unto the "party of the second part, and her bodily heirs and assigns," indicates that Narcissus Tennison had some power to dispose of the property during her life; otherwise why was the word "assigns" used in the same clause and connection with the words "and her bodily heirs"? At least this throws some doubt upon the meaning of the words "her bodily heirs," which should be considered along with the other clauses of the deed in ascertaining the intention of the grantor.

In this connection it may be added that an inspection of the deed (the original being before the court) shows that the scrivener who wrote it was a person of limited education, and not well versed in the conveyance

of real estate, nor did he understand the meaning of the technical terms used therein.

The habendum clause shows that the word "her" was written in a blank space appearing between the words "unto" and "heirs," and that there was *first written* in that blank the word "their," which was subsequently changed by striking out the letter "i" and also changing the last letters of the word so as to make "le" read "her." These changes have much probative force in showing that it was the intention of the grantor to convey the fee to the land to Narcissus, and not simply a life estate, with the remainder over to the heirs of her body. This intention is confirmed by the warranty clause of the deed, which shows that the word "their" was first written in the blank space between the printed words "unto" and "heirs" and then changed to the word "her" in the same manner as it was done in the habendum clause. These written changes, when read in connection with the various other clauses of the deed, and harmonizing with them all save the granting clause, leave but little, if any, doubt as to the intention of the grantor to convey the fee to his daughter.

[6] The conclusion stated finds ample support in the adjudications of this and other states of the Union. In the cases of *Chew v. Kellar*, 171 Mo. 221, 71 S. W. 172, and *Tygard v. Hartwell*, 204 Mo. loc. cit. 205, 102 S. W. 989, this court held that while the courts must read a deed as they find it, and must not reconstruct it or give it a meaning different from what appears upon its face, yet in construing the deed which on its face bears evidence of ignorance of the writer, the courts should not adhere too strictly to the technical meaning of technical words used by him, but should recognize his unskillfulness and gather the true intention of the grantor from the entire instrument, the four corners of the deed.

[7] Under the modern law of this country and England, as before stated, there is no stronger reason for giving full force and effect to the granting clause of a deed than there is for giving such effect to the other clauses thereof; and the word "assigns" as read in the deed, has as well-defined meaning, as do the words "her bodily heirs," and must be given some effect when the intention of the grantor is sought. In *Gannon v. Pauk*, 200 Mo. loc. cit. 88, 98 S. W. 475, this court said the word "assigns" means "those to whom property shall have been transferred." This presupposes that the grantor contemplated the property might be transferred to another by the grantee and her heirs; otherwise the word would have no meaning whatever.

But independent of the matter just mentioned, the significant clause of this deed, and the controlling one, it seems to me, is the habendum, which is definite, certain, and unambiguous, which reads, "to have and to hold unto the party of the second part, and

unto her heirs and assigns forever"—most apt words to convey a fee to Narcissus Tennon. To the same effect is the warranty clause. In the case of *Rines v. Mansfield*, 96 Mo. loc. cit. 399, 9 S. W. 800, it is said:

"While the habendum clause in a deed cannot be used to defeat a grant, it may be used to explain or qualify it, and to define the interest granted, if it has not already been defined. *Warn v. Brown*, 102 Pa. 347."

In the case of *Green v. Sutton*, 50 Mo. at page 192, it is said:

If in a deed "there be inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, then the words of the habendum should have a controlling significance."

In the case of *McCullock v. Holmes*, 111 Mo. loc. cit. 447, 19 S. W. 1097, it is said:

"The fact that the limitation above quoted appears only in the 'habendum' clause of the conveyance to Azra A. Holmes does not deprive it of its legal force or effect. All parts of the deed should be considered in gathering its meaning, and the true intent it designs to express, throughout, should be effectuated. In the premises of this deed 'A. A. Holmes' is named as grantee, while in the habendum the extent of his estate is defined, and the remainder now in consideration carved out. All parts of an instrument are to be construed as consistent with each other, if such construction be possible."

In the case of *Bone v. Tyrrell*, 118 Mo. loc. cit. 182, 20 S. W. 797, it is said:

"The grant in the devise is to Elizabeth Bone, and standing alone under the statute would have been sufficient to pass the fee-simple title of the grantor to her (*Revised Statutes 1845*, p. 219, § 2); but this grant, being immediately limited by a habendum clause, 'to her and her children, heirs of her body, forever,' had the effect of passing to her only an estate in fee tail under the statute of 13 Edward the First, which under the statute of this state became an estate for life in the said Elizabeth, remainder in fee simple to her children. *Revised Statutes 1845*, § 5, p. 219."

In the case of *Hunter v. Patterson*, 142 Mo. loc. cit. 318, 44 S. W. 252, it is said:

"While the erasure of the words 'and his heirs and assigns forever' in the first instance would not, perhaps of itself, create an estate tail, yet when taken in connection with the above-quoted clause of the deed, following the description of the premises conveyed, and preceding the usual habendum, it shows unmistakably that the clause in question was inserted therein for the sole and particular purpose of limiting the estate granted. The governing rule of interpretation is 'that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intent if practicable, when not contrary to law.' 2 *Devlin on Deeds* (2d Ed.) § 836."

In the case of *Linville v. Greer*, 165 Mo. loc. cit. 897, 65 S. W. 583, it is said:

"This position finds support in the rule that when the construction of a deed is doubtful it is to be given that construction which is less favorable to the grantor. But if there be a doubt as to the intention of the parties to the deed, the habendum clause which performs the office of defining, qualifying, or controlling the granting clause when not in conflict with it, is an important factor in arriving at such intent. *Devlin on Deeds* (2d Ed.) § 215."

In the case of *Utter v. Sidman*, 170 Mo. loc. cit. 291, 70 S. W. 704, it is said:

"Per contra the defendants reply by saying that the term, 'her bodily heirs,' is inconsistent with three-fourths of the other clauses in the deed, and as the granting clause conveys the property to Mrs. Clark, and as the habendum clause is to 'assigns,' and as the warranty clause also embraces 'assigns,' it must follow that Mrs. Clark took a fee simple, and the term 'her bodily heirs' must give way. *Devlin on Deeds* (2d Ed.) vol. 1, § 214, thus states the rule: 'Where proper words of limitation are employed in the granting clause, there is no benefit to be obtained by the habendum. Where there is a repugnance between the words expressing the grant and the habendum concerning the estate the grantee is to take, the rule governing the construction of all contracts will be applied, and effect will be given to both clauses if possible. Yet where there is a definite limitation in the words of the grant, and there is a conflict between them and the habendum, the latter must yield. If it appears from the whole instrument that it was intended by the habendum clause to restrict or enlarge the estate conveyed by the words of grant, the habendum clause will prevail.'"

Again in the same case, 170 Mo. at page 297, 70 S. W. at page 706, it is said:

"Under the old rules the qualifying words of limitation in the habendum would have been rejected for repugnancy. But not so now. The manifest intention of the grantor, as gathered from the four corners of the instrument, was effectuated, and that intention was held to be entitled to as much respect when expressed in the habendum as if it had been expressed in the premises."

Again (170 Mo. at page 298, 70 S. W. at page 706), in the same case, it is said:

"In *Hunter v. Patterson*, 142 Mo. loc. cit. 318, 44 S. W. 250, the premises were, 'grant, bargain, sell, convey and confirm unto him, the said party of the second part, ~~and his heirs and assigns forever~~,' a line being drawn as here shown through the words, 'and his heirs and assigns forever.' The habendum was 'unto him, the said party, and to his heirs and assigns forever.' The covenant of warranty was 'unto him, the said party of the second part, his heirs and assigns.' In this case *Robinson, J.*, speaking for this court, said: 'Standing alone, the granting clause proper in the deed as it was with the erasure would pass the fee-simple title to Joseph S. Hunter, but the grant, being limited by the clause "to said party of the second part and to the heirs of his body forever," had the effect to convey to Joseph S. an estate in fee tail only, which, under the above-cited statute, became an estate for life in Joseph S. Hunter, with the remainder in fee in his children; and such has been the general construction put upon similar instruments by this court.'"

And again in the same case (170 Mo. at page 301, 70 S. W. at page 707) it is said:

"In *Iainville v. Greer*, 165 Mo. loc. cit. 397, 65 S. W. 583, *Burgess, J.*, said: 'But if there be a doubt as to the intention of the parties, the habendum clause which performs the office of defining, qualifying or controlling the granting clause when not in conflict with it, is an important factor in arriving at such intent.'"

In the case of *Gannon v. Albright*, 183 Mo. loc. cit. 249, 81 S. W. 1163, 67 L. R. A. 97, 105 Am. St. Rep. 471, it is said:

"The estate is given to 'them and their heirs forever.' This expression, though unnecessary to create a fee, is an appropriate one for that purpose; and that the word 'heirs' is here used

in its ordinary legal sense as one of limitation only cannot be doubted.' When, in addition to the words 'unto them and their heirs forever,' the testator adds the significant words 'and assigns,' it seems to us that, instead of suggesting a doubt of his intention, no more suitable language could have been chosen by Michael Gannon to give his said sons an absolute fee simple, and they emphasize his intention to give them his whole estate in said tract."

In the case of *Gannon v. Pank*, 200 Mo. loc. cit. 94, 98 S. W. 477, it is said:

"In the second place, since an estate in fee tail when brought into existence by a will or deed is instantly struck down by the law and another substituted for it (*Farrar v. Christy's Adm'rs*, 24 Mo. loc. cit. 468, 469), it would seem that courts should proceed with great caution and hesitancy in creating a fee-tail estate by implication (and have it instantly destroyed by the statute, and another created thereby) and would not do so at all unless coerced thereto by unambiguous words creating a necessary inference to that effect."

In the case of *Tisdale v. Prather*, 210 Mo. loc. cit. 408, 109 S. W. 43, the court, in construing a will, used this language:

"It will be observed that the will gives the land to Mrs. Tisdale as her separate estate, to have and to hold the same unto her and her heirs forever, with full power to sell and dispose of the same at any time she might think best. It does not give the land to her and the heirs of her body, which would mean, if such were the words of the will, that the testator intended to give his daughter a life estate only, with remainder to the heirs of her body. The will gives her 'full power to sell and dispose of the same at any time she may think best,' and this power necessarily carried with it a full property interest in the land."

In the case of *Grooms v. Morrison*, 249 Mo. loc. cit. 554, 155 S. W. 432, it is said:

"When the nature of the title intended to be conveyed is, by the granting clause or the description of the property, rendered doubtful, the habendum clause of the deed may be considered in arriving at the intent of the party."

The habendum clause in this deed, as well as the clause of warranty, expressly declares an intention to convey all of the title to Narcissus Tennison. In the early case of *Green et al. v. Sutton*, 50 Mo. loc. cit. 192, this court said:

"If there be inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, then the words of the habendum should have a controlling significance."

The record shows that Narcissus Tennison, after receiving this deed and before her conveyance to Wm. R. Walker, executed various deeds of trust, in which she attempted to incumber all of the land as security for the money borrowed. In 1888 she borrowed \$200 on this land, and executed her trust deed to Willard Ammerman to secure the same, and took a deed of release in satisfaction of said deed of trust in the name of her husband, William G. Tennison. In 1890 William

G. Tennison and Narcissus gave another deed of trust to R. S. Hutchison, trustee, to secure the payment of \$800, and attempted to convey all of the title in the land to secure the same. Again, in 1890, Narcissus Tennison, to secure a loan of \$400, attempted to convey all of the title to this land to C. F. Johnson, trustee, by her deed of trust, and finally by her warranty deed in 1892 attempted to convey all of the title to the land to William R. Walker. This record shows that Narcissus Tennison believed that she held full title in the land, and that she gained that belief from the deed which she held, interpreted in the light of the facts and circumstances surrounding the parties at the time of its execution. In the case of *Patterson v. Camden*, 25 Mo. loc. cit. 22, it is said:

"The business of a court and jury is to ascertain the meaning and intention of the parties in making an agreement, and to carry that into effect if it is consistent with law. I know of no better mode of ascertaining this meaning than is shown if all parties acted on a particular meaning."

And in *Scott v. Scott*, 95 Mo. loc. cit. 318, 8 S. W. 167, this court said:

"It has been said by an eminent chancellor, 'Tell me what the parties have done under a deed, and I will tell you what that deed means,' and in *Patterson v. Camden*, 25 Mo. 22, it is said: 'I know of no better mode of ascertaining the meaning of a writing than is shown if all the parties acted on a particular meaning.'"

In the case of *Jones v. De Lassus*, 84 Mo. loc. cit. 545, it is said:

"Besides all this, the parties to this deed and those claiming under them, by their acts and conduct, for a period of some 20 years, gave to it a construction which the courts are not at liberty to disregard."

In the case of *Hunter v. Patterson*, 142 Mo. loc. cit. 318, 44 S. W. 252, it is said:

"The governing rule of interpretation is, 'that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, * * * and to take into consideration * * * their acts and conduct with respect thereto.'"

No stronger words of conveyance could be used in attempting to carry a fee-simple title than those used in the habendum clause, and the warranty clause in this deed, namely, to the party of the second part, "her heirs and assigns forever." *Jackson v. Littell*, 213 Mo. loc. cit. 596, 112 S. W. 53, 127 Am. St. Rep. 620.

Finally, in the very late case of *Garrett v. Wiltse*, 252 Mo. loc. cit. 707 to 712, 161 S. W. 695 to 697, inclusive, Judge Lamm, speaking for the court, after a review and a reaffirming of the rules laid down in the cases of *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395, *Utter v. Sidman*, 170 Mo. loc. cit. 294, 70 S. W. 702, *Tygard v. Hartwell*, 204 Mo. loc. cit. 206, 102 S. W. 989, *Rines v. Mansfield*, 96 Mo.

394, 9 S. W. 798, *Lanville v. Greer*, 165 Mo. loc. cit. 397, 65 S. W. 579; *Grooms v. Morrison*, 249 Mo. loc. cit. 554, 155 S. W. 480, *Williamson v. Brown*, 195 Mo. loc. cit. 337, 93 S. W. 791, *McClulloch v. Holmes*, 111 Mo. 445, 19 S. W. 1096, and *Green v. Sutton*, 50 Mo. loc. cit. 192, states as follows:

"It will be perceived that presently he recurs to the same subject-matter in the habendum clause, and therein he makes all plain by speaking of 'her, the said party of the second part,' and 'to her heirs and assigns forever'—not once but twice—and it must be held that whatever ambiguity arises by the prior use of the plural number in the granting clause is dispated by the use of the singular number in the habendum clause. Moreover, why should Whitson not warrant to his grandchildren as well as to their mother, if he intended to grant to them? If his bounty took them in, why did he exclude them in his covenant of assurance? Why caress with one hand and smite with the other? * * * We think we are on safe ground to say whatever was the technical function of the habendum clause of a deed in olden times, its present office may be allowed to be to clear up the conveyance by clarifying and removing ambiguities, and smoothing away inconsistencies. It will even control or modify the granting clause when by such control or modification the intent of the grantor as expressed in his words is made plain and effectuated."

When we view the granting clause of this deed, containing the words " * * * convey and confirm unto the said party of the second part, and her bodily heirs and assigns," etc., in the light of the authorities considered, we are constrained to hold that it is indefinite, uncertain, and ambiguous in meaning, and that the true meaning of the grantor, as shown by the whole deed, is that he intended to convey the fee to the land to his daughter, Narcissus Tannison, who purchased it and paid the full value therefor.

We are cited to many cases by counsel for respondents, announcing, as they contend, a contrary rule of construction (which the reporter will note in the publication of this opinion). After a careful reading of those cases, we are satisfied that they throw but little light upon the proper construction of the deed under consideration. The general rules there announced are simple and easily understood, but, owing to the peculiar facts of this case, they are inapplicable to it. Those cases, in substance, hold that where the granting clause of a deed or other clause under consideration is definite and certain in its meaning, said definite and certain meaning cannot be made uncertain and ambiguous by other provisions of the deed; but, in the case at bar we have pointed out the uncertainty in meaning of the granting clause.

For the reasons stated, we are of the opinion that the judgment of the circuit court should be reversed, and that a judgment should be here rendered for the appellant; and it is so ordered. All concur.

STATE v. PACE. (No. 19652.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW — 417(1) — COMPETENCY — HUSBAND AND WIFE — EVIDENCE.

Under Rev. St. 1909, § 5242, as to competency of husband and wife to testify for or against each other in criminal cases, while the wife's testimony as to facts surrounding the alleged larceny would have been admissible with his consent, yet testimony as to her extrajudicial confession of such facts was incompetent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. — 417(1).]

2. CRIMINAL LAW — 419, 420(5) — COMPETENCY — HUSBAND AND WIFE — EVIDENCE — HEARSAY TESTIMONY.

Testimony of the wife's extrajudicial confession is, in prosecution of the husband for larceny, incompetent as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983; Dec. Dig. — 419, 420(5).]

3. LARCENY — 55 — EVIDENCE — DEGREE OF PROOF.

Larceny and place of its commission may be shown by circumstantial, as well as direct, evidence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. — 55.]

4. LARCENY — 55 — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to show larceny of rings from a railway coach.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. — 55.]

5. CRIMINAL LAW — 564(1) — VENUE — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to show that the larceny of rings from a railway coach was committed in the county of prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1277; Dec. Dig. — 564(1).]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Frank W. Pace was convicted of receiving stolen property, under an information also alleging larceny, and he appeals. Reversed and remanded.

The first count of the information charged defendant with the larceny of two rings valued at \$485. The second count charged him with knowingly receiving said stolen property. The venue was laid in Clinton county. Upon trial in the Clinton county circuit court, defendant was found not guilty on the first count, but was found guilty on the second count, and his punishment was assessed at two years in the penitentiary.

On the night of January 19, 1916, Mrs. Charles H. Smith, owner of the rings, was a passenger on a Burlington train en route from St. Joseph to Chicago, occupying berth No. 4 in the Pullman coach. All of the berths were taken. The only other lady in the Pullman car was the wife of the defendant. Defendant and his wife occupied lower berth No. 11. Adjoining defendant's berth was the drawing room, and next be-

yond that was the ladies' dressing room. As the train approached Cameron Junction in Clinton county, Mrs. Smith, who had been in the dressing room for an hour, preparing to retire, came from the dressing room and went to her berth. Immediately thereafter the porter saw the defendant's wife go into the dressing room, and immediately come out of the dressing room and go to berth No. 11, where she remained about a minute and then went back to the dressing room again. About this time Mrs. Smith remembered that, preparatory to washing her hands, she had removed her diamond rings while in the dressing room, and placed them upon a little shelf in front of the mirror, and thereupon she rushed by the porter and up to the dressing room, and came back and told the porter that she had lost her diamonds. The porter then accompanied Mrs. Smith to the dressing room and knocked on the door, and the defendant's wife opened the door and was asked if she had seen the rings. At that time the train was just pulling into Cameron Junction, where it remained for 18 minutes. The Pullman conductor searched the dressing room and the porter. While this was going on, the defendant came to the dressing room and said to his wife:

"My dear, you let them search you; you haven't the rings, and you are perfectly innocent; that is the thing to do."

Defendant's wife was searched in a superficial way, but the rings were not discovered. There was sufficient evidence offered on the part of the state to show that this all occurred while the train was yet in Clinton county. The rings were not found that night, and when the train arrived in Chicago, the next morning, Mrs. Smith told defendant, in the presence of his wife, that the rings were too valuable to let them go, and that she thought it was necessary to have them arrested. Thereupon defendant began to weep and said "that they were children of estimable people; they were church members, and that it would blacken their lives and their family"; and then he said:

"Mrs. Smith, you are a good woman; I know from your looks; and you wouldn't injure any one in that way."

Defendant further said:

"I wish you would give me your address, and I will do all I can to help you find your rings."

Mrs. Smith was pleased with his talk and apologized for having accused them, and gave the defendant her address. About six days later, the defendant and his wife were arrested at 955 Aulgolt street, in the city of Chicago, by detectives from the Chicago police department, and were taken to the police station. They were placed in separate rooms, and were interviewed by the detectives. Over the objection and exception of the defendant, the state was permitted to prove by one of the detectives that Mrs. Pace (defendant's wife), at the police station in Chicago, admitted to him that she got the rings in the

ladies' dressing room on the Burlington train coming from St. Joseph to Chicago. The defendant was searched in the police station at Chicago, and the larger diamond ring was found concealed in defendant's necktie. The detectives then went to the place where defendant and his wife were arrested, and found the other ring, "outside the window sill, right by a bottle of milk."

Mr. T. E. Pratt, an agent for the Burlington, testified that he had a conversation with the defendant shortly after the arrest in Chicago, and while defendant was at the police station in Chicago, and that, in that conversation, defendant told him that defendant's wife brought him the rings, telling where she had found them, and that defendant told her to give them to him and keep her mouth shut; that the defendant told him that this happened "after they left St. Joe, and while the train was being switched at a station." This witness testified that he then asked him if it was at Cameron Junction, and "he said he thought it was." This witness also testified that it was not the custom of this particular train to do any switching except at Cameron Junction.

Mr. T. V. Morrow, sheriff of Clinton county, testified that defendant told him that his wife got the rings in the Pullman car and gave them to him, "and his wife wanted to turn them back to the woman she got them from, and that he was the cause of her not turning them back."

The evidence tended to show that the total value of the rings was \$750. The rings were in possession of the sheriff of Clinton county at the time of the trial, and were produced and identified at the trial. Four witnesses testified for the defendant, to the effect that the porter on the Pullman car had testified at a preliminary hearing of defendant's wife that when he first went to the dressing room and found defendant's wife therein, she had her dress up, and the motion of her hands indicated that she was putting something in her stocking, and also that this occurred after the train left Cameron Junction.

Defendant, testifying in his own behalf, denied that he had ever had possession of the rings in Clinton county, Mo., or in the state of Missouri. Upon cross-examination defendant admitted that he had served a term in the federal penitentiary at Leavenworth.

R. H. Musser, F. B. Ellis, and Frost & Frost, all of Plattsburg, for appellant. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for the State.

WILLIAMS, C. (after stating the facts as above). [1, 2] I. It is contended that the court erred in admitting in evidence, over defendant's objection, the extrajudicial confession or admission of defendant's wife, to the effect that she had taken the rings from the Pullman dressing room. Appellant's point is well taken. It is very clear that under sec-

tion 5242, R. S. 1900, absent defendant's consent, his wife would be incompetent to testify to the facts embraced within her alleged confession or admission. If the facts, coming directly from her lips, and while under oath, would, as has been seen, have been inadmissible, we are unable to discover by any process of logic how those words, uttered in extrajudicial manner, can be said to be admissible. And this is in harmony with the weight of authority on the point. *Baker v. State*, 120 Wis. 135, 97 N. W. 566; 3 *Wigmore on Evidence*, § 2232 (note 1), and cases therein cited. While the point was not urged in the objection to the evidence upon the trial, yet it might be further properly said in passing that such testimony was also inadmissible for another reason, viz. that it violates the hearsay rule. *State v. Levy*, 168 Mo. 521, 68 S. W. 562.

[3-5] II. It is further contended that the evidence is insufficient to support the verdict. In this behalf it is urged: (1) That there was no proof of the larceny of the rings prior to the time they were received by appellant; (2) that there was no sufficient proof that appellant received the rings in Clinton county. We are unable to agree with either of these propositions. The larceny of the rings, as well as the place where received by appellant, were matters that could be shown by circumstantial as well as direct evidence. The evidence will be found fully stated in the foregoing statement. While the evidence on these points is somewhat weak, yet we are of the opinion that there was sufficient evidence to support the verdict.

By reason of the error discussed in paragraph I above, the judgment is reversed, and the cause remanded.

ROY, C., concurs.

PER CURIAM: The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

STATE ex rel. COMMONWEALTH TRUST CO. v. CHORN, Superintendent of Ins. Dept. (No. 20003.)

(Supreme Court of Missouri. In Banc. Dec. 6, 1916.)

1. BANKS AND BANKING §316—DISSOLUTION—RIGHT TO SECURITIES DEPOSITED.

Where a trust company, in process of dissolution, had ceased business prior to 1915, but left on deposit with the superintendent of insurance certain securities, and had complied with Rev. St. 1909, §§ 1140, 7072, as to dissolution, inspection, and request for return of such securities, it was entitled to a return of the securities from the insurance superintendent, notwithstanding Laws 1915, p. 188, § 166, transferring to the banking commission the duties of the insurance superintendent as to trust companies, which applied only to companies doing business or organized after its enactment, and it was not necessary for the insurance superintendent to turn over the securities to the

bank superintendent preliminary to return to the company.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1223; Dec. Dig. § 316.]

2. MANDAMUS §73(1)—WHEN PROPER—MINISTERIAL DUTY.

When the petition shows that the defunct trust company relator has complied fully with the law as to return of securities, and the insurance superintendent has performed all statutory duties preliminary to returning the securities, the return of which is commanded by Rev. St. 1909, § 7072, peremptory writ requiring performance of such ministerial duty will issue.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 115, 135, 144-146, 149; Dec. Dig. § 73(1).]

Mandamus by the State, on the relation of the Commonwealth Trust Company, against Walter K. Chorn, Superintendent of Insurance. Heard on stipulation that the case stand on application and demurrer thereto, with waiver of alternative writ. Peremptory writ awarded.

Fordyce, Holliday & White, of St. Louis, for relator. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for respondent.

BOND, J. I. In this proceeding the parties stipulated that, with our consent, the application for the writ of mandamus should stand on demurrer filed thereto, upon a waiver of the issuance and service of an alternative writ of the same tenor.

The object of the stipulation is to secure the speedy determination of the right to a permanent writ on account of the termination of the office of the defendant in January, 1917, and hence to obtain our final judgment as to the sufficiency of the facts stated in the petition as if they were set forth in an alternative writ to which a demurrer had been filed.

The petition, in substance, states that the relator was incorporated as a trust company under the laws of this state in 1901, and continued doing business as such until March, 1914, at which time, with the permission of the bank commissioner of the state of Missouri, it ceased to act as a trust company, but continued its corporate existence for liquidating purposes; that since said date it has not transacted any of the business specified in section 1140 of the Revised Statutes of 1909, although maintaining always a deposit of securities of the value of more than \$200,000 with the superintendent of the insurance department of the state of Missouri, as required by said section of the statutes; that the respondent is now, and during the present year was, the duly appointed and acting superintendent of the insurance department of the state of Missouri, and as such has in his possession the specifically described securities mentioned in the petition, aggregating in value \$232,155.40.

The petition then states that prior to the

11th of April of the present year the relator had fully discharged all the debts and liabilities upon every kind of contract and agreement, to secure which the aforesaid securities were kept on deposit with the respondent, and, desiring to secure the return to it of said securities, it made to the respondent the proper application specified and prescribed, in the proper mode and by the proper officers defined, in sections 1140 and 7072 of the Revised Statutes of 1909, and thereby requested him to deliver to it the securities so deposited in conformity with the provisions of said statutes; that thereafter the respondent, in accordance with such request and with the provisions of section 7072, caused to be published for the time prescribed by law, in a newspaper in the city of St. Louis, where relator is located, notice of the intention of relator to cease its business in said state; such publication being made in all respects as required by law, and a copy thereof being appended to the petition; that after said publication the respondent caused an examination of the books and papers of the relator to be made by a competent person, and satisfied himself therefrom that all the debts and liabilities for the security of which said securities were deposited with him had been released and discharged; that said investigation was completed before the 20th day of July, 1916, and thereupon relator, having in all things complied with the provisions of law relating thereto, demanded the delivery to it as aforesaid of the securities on deposit with the respondent; that respondent failed and refused to comply with such request for the sole reason, as alleged by him, that since the enactment of March 25, 1915 (Laws 1915, p. 188, § 166), the rights and duties theretofore imposed upon the respondent as superintendent of the insurance department had been devolved on the bank commissioner, and hence it was respondent's duty to transfer the securities to the bank commissioner; wherefore relator must make its application to said bank commissioner.

The petition then alleges that relator did make application to the bank commissioner, who refused to consider the same on the ground that relator "was not doing business in Missouri" on the date of the passage and approval of the said act of the Legislature aforesaid, to wit, on the 25th day of March, 1915, and that therefore said act and the provisions thereof did not apply, and he, as bank commissioner, would not receive said securities from respondent nor deliver them to relator, nor accept a receipt from relator running to the respondent and said bank commissioner jointly. The petition alleges that all these matters were made known to the respondent, who still fails and refuses to deliver to relator said securities so deposited, but still retains and withholds them. The petition concludes with the proper prayer for the alternative writ of mandamus.

II. Relator has complied strictly with the statutes in the steps taken by it to recover the securities originally deposited to secure certain contracts and engagements which it was authorized to make and enter into under the provisions of law governing the conduct of the business of a trust company. The only ground for the refusal of respondent to redeliver said securities is that he thinks they should first be turned over by him to the bank commissioner and by the latter returned to relator. The bank commissioner, however, as shown in the petition, refuses to accept them for the reason that the act of the Legislature devolving on him the powers and duties theretofore imposed by statute upon the superintendent of insurance was enacted with an emergency clause on March 25, 1915, at which date relator had discontinued its business as a trust company, and since the section (166, Laws 1915, pp. 188, 189) which made him the successor of the respondent as superintendent of insurance in the custody of such deposits of securities only gave him such rights as to companies "now doing business in this state or which may hereafter be organized under the provisions of this article to do business in this state," he had no right to receive from respondent the securities in question. As to the right of the bank commissioner in cases where the provision making him the succeeding depository of the superintendent of insurance is applicable, it was ruled by this court in banc that the act made him the legal successor as to all trust companies engaged in active business as such of all the securities previously held by the insurance superintendent which had not become charged with the obligations of the depositor while in the possession of the Superintendent of Insurance. *Fidelity Trust Co. of K. O. v. Revelle, etc.*, 266 Mo. 202, 181 S. W. 53. The only difference between the case cited and the one made by the present petition lies, however, in the fact that the trust company now seeking to recover its securities has wholly discontinued its business as such, or for any other purpose than liquidating its assets and discharging its obligations, and has fully satisfied and discharged all of its contracts and engagements which the said securities were deposited to secure. The plain purpose of the statute substituting the bank commissioner for the superintendent of insurance was to facilitate the business of such companies as should be going concerns at the time of the passage of the act and to provide a proper custodian of the securities which should guarantee performance of future engagements of such trust companies. This is the patent purpose of the statute in question, which was never designed to have the effect, where a trust company had wholly ceased business as such, and discharged all liabilities intended to be secured by such deposit, to cause the superintendent of insurance to turn over such securities to the

bank commissioner in order that he, in turn, might deliver them to the corporation entitled to receive them. No such useless ceremony was in the thought of the lawmakers when framing the act of 1915, and in expressing his opinion to the contrary the bank commissioner correctly apprehended the purpose of the statute, which, as stated in its terms, was intended to govern companies then engaged in business in this state or thereafter organized to engage in business in this state.

[1] It necessarily follows that, since the securities in question were not receivable by the bank commissioner, their legal custody remained in respondent, whose duty now is to turn them over to the depositor after full compliance with the provisions and requirements to that end contained in the statutes.

[2] As the petition shows not only that relator has in all respects complied fully with the law governing its right to recover such securities, but that respondent has also performed all duties enjoined on him by statute before he shall surrender such securities, we must hold that he has omitted a ministerial duty specifically commanded by the statute (R. S. 1909, § 7072), and that our peremptory writ should be awarded requiring him to deliver to relator the securities set out in its petition.

It is so ordered. All concur.

In re LETCHER. (No. 18952.)

(Supreme Court of Missouri. In Banc. Dec. 4, 1916.)

1. CONTEMPT \Leftrightarrow 21—JURISDICTION OF COURT.

No one can be held in contempt of court for refusing to obey an order which that court had no jurisdiction to make.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 34, 63-66; Dec. Dig. \Leftrightarrow 21.]

2. COURTS \Leftrightarrow 39—JURISDICTION—DETERMINATION ON OWN MOTION.

On a citation for contempt, though the question of the jurisdiction of the Supreme Court is not raised, it is its duty to determine the question as an 'initial question upon its own volition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 152-156; Dec. Dig. \Leftrightarrow 39.]

3. OFFICERS \Leftrightarrow 55—RECORDS—COMPELLING PRODUCTION—JURISDICTION OF SINGLE JUDGE—"JUDICIAL DETERMINATION."

Rev. St. 1909, § 10406, requires delivery of public records by officers to their successors. Section 10409 empowers any judge of the Supreme Court or circuit court to issue a warrant for seizure of records if out-going officers refuse to surrender them. Section 10412 provides that any person aggrieved by such warrant may apply to any judge of the Supreme Court or circuit court, and that he shall issue a citation commanding persons interested to appear. Section 10413 provides that the judge may enforce obedience to such citation by attachment and shall proceed in a summary manner and determine the matter according to right and justice and may issue his warrant for the restoration of any record improperly seized. Held, that the warrant may not be issued by a

single judge of the Supreme Court a judicial determination requiring at least a quorum of a division of the court or of the entire court in banc.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 125; Dec. Dig. \Leftrightarrow 85.]

4. CONSTITUTIONAL LAW \Leftrightarrow 814—DUE PROCESS OF LAW.

To support such statutes, they must be so construed as to afford due process of law, and, as due process of law requires a judicial determination of the issues, an order issued by a single judge was invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 934; Dec. Dig. \Leftrightarrow 314.]

5. CONTEMPT \Leftrightarrow 21—JURISDICTION OF COURT.

Under such statutes, where a single judge ordered the surrender of the property, the refusal of the retiring officer to obey the warrant issued did not place him in contempt of court; the warrant having been issued without jurisdiction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 34, 63-66; Dec. Dig. \Leftrightarrow 21.]

6. COURTS \Leftrightarrow 203—JURISDICTION—SUPREME COURT—STATUTES—INSTRUCTION.

Since under Const. art. 6, § 2, the Supreme Court has appellate jurisdiction only, save as provided by section 3, that it has general superintending control over all inferior courts with power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, Rev. St. 1909 §§ 10409, 10412, and 10413, so far as they purport to give the Supreme Court or a judge thereof original jurisdiction to issue a warrant requiring delivery of public records by retiring officers to their successors, and to order, and determine the disputed rights to possession of records according to right and justice, are unconstitutional and void.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \Leftrightarrow 203.]

Original proceedings in contempt against Isaac A. Letcher. Citation quashed, and contemner discharged.

M. E. Rhodes and S. G. Nipper, both of Potosi, for petitioner. Edward T. Eversole, of Potosi, and Ernest A. Green, of St. Louis, for respondent.

FARIS, J. This is an original proceeding bottomed upon a citation for contempt, and now here at issue upon a motion for judgment upon the pleadings. For an understanding of the questions which we find it necessary to discuss, we must needs go back to the foundations of the case.

At a time prior to the 17th day of May, 1915 (on which day an affidavit as provided by section 10409, R. S. 1909, was in our April term, 1915, lodged with our Chief Justice), one Isaac A. Letcher was collector of the revenue of Washington county. His term expired on the 4th day of March, 1915, and his successor, one George Carr, thereupon entered duly upon the discharge of the duties of said office. Thereafter a controversy arose between Carr, the incumbent, and Letcher, the outgoing collector, as to the possession of a certain book, called in the record before us an "Abstract of Collections," and of certain duplicate current tax receipts for the year 1914; Carr contend-

ing that said book and receipts were adjuncts of the office of collector, while Letcher contended that they were not such books and papers as were by law required to be kept, but that they were his own private property, kept by him for his own convenience. Carr thereupon, and on the said 17th day of May, filed in this court in the April term, 1915, the following affidavit (caption and merely formal parts omitted):

"George Carr, being duly sworn, upon his oath states that on the 3d day of November, 1914, he was duly elected collector of the revenue within and for Washington County, Mo., and that he was commissioned, sworn, qualified and gave bond as such collector and entered upon the duties of said office on the 4th day of March, 1915; that Isaac A. Letcher was the duly elected, qualified and acting collector of the revenue of said Washington county, Mo., from the first Monday in March, 1911, to the first Monday in March, 1915, and the said Isaac A. Letcher has retained and now has in his possession certain books, records and papers belonging to said office of collector of the revenue of said county, to wit, one book called and named 'Abstract of Collections' for the year 1914, and all the duplicate current tax receipts for the year 1914, and this affiant is entitled to the possession of the same; that the said books belong to Washington county, Mo., and were paid for by Washington county aforesaid, and appertain to the office of the collector of the revenue of and for said county; that the said Isaac A. Letcher has failed and refused to deliver said books, records and papers to the affiant as he is required to do under the provisions of article 1, c. 101, of the Revised Statutes of Missouri of 1909.

"Wherefore, affiant prays the Honorable Archelaus M. Woodson, Judge of the Supreme Court of Missouri, to issue his warrant to the marshal of the Supreme Court, requiring him to deliver to the affiant the books, records and papers named in the affidavit."

On the 19th day of May, 1915, there was issued by our Chief Justice, under the provisions of section 10409, R. S. 1909, the same being one of the sections of article 1 of chapter 101, R. S. 1909, the following order, omitting signature and merely formal parts:

"The State of Missouri, to the Marshal of the Supreme Court of Missouri, Greeting: Information having this day been given to Archelaus M. Woodson, Chief Justice of our Supreme Court, by the affidavit of George Carr, filed with said justice, that the said George Carr, on the 3d day of November, 1914, was duly elected collector of the revenue within and for Washington county, Mo., and that he was commissioned, sworn, qualified and gave bond as such collector and entered upon the duties of said office on the 4th day of March, 1915; that Isaac A. Letcher was the duly elected, qualified and acting collector of the revenue of said Washington county, Mo., from the first Monday in March, 1911, to the first Monday in March, 1915, and the said Isaac A. Letcher has retained and now has in his possession certain books, records and papers belonging to said office of collector of the revenue of said county to wit, one book called and named 'Abstract of Collections' for the year 1914, and all the duplicate current tax receipts for the year 1914, and that affiant is entitled to the possession of the same; that the said books belong to Washington county, Mo., and were paid for by Washington county aforesaid, and appertain to the office of the collector of the revenue of and for said county; that the said Isaac A. Letcher has failed and refused to deliver said books, records and papers to the

affiant as he is required to do under the provisions of article 1, c. 101, of the Revised Statutes of Missouri of 1909.

"These are, therefore, to command you to search for and seize the books, records and papers hereinbefore mentioned appertaining to the collector's office of said Washington county, and deliver same into the hands of George Carr, collector of said county, and that if said books, records and papers be not delivered to you upon demand, you may break open any doors, trunks or places in which said books, records and papers may be, or in which you may suspect them to be, and if any person shall resist you in the execution of this warrant you shall arrest him and carry him before some justice of the peace to be dealt with for obstructing the execution of process, and that if said Isaac A. Letcher shall conceal or destroy said books, records and papers so as to prevent you from seizing same, then you shall report that fact to the undersigned, so that the said Isaac A. Letcher may be dealt with as for a contempt; and that you make your return of your proceedings hereunder."

This order (designated in the applicable statute as a "warrant") having been duly served upon said Letcher, our marshal made his return, showing such service, and further showing that Letcher refused to produce or deliver the said book and receipts, and refused to make known their whereabouts, and that our said officer after making diligent search therefor was unable to find them.

Thereupon, and on the suggestion of Carr, we issued our citation to Letcher to appear before us on the 31st day of May, 1915, then and there to show cause, if any he had, why he should not be punished by us for contempt. Letcher (called hereinafter contemner, for convenience and brevity only) duly appeared on the day to which he was cited and filed in this court: First, a petition under the provisions of sections 10412 and 10413, praying that a citation issue to said George Carr, and to all other persons interested, to appear before this court to the end that the matter in controversy, to wit, the matter of the right of possession of said book and duplicate tax receipts, might be determined by us "according to right and justice"; second, a return, wherein in substance he denied that the book and tax receipts in controversy were records of the office of collector of the revenue of Washington county, denied that he was withholding any books or records pertaining to said office, but averred the fact to be that the book and tax receipts in question were the private personal property of contemner, kept by him for his own personal and private convenience. Contemner further averred that there had been presented to Hon. E. M. Deering, as judge of the Twenty-First judicial circuit, an affidavit under said section 10409, having for its object the identical relief prayed for by said Carr, by his affidavit aforesaid, lodged in the instant case with our Chief Justice and on which our initial order herein was bottomed; that upon a full hearing Judge Deering refused to issue his warrant for said book and papers, finding that the said records were the property of contemner; that

a suit in replevin, brought by Washington county for the possession of said records, was pending undisposed of; that section 10409 had no application, as contemner was advised, to the facts presented in this controversy, but, if this court should hold said section to be applicable, then contemner desired that all parties in interest be cited before this court and the matter be determined according to right and justice; and contemner prayed that our citation for contempt be quashed and he be discharged thence.

To this return, after filing a general denial, learned counsel for said Carr filed a motion for judgment upon the pleadings. While upon the view we take of the matter a shorter statement would have sufficed, yet, since the proceeding is interesting and novel in the annals of jurisprudence, we have set forth so much of the facts in order that the questions up for judgment may be fully seen by those interested and the curious as well.

[1] Upon the very threshold, we meet the question of our jurisdiction to entertain and to hear and determine the initial matter out of which the instant proceeding in contempt grew. If we had no jurisdiction to issue the original order to contemner requiring him forthwith to turn over the book and duplicate tax receipts to Carr, then it is manifest that contemner cannot be in contempt for refusing to obey such order. For no one can be or ought to be, held in contempt of a court for refusing to obey an order which that court had no jurisdiction to make. 1 Bailey on Habeas Corpus, 262; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. St. 724, 28 L. Ed. 1117; *In re Pierce*, 44 Wis. 411; *Ex parte Hollis*, 59 Cal. 405.

[2] While the question of our jurisdiction is not raised, or in any wise mooted, we are by law the keepers of our own jurisdiction, and we have the right, and it is our duty, to determine this question for ourselves as the initial question up for decision in any case which comes before us. So of our own volition we will look to this question here.

[3-5] Even a casual examination of the statutes under which the initial proceeding herein was brought (article 1 of chapter 101, R. S. 1909) shows that it is contemplated that a hearing may be had thereunder to determine the right of possession of the records claimed in the affidavit. Indeed, it is patent that any scheme or so-called procedure which (upon an order issued pursuant to an *ex parte* affidavit) would permit one person to take from another any article, or record, or property, arbitrarily, without any hearing, or day in court, or without affording any opportunity to be heard, would be to take the property of another without due process of law. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. In short, unless we construe the statutes in question as con-

templating among their provisions the affording of an opportunity for a hearing of the disputed question of the right of possession of the records so arbitrarily taken, then the whole scheme is utterly void. To uphold these statutes at all, we must construe sections 10412 and 10413 as permitting a hearing to one from whose possession records are arbitrarily taken by order of the court, or judge who issues such "warrant." In such a hearing, wherein the court or judge is required to "determine the matter according to right and justice" (section 10413, R. S. 1909), such officer or tribunal acts judicially, otherwise he could not act at all. Apposite to both of the propositions, *supra*, Mr. Justice White (now Mr. Chief Justice White), in the case of *Hovey v. Elliott*, 167 U. S. loc. cit. 418, 17 Sup. Ct. 844 (42 L. Ed. 215), said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

"Again, in *Ex parte Wall*, 107 U. S. 265, 289, at page 353, 2 Sup. Ct. 569, at page 590 [27 L. Ed. 552], the court quoted with approval the observations as to 'due process of law' made by Judge Cooley, in his *Constitutional Limitations*, where he says: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the *Darmouth College Case*: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society." And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial."'"

Therefore our jurisdiction to issue such an order as was issued herein connotes, or carries with it as a necessary legal concomitant, the power and jurisdiction to hear and determine the matter of the ultimate right of possession of the records in controversy, "according to right and justice." Section 10413, R. S. 1909. No one judge of this court can judicially sit and finally determine any matter "according to right and justice," when the procedural requisites connote a judicial determination. If the matter is in a division, a quorum thereof must sit; if in banc, at least four constitute a court to hear and judicially determine questions of whatever sort, wherein our jurisdiction lies.

[6] Under the Constitution, our jurisdiction (except as to the issuance and hearing of certain original remedial writs) is appellate only. The pertinent provision of the

Constitution so limiting our powers reads thus:

"The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under the restrictions and limitations in this Constitution provided." Section 2, art. 6, Const.

Construing the provision set forth supra, and also the exceptions thereto as the Constitution sets them out, we said in the case of *Wait v. Railroad*, 204 Mo. loc. cit. 504, 103 S. W. 65, this:

"The Supreme Court is a court of appellate jurisdiction confined by the Constitution to the exercise of such jurisdiction only; that is, it sits as a court of errors, except in cases otherwise directed by the Constitution. Article 6, § 2, Const. of Mo. The cases of which we have original jurisdiction are set forth in section 3 of the same article, reading: 'The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs and to hear and determine the same.'

"In construing the foregoing section of the Constitution, this court has held that a writ of injunction, though remedial, is not another original remedial writ in the constitutional sense, but that a writ of prohibition is an original remedial writ in such sense; and, without going into the philosophy of the matter, it may be said that it is quite out of the question to hold that we have jurisdiction to hear and determine the issues raised by the motion in this case—though it cannot be denied they smack of originality as well as remedy. The phraseology of the Constitution is general and somewhat elastic; but not elastic enough to give us jurisdiction of every remedy and writ that in common parlance may be said to be original and remedial, and we deem it our bounden and obvious duty to restrict our original jurisdiction well within the wise and impassible limits of the Constitution."

It has been so often said that it is not profitable further to consider whether it is within the power of the Legislature to add to or subtract from our jurisdiction as it is defined and limited by the Constitution. We have repeatedly had occasion to discuss this question, and upon it we have spoken with but one voice. *State ex rel. v. Locker*, 266 Mo. loc. cit. 389, 181 S. W. 1001.

It follows, we think, that sections 10409, 10412, and 10413, R. S. 1909, so far as they purport to give this court, or a judge thereof original jurisdiction to issue the order therein provided for and to hear and determine the disputed right to the possession of books and records, according to right and justice, are void because not within constitutional delimitations. Section 2, art. 6, Const.; section 1, art. 6, Const.; section 3, art. 6, Const.; section 8, Amendment of 1884; *Wait v. Railroad*, supra; *State ex rel. v. Locker*, supra; *State ex rel. v. Tinscher*, 258 Mo. loc. cit. 17, 166 S. W. 1028, Ann. Cas. 1915D, 696; *State ex rel. v. Woodson*, 161 Mo. loc. cit. 454, 61 S. W. 252.

Since we had no jurisdiction to issue the warrant by which we ordered the contemner to turn over the records in controversy

to said Carr, it follows that contemner could not be guilty of contempt of this court for refusing to comply with that order. *Ex parte Rowland*, supra. Other questions are mooted; but, since this view disposes of the case, we need not go into these other questions.

Let our citation for contempt be quashed, and the contemner discharged. All concur.

WILSON v. CHICAGO GREAT WESTERN R. CO. (No. 12122.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 18, 1916.)

1. CARRIERS \Leftrightarrow 177(3)—INITIAL CARRIER—LIABILITY.

A carrier of goods received for through transportation became responsible for their destruction while in the custody of the delivering carrier, and in the course of transportation under the terms of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779-789; Dec. Dig. \Leftrightarrow 177(3).]

2. PLEADING \Leftrightarrow 32—STATEMENT OF LEGAL EFFECT—DEMURRER.

A petition in an action for damages for the destruction of goods during transportation, setting out the shipping contract in *hæc verba*, but failing to plead its legal effect, was demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 58-57; Dec. Dig. \Leftrightarrow 32.]

3. PLEADING \Leftrightarrow 406(3)—DEMURRER—WAIVER.

In such case where defendant answered to the merits, it thereby waived its right to demur to the petition on the ground that it pleaded the evidence and not the facts or the legal effect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1358; Dec. Dig. \Leftrightarrow 406(3).]

4. CARRIERS \Leftrightarrow 154 — CARRIAGE OF GOODS — LIMITATION OF LIABILITY—VALIDITY.

A stipulation in a contract of shipment, placing a limited valuation on the property shipped in case of loss by the default of the carrier, when not made in consideration of a special or reduced rate of shipment, is not binding on the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 641-645, 667; Dec. Dig. \Leftrightarrow 154.]

5. CARRIERS \Leftrightarrow 158(1)—CARRIAGE OF GOODS—LIMITED VALUATION.

A stipulation in a contract of shipment that the amount of any loss or damage for which the carrier should be liable should be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid, was valid, so that a shipper, who had purchased a soda fountain for \$100, the actual value of which was \$250, could recover only the cost to him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 698, 708; Dec. Dig. \Leftrightarrow 158(1).]

Appeal from Circuit Court, Worth County; Wm. C. Ellison, Judge.

"Not to be officially published."

Action by George B. Wilson against the Chicago Great Western Railroad Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed on plaintiff's filing of a remittitur of \$150 and interest thereon from the date of the judgment; otherwise reversed, and cause remanded.

John Barton Payne, of Chicago, Ill., and Kelso & Kelso, of Grant City, for appellant. Du Bois & Miller, of Grant City, for respondent.

JOHNSON, J. This is an action against a common carrier to recover damages for the destruction during transportation of a soda fountain plaintiff delivered to defendant at Conception for transportation to Grant City and delivery at that point to plaintiff, who was both consignor and consignee. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiff for \$250, and, following the overruling of its motions for a new trial and in arrest of judgment, defendant appealed.

Plaintiff, a merchant of Grant City, bought a secondhand soda fountain at a sale under judicial process for the price of \$100 but the actual value of the property, as found by the jury, was \$250. He crated the fountain and delivered it to the agent of defendant at Conception for transportation to Grant City, received a bill of lading made out by the agent on one of defendant's blanks, and loaded the property in a freight car of defendant, which was standing on defendant's house track. Grant City is northeast of Conception, and is on a branch line of the Chicago, Burlington & Quincy Railroad Company. Defendant could have hauled the car south to St. Joseph, and there delivered the fountain to the Burlington Company, but, instead of doing this, it switched the car at Conception to the Wabash Railroad Company, and it was hauled by that company eastward to Darlington, where it was delivered to the Burlington Company, which completed the transportation and delivered the fountain to plaintiff in such a damaged condition that it was wholly worthless.

[1] The agent of defendant at Conception was also the agent of the Wabash Company. The two railroads cross at right angles, the Wabash Road being on a much higher grade than defendant's, and a joint station is maintained at the crossing on the plane of defendant's tracks. Sometimes shippers on the Wabash Road, for convenience, were allowed to load cars on defendant's house track, and such cars were switched over a connecting track to the Wabash Road. Plaintiff gave the agent no instructions relating to the routing of the shipment, and accepted without objection the bill of lading he issued (apparently on behalf of defendant), but defendant contends that the agent intended to route the shipment over the Wabash, and by mistake used one of defendant's contract blanks. But if such mistake were made it was not a mutual mistake, and we hold the evidence shows beyond question that defendant accepted the shipment, entered into a contract for its transportation to Grant City, had the option of routing it either via St. Joseph or over the Wabash via

Darlington, and as a common carrier hauled the car from its own house track to the connecting track, and there delivered it to the Wabash. In other words, the relation of shipper and carrier was created between plaintiff and defendant for through transportation to Grant City, and the latter became responsible for the destruction of the property while it was in the custody of the delivering carrier and was in the course of transportation under the terms of the contract, which provided for through transportation.

[2, 3] In its motion in arrest of judgment defendant, for the first time, challenged the sufficiency of the petition to state a cause of action. The ground of the objection is that plaintiff set out the shipping contract in *hæc verba* in his petition, but failed to plead its legal effect. This would have been good ground for a demurrer to the petition, but by answering to the merits defendant waived the objection. As is well said by the Supreme Court in *Reilly v. Cullen*, 159 Mo. loc. cit. 329, 60 S. W. 127:

"To set out in the petition in *hæc verba* the contract on which the case is founded is to plead the evidence, not the facts. A pleader should determine in his own mind the legal effect of the written contract or other document that underlies his case, and plead it by its legal effect as he understands it, and as he purposes to maintain it. If the instrument is merely copied into the petition, it leaves uncertain the issue intended to be tendered, depending on the construction that may be put upon it at the trial. Our code pleading furnishes no authority for such uncertainty. But where, as in this case, no demurrer is filed and no objection is made to the petition until the trial is on, it comes too late, if, by construing the petition then as stating what the evidence pleaded tends to prove, it constitutes a cause of action."

[4, 5] The court did not err in refusing defendant's demurrer to the evidence, nor do we find any prejudicial error in the record except the following: The shipping contract contained the agreement:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property being the bona fide invoice price, if any, to the consignee including the freight charges if prepaid at the place and time of shipment under the bill of lading."

In substance this was an agreement that defendant should pay the actual value of the property, if it was destroyed during the transportation by a cause for which the carrier would be liable, but that the rule for ascertaining such actual value should be the bona fide cost of the property to plaintiff, the consignee. This being an intrastate shipment, we look to our own laws and juridical policies for pertinent principles and rules, among which we find the rule that a stipulation in a written contract of shipment, placing a limited valuation on the property shipped in case of its loss by the default of the carrier, when not made in consideration of a special or reduced rate of shipment, is not binding on the shipper. *Leas*

v. Railroad, 157 Mo. App. 455, 136 S. W. 963, and cases cited.

But the stipulation under consideration recognizes the right of the shipper to measure his damages in such case by the actual value of the property, and therefore cannot be regarded as a stipulation for a limited valuation. The parties were *sui juris*, and had a right to embrace in their contract an agreed rule for the ascertainment of the actual value of the property. The case falls under the doctrine of the decision of the St. Louis Court of Appeals in *Warehouse Co. v. Railroad*, 124 Mo. App. loc. cit. 566, 102 S. W. 11. It was error to allow a greater recovery than the cost of the fountain, but this may be cured by remittitur. If plaintiff, within 10 days from the filing of this opinion, shall file a remittitur of \$150 and interest on that sum from date of the judgment, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded. All concur.

CHANCE v. CITY OF ST. JOSEPH. (No. 12153.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. PLEADING \Leftrightarrow 34(3)—PETITION—CONSTRUCTION.

A petition, not demurred to, but answered, will be construed most favorably to plaintiff, and, if a constitutive fact, not expressly stated, may be said to follow as a necessary implication from the facts alleged, it is sufficient to support a verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. \Leftrightarrow 34(3).]

2. PLEADING \Leftrightarrow 403(4)—DEFECTS—PETITION—CURE BY ANSWER.

It is a defect merely, cured by answer, for the petition for injury to a traveler, alleging the ending of a street at a precipitous embankment, the absence of a barrier or guard, and that defendant city negligently maintained it without guard, to fail to allege notice to defendant of absence of a barricade.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. \Leftrightarrow 403(4).]

3. MUNICIPAL CORPORATIONS \Leftrightarrow 764(1)—DEDICATED STREETS—DUTY TO KEEP SAFE.

The grading by a city of a dedicated and publicly used street constitutes an assumption of control and invitation to use it as a street, which it is bound to keep reasonably safe for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616, 1619, 1620; Dec. Dig. \Leftrightarrow 764(1).]

4. MUNICIPAL CORPORATIONS \Leftrightarrow 796—STREETS ENDING AT PRECIPICE—BARRIERS.

It is a city's duty to maintain a barrier across a street, where it ends abruptly at a precipitous bank.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1655; Dec. Dig. \Leftrightarrow 796.]

5. MUNICIPAL CORPORATIONS \Leftrightarrow 807(1)—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE—USE OF STREETS.

Contributory negligence of a traveler, injured through a defect in a street, cannot be

predicated on the fact that by going onto such street he had deviated from his direct route.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1679; Dec. Dig. \Leftrightarrow 807(1).]

6. MUNICIPAL CORPORATIONS \Leftrightarrow 804—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE—DRUNKENNESS.

A traveler, injured through a defect in a street, will not be held guilty of contributory negligence as matter of law, because drunk; but his conduct is to be judged by the rule of care exacted of an ordinarily careful and prudent sober person in his situation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1674-1676; Dec. Dig. \Leftrightarrow 804.]

7. MUNICIPAL CORPORATIONS \Leftrightarrow 805(7)—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

As regards contributory negligence of a traveler, injured where a street ended at a precipice, presence of a house in the street was not an indubitable warning of its ending; the condition of lights being such that it might be inferred that the house was being moved, and the street at the side of the house being apparently open.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. \Leftrightarrow 805(7).]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by Frances Chance against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles L. Faust, City Counselor, and Merrill E. Otis, First Asst. City Counselor, both of St. Joseph, for appellant. Duvall & Boyd and Mytton & Parkinson, all of St. Joseph, for respondent.

JOHNSON, J. Plaintiff, the widow of Henry Chance, deceased, sued to recover damages for the death of her husband, which she alleges was caused by negligence of defendant in failing to maintain a barricade across the end of a public street, which ended at the crest of a precipitous declivity. The petition alleges:

"That at all the times herein mentioned Elwood street and Belmont street were public thoroughfares and streets running north and south and paralleling each other in the city of St. Joseph, with no other street running north and south between them; that at all the times herein mentioned Poulin street was a public thoroughfare and street running east and west in the city of St. Joseph, and intersecting Elwood and Belmont street; that on the 11th day of January, 1913, Henry Chance, deceased, while in the exercise of ordinary care was driving west on Poulin street, between Elwood and Belmont streets, and was precipitated over a high bluff to the ground beneath as he drove west in Poulin street, west of Elwood street and east of Belmont street; that he was precipitated over said high bluff to the ground beneath on account of and by reason of the negligence of the defendant city in maintaining said street, thrown open by the city for travel by the public, in a dangerous and unsafe condition, in that said street was maintained so that the roadway thereof in traveling west on said street between Elwood and Belmont streets led to a precipitous embankment, which

rendered said street dangerous and unsafe for pedestrians and persons driving thereon, and carelessly and negligently maintained said street in said condition, without any guards or rails or barriers, or notice or warning of any kind or character, to notify the public of the existence of said precipitous embankment on said street," etc.

The answer is a general denial and a plea of contributory negligence. A trial in the circuit court resulted in a verdict and judgment for plaintiff in the sum of \$6,000, and defendant appealed.

The injury which resulted in the death of plaintiff's husband occurred near 10 o'clock in the evening of January 11, 1913, at the west end of Poulin street, in St. Joseph. That street runs east and west, is 50 feet wide, and is in Bellevue addition, which was platted in 1858. Going west from Prospect avenue, which runs north and south along the base of a river bluff, it runs 800 feet or more up the east side of the bluff and ends at the summit, being intersected in turn by Bellevue and Elwood streets. The distance from the west line of Elwood to the end of Poulin is not to exceed 150 feet. There is a residence on the northwest corner of Poulin and Elwood, and a small dwelling house in the middle of Poulin, at the end of that street. That house was built many years ago, with the permission of the city and after the grading of Poulin street, which was done 25 or 30 years before the date of the injury. The distance from the south side of the house to a ditch near the south line of Poulin street was 10 or 12 feet, and there was a covered cistern in this space. The evidence of plaintiff tends to show there was some travel on the street by delivery wagons and by others who drove to the end of the street and turned back in front of the house. No one could drive past the house without going over the bluff, since the declivity began immediately at its rear. There had been a fence from the house to the south line of the street, but it had disappeared, and there was nothing to prevent a horse and wagon from passing on the south side of the house to the edge of the bank which formed the west side of the bluff.

Chance lived in the "French Bottoms" northwest of the city, and in going to and from the city usually drove along Prospect avenue, the main traveled way. He had been in the city during the day, had visited a number of dramshops, and the evidence strongly tends to support the conclusion that, if not intoxicated, he was, to some extent, under the influence of liquor. In going home he approached Prospect avenue from the east on Poulin street, and instead of turning north on Prospect, as he should have done, continued west up the hill, and, when he reached the house in the street, drove around the south side, over the cistern cover which was level with the surface, and to and over the edge of the bank. The next

morning he was found unconscious at the foot of the bank, and two days later he died.

His course up Poulin street and past the house was traced in the snow, which had freshly fallen and which concealed the cistern cover and the fact that all travel on that street ended in front of the house. The night was clear, but there was no moonlight, and no street lights were in that vicinity. The house in the street was about 17 feet wide and 11 or 12 feet deep. Its builder, introduced as a witness by plaintiff, testified that, more than 15 years before, he built it with permission of the board of public works, on condition that he build a fence from the house to the south side of the street as a barricade to keep travelers from going to the edge of the bank; but, as stated, this fence had long since disappeared.

[1, 2] Counsel for defendant attack the petition on the ground that its omission of an allegation that defendant had either actual or constructive notice of the absence of a barricade at the end of the street constitutes a complete failure to state a cause of action, which subjects the petition to attack at any stage of the case, regardless of the fact that defendant offered no demurrer, but filed an answer to the merits. Where the petition is not assailed by demurrer, and the defendant answers, the rule is to construe its allegations most favorably to the plaintiff, and, if a constitutive fact is not expressly stated, but may be said to follow as a necessary implication from the facts alleged, the petition will not be held insufficient to support a verdict. For the reasons stated by the Supreme Court in the similar case of *Hurst v. City*, 96 Mo. loc. cit. 172, 9 S. W. 631, and by this court in *Wilson v. City*, 139 Mo. App. loc. cit. 560, 123 S. W. 505, we regard the petition as merely defective, and hold that the defect was cured by answer.

[3] Next it is contended that the jury should have been directed to return a verdict for defendant. We think the evidence of plaintiff shows that Poulin street, between Elwood street and the edge of the declivity, was a public street over which defendant had assumed and exercised control. While the platting and dedication of a street, followed by public use of such platted street as a thoroughfare, will not alone give it the character of a street, nor cast upon the city the duty to keep it in repair (*Downend v. City*, 156 Mo. loc. cit. 73, 56 S. W. 902, 51 L. R. A. 170; *Curran v. City*, 284 Mo. loc. cit. 659, 175 S. W. 584; *Baldwin v. City*, 141 Mo. loc. cit. 212, 42 S. W. 717; *Atkinson v. City*, 183 Mo. App. loc. cit. 5, 112 S. W. 1022) the grading of such dedicated and publicly used street by the city will constitute an assumption of control and an invitation to the public to use the street as one which the city is duty bound to keep in a reasonably safe condition for travel (*Atkinson v. City*, supra; *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168;

Ruppenthal v. St. Louis, 190 Mo. 213, 88 S. W. 612).

[4] Plaintiff sustained her burden of showing that Poulin street was a public street to the edge of the bank, and the next question for our consideration relates to the duty, if any, of the city to maintain a barricade at the end of the street to prevent unwary travelers from driving over the precipitous bank. Municipalities are not required to fence public streets to prevent travelers from straying outside them, nor to mark their limits, but are required to erect and maintain suitable barriers where there are dangerous places, which, without such protection would render the street unsafe and dangerous to travel. The question in each case is whether a barricade is needed to make the highway reasonably safe and convenient to travelers who are themselves in the exercise of reasonable care. *Logan v. New Bedford*, 157 Mass. 534, 32 N. E. 910; *Ballentine v. Kansas City*, 126 Mo. App. 130, 103 S. W. 564; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528. It is held in the last case cited that:

"A street, which has a deep, unprotected excavation extending from an adjacent lot to its margin, is not in a reasonably safe condition for travel. If the excavation rendered travel on the street dangerous, it was as much the duty of the city to protect the public against such dangers as it would have been had the excavation been in the street itself."

Even more apparent and certain is the duty of maintaining a barrier across a public street, where it abruptly ends at the very edge of a precipice. Defendant seems to have recognized its duty to barricade the end of Poulin street when it permitted a small house to be built in the street at the edge of the declivity, on condition that the builder put up a fence which, with the house, would interpose a complete barrier to the further progress of travelers. The primary duty of maintaining that barrier rested upon defendant, and the evidence of plaintiff shows that defendant was remiss in the performance of that duty when it allowed a substantial part of the barrier, viz. the fence, to be destroyed, thus leaving an inviting trap exposed for the unwary or negligent traveler to fall into.

[5, 6] There can be no reasonable question that the evidence of plaintiff makes out a case of negligence against the city, and the most serious questions for our determination relate to the issue of contributory negligence. No such negligence should be predicated of the fact that Chance deviated from his usual course of travel and drove westward up the hill on a street which could not be used as a route homeward and with which he was unfamiliar. He had a right to drive on any public street, and his motive or purpose in selecting any course of travel was his own business. People use the streets for purposes of exercise, recreation, or mere curiosity, and a traveler cannot be pronounced

negligent for having no serious reason for using a particular street. Nor does the fact that Chance was under the influence of intoxicants compel us to hold that he was guilty in law of negligence. Drunk or sober, he had a right to drive to the end of that street if he chose. The question of whether or not he was negligent in attempting to drive through the apparently open course in the street south of the house is to be solved by the application to his conduct of the rule of care which the law would exact of an ordinarily careful and prudent sober person in his situation. If the jury were entitled to infer from all the facts and circumstances of that situation that a sober person, while in the exercise of reasonable care, would or might have done as he did, the question of contributory negligence becomes resolved into an issue of fact for the jury to determine, and the court did not err in overruling the demurrer to the evidence.

[7] The presence of the house in the street was not, of itself, an indubitable warning that it marked the end of the public thoroughfare. The conditions of light and visibility of objects were such that a traveler well might have inferred that the house was being moved along the street and was a mere temporary obstruction. The apparently open street south of the house might easily have been accepted as an invitation to proceed, and as an assurance that no deadly peril lurked in the way. Clearly the issue of contributory negligence was one of fact for the jury to solve. The point of a lack of proof of a causal connection between the negligence of defendant and the injury is obviously not well taken and will not be discussed. The court did not err in refusing the request of defendant for a peremptory instruction.

Instruction C, asked by defendant, was properly refused.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

ZIMMERMAN v. PRYOR et al. (No. 12164.)
(Kansas City Court of Appeals. Missouri. Nov. 27, 1916.)

1. MASTER AND SERVANT §258(19) — ACTION FOR INJURY—SUFFICIENCY OF PETITION—DUTY TO INEXPERIENCED SERVANT.

A petition alleging that defendant, by its foreman under whom plaintiff was working, ordered plaintiff to carry away old floor boards taken up from a box car recently used in carrying cement, that the wind was blowing, and that loose cement from the boards, etc., was blown into plaintiff's eye, causing its loss, that plaintiff by reason of his youth and inexperience did not know of the injurious effect of cement on the eye and could not appreciate the danger therefrom, and that the foreman neglected to warn him of the danger or to caution him to avoid injury, not attacked by demurrer, and in view of the liberal rule of construction applicable in such case, sufficiently pleaded the constitutive facts as to defendant's knowledge of the presence of the ce-

ment and its dangerous character and of plaintiff's youth and inexperience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 834; Dec. Dig. ¶ 258(19).]

2. PLEADING ¶ 406(3) — DEFECT CURED BY ANSWER.

Any defects in such petition in such respects were mere irregularities, which were cured by the defendant's answer to the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1358; Dec. Dig. ¶ 406(3).]

3. MASTER AND SERVANT ¶ 285(11)—ACTION FOR INJURY — BURDEN OF PROOF — DUTY TO INEXPERIENCED SERVANT.

Under such petition, plaintiff had the burden of proving the facts as to the master's knowledge of the dangerous character of his work, and of his youth and inexperience, alleged as a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 896; Dec. Dig. ¶ 285(11).]

4. MASTER AND SERVANT ¶ 276(2)—CAUSE OF INJURY—SUFFICIENCY OF EVIDENCE.

Evidence in a minor servant's action for injury, *held* to point with certainty to the poisoning of his eye by the blowing into it of cement dust rising from boards from the floor of a car, which boards he was directed to take away.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ¶ 276(2).]

5. MASTER AND SERVANT ¶ 285(1)—CAUSE OF INJURY—QUESTION FOR JURY.

In such action the contradictory evidence of the defendant, that the injury resulted from a germ infection, merely raised an issue of fact for the jury, and did not destroy or impair the probative effect of plaintiff's evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1008; Dec. Dig. ¶ 285(1).]

6. MASTER AND SERVANT ¶ 153(4) — ACTION FOR INJURY — DEFENSES — MISREPRESENTATION OF AGE.

That a minor servant misrepresented his age to obtain employment would not estop him from showing that he was young and inexperienced as to dangers arising in the employment, since it is the inexperience of a servant and his consequent ignorance presumed therefrom which places the duty upon the master of warning him of the existence of dangers of which he would otherwise have no knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 316; Dec. Dig. ¶ 153(4).]

7. MASTER AND SERVANT ¶ 286(41)—ACTION FOR INJURY—QUESTION FOR JURY—MISREPRESENTATION OF AGE.

Misrepresentation of age should be treated only as a circumstance for the jury on the question whether the master had exercised reasonable care in not warning the servant of the presence of a danger which would be unknown to an inexperienced servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1046-1048; Dec. Dig. ¶ 286(41).]

8. MASTER AND SERVANT ¶ 286(25)—INJURY—MASTER'S KNOWLEDGE—DANGER TO INEXPERIENCED SERVANT—QUESTION FOR JURY.

In a minor servant's action for the destruction of his eye from cement dust blown into it from boards taken from a car, *held*, on the evidence, that the master's actual or constructive knowledge of the presence and character of cement on the boards and of the special danger

to the servant by reason of his inexperience was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1030; Dec. Dig. ¶ 286(25).]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

"Not to be officially published."

Action by Dewey Zimmerman, a minor, by Alice Zimmerman, next friend, against E. B. Pryor and another, receivers of the Wabash Railway Company and the Wabash Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. L. Minnis, Gen. Counsel, and N. S. Brown, both of St. Louis, and Phillips & Phillips, of Moberly, for appellants. E. O. Doyle, of Moberly, for respondent.

JOHNSON, J. This is a master and servant case. At the time of his injury plaintiff, the servant, was 17 years old, and had been employed 4 months as a common laborer by the defendant receivers at the yards of the Wabash Railway Company in Moberly. On a hot, windy day he was engaged in carrying away boards which were torn from the floor of a box car being repaired and were thrown out to one side. The car had carried cement, and the floor was covered with cement dust which was blown about from the boards when they were thrown out. The evidence of plaintiff tends to show that particles of cement dust were blown into his eye; that such dust is a caustic poison which is very injurious and dangerous to the eye; that owing to his youth and inexperience he did not know of this injurious property and its dangers; that defendant had or should have had such knowledge, as well as knowledge of his inexperience and ignorance; and that defendant negligently ordered him to work in that place without warning him of such special danger and hazard. There was a verdict and judgment for plaintiff, and defendant appealed.

[1-8] The petition alleges:

"That defendants owed plaintiff the duty to furnish him a reasonably safe place to perform the labor required of him, and to exercise due care at all times to keep and maintain such place in a reasonably safe condition and further duty to warn plaintiff of any danger or risk connected with such place, or the labor to be performed that was not known or appreciated by plaintiff on account of his youth and inexperience, when such danger or risk was known to defendants or by the exercise of ordinary care could and should have been known; that notwithstanding the duties owing plaintiff by defendants, and plaintiff's youth and inexperience, obvious, defendants, by their boss or foreman, under whom plaintiff was working, ordered and directed plaintiff to carry away old floor boards which defendants, by their agents and servants, at the time, were taking up from a box car and throwing from the door to the side of the car, which car had recently been used by the defendants in transporting cement, large quantities of which had been left on the floor, covering the boards which were being torn up and which

plaintiff was required to remove; that at the time the wind was blowing and the loose cement came from the door and from the boards and covered and surrounded plaintiff when he approached the car to get the planks, and that while plaintiff was so engaged and while in the act of picking up the planks or boards at the door of said car, large quantities of the said cement were blown or thrown into plaintiff's eye, which so poisoned and injured plaintiff's right eye as to form or produce an ulcer thereon which totally destroyed the sight thereof; that said cement was poisonous and destructive to plaintiff's eye, and plaintiff, by reason of his youth and inexperience, was unacquainted with the dangerous and injurious effect of the cement upon and to the eye and could not and did not appreciate the danger therefrom; and that the boss or foreman in charge of said work and with authority to order or direct plaintiff, failed and neglected to warn plaintiff of the danger to which he was exposed or to caution or instruct him in any manner to avoid the same. Plaintiff says that through the carelessness and negligence of defendants in failing to perform their duties as hereinabove set out, plaintiff has sustained lasting and permanent injuries in the loss of his right eye," etc.

The answer is a general denial and a plea of contributory negligence. Counsel for defendants attack the petition on the grounds that it is fatally defective: First, for not alleging that defendants knew, or might have known, of the presence of cement or its dangerous character; and, second, for not alleging that defendants knew of the youth, inexperience, and lack of knowledge of plaintiff. The burden is upon plaintiff to plead and prove these facts as elements of his alleged cause of action. *Wilks v. Railroad*, 159 Mo. App. 711, 141 S. W. 910; *Fulwider v. Gaslight & Power Co.*, 216 Mo. loc. cit. 587, 116 S. W. 508; *Current v. Railway*, 86 Mo. 62; *Mueller v. Shoe Co.*, 109 Mo. App. 506, 84 S. W. 1010; *Kelley v. Railroad*, 105 Mo. App. 365, 79 S. W. 973; *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657, 80 S. W. 364; *Hester v. Dold Packing Co.*, 84 Mo. App. 451. But by applying the liberal rule of construction which must be applied to a petition not attacked by demurrer, we hold that the constitutive facts under consideration are sufficiently pleaded, and that the defects pointed out by defendants are mere irregularities which were cured by defendants' answer to the merits.

[4] Next it is argued by defendants that the evidence leaves the cause of the alleged injury in the field of conjecture and speculation, and they invoke the well-settled rule that where the evidence of plaintiff fails to point with certainty to the pleaded act of negligence as the proximate cause of the injury, the plaintiff should be held to have failed in his proof. The facts and circumstances disclosed by the evidence of plaintiff we find do point with certainty to the poisoning of his eye by the blowing into it of

a poisonous cement dust arising from the boards thrown out of the car.

[5] The evidence of defendants contradicts this inference and tends to show that the injury resulted from a germ infection, but such evidence merely raised an issue of fact for the jury to determine, and did not destroy or impair the probative character of plaintiff's evidence.

[6-8] Finally it is argued that the evidence failed to show that defendants had knowledge, actual or constructive, of the presence and character of the special danger or of the youth and inexperience of plaintiff.

It was a rule of defendants not to hire laborers who were under 21 years of age, and plaintiff falsely stated his age to obtain employment. The mere fact that he misrepresented his age would not estop him from showing that he was young and inexperienced, and should be treated as only a circumstance the jury might consider in solving the question of whether or not defendants had exercised reasonable care in not warning him of the presence of a danger which would be unknown to an inexperienced laborer. *Wilks v. Railroad*, 159 Mo. App. loc. cit. 724, 141 S. W. 910. It is the inexperience of a laborer and his consequent ignorance which should be presumed therefrom that places the duty on the master of warning him of the existence of dangers of which the inexperienced would not be aware. *Thompson on Negligence*, §§ 4055, 4056; *Omans v. Packing Co.*, 151 Mo. App. 557, 132 S. W. 283; *Cunningham v. Railroad*, 156 Mo. App. 617, 137 S. W. 600; *Reickert v. Packing Co.*, 136 Mo. App. 565, 118 S. W. 525; *Seals v. Whitney*, 130 Mo. App. 412, 110 S. W. 35; *Gummerson v. Bolt & Nut Co.*, 185 Mo. App. 7, 171 S. W. 859.

Lime and cement which contain a caustic poison of particular malignance to the tissue and structure of the eye are commodities carried by railroads so frequently and in such quantities that their injurious properties must have been known to defendants. In the performance of the duty of master-ship to exercise reasonable care to provide plaintiff a reasonably safe place in which to work, the jury were entitled to infer that defendants should have known that the boards were covered with the poisonous dust, and that to set an inexperienced laborer to work where dust from them would be thrown or blown into his eyes added a very serious danger to the natural hazards of his service.

Not to warn him of such danger was an act of negligence for the consequences of which the master should be held responsible. The court did not err in overruling the demurrer to the evidence.

The judgment is affirmed. All concur.

PENTER v. RITTER. (No. 1925.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

1. DAMAGES \S 217—Loss of Dog—INSTRUCTIONS.

Where in an action for the value of a dog killed, after suit brought, and while in defendant's possession after a demand by plaintiff, the owner thereof, had been refused, the evidence did not show that defendant claimed that he was holding the dog as bailee, or because he felt himself accountable to the person who left the dog in his care, but gave as the only reason for his refusal that he was not satisfied that plaintiff owned the dog, the court properly instructed the jury that, if they found for plaintiff, they should assess the value of the dog at its fair market value at the time suit was brought.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 556-559; Dec. Dig. \S 217.]

2. ANIMALS \S 100(9)—ACTION FOR DAMAGES—INSTRUCTIONS.

In such case the court properly refused to instruct that if the dog came into defendant's possession by coming onto his premises by its own volition, or being brought there by some person other than defendant, and was while in his possession injured so as to render it of no market value, plaintiff could not recover; the law being that, if the dog voluntarily came to defendant's premises and defendant was not a bailee, his refusal to give it up on demand of the real owner made him liable.

[Ed. Note.—For other cases, see Animals, Cent. Dig. \S 385; Dec. Dig. \S 100(9).]

3. BAILMENT \S 11—LIABILITY OF BAILER—NEGLIGENCE.

The unlawful tortious possession by a bailee renders him liable for injury or loss, regardless of negligence on his part.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. \S 33-36; Dec. Dig. \S 11.]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by J. C. Penther against Dave Ritter. From judgment for plaintiff, defendant appeals. Affirmed.

Hamlin, Collins & Hamlin, of Springfield, for appellant. Moon & Moon, of Springfield, for respondent.

ROBERTSON, P. J. In the latter part of December, 1914, plaintiff's shepherd dog wandered from home. In the course of a short time thereafter he appeared and remained at the home of the defendant, where he was harbored until July 14, 1915. On the day before the plaintiff observed it with defendant and immediately recognized it as his dog. He so advised defendant and demanded possession thereof. There was another man with plaintiff who recognized the dog as plaintiff's and so informed defendant. Plaintiff requested defendant to call up a bank in plaintiff's home town and ascertain his standing. Plaintiff was a trader in stock, and no reason is suggested for defendant questioning plaintiff's good faith in setting up a claim to the dog. Defendant emphatically refused to surrender the dog to the

plaintiff. The plaintiff went before a justice of the peace and instituted a replevin suit for the dog. The writ was issued and delivered to the constable early on the following day, the 14th. He immediately went to defendant's home, arriving there about 8 o'clock in the morning, with the writ, and found the dog dead. It had been so mangled with a hay mower as to necessitate its being killed shortly before the constable got there. Upon a trial in the justice of the peace court a judgment was entered for plaintiff, and defendant appealed to the circuit court. A jury trial there resulted in another judgment for plaintiff assessing the value of the dog at \$87.50. Defendant has appealed.

[1] The court for plaintiff instructed the jury that if they should find for plaintiff to assess the value of the dog at its fair market value at the time the suit was brought.

The defendant contends that plaintiff was entitled, at the most, to recover only the value of the use of the dog after plaintiff demanded it and before its death. It is asserted that unless the death of the dog was caused by defendant's negligence he cannot be held to answer for the value of the dog.

It is necessary to consider the right, if any, the defendant had to retain the dog after plaintiff's demand, under the circumstances we have stated. There was no duty resting on defendant in the first instance to assume any responsibility for the dog or to harbor him. In the case of Wright v. Richmond, 21 Mo. App. 76, 78, it was held that one who assumed control of a stray mule acquired no right to the possession thereof, and could acquire none except by a compliance with the estray law. We do not overlook the distinction between certain phases of that case and this one on that point, but we can think of no necessity of announcing a rule that would impose a duty on any person to take charge of a harmless wandering dog, or to hold that, if he did that, he had any right thereafter to refuse to deliver it over to one making such a plausible claim for it as did the plaintiff in this case, corroborated by his companion, and offering further evidence of his good faith. When defendant refused under such circumstances, his possession became wrongful, and he was properly held accountable to plaintiff.

The instruction authorizing the value to be determined as of the time of the commencement of the suit was proper. Westbay v. Milligan, 74 Mo. App. 179, 182; Rosentretor v. Brady, 63 Mo. App. 398, 404; Willison v. Smith, 60 Mo. App. 469, 473; Bradley v. Campbell, 132 Mo. App. 78, 81, 111 S. W. 514; Schnabel v. Thomas, 98 Mo. App. 197, 203, 71 S. W. 1076. The rule contained in section 2650, R. S. 1909, applicable to replevin cases originating in the circuit court, and section 7776, R. S. 1909, as to cases be-

gun in a justice of the peace court, providing for the assessment of the value of the property when defendant has possession of it at the time of trial, can have no application when a state of facts exist to which that rule cannot apply.

Defendant relies on the case of Pope v. Jenkins, 30 Mo. 523, but it is readily distinguished from this one, in that in this case the defendant, after demand by plaintiff and refusal to surrender possession to the defendant, was then a wrongdoer, and must answer for the loss of the dog thereafter when so under his control.

Further, the evidence clearly shows that the dog followed a boy named Davis who was going hunting out near defendant's farm, and that Davis left the dog there, telling two of defendant's hired men that he did not know whose dog it was and that he would leave it there. The evidence does not disclose that the defendant in refusing to give plaintiff the dog on demand claimed that it belonged to Davis or claimed that he, the defendant, was a bailee keeping the dog for Davis, or that his refusal to give the dog to plaintiff on demand was because he felt himself accountable to Davis or any one else for a return of the dog. The only reason defendant gave for not turning the dog over to plaintiff was that he was not satisfied that it belonged to the plaintiff.

[2, 3] The defendant asked and the court refused to give the following instruction:

"The court instructs the jury that, if you find and believe from the evidence in this case that the dog in question came into the possession of the defendant by coming onto defendant's premises of its own volition or by being brought onto defendant's premises by some person other than defendant, and was while in the possession of the defendant injured or crippled so as to render said dog of no market value, then plaintiff cannot recover in this action."

This instruction was properly refused, because under the law, if the dog voluntarily came to defendant's premises and defendant was not a bailee of the dog in any sense, his refusal to give it up on demand of the real owner clearly made him liable. As stated, defendant did not make the claim at the time of the demand, nor, indeed, at the time of the trial, that he was keeping the dog as a bailee of Davis or any one else to whom he might have to account. In 3 R. C. L. § 53, we find the rule declared as follows:

"On the question of the duty of a bailee at his peril to determine between the bailor and a third person claiming title, the authorities are less numerous than the importance of the subject would seem to suggest, although the pronounced weight thereof sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion, for which the latter may recover, if entitled to possession at the time of his demand."

Cobbey on Replevin (2d Ed.) § 432, in dealing with the question of the duty of an agent or bailee with reference to property when claimed by a third person declares the rule

that "To be protected, the agent should state on demand the character of his possession and for whom he is acting." Van Zile on Bailments and Carriers (2d Ed.) § 55, declares that unlawful tortious possession renders the bailee liable for injury or loss, regardless of negligence on his part. See, also, Bradley v. Campbell, 132 Mo. App. loc. cit. 82, 111 S. W. 514. It therefore follows that the defendant, coming into possession of this dog through Davis, who stated when he left the dog on defendant's place that he did not own it, held the dog tortiously as against this plaintiff, who was the real owner, when defendant refused to yield to plaintiff's demand.

For the reasons herein stated, the judgment should be affirmed.

STURGIS and FARRINGTON, JJ., concur.

PASCHE et al. v. SOUTH ST. JOSEPH TOWN-SITE CO. (No. 11727.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916.)

1. COMMERCE §10—INTERSTATE COMMERCE—POWER OF STATE—NONEXERCISE OF POWER BY CONGRESS.

Until Congress asserts its constitutional power to regulate interstate commerce to avoid contracts for street paving providing that the brick must be manufactured in the state, the state law governs the validity of such contracts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. §10.]

2. MUNICIPAL CORPORATIONS §330(3)—PAVING CONTRACT—REQUIRING USE OF BRICK FROM STATE—VALIDITY OF CONTRACT.

Where a contract for street paving in a city provided that the brick must be manufactured in the state, and brick so manufactured could be purchased for a less price than brick manufactured outside the state, the contract was not void as stifling competition and cutting off the right of selection of equally good brick from other states.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §330(3).]

3. PARTNERSHIP §11—CREATION OF RELATION—LACK OF AGREEMENT TO SHARE LOSSES.

Where parties agreed to share the profits of a business without mentioning losses, the fact did not destroy the effect in creating a partnership of what was expressly said as to profits.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. §11.]

4. PARTNERSHIP §54—EVIDENCE OF RELATION.

In an action on assigned special tax bills by parties who claimed to be partners, the jury could consider plaintiffs' acts and conduct in managing and conducting the claimed partnership business in determining whether plaintiffs intended to be and were partners in the transaction, the evidence not falling within the rule aimed against allowing a party to manufacture evidence for himself.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. §54.]

5. TRIAL \S 244(2) — INSTRUCTION — COMMENT ON EVIDENCE.

An instruction singling out parts of the evidence for comment was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 578; Dec. Dig. \S 244(2).]

6. TRIAL \S 240 — INSTRUCTION — ARGUMENTATIVE FORM.

An instruction argumentative in form was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 561; Dec. Dig. \S 240.]

7. PARTNERSHIP \S 216(3) — ACTION BY PARTNERS — FAILURE TO PROVE RELATION.

Plaintiffs, suing on special tax bills for street paving assigned to them jointly, claiming to be partners in the transaction, could recover, although they were not technically partners, since the judgment would bind them in any other action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 418; Dec. Dig. \S 216(3).]

Appeal from Circuit Court, Buchanan County; T. B. Allen, Judge.

"Not to be officially published."

Action by Charles Pasche and another against the South St. Joseph Town-site Company. From a judgment for plaintiffs, defendant appeals. Judgment affirmed.

See, also, 174 Mo. App. 614, 161 S. W. 322.

Broadus & Crow, of Kansas City, and John S. Boyer, of St. Joseph, for appellant. Culver & Phillip, of St. Joseph, for respondents.

ELLISON, P. J. Plaintiffs' action is founded on special tax bills for street paving in the city of St. Joseph which were assigned to them by the contractor. The judgment was for them in the trial court.

It appears that the specifications and contract provided that the paving should be of brick, and that such brick must be manufactured in the state of Missouri. It is contended that this last clause rendered the contract void for two reasons: First, that it interfered with interstate commerce by confining the material within one state; and, second, that by confining the material to one state competition was stifled and the right of selection of brick equally as good from other states was cut off.

[1] The first ground is not good, for the reason that, while Congress may make such regulation of interstate commerce as to avoid contracts of this character, it has not done so. The power is invested in Congress, but it has not yet been exercised. The rule is that until the Congress interferes by asserting its power the states are left free and unaffected so far as matters of commerce between themselves is concerned.

[2] The second ground doubtless would have been good if the result of the provision had been to restrain competition and enhance the cost of material to the taxpayer. But it is rendered unsound by reason of the showing in the record that it was admitted that brick manufactured in this state could be

purchased for a less price than that manufactured outside the state. *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 923, 3 Ann. Cas. 306.

[3] It is alleged in the petition that plaintiffs are partners, and the claim is made that the evidence was insufficient to show a partnership; or, at most, the evidence was of such character as to make a question for the jury, under proper instructions, and that such instructions had not been given. The evidence tended to show that the agreement between plaintiffs was that they were to share the profits, but no mention was made of losses. The fact that nothing was said about losses did not destroy the effect of what was expressly said as to the profits. In *Lengle v. Smith*, 48 Mo. 276, cited by plaintiff, we find this statement:

"The plaintiff and defendant were partners. The one gave his services in buying and collecting the cattle and hogs; the other gave the use of the necessary capital; and they were to divide the profits. This community in the profits made them liable for the losses, there being no special contract in regard to them. Thus were they partners both in the profits and losses of the adventure."

[4] But it is said that error was committed in the last paragraph of plaintiffs' instruction No. 2, reading as follows:

"The jury are further instructed that in determining whether the plaintiffs, Pasche and Craver, intended to be partners and were partners in the transactions above referred to, you have the right to take into consideration, not only the agreement, if any, made between them when the transaction began, but also their acts and conduct in managing and conducting the business in which they were engaged."

The objection is to allowing the jury to consider plaintiffs' acts and conduct in managing and conducting the business. We do not see why the jury should not consider the acts of plaintiffs in conducting the business. That evidence, as sought to be applied to this case, does not fall within the rule which is aimed against allowing a party to manufacture evidence for himself. The conduct of the parties in this case bore on the question of partnership and was pertinent to the inquiry. *McDonald v. Matney*, 82 Mo. 358, 365; *Boon v. Turner*, 96 Mo. App. 635, 641, 70 S. W. 916; *Gilbert v. Whidden*, 20 Me. 367; 30 Cyc. 405.

[5, 6] The complaint of the court's action in refusing defendant's instructions A and No. 4 has been practically covered by what we have written. Instruction A was properly refused. It singled out parts of the evidence for comment, and it was argumentative in form. All that was necessary on the question of partnership was included in instruction No. 4a given for defendant. The views we have expressed substantially dispose of refused instruction No. 4.

[7] But, even though the foregoing considerations were not sufficient to control the case, it seems to us that defendant's objection concerning the matter of partnership should not

be allowed to affect it. The plaintiffs allege they were partners, and the record, at least, shows without dispute that they were assignees of the tax bills, and were associated together in the enterprise, and were jointly interested in it. A judgment would bind them in any other action. Where, then, could it make any possible difference to defendant whether or not they were technically partners? In speaking on this subject, this is said in 30 Cyc. 403c:

"If, however, joint plaintiffs establish a cause of action against defendant, without proving a partnership between them, an allegation that they are partners may be disregarded as surplusage."

The question made as to the right of defendant's secretary to sign defendant's name to the petition for the work was disposed of in *Pasche v. South St. Joseph Town-Site Co.*, 174 Mo. App. 614, 161 S. W. 322. We see no reason for a change of the views there expressed.

The matters of defense have been chiefly technical, and after full consideration we conclude the law and the facts are with the plaintiff, and the judgment is affirmed. All concur.

FAIRFIELD v. BICHLER et al. (No. 11952.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 18, 1916.)

1. MASTER AND SERVANT ⇨276(1)—INJURY TO SERVANT—EXPLOSION OF OXYGEN ACETYLENE WELDING APPARATUS.

In action for death of servant by explosion of oxygen acetylene welding apparatus, evidence of insufficient instruction of decedent and improper location of the gas tanks, etc., held sufficient to establish plaintiff's case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950, 954; Dec. Dig. ⇨276(1).]

2. MASTER AND SERVANT ⇨135—INJURY TO SERVANT—CUSTOMARY CONDUCT OF BUSINESS.

That the master conducts his business in the manner customarily followed by experienced men in the same line of business is conclusive against negligence only if the jury believe that these other men have acted with ordinary prudence and care in adopting such method.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 271, 281, 293; Dec. Dig. ⇨135.]

3. PARTNERSHIP ⇨243—DEATH OF PARTNER—LIABILITY OF FIRM FOR DEATH OF EMPLOYÉ.

Where the employé of two partners was so injured that he died afterwards, from negligent explosion which instantaneously killed one of the partners, the partnership estate was liable for damages for the employé's death, since, the deceased partner being alive when the employé was injured, the partnership was not dissolved by the partner's death until after the wrong was committed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 509, 510, 512, 513; Dec. Dig. ⇨243.]

4. MASTER AND SERVANT ⇨293(1)—INJURY TO SERVANT—ACTION—INSTRUCTIONS.

In an action for death of employé by explosion of oxygen acetylene welding apparatus, instructions basing plaintiff's recovery upon explosion from certain causes, not mentioning defendant's negligence, were error; the defendants not being insurers of the safety of the apparatus.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1148; Dec. Dig. ⇨293(1).]

5. MASTER AND SERVANT ⇨291(13)—INJURY TO SERVANT—ACTION—INSTRUCTIONS.

In such action, instruction for plaintiff submitting defendant's negligence in failing to erect a barrier between the tanks and the place of working was erroneous which failed to submit the question whether such negligence caused the death; there being evidence that the explosion was such that a barrier would not have saved decedent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1145; Dec. Dig. ⇨291(13).]

Appeal from Circuit Court, Buchanan County; T. B. Allen, Judge.

Action by Anna B. Fairfield against Nicholas Bichler and another. From judgment for plaintiff, defendants appeal. Reversed and remanded.

W. E. Stringfellow, of St. Joseph, and Hogsett & Boyle, of Kansas City, for appellants. Randolph & Randolph, of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff is the widow of Ernest Fairfield, who was an employé of Gels & Bichler, a partnership and proprietor of boiler and sheet iron works in the city of St. Joseph. He was killed in an explosion on the 20th of October, 1914. Gels was killed in the same explosion, and Bichler was appointed administrator. The latter is a party defendant in this cause both as an individual and as such administrator. The action is for damages and is based on charges of negligence specified in the petition. The judgment was for the plaintiff.

It is alleged in the petition that a part of defendant's business was welding metals by the use of two gases (oxygen and acetylene) conveyed in two rubber hose from tanks, the hose uniting at the end, thereby fusing the gases, so that when ignited they made a blaze, or torch, of intense heat and performing proper service when applied to the metal. It is alleged that defendants built a small one-story brick building about 17 feet square, with only one room, in which they installed two metal tanks. One of these tanks was the larger, and acetylene was generated therein by "feeding" carbide into water. The other tank was filled with oxygen from some other place and brought to the building. These tanks were near each other in a corner of the room and the work bench, where the welding was done, stood about 8 feet away. It is charged that both of these gases were powerful and dangerous explosives. Attached to the acetylene tank is what is called a "motor

case" or "water bottle" said to contain ten quarts of water. The gas which has been generated in the tank itself passes from such tank through this water bottle into the service pipe, thence by the hose to the point where it unites with the oxygen hose, blending therewith, and when ignited becomes the welding torch as above stated. A back fire from the torch is liable to follow the hose back to the acetylene tank which, if not protected, would cause it to explode, but this water bottle is a protection against such an accident, as the fire could not pass through the water bottle, if properly filled, to the tank itself.

After stating that it was defendant's duty to furnish deceased with a safe place to work, the following acts of negligence are specified in the petition: First, they furnished deceased unusual defective and unsafe gas. Second, that the tanks were defectively constructed and the material therein was defective. Third, that the acetylene tank was not provided "with a sufficient water bottle with water therein to prevent a back fire from the torch." Fourth, that the room was too small, was improperly arranged and ventilated. Fifth, that the tanks should have been put in a place entirely outside of the room or building where the welding was done, so as to have been isolated from the flame of the torch, or sparks from the metal.

[1] It was shown by testimony given by experts that too much pressure could cause explosion of acetylene gas, and that it would explode in contact with fire, but oxygen would not. That the latter will explode by expansion caused by heat applied to the tank in which it is held.

One Shamrod was defendants' foreman, but deceased, after some 8 or 10 days' instruction by an expert paid by defendants, had handled the torch and controlled the apparatus for near four months. It seems that defendants had just started an oxygen gas plant near by, and that one Frid, an expert, from such a plant at Kansas City, had been sent to defendants' plant to instruct or assist them in getting started. He testified that deceased came to the oxygen plant and asked him to come over; that he was "having some trouble with the gases." Geis was there, and they, with deceased, went over to see "what the trouble was." Deceased took hold of the torch and applied it to metal plate he was welding when the explosion occurred with terrific force. It killed deceased, Geis, and a bystander; Frid being the only one in the room left alive, and he was badly injured. He testified that he saw a flash, and then came the explosion. It totally destroyed the building and both tanks were blown open or apart; the oxygen tank scattered in every direction; pieces were carried 400 feet away. There was some evidence tending to show two explosions almost together—only far enough apart to distinguish a dull sound,

and then, immediately, the main and destructive one.

While it was said that the acetylene gas could be made to explode from too much pressure, we think the evidence, and reasonable inferences to be drawn therefrom, together with the circumstances, afford reasonable and probable ground to believe either that escaping gas came in contact with the torch, or that back fire passed along the hose back through the "water bottle" (insufficiently or improperly filled) to the acetylene tank. The explosion of the gas in the oxygen tank, which gas, as we have stated, will not explode from contact with fire, but will from expansion caused by extreme heat, is accounted for by experts by the heat of the exploding flash of the gas in the acetylene tank. The evidence showed this heat to have been 6,000 degrees.

There was evidence tending to show that proper care and prudence required that the gas tanks should not have been located in such proximity to the work bench where the welding torch was used, and sparks occasionally fall from the metal, and that they should have been located in some proper structure outside of the welding room, or building. The jury may well have found that if that had been their location, either of the two things which did occur would not have occurred, viz., that there would not have been an explosion, or, if there had, it would not have killed deceased. These acts of commission and omission are a part of the negligence specified in plaintiff's petition.

Deceased was a young married man 19 years and 6 months old. We think defendants' suggestions that he was an experienced man fully capable of handling the plant, and that he was in exclusive charge of it, are not supported by the record. We have already seen that defendants had him instructed for about 8 days, when other evidence showed that it should require a year of experience and teaching to fully qualify one for such position. He was being paid only about one-third what a capable and experienced man should receive. While it is true that deceased was in charge of the welding with the assistance of a helper, yet one Shamrod was the foreman over him. The foregoing considerations justify the trial court in overruling the demurrer to the evidence.

[2] Defendants insist that if the master conducts his business in the manner customarily followed by experienced men in the same line of business it is conclusive against negligence. In support of this insistence we are cited to *Cohn v. Lounge Co.*, 222 Mo. 488, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888, *Chrismar v. Bell Telephone Co.*, 194 Mo. 189, 209, 92 S. W. 378, 6 L. R. A. (N. S.) 492, *Brands v. St. Louis Car Co.*, 213 Mo. 698, 708, 112 S. W. 511, 18 L. R. A. (N. S.) 701, and many cases from other states.

Applying this rule to this case, defendants

contend that it was conclusively shown that other similar plants had their gas tanks placed in the same room with the welder, and that none separated them by putting the tanks in a separate structure. This insistence makes it necessary to examine the rule invoked with a view to understanding whether it has been properly stated by defendants and properly applied by them.

The rule to be correctly stated should include the qualification that the other similar business conducted in the same way should be conducted by prudent and ordinarily careful men. Then, if the triers of the fact believe that the other similar business was conducted by such prudent and careful men in a certain way, they would not be permitted to say such mode, followed in the given case, was negligence. For a mode of business which is adopted and followed by men of ordinary prudence and care is the standard, not only in this state, but in others to which we will refer. It is for the jury to find the preliminary fact whether the men shown to have so conducted their business were, in fact, prudent and careful men. Though a business patently dangerous is conducted by any number of persons in a way as to strike every one as being extremely hazardous, the jury would be justified in finding that such persons were not prudent persons, and therefore could refuse to adopt their mode of business as a test, and refuse to excuse a defendant for following it. If, in a given case against the proprietor of a powder factory for damages resulting from an explosion caused by permitting fire to be carried into the powder room, it were shown that other manufacturers conducted their business in the same way, the jury, of course, would refuse to accept the statement of any number of witnesses that such men were careful and prudent.

We think it apparent from that part of the opinion in *Coin v. Lounge Co.*, supra, 222 Mo. loc. cit. 506, that the rule in cases patently involving extraordinary hazard, the jury would not be bound by evidence that such business, carried on in a patently dangerous way, was being conducted by prudent men. So it was said in *Texas & Pac. Ry. Co. v. Behymer*, 189 U. S. 468, 470, 23 Sup. Ct. 622 (47 L. Ed. 905):

"That the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

We think the view of this question which we are endeavoring to express finds support

in 4 Thompson, *Law of Negligence*, § 3770. He says that:

"The rule of ordinary care (that is the way it is ordinarily done) directs the jury to consider, not whether the machinery was dangerous, but whether it was of the kind ordinarily used for similar work. * * * Thus individual and even incorporated employers are allowed by their general custom or habit of acting, or by their general neglect and inattention to social duty, to make a rule of law for their own exoneratation."

Further on, in the same section, the author says that:

"The standard is not what men ordinarily do under like circumstances, but what reasonably prudent and careful men, having due regard for their social obligations—that is to say, for the rights and safety of others—do under like circumstances."

The same author in section 31, vol. 1, says that:

"The standard demanded by the law is not ordinary care of men generally, but the *ordinary care of prudent men*, engaged in a particular employment or specialty." (Italics the author's.)

In *Sappenfield v. Railroad*, 91 Cal. 48, 57, 27 Pac. 590, the court applied the rule of accustomed use to "an appliance or machine not obviously dangerous." In *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078, the rule was applied where the act was not "self-evidently negligence." The language used in *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112, is a striking illustration of our view. The court said that:

"If the defendants had proved that in every mining establishment that has existed since the days of Tubal Cain, it has been the practice to cut ladder holes in their platforms, situated as this was while in daily use for mining operations, without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence, or a due regard for the safety of those who were using their premises by their invitation. The gross carelessness of the act appears conclusively upon its recital."

We have noted that in *Coin v. Lounge Co.*, supra, Judge Gantt in stating the rule has omitted the words "careful or prudent" men, conducting similar business, but manifestly one or both those words were understood. They are used in the Missouri cases to which he refers; some written by himself. And so one or the other is used in the cases from Pennsylvania, Michigan, and Nebraska to which he refers in *Brands v. Railroad*, 213 Mo. loc. cit. 708, 709, 112 S. W. 511, 18 L. R. A. (N. S.) 701.

[3] Defendant further insists that the death of Gels dissolved the partnership, and that his partnership estate cannot be held liable for damages. In response to this we say that Gels was alive when Fairfield was hurt. The partnership existed when the wrong was done; that is, Gels' death and Fairfield's injury were simultaneous. The partnership was dissolved by Gels' death after the wrong was committed, and the circumstance that Fairfield did not die until

some hours afterwards will not influence the fact that the injury was inflicted while Geis was alive, though at the instant of his death.

[4] We, however, find error in the instructions for plaintiff. The first one, besides being confusing in construction, makes defendants insurers of the safety of the acetylene apparatus. After full preliminary as to deceased being employed, etc., the instruction continues thus:

"And if said acetylene generator was not so equipped as to prevent back fire from reaching the acetylene gas in the generator, or had become defective so as not to prevent back fire reaching gas in the generator causing an explosion, and if you believe an explosion was caused by reason of a back fire from the torch through the tube into the acetylene generator, then your verdict should be for the plaintiff."

This is such faulty construction as to be confusing. It would be relieved somewhat if the word "thereby" was put between the words "generator" and "causing," or if the words "causing an explosion," in the fourth line from the bottom, had been omitted altogether. But the hypothesis of defendants' negligence is not referred to directly, or in effect. The mere fact of the defect and the explosion is made to determine liability, however unforeseen the defect, or however careful defendants may have been.

[5] The second instruction for plaintiff properly submits defendants' negligence in failing to have a barrier erected between the tanks and the torch and work bench, or to have had the tanks located outside, yet it does not submit the hypothesis whether if there had been a barrier, plaintiff would not have been killed by the explosion, thereby establishing a causal connection between the negligence and the death. There was evidence tending to prove the explosion to have been so terrific and destructive that it might well have been believed that a barrier built in the room would not have saved deceased.

The third instruction was defective in this respect: It submitted three causes for either of which defendants were stated to be liable—one that the explosion was caused "by some defect in the tank," or "in the working of the automatic portion of the generator," or "from any defect or leak which is [was] not within the knowledge of this plaintiff, but is [was] or by the exercise of reasonable diligence could have been in the knowledge of Geis & Bichler, or either of them before said explosion, then your verdict shall be for the plaintiff." The last-stated cause of the explosion is properly required to have been in the knowledge of defendants, but the two others are not, and thus defendants were made insurers if the jury believed the explosion came through either of those causes. Another defect in the instruction may not have been read to the jury as it is now printed; if it was, it was very liable to mislead. It submits whether the defect or leak was

"not within the knowledge of this plaintiff." It should have read "the deceased Fairfield."

The court's action was proper on defendants' refused instructions.

The judgment will be reversed, and cause remanded. All concur.

DANGLADE & ROBINSON MINING CO. v.
MEXICO-JOPLIN LAND CO. et al.
(No. 1843.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

1. CORPORATIONS ⇐415—AUTHORITY OF OFFICERS—DIRECTOR.

The director of a corporation does not by virtue of his office have authority to make a chattel mortgage disposing of all the corporation's property in the absence of any previous exercise of such authority or custom of holding out as having such authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. ⇐415.]

2. CORPORATIONS ⇐415—AUTHORITY OF OFFICERS—TREASURER.

The treasurer of a corporation does not by virtue of his office have authority to make a chattel mortgage disposing of all the corporation's property in the absence of any previous exercise of such authority or custom of holding out as having such authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. ⇐415.]

3. CORPORATIONS ⇐415—AUTHORITY OF OFFICERS—MANAGER.

The manager of a corporation was not given authority, by his appointment as manager "to manage the mining interests and property of the company," to execute a chattel mortgage disposing of all the corporation's property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. ⇐415.]

4. CORPORATIONS ⇐477(4)—SEAL—EXECUTION OF CHATTEL MORTGAGE.

Where a chattel mortgage executed in behalf of a corporation is not sealed with a corporate seal, it does not make out a prima facie case of its validity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1860; Dec. Dig. ⇐477(4).]

5. CORPORATIONS ⇐425(5) — AUTHORITY OF OFFICERS—ESTOPPEL.

The fact that the director of a corporation represented that he had authority to execute a chattel mortgage, and that the creditors believed it and relied thereon in taking the mortgage and extending the time of payment, did not estop the corporation to deny the director's authority in the absence of any knowledge by the corporation or its other officers and directors of such facts, other than the wrongdoer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. ⇐425(5).]

6. CORPORATIONS ⇐432(12)—AUTHORITY OF OFFICERS—MANAGER.

The fact that the manager of a mining corporation loaned articles of the corporation's machinery or equipment for use elsewhere, or any act not involving the parting with title, even if known to the corporation, while showing the extent of his authority, could not conclusively show authority to alienate the property by custom or usage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737, 1743, 1762; Dec. Dig. ⇐432(12).]

7. CORPORATIONS \Leftrightarrow 426(12)—CONTRACTS—RATIFICATION.

Where the unauthorized execution of a chattel mortgage was a benefit to the corporation in securing an extension of time, and a detriment to the creditor in that it was led to forbear taking action to compel payment, knowledge thereof would call for a prompt repudiation, and acquiescence with knowledge would be a ratification of the unauthorized act; but such knowledge must be shown and will not be presumed because of the knowledge of the wrongdoing officer or agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1716; Dec. Dig. \Leftrightarrow 426(12).]

8. SET-OFF AND COUNTERCLAIM \Leftrightarrow 33(1)—CLAIM ARISING OUT OF THE SAME TRANSACTION.

Where a chattel mortgage was executed in behalf of a corporation to secure a debt of the corporation, without authority, the debt is so closely connected with the creditor's conversion of the property under the chattel mortgage that the one should be set off against the other, and the corporation can recover if at all only the difference between such debt and the reasonable value of the property converted.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 1, 32, 54; Dec. Dig. \Leftrightarrow 33(1).]

9. APPEAL AND ERROR \Leftrightarrow 582(2)—ABSTRACT OF TESTIMONY—RULE OF COURT.

Under the rules of the court it is not necessary in order to present all the evidence to the Supreme Court that the same should be printed in toto in the form of question and answered in the abstract of record, but the evidence should be presented in narrative form, avoiding unnecessary repetition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2583; Dec. Dig. \Leftrightarrow 582(2).]

10. COSTS \Leftrightarrow 254(4)—ABSTRACT OF TESTIMONY.

Where appellant has not complied with the rules of the court in abstracting the record on appeal, no costs will be allowed for printing the abstract, unless with the express consent of the respondent.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 966; Dec. Dig. \Leftrightarrow 254(4).]

Appeal from Circuit Court, Jasper County; Joseph D. Perking, Judge.

Suit by the Danglade & Robinson Mining Company against the Mexico-Joplin Land Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

H. S. Miller, of Joplin, for appellant. A. W. Thurman, of Joplin, for respondents.

STURGIS, J. This is a suit for conversion of a certain mining plant, consisting of buildings, machinery, and mining appliances, belonging to plaintiff and located on a mining lease in Jasper county. The land belonged to defendant, plaintiff being a lessee. Plaintiff had erected this mining plant and carried on mining operations without much success. It became indebted to defendant for about \$500 for royalty on ores mined. The defendant acknowledges and seeks to justify its taking and selling the mining plant in question under an alleged chattel mortgage given by plaintiff to defendant to secure this indebtedness. Plaintiff admits that such a chattel mortgage was given, pur-

porting to be executed by one James T. Robinson, as vice president of plaintiff, but says that Robinson was not the vice president of plaintiff, but was only a director, treasurer, and manager of the mining business of plaintiff and without authority to execute a mortgage conveying all its property. The defendant claims that Robinson, as director, treasurer, and manager, had such authority, and, if not, that plaintiff ratified his act in so doing, and is estopped to deny the validity of the mortgage.

It is not stated or shown whether plaintiff is a domestic or foreign corporation or where its home office is located. Three of its directors, of whom one was president and another secretary, lived in Kansas City. Two of the directors, Robinson, who was treasurer, and Danglade, lived in Jasper county at Webb City, near where the plaintiff's mining plant was located. According to the records, there never was but one formal meeting of the board of directors, at which time the officers were elected and Robinson was made treasurer with power "to manage the mining interest and property of the company at a salary of \$25 a week, and employ such labor as he deemed right, necessary, or expedient at such wages or salary as are just and usual for such services."

The plaintiff has no property or business except this mining plant and lease. When the mine was being operated, Danglade, who was interested in a mine on nearby land, rather than Robinson, was the active manager of the mining operations, though Robinson was consulted more or less frequently. The plaintiff's mine and mill being shut down for want of profitable ore, it had no money and no property except this mining plant. It owed only this one debt of \$500, the collection of which was in the hands of A. W. Thurman, a lawyer at Joplin. He was pressing the claim and finally induced Robinson to execute this chattel mortgage covering all of plaintiff's property and signing it as vice president. Robinson explains his doing this by saying he was vice president of another mining company and thought he was vice president of plaintiff. The secured note was made payable in 60 days, at which time Robinson paid \$200 thereon from his private funds and, as plaintiff's evidence shows, without the knowledge of any other officer or director. Nothing more being paid and the balance of the debt being past due, the mortgage was foreclosed and the property sold to an outside party and lost to plaintiff. The mortgage was never recorded and no corporate seal was attached thereto.

Robinson testified that when he signed the mortgage he told defendant's attorney, Thurman, that he had no authority to execute such mortgage, and that he had consulted with the president who had refused to consent to this action. This, however, was denied by Thurman, and under the instructions

given the jury must have found that Robinson did not so state.

There was no meeting of the board of directors authorizing the giving of this mortgage, and there is evidence justifying the finding that Robinson executed the same without consulting with, and without the knowledge or consent of, any other officer or director. All of them, except the president, who died in the meantime, testified that they knew nothing of any mortgage being given or any foreclosure of same till after the property was sold and lost. Danglede, who was always near at hand and who actively managed the property together with Robinson, says that defendant's attorney tried to get him to consent to have his company give a chattel mortgage, but that he refused and told such attorney that there was no need of so doing, as the company could pay out, and that he would not consent to mortgaging the property. We find no denial of this statement.

There is also evidence from which the jury might have found that Robinson did consult with his company, and that this mortgage was executed with its knowledge, if not its express consent. When first asked to give the mortgage, Robinson declined to do so until he first consulted the president and directors at Kansas City. He went there, and on his return, according to defendant's evidence, which the jury believed, said it was all right and he would, and thereupon did, execute this mortgage. Robinson admits that he promised to and that he did consult with the president and directors, but also says that the president refused to sanction the giving of any mortgage. This last statement the jury disregarded. There is also strong evidence that Danglede received several letters notifying him and the company that the mortgage and note were due and must be paid or the mortgage would be foreclosed. These letters seem to have been sent where the plaintiff usually got its mail, though, as stated, it is not shown where the plaintiff maintained its business office, if anywhere. If plaintiff's officers and directors gave the business any attention whatever, they knew that this just debt was due defendant, and that no funds were on hand to pay same. Plaintiff secured a considerable extension of time by reason of this mortgage being given, and plaintiff's conduct with reference thereto is more consistent with knowledge that the debt was secured and time given to pay same than a lack of such knowledge.

[1-3] We are not willing to hold, as we think the trial court in effect did by the instructions given and refused, that Robinson, by virtue of his office as director, treasurer, and manager, had authority to make a mortgage disposing of all plaintiff's property and disabling it from doing business in the absence of any previous exercise of such authority or custom or holding out as having such authority. Such is the holding in *Union*

National Bank v. State Nat. Bank, 155 Mo. 95, 103, 55 S. W. 989, 78 Am. St. Rep. 560, where the mortgage was executed by the president. "An individual director has no general authority to make contracts for the corporation, and there is no presumption that a contract purporting to be made by him was authorized by the corporation, even though he owns a majority of the corporate stock." 7 R. C. L. p. 440. The cases cited sustain this proposition. Nor has the treasurer of a corporation any such authority by virtue of his office. 7 R. C. L. 454; 3 Cook on Corporations, § 717. Nor do we think that Robinson was given such authority by his appointment as manager "to manage the mining interests and property of the company." As one of the directors testified, his business as manager was confined to the physical management of the property and the carrying on of the mining operations. As treasurer he had the right to collect any money belonging to plaintiff and to disburse the same inclusive of paying its debts. "In case of a manufacturing corporation a general agent appointed to carry on its business has no implied authority to mortgage or pledge its machinery." 7 R. C. L. 645, citing *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. See, also, 10 Cyc. 927, 1198, 1199, 1200; *Hyde v. Larkin*, 35 Mo. App. 365, 370; *State ex rel. v. Perkins*, 90 Mo. App. 603, 609; *Degnan v. Thoroughman*, 88 Mo. App. 62, 66; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425.

[4] Where such an instrument is not sealed with a corporate seal, it does not make a prima facie case of its validity. *Degnan v. Thoroughman*, 88 Mo. App. 66; *Musser v. Johnson*, 42 Mo. 74, 79, 97 Am. Dec. 316; 7 R. C. L. 668; 10 Cyc. 994, 1018.

[5] Plaintiff's instruction No. 6, to the effect that, though defendant's claim was just, yet if the mortgage was executed by Robinson without authority and without the knowledge of any other director of such mortgage being given or extension of the debt secured, plaintiff was not estopped to question its validity, should have been given. Defendant's instruction No. 13 is erroneous for the same reason, and the fact that Robinson represented that he had authority to execute the mortgage, and that defendant believed it and relied thereon in taking same and extending the time of payment did not, as there stated, estop plaintiff to deny his authority in the absence of any knowledge by plaintiff, its officers and directors other than Robinson, of such facts. *Hackett v. Van Frank*, 105 Mo. App. 384, 396, 79 S. W. 1013; *Sedalia Nat. Bank v. Heating Co.*, 145 Mo. App. 319, 130 S. W. 377. Of course Robinson had knowledge of his own act, and if his knowledge is that of the corporation, then ratification by acquiescence would be neces-

sarily presumed. The knowledge necessary, however, to presume ratification by acquiescence must be to some officer or agent other than the wrongdoer. *Hyde v. Larkin*, 85 Mo. App. 365, 372.

[8] There is no evidence that plaintiff ever owed any other debt not promptly paid or that it ever gave any mortgage to secure one so that there could be no implied authority from similar acts of Robinson or any other officer or agent. The fact that Robinson had loaned articles of plaintiff's machinery or equipment for use elsewhere, or any act not involving the parting with title, even if known to plaintiff, while showing the extent of his authority, would not conclusively, at least, show authority to alienate the property by custom or usage.

[7] There is no doubt that the giving of this mortgage was a benefit to plaintiff in securing an extension of time to pay its debt, and it was likewise a detriment to defendant in that it was led to forbear taking action to compel payment. In such case any knowledge by plaintiff of the mortgage being given by its unauthorized agent or officer would call for a prompt repudiation of such act, and any acquiescence therein with knowledge would be a ratification of the unauthorized act. *Mining Co. v. Taylor*, 247 Mo. 1, 28, 152 S. W. 5; *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187; *First Nat. Bank v. Fricke*, 75 Mo. 178, 183, 42 Am. Rep. 397; *Holmes v. Board of Trade*, 81 Mo. 137, 143. In such cases, however, knowledge must be shown, though it may be so shown by circumstantial evidence, and such knowledge will not be presumed because known to the wrongdoing officer or agent.

[8] It should also be remarked, in view of another trial, that plaintiff's debt, which is not disputed, is so closely connected with defendant's conversion of this property that the one should be set off against the other, and plaintiff can recover, if at all, only the difference between such debt and the reasonable value of the property converted.

[9, 10] We are not unmindful that appellant has not complied with the rules of this court in abstracting the record herein. The defendant, however, has expressly waived any objection thereto, and owing to the peculiar circumstances of this case we have considered the same on its merits. The rule of court requiring the record to be abstracted and the evidence reduced to narrative form, avoiding unnecessary repetitions and thereby shortening the record and presenting the same in a more condensed and intelligible form to this court, is made for the benefit of the court to expedite the proper disposal of its business. It is not necessary in order to present all the evidence to this court that the same be printed in toto in the form of questions and answers. All the evidence may be presented in narrative form.

Since appellant has not complied with the rules of court, no costs will be allowed for printing the abstract, unless with the express consent of the defendant.

The judgment will therefore be reversed, and the cause remanded.

FARRINGTON, J., concurs. ROBERTSON, P. J., concurs in the result reached.

LEE MASTER v. BUTLER COUNTY R. CO.
(No. 1799.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. RAILROADS \Leftrightarrow 441(6) — LIABILITY FOR KILLING STOCK — STATUTE — BURDEN OF PROOF.

In an action under Rev. St. 1909, § 3145, for double damages for the killing of a mare at a point where the railroad was required to fence, the burden is on plaintiff to prove either directly or by circumstances that the animal entered the right of way at a place where the statute required fences or guards to be erected, and that the statute had not been complied with.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1583-1587; Dec. Dig. \Leftrightarrow 441(6).]

2. RAILROADS \Leftrightarrow 411(18) — DUTY TO FENCE — CATTLE GUARDS.

When a road across a railway has become a public road, so that the railroad company is not bound to fence across it, it is bound to construct cattle guards.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1445-1447; Dec. Dig. \Leftrightarrow 411(18).]

3. RAILROADS \Leftrightarrow 446(7) — LIABILITY FOR KILLING STOCK — EVIDENCE — DUTY TO FENCE.

In an action for double damages for the killing of plaintiff's mare at a point where the railroad was required to fence, evidence tending to show that the mare strayed from a highway established by user only, onto the railroad track, and was struck and killed near the end of a trestle 46 feet from the wagon track of the road, it was a question for the jury whether the railroad company was obliged to construct a cattle guard between a highway and the place where the mare was killed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1684; Dec. Dig. \Leftrightarrow 446(7).]

4. APPEAL AND ERROR \Leftrightarrow 927(5) — REVIEW — DEMURRER TO EVIDENCE — EVIDENCE CONSIDERED.

On a demurrer to the evidence, the appellate court relies on the evidence most favorable to the party attacked.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3748; Dec. Dig. \Leftrightarrow 927(5).]

5. APPEAL AND ERROR \Leftrightarrow 499(3) — QUESTIONS PRESENTED FOR REVIEW — ADMISSION OF EVIDENCE — FAILURE TO OBJECT.

An alleged error in the admission of testimony cannot be reviewed where no objection or exception thereto appears in the abstract of his testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2297; Dec. Dig. \Leftrightarrow 499(3).]

6. APPEAL AND ERROR \Leftrightarrow 874(5) — QUESTION PRESENTED FOR REVIEW — REDUCTION OF VERDICT — FAILURE TO OBJECT.

An order requiring plaintiff to consent to reduction of the damages, after which defendant's motion for a new trial was overruled,

cannot be reviewed where the only exception shown by the record entry was to the overruling of the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481; Dec. Dig. § 874(5).]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by William Le Master against the Butler County Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lew R. Thomason, of Poplar Bluff, for appellant. L. M. Henson, of Poplar Bluff, for respondent.

FARRINGTON, J. This is an action for double damages under section 3145, R. S. 1906, for the killing of a mare belonging to plaintiff by a train on defendant's railway at a point "where said railroad passes along and adjoining inclosed cultivated fields and uninclosed lands, and not at the crossing of a public highway or other road." It is alleged that defendant failed to erect and maintain lawful fences and to construct and maintain sufficient cattle guards along this railroad where the mare went upon it, and that by reason of defendant's failure, as aforesaid, the mare went upon the railroad and was killed to plaintiff's damage in the sum of \$85. Judgment for \$174 was asked. The answer was a general denial. A trial resulted in a verdict for \$70 for plaintiff, which was doubled by the court in the judgment. However, before overruling defendant's motion for a new trial the court directed that the verdict be reduced to \$50, and that the judgment stand for \$100. Defendant has appealed; its main contention being that the trial court erred in overruling its demurrer to the evidence offered at the close of the case.

Defendant does not contend that the mare was not killed by a collision with one of its trains. The entry of the animal upon the tracks and its death occurred out in the country, so that no question of switch limits and the like is involved.

It is undisputed that there was no cattle guard or fence on the side of the highway with which we are concerned where it crossed defendant's railroad.

Plaintiff during the trial admitted in open court that this highway which crosses defendant's railroad is a public road and in his brief in this court speaks of it as such. Defendant at the trial and in this court insisted that this highway is a public road. One of defendant's witnesses said he came to Butler county in 1866, and that the road was in existence then; that it runs down into Arkansas in a southwesterly direction; that there is no other road in the eastern part of the county running in that direction; and that the road has been generally and extensively used by the public. There is no question but that this highway had long been es-

tablished as a public road by user, there being no pretense that there had ever been any regular proceeding taken in the county court to open and establish the same.

Defendant's railroad runs north and south and crosses a slough or creek which runs (that is, the ditch runs) northeast and southwest. The slough is about 125 feet wide and 5 feet deep, in which there is nearly always water. The railroad crosses it on a pile trestle about 125 feet long and about 9 feet in height from the bottom of the slough. Alongside the slough—along the southeast bank of it—is this public road, and it likewise intersects with the line of the railroad at an angle of about 45 degrees. At the crossing, between the rails of the railroad, are crossing boards about 16 feet in length, being laid, not with their ends in a line, but with the end of each a little removed from the end of the board next it so as to conform to the angle of 45 degrees at which the highway intersects the railroad. To the south of these crossing boards, and just beyond what appears to be the southeastern line of the highway, is a cattle guard, but with that we are not concerned. There is no cattle guard or obstruction of any kind to the north of the crossing boards, that is, between the crossing boards and the south end of the trestle and the southeast bank of the slough. It is with this space that we have to deal.

The appellant contends that the evidence is all one way to the effect that this mare went upon its track at the public crossing where it was not required to fence, and from there went to the north along the track to the point where she was struck and killed.

Respondent contends in his brief that this public road was never established by any court proceedings and had no fixed boundaries; that it crossed defendant's railroad about 46 feet south of the slough; that his mare was struck and killed between the public road crossing and the slough, in fact only a few feet from the slough; that it is a question of fact to be determined by the jury whether the animal was killed upon a public road crossing where the railroad is not required to fence or at a point where a fence is required, and that the jury's finding of the fact is conclusive where there is any testimony upon which to base the same, citing *Prather v. K. C. & N. C. R. Co.*, 84 Mo. App. 86.

[1] The liability in this kind of case is statutory, and the plaintiff has the burden of proving, either directly or indirectly, or from physical facts and circumstances, that the animal entered the right of way at a place where the statute requires fences or cattle guards to be erected, and that the statute had not been complied with. *Lynn v. St. Louis, I. M. & S. Ry. Co.*, 164 Mo. App. loc. cit. 450, 146 S. W. 451.

[2] It is held that if a road across a railway has become a public road so that the

railroad company is not bound to fence across it, then it is bound to construct cattle guards. *Brown v. K. O., St. J. & C. B. Ry. Co.*, 20 Mo. App. 427, loc. cit. 438. In that case Phillips, P. J., said:

"If the defendant could not be held bound for an injury occurring on this crossing because of its failure to fence there, it follows as an inevitable corollary that the corresponding duty devolved upon it to construct cattle guards at the point."

Also, that the duty to maintain cattle guards at crossings is as imperative as the duty to maintain fences along the right of way, and that even though the animal enter the right of way at a highway crossing, if, because of the absence of a cattle guard, it then goes into an adjacent field and is killed by a passing train, the railroad is liable in double damages to the owner. *Worley v. St. L. & S. F. R. Co.*, 135 Mo. App. 461, loc. cit. 465, 115 S. W. 1039; *Brown v. K. O., St. J. & C. B. Ry. Co.*, 20 Mo. App. 427, loc. cit. 434.

[3] From what has been said it would appear that the appellant is liable under the statute, this being a public road crossing, even taking appellant's contention as granted that the mare entered upon the railroad at the crossing where appellant was not required to fence, unless it appears that the mare never got beyond this space occupied by the public road where the appellant was not required to fence, or, if she did, unless it appears beyond any doubt from plaintiff's own evidence that appellant is excused for the absence of a cattle guard. The proposition last referred to was pressed at the trial, and we presume was embodied in the instructions, but appellant has not copied the instructions in the abstract.

Several days before the occurrence in question plaintiff had turned this mare out to graze, not having feed for her. He last saw her on a Thursday, and she was killed the following Saturday. He went out to hunt her on Monday and heard she was killed. He testified:

"I saw tracks where she went into the water in the slough, and the train hit her when she came up on the dump. I don't know how far the tracks were from the end of the trestle. From the northwest edge of the public road to the trestle, I think, is about 40 feet; the tracks [of the mare] were about 9 feet from the public road. I saw tracks going down toward the water; it looked like she came on the west side of the trestle. I guess about 9 feet from the trestle; there was blood and hair on the track. It was 46 feet from the south end of the railroad trestle to the north wagon tracks on the public road, having measured the distance; found signs of the killing close to the end of the trestle, pretty close to the south end."

Plaintiff's witness Brachter testified:

That from the northwest side of the public road to the south end of the trestle is 30 or 35 feet, being "perhaps about 3 feet farther from the end of the trestle to the crossing planks along the west rail than it is on the east rail."

Also:

"I saw certain marks near the end of the trestle that indicated that the animal was

struck there; I saw horse tracks which showed the animal was going north to that point, the tracks come north between the rails up to that point from probably 6 feet from the crossing plank, where they first come onto the railroad. The tracks showed to have first come onto the railroad track about 6 feet north of the crossing plank, and turned up the railroad between the rails toward the trestle."

Plaintiff's witness Brey, one of defendant's section men who found the dead animal, testified that from the signs the mare was struck just south of the trestle, and that from the south end of the trestle to the north edge of the wagon tracks at the crossing is about 30 feet.

Among the exhibits introduced at the trial (and the only one brought here, although there seems to have been another plat used at the trial as well as certain photographs) is a blueprint plat purporting to show the railroad track and trestle, the slough and the public road crossing. On it is indicated the distance from the center of the center crossing plank to the south end of the trestle. It is 54 feet. This nearly agrees with plaintiff's testimony to the effect that he measured the distance from the south end of the trestle to the north wagon tracks, and that it was 46 feet.

[4] On a demurrer to the evidence the appellate court relies on the evidence most favorable to the party attacked. The evidence is of a substantial character that the mare entered upon the railroad near the wagon tracks at the crossing at a point where appellant was not required to fence, and walked north up the railroad, and was struck and killed at a place very near the south end of the trestle. We think it was a question of fact for the jury to decide whether the animal was killed beyond a point at which the railroad company should have erected a cattle guard. It is not enough for appellant to say that the trestle was an effective barrier to stock, for the question is made to rest on a demurrer to plaintiff's evidence; besides, the trestle, according to appellant's plat, was 54 feet distant from the center of the center crossing board. Nor is it important one way or the other whether it would have been of any practical benefit to have had a cattle guard with a fence leading from it west down the dump and running into the bank of the slough. The only thing with which we are concerned is the absence of any cattle guard because this mare came down the railroad track, and it is to be presumed that if there had been a cattle guard in compliance with the statute the animal would not have walked over it and reached the point where she was killed. In *St. Louis, K. & N. Ry. Co. v. Clark*, 121 Mo. loc. cit. 183, 25 S. W. 195, 906, 26 L. R. A. 751, the court in speaking of this statute observed:

"This would seem broad enough to include every part of the road in which a concurrent right of user by the public does not exist."

There was a conflict in the evidence as to whether or not there was sufficient space,

between the northwest side of the highway and the south end of the trestle, for a cattle guard. The jury evidently found that there was (although appellant does not bring up the instructions), for that was a contested point throughout the trial, and there is substantial evidence to support the finding.

[5] It is contended that the court erred in permitting plaintiff's witness Nickey to testify that he as county highway engineer did not do or cause to be done any work or expend any public money upon this highway. Turning to Nickey's testimony in the abstract we find no objection whatever nor any exception throughout the entire scope of his testimony. The point is lost.

[6] It is urged that the court erred in reducing the amount of the verdict from \$70 to \$50, and then overruling defendant's motion for a new trial. At the time the trial court acted it had before it the motion for a new trial in which it was assigned as error that the verdict was excessive. The only exception appearing is one to the action of the court in overruling the motion for a new trial. The record entry of the order of the court reducing the verdict and judgment is set out in full in appellant's abstract of the record proper, and we examined there to see if any objection or exception on the part of the defendant (appellant) was manifested, finding none. It therefore appears that this question relating to the reduction of the verdict and judgment is complained of the first time in this court, and this robs the point of any merit for appellate purposes.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

VILES v. VILES. (No. 1748.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. On Motion for Rehearing, Dec. 21, 1916.)

1. TRIAL \S 296(2)—INSTRUCTIONS—DEFECTS—CURE BY OTHER INSTRUCTION.

In action for fraud inducing plaintiff to buy oil stock, where plaintiff claimed that shares given him after complaint of the fraud were accepted in compromise of another claim, and an instruction on his theory was given, a following instruction for defendant that if plaintiff accepted such shares "to settle said controversy," referring to plaintiff's claim of fraud, plaintiff could not recover "regardless of other issues," was not misleading as barring plaintiff, even if he accepted the stock for the purpose claimed by him, especially when read in connection with plaintiff's instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. \S 296(2).]

2. APPEAL AND ERROR \S 301—OBJECTION BELOW.

Where instruction was not complained of in appellant's motion for new trial, it was not reviewable; the trial court not having been given opportunity to correct it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. \S 301.]

3. TRIAL \S 253(3)—INSTRUCTIONS—IGNORING EVIDENCE.

In action for fraud, instructions upon the whole case, directing the issues to be found for plaintiff, if facts hypothesized were found for him, were properly refused where they ignored an issue of compromise raised by defendant's evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. \S 253(3).]

4. FRAUD \S 11(2)—SALE OF OIL STOCK—REPRESENTATIONS—SPECULATIVE VALUE.

Where the entire holdings of an oil company consisted of undeveloped property of entirely speculative value, fraud was not to be ascribed to representations of a seller of stock of the corporation, as to value of such properties, because he allowed elements of speculation to enter into such representations; mines being peculiarly speculative investments.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 13; Dec. Dig. \S 11(2).]

On Motion for Rehearing.

5. TRIAL \S 253(3)—INSTRUCTIONS—IGNORING EVIDENCE.

Refusal of instruction ignoring issues raised by evidence is not error, even though such defect may be cured by another instruction submitting such ignored issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. \S 253(3).]

6. TRIAL \S 261—REQUESTED INSTRUCTION.

Generally it is not error to deny a requested instruction, unless it is correct in all respects.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. \S 261.]

Sturgis, J., dissenting in part.

Appeal from Circuit Court, Polk County; C. H. Skinker, Judge.

Action by E. L. Viles against W. W. Viles. From judgment for defendant, plaintiff appeals. Affirmed.

Wright Brothers and Argus Cox, all of Springfield, and T. H. Douglas, of Bolivar, for appellant. Herman Pufahl, of Bolivar, and V. O. Coltrane, of Springfield, for respondent.

ROBERTSON, P. J. The plaintiff brought this action to recover damages for alleged fraud perpetrated upon him by the defendant, his second cousin, in a transaction in which plaintiff bought shares of stock in the Burkburnett Oil Company, a corporation of Texas of which defendant was president. A jury trial resulted in a verdict for defendant, and plaintiff has appealed. The only errors assigned are as to instructions refused and given.

[1] After plaintiff had purchased the stock, claims to have discovered the fraud and complained to defendant, five additional shares were delivered to and retained by him. The defendant contended at the trial that this constituted a compromise and settlement of the controversy sought to be adjudicated in this case; the plaintiff claimed that the additional stock was accepted by him only for the purpose of adjusting a controversy that had arisen about the amount of money that

defendant represented had been paid for leases held by the oil company. The plaintiff requested and was given an instruction upon his theory of the facts. This was followed by one in behalf of defendant referring to the controversy about the alleged misrepresentations made by him, and the jury was told that:

If "in order to settle said controversy, the defendant procured for the plaintiff five additional shares of stock of the company to settle such difference, and the plaintiff accepted such stock and still retains the same, then it is your duty to find the issue for defendant, regardless of the other issues in the case."

The criticism made of this instruction in behalf of plaintiff is that the jury under it should find for defendant, even if plaintiff retained the additional shares of stock for the purpose for which he claims it was accepted. But the instruction requires the jury to find that the defendant procured additional stock to settle the difference involved in this suit, and the requirement that it be found that the plaintiff accepted the stock is so connected therewith that the jury could not have been misled or have concluded therefrom that the acceptance and retention could have referred to anything else than the purpose therein immediately before specified, especially when read in connection with the instruction given in behalf of plaintiff on the same question.

[2] An instruction numbered 10 given in behalf of defendant is complained of in the brief filed in behalf of plaintiff, but a reference to the motion for a new trial discloses that no complaint was made therein of this instruction. No rule is better established than that an appellate court shall not pass on errors of this kind charged against the trial court which that court has not been given an opportunity to correct.

[3] Instructions numbered 3 and 4 requested by the plaintiff were refused by the trial court, and of this action complaint is made. Each of these instructions were upon the whole case and directed the issues to be found for the plaintiff if the facts therein hypothetically submitted were found in favor of plaintiff. These instructions ignored the question of compromise, and for that reason alone the court cannot be convicted of error in refusing to give them.

[4] Three instructions (5, 5A, and 5B) were requested by plaintiff and refused. This is assigned as error. One of these instructions told the jury that in determining the value of the leases held by the oil company that there should not be taken into "consideration any value you may believe from the evidence to be of a purely speculative character." The other two instructions eliminated from the term "value," as used in other instructions, all value that was purely speculative in its character. These instructions, if given, would have been equivalent to a directed verdict for plaintiff. The entire holdings of the oil company consisted of undeveloped property, and the entire value was specula-

tive. While it had a market value it was necessarily based to a large extent on the speculative idea the public had of it. Our Supreme Court in *Morgan County Coal Company v. Halderman*, 254 Mo. 596, 646, 163 S. W. 828, 843, quotes approvingly as follows:

"No man, however scientific he may be, could certainly state how a mine, with a most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and everyone knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!"

We are not holding that there could be no fraudulent representation as to the value of properties of this character, but we do hold that in this case the defendant should not be convicted of fraud because in making his representations as to value he allowed elements of speculation to enter therein. These three instructions were properly refused.

There being no reversible error, the judgment of the trial court is affirmed.

STURGIS and FARRINGTON, JJ., concur.

On Motion for Rehearing.

ROBERTSON, P. J. Appellant vigorously challenges the correctness of the statement in the opinion that the trial court properly refused instructions 3 and 4 offered by plaintiff because they ignored the defense of an alleged compromise. It is urged that such a holding is in conflict with the opinions in the cases of *Melly v. St. Louis & San Francisco R. Co.*, 215 Mo. 567, 587-589, 114 S. W. 1013, *Turner v. Southwest Missouri R. Co.*, 138 Mo. App. 143, 151, 120 S. W. 128, *Jackson v. Western Union Telegraph Co.*, 174 Mo. App. 70, 82, 156 S. W. 801, *Wright v. Dinger Mining Co.*, 163 Mo. App. 536, 539, 147 S. W. 213, *Johnson v. Springfield Traction Co.*, 176 Mo. App. 174, 186, 161 S. W. 1193, and *Keller v. Blurton*, 188 S. W. 710, 711.

[5, 6] An examination of all of the decisions in the above cases, together with those there cited, as well as the ones cited in *Wingfield v. Wabash R. Co.*, 257 Mo. 347, 363, 377, 166 S. W. 1037, will reveal that in none of them was it held error to refuse this character of an instruction. All of the opinions in the cases leading up to the *Melly Case*, supra, and many thereafter, refer to the giving of such an instruction, when accompanied with proper instructions setting out the defense, as not constituting reversible error. Such is the holding in the *Wingfield Case*, supra. If a party "who asks an instruction on the whole case must not frame it so as to exclude from the consideration of the jury the points raised by the evidence of his ad-

versary" (Wingsfield Case, 257 Mo. 362, 166 S. W. 1041), it is difficult to convict the trial court of error in refusing an instruction that does not meet this requirement, even though there may be an instruction given which submits the defense. We have never supposed there was any law that would convict a court of error in refusing an incorrect instruction which the opposite party could correct by obtaining an instruction covering the omission constituting the defect. "The general rule is that it is not error to deny a request for an instruction, unless it is correct in all respects." Trustees of Christian University v. Hoffman, 95 Mo. App. 488, 497, 69 S. W. 474; Lall & Hull v. Pacific Express Co., 81 Mo. App. 232, 235.

Nevertheless, the refusal of the instructions is justified on other grounds. One of them relates to alleged misrepresentations as to the lease of the oil company containing no forfeiture clause, and was based on the theory that the leases were less valuable by reason of this clause, but there was no testimony to that effect. The other one was on the theory that if the leases had not been developed by drilling, and that was necessary in order to determine their value and to learn whether the purchase of the stock of the company would be safe investment and plaintiff did not know that but defendant did, that defendant knew of plaintiff's ignorance in this respect and failed to convey such information to plaintiff, then the verdict should be for plaintiff. Even if the plaintiff was so ignorant, and the instruction properly declares the law, there was no testimony to justify the giving of the instruction, as there was no showing that defendant knew of plaintiff's ignorance in this regard.

The motion for a rehearing is overruled. All concur; STURGIS, J., in the result only.

SHAHAN v. LUSK et al. (No. 1741.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. DAMAGES \Leftrightarrow 105—KILLING STOCK—MEASURE.

The measure of damages against a railroad for killing stock is the value of the stock in the vicinity where and when the animals were killed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 266-271; Dec. Dig. \Leftrightarrow 105.]

2. DAMAGES \Leftrightarrow 174(2)—KILLING STOCK—EVIDENCE OF VALUE—PURCHASE PRICE.

In an action against a railroad for killing plaintiff's animals, the amount he paid for them one year before, while competent evidence of their value at that time, is not evidence of their value at the time and place where they were killed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 463, 467; Dec. Dig. \Leftrightarrow 174(2).]

3. APPEAL AND ERROR \Leftrightarrow 1140(4)—DISPOSITION OF CASE—REDUCTION OF JUDGMENT.

Where the only competent evidence in an action to recover the statutory double damages

for killing stock showed that the market value of the stock was only one-half the amount of the verdict, a judgment for double the amount of the verdict will be reversed unless plaintiff remits one-half thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4466; Dec. Dig. \Leftrightarrow 1140 (4).]

Sturgis, J., dissenting.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Hamid Shahan, by next friend, R. S. Hamra, against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad. Judgment for plaintiff, and defendants appeal. Affirmed on condition that plaintiff remit one-half thereof; otherwise, to be reversed and remanded.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Sam J. Corbett, of Caruthersville, for respondent.

ROBERTSON, P. J. The plaintiff's mule and mare wandered upon defendants' railroad track and were killed by a passing train. At this point defendants were required by section 8145, R. S. 1909, to, but did not, fence their right of way. Plaintiff sued, and a jury trial resulted in a verdict in his favor for \$250. The court, under the statute, doubled the amount and entered judgment accordingly. The defendants have appealed, and urge that the court admitted improper testimony and that the jury doubled the amount the proof showed the animals to be worth, and that therefore this judgment should be reversed and the cause remanded, unless plaintiff will remit one-half of it. If the testimony admitted without objection shows any value, it unquestionably does not show more than \$125; \$50 for the mare and \$75 for the mule.

We shall refer to the testimony that is relied upon to show a value in excess of \$125 for the team. The plaintiff, an Assyrian, a peddler traveling over the country, and who testified through an interpreter, said that he bought them about one year before they were killed. The mare was blind in one eye. He was asked if he knew what the market value of this team was on the date it was killed. The answer was that they were worth \$300 if he wanted to sell them. The court on motion of defendants struck this out. Then plaintiff proceeded to testify that he could get, and would not take less than, \$300. After the plaintiff had given this testimony attempting to show the market value of the animals, the trial court, who saw the witness and heard him testify, remarked in the presence of the jury, and in ruling on defendants' objection: "He doesn't know what the market value means." Plaintiff was then asked what he paid for them, and he answered, over defendants' objection, \$400.

[1] When there is a market value, as in

this case, it must control (*Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 108, 114 S. W. 1049, and cases there cited), and it must be such a value in the vicinity where and when the animals were killed (*Warden v. Missouri, Kansas & Texas Ry. Co.*, 78 Mo. App. 664, 668).

[2] What plaintiff gave for the team may have been some evidence of its value at the time and place of the purchase, but not at the time and place where killed. *Miller v. Bryden*, 34 Mo. App. 602, 607, and 608; *Johnson & Co. v. Springfield Ice & Refrigerator Co.*, 143 Mo. App. 441, 452, 127 S. W. 692; *Niemetz v. St. Louis Agricultural & Mechanical Association*, 5 Mo. App. 59, 64; *Grant v. Hathaway*, 118 Mo. App. 604, 610, 96 S. W. 417. In the opinion in this last case it is held that proof of the amount paid eleven months before the time when the value must be fixed is no evidence upon that question.

The fact that the court was of the opinion the plaintiff did not know what the question as to the market value of the team meant was of itself no reason for dispensing with proof on that question.

[3] We have referred to all of the testimony that was submitted to the jury and which has any bearing on the value of the team above \$125, and as this testimony is of no probative force, and since error was committed in admitting testimony as above noticed, we must hold that the judgment on the record before us cannot be upheld for an amount exceeding \$250, and, if plaintiff will within ten days after this opinion is filed remit therefrom sufficient to reduce it to that amount, it will be affirmed; otherwise, it will be reversed and the cause remanded.

It is so ordered.

FARRINGTON, J., concurs.

STURGIS, J. (dissenting). I am constrained to differ with my Associates in holding that there is no evidence warranting the jury in finding that the value of the animals killed exceeds \$125, being \$50 for the horse and \$75 for the mule. The plaintiff testified, through an interpreter, as follows:

"Q. What was the reasonable market value at the time and place on the day they were killed; that is, if a man wanted to sell them but didn't have to sell, and a man wanted to buy but didn't have to buy? Interpreter: Could have sold them for \$300 any time he wanted to. Mr. Stewart: Object to that and ask it be stricken out because it is not responsive to the question. By the Court: Tell him to answer the question. Interpreter: Said they were worth that at that time. Mr. Stewart: Renew my objection, not responsive to the question. Interpreter: He says a man come in to sell, to tell like that, how much he would give for that, he says he would tell like that, he would pay \$300, said he wouldn't take less than \$300. Mr. Stewart: Renew my objection. By the Court: He doesn't know what the market value means. Objection overruled. Mr. Stewart: Exception."

It seems to me that when a witness, in answer to a question as to the market value of these animals, answers that he could have sold the same for \$300 at any time he wanted to, that same were worth that at the time they were killed, and if a man had offered him \$300 he would not have taken it, it is competent evidence based on a correct measure of damages and responsive to the question, though the last statement is not strictly a proper measure of damages, but is harmless. The maximum value of \$125 as fixed by the majority opinion is that of the section foreman and two persons called by him to appraise the animals after their death on a casual inspection. One of these appraisers testified that the valuation of the horse at \$50 was on the theory that it was blind in both eyes, and the evidence clearly shows that it had one good eye. It so accords with reason and experience that a horse with one good eye is more valuable than one totally blind that the jury was warranted in concluding that, if the horse was worth \$50 on the supposition of being totally blind, it was worth more with one good eye. The mule was shown to be sound but rather poor. Furthermore, the plaintiff testified that the two animals cost him \$400 about a year previous, and the cost price, when not too remote, is admissible, not as the measure of damages, but as throwing some light on the question.

Evidence of value, in the nature of expert or opinion evidence, is always advisory and not binding on the jury. The jury, in weighing such evidence, has the right to use its own knowledge and experience along the same lines. The jurors here were put in possession of knowledge as to the age and condition of these animals and the purpose for which they were being used. The jurors were from a rural community, and this court is not required to be ignorant of the fact that such jurors, when in possession of the facts shown by this record, have the knowledge and experience requisite to form a fair estimate of the value of such common animals. I am of opinion therefore that the jury in no way attempted or intended to double the amount of damages found, but intended to and did, on sufficient evidence, find the animals to be of the reasonable value of \$250 at the time they were killed. That the amount of such damages should be doubled in entering the judgment is a matter which the law directs.

KRIPPENDORF-DITTMAN CO. v. HUNT-RIDDICK MERCANTILE CO. et al.

(No. 1920.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. FRAUDS, STATUTE OF §159 — SALE OF GOODS — PART ACCEPTANCE — ONE OR TWO CONTRACTS — QUESTION FOR JURY.

Evidence of a sale of goods, part to be delivered at one of the buyer's stores and part at

its other store, being one sale, so that acceptance of the goods shipped to one store would, under Rev. St. 1909, § 2784, take the contract out of the statute of frauds, the sale being all at the same time and place, though the goods for each store were entered on a separate order blank, held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 378; Dec. Dig. ¶159.]

2. FRAUDS, STATUTE OF ¶83—"CONTRACT OF SALE" OF GOODS.

The contract arising from an order for shoes, though they are thereafter manufactured, is one of sale, as regards the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 147-153; Dec. Dig. ¶83.

For other definitions, see *Words and Phrases, First and Second Series, Contract of Sale*.]

3. APPEAL AND ERROR ¶1078(1) — POINTS NOT BRIEFED.

A point not briefed by either party will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4256; Dec. Dig. ¶1078(1).]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by the Krippendorf-Dittman Company against the Hunt-Riddick Mercantile Company and another. From an adverse judgment, plaintiff appeals. Reversed and remanded.

Williams & Galt, of Springfield, for appellant. Patterson & Patterson, of Springfield, for respondents.

STURGIS, J. The plaintiff is a manufacturer and wholesale merchant of shoes at Cincinnati, Ohio. The defendant is a retail merchant having two stores and places of business, one at Tulsa, Okl., and the other at Springfield, Mo. The defendant's principal place of business was at Tulsa, and the Springfield store was in the nature of a branch store. The defendant's purchasing agent was at Tulsa, and there bought goods for both stores. This suit is for the purchase price of a bill of shoes alleged to have been bought by defendant's buyer at Tulsa and shipped to defendant at Springfield. The defendant refused to receive or pay for this shipment. The defendant pleaded the statute of frauds (section 2784, R. S. 1909), and the trial court sustained a demurrer to the evidence and forced plaintiff to take a nonsuit.

[1] The only question presented on this appeal is the correctness of the trial court's ruling that plaintiff could not recover because of its failure to show any contract or memorandum in writing signed by the party to be charged sufficient to satisfy the statute of frauds relating to the sale of personal property of greater value than \$30. The plaintiff's evidence shows that its traveling salesman, with his samples, was at Tulsa, and there met the defendant's buyer, who gave him an order for certain shoes to be shipped to the Tulsa store, and for certain other shoes to be shipped to the Springfield

store. The defendant's buyer selected the kind and quantity of goods sold, and the plaintiff's salesman wrote out the order or orders on blank forms used for that purpose, specifying the kinds, quantity, sizes, prices, etc., and forwarded same to plaintiff.

The order or orders were not signed by defendant or any one for it, and as defendant received and accepted the goods shipped to Tulsa, it becomes important to determine whether there was only one sale and order covered by the shipments or whether there were two separate and distinct sales or orders, one for the Tulsa store, and the other for the Springfield store. Recognizing that the receipt and acceptance of part of the goods takes a case out of the statute of frauds, the defendant, in its brief, says:

"The real question to be determined in this case is whether or not the trial court was correct in declaring as a matter of law that the evidence offered on behalf of the appellant disclosed the fact that there are two separate and independent contracts between the parties for the sale of goods, wares, and merchandise, and that the one sued upon was within the statute of frauds. If that evidence shows that the transaction by which these two orders for shoes were given embraced but one contract, then the judgment of the trial court should be reversed and the cause remanded. If that evidence shows that the two alleged orders upon acceptance by appellant were two separate and distinct contracts, then the judgment should be affirmed."

The defendant, in its brief, further says:

"The evidence tended to show that the traveling salesman made two separate written orders for the goods, neither of which was signed by the respondent or any one for it."

This, we think, is as strong a statement in defendant's favor as the facts will warrant. But defendant forgets that the demurrer to the evidence was based on the ground that the evidence conclusively showed that two distinct sale contracts were made. The evidence is that the traveling salesman filled up two order blanks, but this is not inconsistent with there being only one sale, since an inspection of the original orders shows that there was hardly room enough on one blank for the entire order; and since part of the goods were to be shipped to one place and part to the other, it was necessary to designate separately what goods were to be shipped to Tulsa and what to Springfield. The use of two order blanks was therefore largely a matter of convenience. The sale was all at one and the same time—one buyer and one seller each represented by a single agent—and was essentially one transaction. The two order sheets were transmitted to plaintiff together, were received and accepted on the same date, and notification of the acceptance mailed to defendant on one date. The goods were then manufactured, the defendant's name and place of business stamped thereon, and both shipments made on the same day. The original sheet shows that each is an exact duplicate of the other, except that the Tulsa part of the order includ-

ed one kind or grade of shoe not wanted at the Springfield store. The evidence is that the order was first made out for the Tulsa store, and then the buyer directed the salesman to duplicate the order for the Springfield store, except as to the one kind of shoes not wanted there. But this appears to have been a mere convenience and detail in carrying out one transaction and one purchase for both stores rather than showing distinct purchases for each store and constituting two separate transactions. Even if there are facts warranting a finding that there were two distinct sales, the court could not so declare as a matter of law. The part of the goods shipped to Tulsa was received, accepted, and paid for by defendant without question. If there was but one sale of all the shoes this is conceded to be sufficient to take the case out of the statute. *Rickey v. Tenbroeck*, 63 Mo. 563.

[2] Plaintiff has also suggested that the orders in question were for the manufacture of goods for defendant rather than a sale of goods, wares, and merchandise, and therefore not within the statute of frauds. The contracts here are much like those considered in *Helmert, Bettman & Co. v. Nagel & Co.* 112 Mo. App. 202, 87 S. W. 61, and *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656, and this point must be ruled against plaintiff.

In view of another trial we note that when the goods arrived at Springfield the defendant caused same to be returned to plaintiff without any excuse whatever, except that some time later defendant said it could not use them. The goods were again returned to Springfield, and later, as an excuse for not receiving them, defendant wrote this letter:

"In reply to your letter of September 12th, beg to say all orders placed by our company when given are to be accepted by a directory of the Hunt-Riddick Co. and we have no record whatever of placing an order signed properly with the Krippendorf-Dittman Co., and for this reason the shoes were returned. None of the directors of this company knew that this order was placed and we kindly ask to notify our clients that the shoes are in Springfield subject to their order."

Later it wrote again:

"We are referring to shipment of goods made our Springfield store last fall. The order was supposed to have been given by an authorized agent of our company. This is an error, as Mr. Riddick and I are liable only for orders placed with our signature. We have been advised by the railroad company that these shoes will be sold within a short time to pay storage charges and freight. [Signed] Hunt."

These letters plainly refer to the unsigned orders forwarded to plaintiff and then in its hands and which defendant evidently thought were signed by its purchasing agent, Lindsay. The defendant was seeking to repudiate the purchase solely on the ground that such purchasing agent could not bind defendant without a specific approval by its board of directors. But defendant recogniz-

ed its buyer's authority so far as pertains to the goods shipped to Tulsa, and there is evidence that this agent was defendant's regular buyer, having and exercising such authority generally. It is suggested that where one writing refers to another, such other is to be considered part thereof, and that the whole correspondence relating to this sale of goods must be taken and read together, and when so taken there is sufficient in writing signed by defendant to satisfy the statute.

[3] This point is not briefed by either side, and we will leave it as we find it.

The judgment will be reversed, and the cause remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

SHELTON v. CHICAGO, M. & ST. P. RY. CO.
(No. 11968.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. APPEAL AND ERROR \S 1001(1), 1002—CONFLICTING EVIDENCE.

The Court of Appeals cannot weigh conflicting evidence nor set aside a verdict having substantial testimony to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3928-3933, 3935-3937; Dec. Dig. \S 1001(1), 1002.]

2. CARRIERS \S 318(5)—PASSENGERS—INJURY—GETTING OFF TRAIN.

In action against railroad for injuries from being knocked from car platform by sudden jerking, evidence that plaintiff, a passenger, desiring to get off the train, was advised by the brakeman that the train would stop or slow up at the depot and stood with the brakeman on the car steps when thrown therefrom by a jerk, held to support plaintiff's verdict.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1309, 1310; Dec. Dig. \S 318(5).]

3. CARRIERS \S 336—PASSENGERS—AUTHORITY OF BRAKEMAN.

A passenger is entitled to rely on the invitation and suggestion of a brakeman to occupy a place on car steps preparatory to getting off when the train stops or slows up at a station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1357-1362; Dec. Dig. \S 336.]

4. CARRIERS \S 347(8)—PASSENGERS—GOING ON STEPS—QUESTION FOR JURY.

Whenever there is any good reason for a passenger going upon the steps of a car, it is a question for the jury whether such act amounts to contributory negligence or not.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1355, 1356, 1379, 1402; Dec. Dig. \S 347(8).]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

"Not to be officially published."

Action by Edmund R. Shelton against the Chicago, Milwaukee & St. Paul Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Fred S. Hudson, of Kansas City, for appellant. John W. Clapp, of Milan, and Platt Hubbell and Geo. H. Hubbell, both of Trenton, for respondent.

TRIMBLE, J. This is a suit for personal injuries caused, so plaintiff avers, by his being negligently jerked from the steps of a passenger train at defendant's station of Lucerne, which position on the steps plaintiff was induced to take by the alleged negligent instructions, invitation, suggestion, directions, and misinformation of defendant's brakeman on said train, it being his duty to assist passengers in and about boarding said train and in alighting therefrom. The answer was a general denial and a plea of contributory negligence. Plaintiff obtained a verdict and judgment for \$4,000, and defendant has appealed.

[1] We are asked to reverse the case outright, as it is claimed there is no substantial evidence on which to base a verdict for plaintiff. This calls for a somewhat detailed analysis of the evidence, and this means, of course, the evidence in plaintiff's favor, since it is the jury's province to say which side told the truth or what were the true facts. We cannot weigh conflicting evidence, nor set aside a verdict having substantial testimony to support it.

[2] The injury occurred on the afternoon of Sunday, March 24, 1912, at Lucerne, a station on defendant's line of railway which, at that point, runs north and south. Powersville is a station north of Lucerne. Defendant's train No. 8 was a north-bound passenger, and No. 3 was a south-bound. Ordinarily they met at Osgood. But on this Sunday afternoon the station agent at Lucerne told the plaintiff that No. 8 was late, and that the two trains would meet at Powersville. Plaintiff thereupon decided to go to Powersville on No. 8 and return on No. 3, and purchased a ticket for this purpose. Upon the arrival of No. 8 at Lucerne plaintiff boarded the train at the platform and entered the smoking car, where he saw two acquaintances on the east side of the coach and entered into conversation with them. Shortly thereafter the train backed south on the main line to the passing track switch, and, over it, headed in north on to the passing track to the right or east of the main track. After getting upon the passing track, it stopped and remained at the south end thereof, although there was a switch at the north end beyond or north of the depot. And, unless the train was going to again stop at the depot on its way north, it could have gone on up the passing track to the switch at the north end and there, as soon as the south-bound train had passed that point and the track was clear, get upon the main line and proceed on its journey. While No. 8 was thus standing on the south end of the passing track, a train from the north passed on the main line. Plaintiff, being engaged in conversation with his friends on the east side of the coach, did not see what train it was that passed, but, of course, heard it, and some question arose in plaintiff's mind as to whether it was No. 2. He remarked that if

that was No. 3 he had better get off because he couldn't get back that day and he wouldn't go to Powersville. He arose and went to the north door of the smoking car. By this time his train had backed south off the passing track and was on the main track a few feet south of the passing track switch which was 760½ feet south of the depot platform. Plaintiff passed out of the car door upon the platform, and, as he did so, he observed the brakeman on the east steps of said platform and asked him what train had just passed south. The brakeman replied it was No. 3. Plaintiff told the brakeman he had a ticket and intended going to Powersville and come back on No. 3. The brakeman replied that it had already gone by, and plaintiff then said he had better get off. To this, according to plaintiff's evidence, the brakeman replied that the train would either slow down or stop at the station. The train was then moving toward the depot. Upon being told this, plaintiff got upon the west step of the car platform in readiness to get off the moment the car slowed down or stopped, and the brakeman stood above plaintiff on the platform or on the ledges on either side of the steps, and, holding to the rods on either side, looked out north to the depot. Plaintiff says that he (plaintiff) first got upon the second or middle one of the three steps, and when the train slowed up he got upon the lowest step with the intention of getting off as quick as he could after they stopped, and was facing to the west holding with his hands to the rods on either side; that while he was in this position and just before the train reached the south end of the platform, or when it was right at the south end, it gave a sudden, unusual, and hard jerk, which broke the hold of his right hand and caused his body to fly around and strike his head against the body of the car. He says that after this blow he doesn't know how he fell except that when his right hand broke loose and his body swung around he grabbed with his right hand and held onto the car somewhere in a desperate attempt to keep from falling to the ground and being cut in two. He doesn't know how far he was carried while thus clinging to the car, but says he fell between the car and the depot platform, and his leg was cut off below the knee, or it was mangled so that it had to be amputated. One of the bracing rods underneath the car also struck his head, and he was carried along the track, and otherwise bruised and injured.

The brakeman denied that he was on the platform with plaintiff, and says he had no conversation with him, and consequently did not tell him the train would slow up or stop at the depot. A witness Huffman, however, swore that he saw plaintiff on the platform and the brakeman there talking to him. The brakeman swore that when the train backed south off the passing track to the main track, the cowcatcher was 15 or 20 feet south of the switch, and that he lined the switch

up so as to clear the main track and then, while the train was standing still, he ran down and got on the front end of the baggage car and got the baggage man to unchain the door and let him in. There was evidence that the baggage car had no steps on it, and that it was customary for the brakeman to get on the first car that had steps. The smoker was next to the baggage car so that the brakeman had only to go the additional length of the baggage coach to reach the platform plaintiff was on.

Plaintiff testified that he had seen the trains meet there before, and that after No. 8 had backed from the depot down to the passing track switch and had gotten upon the passing track, the train, if it had finished all its business at the depot and the passing track was clear, would then go on up the passing track and out onto the main line at the north end after the south-bound train had passed, but that, if it had not finished its work at the depot, it would again back south onto the main line, after the other train had passed, and then go on to the depot and finish before proceeding on its way. The passing track was clear on this occasion, and the engineer testified that they could have gone on out at the north end of the passing track if they had wanted to.

A number of young fellows were at the depot engaged in "train hopping." They got on No. 3 as it went south and rode up to the switch, where they jumped off and got on No. 8 to ride back to the depot. One of them (Huffman) says that a man in the engine on the west or left side (which is the fireman's place) kept looking back and smiling at them; that the witness and perhaps one other "train hopper," Blackman, were on the west side of the train No. 8, and this man in the engine looked back and saw them and grinned and waved his hand at them; that every time this man in the engine looked out he was looking back. He said it was either the fireman or engineer; he didn't know which, but he had on clothes like they usually wore.

Another train hopper (Canaan) was on the east (the engineer's) side of the train having climbed upon the east rear steps of the dining car which was the rear car of the train. He says the engineer had his head out the cab window looking back at him; that the engineer watched him for about 300 yards, and that when he (the witness) got in about 200 yards of the depot the train seemed to slow up, and then when the engine was about the south end of the depot platform it gave a "surging jerk" and began running faster and faster. On cross-examination by defendant, he said the first jerk or lurch was given when the engine—

"was about something like the south end of the depot platform. Q. That is the first jerk that the train gave? A. If I remember right, it is. Q. That is when the engine got to the south end of the depot or when you got to the south end of the depot? A. When the engine got to the south end of the depot. Q. That is where that

man is standing in picture No. 3? A. Yes, sir. Q. That is where the engine gave the first lurch? A. Yes, sir."

Further on in the cross-examination he said he remembered only one jerk, and that he remembered it because the train slowed up and he thought it was going to stop, and then it gave a sudden jerk and went on; that he was the length of the train, or about 100 yards, south of the depot when the train gave this lurch.

This evidence tends to corroborate plaintiff as to the jerk that threw him off the steps. The mail crane was shown to be 44 feet south of the south end of the platform. Plaintiff testified that the train "slowed up about the time it got to the mail crane or a little before possibly"; that then when the engine got "right at the south end of the platform" it gave the violent jerk that jerked him off the steps. Plaintiff's Exhibit 3 is a large photograph of the depot and platform taken from the south with the south end of the platform in the foreground and a man standing on the platform very near the south end thereof. Plaintiff says that he was thrown down from the train at or about where this man is shown in the photograph, which, as stated, is within a very short distance, not over 2 or 3 feet, of the south end of the platform. Defendant's witness Roberts says when he first saw plaintiff he was clinging to the car and was further north down the platform and nearly to the freight room door. He says plaintiff might not have quite passed the bay window of the depot (which was south of the freight door), but that, when picked up, he was north and east of the freight door. If the blow on plaintiff's head in striking the car rendered him unconscious, as he says it did, doubtless he does not know where with reference to the platform he fell to the ground. But even if he was nearly to the bay window and was then clinging to the car when Roberts first saw him and was carried for 30 feet in this situation, and then fell and was rolled for 15 feet more till he was picked up at a point north of the freight door, still this makes no vital difference. The important matter is, Did the train give a jerk that broke plaintiff's handhold and threw him around against the car from which he shortly afterwards fell? Roberts' testimony does not go to this. Plaintiff was clinging to the car when Roberts first saw him near the bay window, and he went only 30 feet from that time till he fell to the ground. Roberts did not see the jerk that threw him off the steps, and admits that he doesn't know where plaintiff first struck the platform. May, another of defendant's witnesses, standing on the platform a little north of the freight room door, says when he first saw plaintiff he was clinging to the car and was at about the south part of the depot, and that he fell right in front of the witness and was rolled some 30 feet to the north, so that he too did not see

plaintiff at the time the latter claims he was jerked off the steps. The whole thing happened quickly, and the difference between the points where plaintiff fell to the ground does not determine the case nor destroy it, if plaintiff otherwise has one. The extent of the platform south of the depot is not shown in feet but, judging by comparison with other objects, whose distances are given, the platform was not of such great length as to show that the jerk could not have occurred when and where and as plaintiff says it did. The platform was 8 inches' high and 21 inches from the west rail. Plaintiff fell in between the rail and the platform.

The engineer denied that he looked back and saw any boys on his train, or that he gave any unusual jerk, or did anything other than to gradually increase his speed as he went north from the switch after getting out on the main track. And yet he testified that when he got north of the depot a little, the fireman, who was looking back, said to him, "That will do! That will do! Somebody went under the train!" The fireman also denied seeing any boys on the train or that he waved at them, and yet he says that when he got by the depot he happened to glance back and saw somebody fall, and that "I told the engineer that would do; that somebody had fell under."

The evidence showed that the brakeman assisted and directed the passengers in getting on and off the train. Plaintiff had purchased a ticket which was produced at the trial. He had become a passenger with the intention of going to Powersville. There was not even an attempt to show that he was a "train hopper."

Now we cannot say that the foregoing evidence, together with all the inferences to be drawn therefrom in plaintiff's favor, is wholly without probative force, or is so lacking in substantial value as to justify us in setting aside the verdict of the jury. Neither can we say that the physical facts and defendant's testimony overwhelmingly show that plaintiff was not jerked off, but was attempting to jump from the train in the ordinary way and was injured in such attempt.

Defendant's two witnesses Roberts and May, who were on the platform at the time plaintiff fell, do not even go to the extent of saying that plaintiff was not jerked off the steps before he fell. When they first saw him he was clinging to the car with his hands. Both say he was carried in this way a little distance after they first noticed him. Roberts says that he was carried thus about 30 feet before his hold broke and he fell. Neither of them say he let loose voluntarily. Roberts says:

Plaintiff "was hanging on; hanging on the train; he was holding on; he was thrown off, or fell, or went down, anyhow; it was done in an instant, done quick; didn't have much time."

May said:

"It looked like he was trying to hold; he was hanging when I first saw him; he had too high a hold to be dragging; he broke loose all at once when he broke loose; the train was running unusually fast; he touched the sidewalk with his feet once in a while; he fell right in between the rail and the platform; and the next step that came along he tried to raise up, and that step hit him, and turned him over, and drug him quite a little ways; he fell right in front of me."

The evidence of these witnesses of defendant, therefore, did not reach to the vital question in the case, namely: Did the train give a jerk that broke plaintiff's handhold and threw him around against the car and place him in a perilous clinging position from which he shortly afterwards fell? And, if so, when and where did that jerk take place?

Another witness for defendant, J. E. McAndrews, testified that he was standing on the platform at the south corner of the depot, and that he saw plaintiff on the steps of the car in a position to get off as the train backed off the side track onto the main line. This was over 750 feet away. And yet in almost the next breath he said it was probably 150 to 200 feet south of where he was standing when he first saw plaintiff; that plaintiff had hold of the rods on either side and with his back from the steps ready to get off; that he rode that way until he was in 10 or 12 feet of the witness, and then he got off; that he alighted all right, but was kind of dazed in some way; that he didn't go straight down, but held his feet for an instant and plunged around, and after the steps had passed him the side of the car brushed him or hit him on the shoulder, and then he "kind of twisted" and went down between the platform of the depot and the rail. The platform, as stated, was 8 inches high and only 21 inches from the rail. From the position of this witness to where plaintiff was rolled, the other two witnesses, Roberts and May, must have been in the line of his vision, and yet he said he was the only man on the platform. He afterwards changed this so as to say he remembered seeing no one. He did not testify at the first trial of the case. The other two could not say which way plaintiff was facing. It will be observed that McAndrew's testimony differs widely from that of the other two men; and, in addition to this, the jury would have the right to say whether his version of the way plaintiff fell was in accord with the laws of motion and force if plaintiff voluntarily alighted from the car as this witness says he did. Plaintiff's witness, Huffman, did not conclusively disprove plaintiff's story as to how the latter got off the train. On cross-examination he said he saw plaintiff get off the train, but his testimony shows on its face that he was giving merely his supposition as to how plaintiff got off the steps. He was asked:

"Q. You saw Shelton get off, didn't you? A. Yes, sir. Q. Did he swing off just like you did? A. Yes, sir; I suppose so, only he— Q. Sir? A. Well, he swung off like I did; he stepped off, I suppose, as I did, but he held on with one hand. Q. He run along on the platform along the side of the train awhile, did he? A. Yes, sir. Q. You saw him do that? A. Yes, sir. Q. How far would you say he held onto the hand-holds and ran along the side of the train on the depot platform, 50 or 75 feet? A. No, sir; I imagine about 30 feet he held onto it; probably 40 feet; I am not sure."

In this state of the evidence, therefore, we cannot say that plaintiff's case is without substantial evidentiary support or that it is contrary to well-established physical laws.

[3] If plaintiff's version of how it occurred has a substantial evidentiary basis, does it make a case of actionable negligence? We do not understand defendant to seriously contend that it does not, if plaintiff's version is in all respects true. Plaintiff was a passenger, but was desiring to terminate that relation and leave the train. The brakeman, whose duty it was to see passengers on and off the train, told him the train would slow up or stop at the depot, and the implication of this was for the passenger to stay on and not get off then, but that he would have opportunity to do so at the depot. The brakeman knew of the plaintiff's position and intention to get off and stood over him at the steps and talked to him as they went toward the depot. With the passenger in this known situation, which was brought about by the brakeman's assurance that the train would slow up or stop, the train slowed up as if it were going to stop, and then gave a violent lurch which jerked plaintiff from the steps and ultimately to his injury. And such facts are shown that the jury could infer from them that the jerk was made in an attempt to throw train hoppers off. The brakeman's assurance to the plaintiff and his knowledge of plaintiff's intention and position, taken as a result of that assurance, combined with the jerk of the train, was a violation of the duty of the care defendant's servants owed to plaintiff as a passenger and was therefore negligence. The plaintiff was entitled to rely on the invitation and suggestions of the brakeman. *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143, 148; *Eddy v. Wallace*, 49 Fed. 801, 1 O. C. A. 435; *Wellmeyer v. St. Louis Transit Co.*, 198 Mo. 527, 95 S. W. 925; *Kirkpatrick v. Metropolitan St. Ry.*, 181 Mo. App. 515, 143 S. W. 865; *Grace v. St. Louis R. Co.*, 156 Mo. 295, 56 S. W. 1121. And his suggestions to the plaintiff, combined with the jerk of the train, constituted negligence. *Dallas v. Illinois C. R. Co.*, 144 Ky. 737, 139 S. W. 958; *Illinois, etc., R. Co. v. Dallas*, 150 Ky. 442, 150 S. W. 536, and authorities supra.

[4] It is next urged that it was negligent for plaintiff to get upon the step in a place where he might be thrown off. But the authorities hold that wherever there is any good reason for a passenger going upon the

steps, it is a question for the jury whether such act amounts to contributory negligence or not. *Braun v. Grand Rapids, etc., R. Co.*, 183 Mich. 569, 150 N. W. 144, 145; *Owens v. Wabash R. Co.*, 84 Mo. App. 143, 148, 149; *Eddy v. Wallace*, and the other authorities cited supra. See, also, *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 267, 21 S. W. 739.

The point that it was contributory negligence as a matter of law for plaintiff to voluntarily attempt to alight from a train while it was in rapid motion is met by the answer that plaintiff's evidence shows he did not voluntarily jump from the train, nor did he voluntarily leave the train in any manner, but was standing upon the step expecting the train to slow down or stop, and, while thus expecting, he was jerked from the train. Authorities supra. See, also, *Richmond v. Quincy, Omaha & K. C. R. Co.*, 49 Mo. App. 104; *Parks v. St. Louis, etc., R. Co.*, 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425; *Willmot v. Consolidated St. Ry. Co.*, 106 Mo. 535, 17 S. W. 490; *Sweeny v. Kansas City, etc., R. Co.*, 150 Mo. 385, 398, 51 S. W. 682.

It is contended that plaintiff's evidence shows that the train slowed down a long distance before it reached the depot, and then started up again, and kept getting faster and faster till it passed the depot, and that at some distance before it reached the depot, either 200 yards or 200 feet, plaintiff became convinced that the train was not going to stop, and that, notwithstanding the train was going faster and faster, plaintiff then went from the second to the first or lowest step, thereby placing himself in a still more dangerous position after he knew the speed was increasing and that the train was not going to stop, and that consequently he cannot recover.

We think a careful study of plaintiff's evidence will show that he testified to two places at which the train slowed and started up, once halfway between the house track switch and the mail crane (500 or 600 feet south of the depot), and a second time at or nearly at the mail crane, which was only 44 feet from the south end of the depot platform; that it was the jerk after the second slowing that threw him off. In one place plaintiff is talking about his movements and what he thought immediately after the first slowing. He was asked:

"Q. It is a fact that you knew that the train was not going to stop when it was 500 or 600 feet south of the depot? A. Not unless it reduced speed. * * * Q. Didn't you say in your testimony here, and said a moment ago that was right, that you first knew, first thought, when the train was half way between the mail crane and the house track switch that it wasn't going to stop and that was after it gave the first lurch? A. I didn't think at any time but what they would slow down or stop? Q. Let me ask you this again, was this question asked and this answer made: 'Q. Well, now then, when it gave the first lurch, that is when it was that you first thought it was not going to stop? Your answer is 'Yes, sir,' is that right? A. Yes, sir.

Q. And that is the truth now, isn't it? A. Well, I knew they weren't going to stop unless— Q. Answer my question, that is the truth now? A. Yes, sir. Q. So you first knew that the train was not going to stop when it was 500 or 600 feet south of the depot, when it gave the first lurch? A. Why, the way it was going. Q. That is when you knew it wouldn't stop? A. I knew it wouldn't if it didn't reduce speed. Q. It was going faster, didn't you say? A. Well, he slowed up after that. Q. When did he slow up, with reference to the first lurch? Now didn't you say two or three minutes ago that the first lurch was given down there half way between the mail crane and the house track switch stand, after it had slowed up? A. That I noticed. * * * Q. Which time was it he gave the first lurch? A. Half way between the house track and the mail crane. Q. That is the first lurch? A. That I noticed. * * * Q. You say, then, that that was the first lurch? A. That I noticed. Q. And that was after the train slowed up? A. That was before the train slowed up. Q. Well, now, where was it that it slowed up then? A. Well, it slowed up about the time it got to the mail crane or little before, possibly. Q. Little before it got to the mail crane? A. Yes, sir. Q. How much did it slow up there? How much did it reduce its speed? A. Well, he just applied the air brake like it was going to stop."

He then testified that he didn't know whether he was on the first or second step at this time or not, but thought he was on the second; that he got down on the first step "just before it [the train] got to the depot like any other passenger that was going to get off." He was then asked if the train did not keep getting faster as it went on from the mail crane to the depot, and he replied in the affirmative, and in answer to the next question he said:

"A. It didn't have time to get much faster, because the mail crane is right by the depot. Q. He kept getting faster and you stepped down on the next step? A. Yes, a jerk or two. Q. He kept getting faster did he? A. Yes. Q. Where was it, with reference to the south end of the depot, that he gave this violent lurch that jerked you off? A. Right at the south end of the platform. Q. What position were you in at that time? A. I was standing facing the west, just like any other passenger that was aiming to get off of a train that was going to stop or slow down. Q. Which step were you on? A. Bottom step. Q. Facing the west? A. Yes. Q. Did you have hold of the handholds? A. Yes, sir. Q. Both hands? A. Yes."

It thus appears that the plaintiff at no time, prior to the jerk that threw him off the steps, reached the conclusion that the train was not going to slow down or stop, but that, in what he said about the train not going to stop (not slow down), he was giving his impression or what he thought about it at the time the train was several hundred feet south of the mail crane and based on the way the train was then running and before it slowed up at the crane, and not his opinion as to what it was going to do when, after it slowed up the second time, he stepped down on the lowest step. Such being the case we cannot say, as a matter of law, that his own testimony forecloses and bars his right to recover.

We have carefully studied the record and

analyzed it to ascertain whether plaintiff has made out a case. The facts upon which he relies are somewhat unusual, but they cannot be said to be so wholly improbable as to be unworthy of belief. The case was submitted upon instructions about which no complaint is made. The jury found a verdict for plaintiff. This verdict received the approval of the trial court who heard the evidence and saw the witnesses.

We are without authority to disturb it, and accordingly it must be affirmed. It is so ordered. The other Judges concur.

McMICHAELS v. REECE (No. 12126.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. HOMESTEAD \S 144 — SALE UNDER TRUST DEED—PURCHASE BY ONE COTENANT.

The rule that in the absence of fraud a cotenant can buy at a sale under deed of trust and oust the other tenants does not apply, where the purchasing tenant was the mother and guardian of the other tenants, who were minors, and the property was the homestead belonging to all of them; but in such case the mother holds the estate purchased by her in trust for all, and, when the homestead terminates at the majority of the children, can be compelled to convey the fee to them.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 281; Dec. Dig. \S 144.]

2. HOMESTEAD \S 139—LEVY OF EXECUTION—PURCHASE AT TRUSTEE'S SALE.

Where a widow purchased the homestead property at a foreclosure sale under a trust deed to protect the homestead of herself and minor children, her interest therein cannot be seized under execution against her, notwithstanding Rev. St. 1909, \S 6711, providing that a homestead cannot be claimed in real estate against a debt antedating the record of the deed to the land.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 254-258; Dec. Dig. \S 139.]

3. HOMESTEAD \S 203—LEVY OF EXECUTION—SALE OF FEE SUBJECT TO HOMESTEAD.

Execution cannot, during the existence of a homestead right, be levied upon the land for the purpose of selling the interest in the fee subject to the homestead estate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 381, 382, 384-386; Dec. Dig. \S 203.]

Appeal from Circuit Court, Nodaway County; Arch B. Davis, Special Judge.

Action by Robert McMichaels against Emma J. Reece. From an order denying plaintiff's motion to quash the sheriff's return to an execution which set off real estate to defendant as her homestead, plaintiff appeals. Affirmed.

Wright & Ford and Ira K. Alderman, all of Maryville, for appellant. Ellis G. Cook and O. S. Fuqua, both of Maryville, for respondent.

ELLISON, P. J. This litigation arises on a motion to quash a sheriff's return of an execution, which disclosed that the sheriff,

instead of levying the writ, set off real estate to the debtor as her homestead. Plaintiff in the execution, claiming that the property was not exempt, filed his motion to quash the return, and the court overruled it. He then appealed to this court for relief.

A. A. Reece and this defendant, Emma J. Reece, were husband and wife, with several minor children. He owned and resided on the real estate in controversy, which is not more than the statutory homestead exemption. He and his wife joined in the execution of a note and a deed of trust on this property to secure it. They afterwards jointly executed another note, not secured, on which the holder obtained judgment. Then A. A. Reece died, leaving this defendant as his widow and the minor children. Afterwards the deed of trust was foreclosed by the holder, and defendant, Emma, bought the land at the sale. She then recorded her trustee's deed. After she recorded it the judgment creditor had the execution in controversy issued and placed in the hands of the sheriff, and he, as we have said, set off the property to her as the homestead of herself and minor children.

[1] Under the provisions of our homestead statute (section 6711, R. S. 1909) a homestead cannot be claimed in real estate against a debt antedating the record of the deed to the land. Plaintiff in the judgment concluded that as his claim was older than defendant's trustee's deed, she was not entitled to a homestead as against his debt. He undertakes to justify this conclusion upon the idea that while defendant, as Reece's widow, could have claimed a homestead, against plaintiff, for herself and minor children, she abandoned that right by becoming the purchaser of the land at the trustee's sale; that she thereby became the owner as any stranger would, and recorded her deed; hence, as such deed was subsequent to plaintiff's debt, she could not claim a homestead. In endeavoring to forestall the thought that defendant, as cotenant with the minor children, could not set herself up adversely against them, plaintiff claims that, in the absence of fraud, one cotenant has a right to buy the entire title and thus oust his cotenants. He cites *Becker v. Becker*, 254 Mo. 668, 163 S. W. 865, in support of this. In that case it was decided that, where there is a note secured by deed of trust on land owned by tenants in common, and without suggestion from any cotenant the holder of the note forecloses the deed of trust, one of the cotenants may purchase, at a fair sale, the whole title just as a stranger would. In that case the court recognizes the rule that there is a confidential relation existing between tenants in common, and that if one buys an outstanding title or discharges an incumbrance, it is for the benefit of all if they will contribute to him. But the court likens the case to that of sales by court process such as in partition where the whole

public is invited to bid; each cotenant having an equal right with any other person. In support of that case Judge Walker cites *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167, from which we quote the following:

"But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public. Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about, and which sale he in no way controls. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587 [23 L. Ed. 383]; *Allen v. Gillette*, 127 U. S. 589 [8 Sup. Ct. 1331, 32 L. Ed. 271]."

But, in fundamental particulars, this case is not like either of those. Here the cotenants of defendant are her minor children of whom she is guardian. They are helpless, and must naturally look to her for protection, and we regard her as wholly disabled from buying the land solely for herself and setting up against them an antagonistic title. It would violate the trust imposed upon her in relation to her children. This being true, it manifestly follows that plaintiff's execution against defendant could not affect the right of the children to the homestead.

[2] But the more difficult question remains, viz., Has defendant a right to claim a homestead? or, put another way, has plaintiff a right to sell her interest in the land free of any claim of homestead by her? It is conceded, of course, that she had a homestead unless it was divested by her purchase under the deed of trust sale, whereby, as plaintiff claims, she became owner of an estate in fee, instead of a homestead life estate. On this branch of the case we have not been cited to any applicable authority. It would seem that when defendant bought at the trustee's sale, she only protected her own homestead estate, for she could not buy the interest of her children, as against them, since, as we have seen, it was her duty to protect them. She holds the property in trust for them to enjoy until the expiration of their homestead, when they become of age, and the fee-simple title thereafter. In other words, they on becoming of age, can pay back to her their proper proportions of the purchase money which she paid out and obtain from her a deed to their respective fee-simple interests, subject to her homestead right.

[3] Furthermore, as long as a homestead right exists, the land is not subject to execution, and such writ cannot, during that time, be levied upon it for the purpose of selling the interest in fee, subject to the homestead estate. *Armor v. Lewis*, 252 Mo. 568, 583, 161 S. W. 251; *Moore v. Wilkerson*, 169 Mo. 334, 337, 68 S. W. 1035, and cases cited.

The spirit of the statute, as expounded by

decisions, is that the homestead may be likened to an entirety. As each (the widow or children) become individually disentitled to it, those remaining take all of it. Plaintiff, therefore, should not have precipitated this contest by refusing to concede defendant's right to a homestead, and the court was right in refusing to adopt his view that no homestead right existed.

The judgment is affirmed. All concur.

WILSON v. WILSON. (No. 11940.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916.)

1. DIVORCE — 132 — INDIGNITIES — SUFFICIENCY OF EVIDENCE.

In a wife's suit for divorce on the ground of indignities constituting a statutory cause for divorce in which the husband filed a cross-petition praying for divorce on the same ground, evidence held to sustain a judgment refusing each party a divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. — 132.]

2. DIVORCE — 184(10) — APPEAL — WEIGHING EVIDENCE.

While the appellate court is not bound by the findings of the trial court in divorce cases, where the evidence is conflicting and does not greatly preponderate in favor of either party, deference will be given to the judgment of the trial judge who had the advantage of personal contact with the parties and witnesses.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 572; Dec. Dig. — 184(10).]

3. DIVORCE — 29 — INDIGNITIES — CONFINEMENT IN INSANE HOSPITAL.

Where a wife thought she was acting for her husband's benefit in consigning him unnecessarily to a hospital for the insane, her innocent wrong cannot be construed as an indignity within the meaning of the divorce statutes.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 84-92, 94; Dec. Dig. — 29.]

4. DIVORCE — 29 — INDIGNITIES — OPPOSING TERMINATION OF GUARDIANSHIP.

Where a wife acted in good faith with the support of probable cause in opposing the termination of her guardianship over her husband who had been adjudged incompetent to manage his affairs, her action was not an indignity within the meaning of the divorce statutes.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 84-92, 94; Dec. Dig. — 29.]

5. DIVORCE — 282 — APPEAL — RESERVATION IN LOWER COURT OF GROUNDS FOR REVIEW.

Where defendant consented in open court to an order allowing suit money to plaintiff, and did not object or except to the allowance, the trial court cannot be convicted of error.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 565; Dec. Dig. — 282.]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

"Not to be officially published."

Suit for divorce by Martha J. Wilson against Marion C. Wilson, in which defendant filed a cross-petition for divorce. From a decree that neither party have a divorce and an order overruling its motion for a new trial, defendant appeals. Affirmed.

R. W. Grier and B. G. Voorhees, both of St. Joseph, for appellant. O. F. Strop, of St. Joseph, for respondent.

JOHNSON, J. This is a suit for divorce begun in the circuit court of Buchanan county September 15, 1915. The parties were married in May, 1878, and lived together in Holt county as husband and wife until their separation, which occurred early in the year 1915. By their joint labors they amassed property of the value of \$30,000, consisting of 280 acres of farm land, and personal property worth \$7,000. The title and possession of all of this property are in the defendant, with the exception of about \$700 in money and an automobile which are in the possession of plaintiff. The petition alleges ill treatment of a nature to constitute indignities within the statutory meaning of that term, and the abandonment and nonsupport of plaintiff by defendant. The prayer is for a divorce, and that the court "make such orders as may be just and proper to provide for her support and maintenance, pending this suit, and also to allow her such sums of money as may be just and proper in order that she may prosecute this action, * * * and that she may be awarded such alimony as may be found by the court to be reasonable and just."

Defendant filed his answer and a cross-petition in which, after denying the allegations of the petition, he alleged acts of misconduct on the part of plaintiff which would constitute indignities entitling defendant to the divorce he prayed the court to decree in his favor.

The court heard the case December 6, 1915, and adjudged that neither party was entitled to a divorce. When the court indicated a purpose to render such decision and judgment, counsel for plaintiff suggested that no temporary allowance had been made for suit money or attorney fees, and requested that an allowance for suit money be made. Counsel for defendant stated that no objection would be offered to the allowance of a fee, but declined to agree upon the amount of such allowance. Counsel for plaintiff then suggested that \$500 would be a reasonable fee, to which no objection was interposed by the opposing counsel, who remarked that "they must leave it to the court." The court then stated that, "since no objection was made to the amount suggested by plaintiff's counsel, and in view of all of the evidence in the case, he would fix the amount at that figure." No objection was offered or exception saved to this order. Afterward it was attacked in the motion for a new trial by defendant, as was also the judgment refusing a divorce to defendant. The motion was overruled, and defendant appealed. Plaintiff has not appealed, but has accepted the judgment of the court as final.

The case therefore presents two questions for our determination, viz.: First, did the court err in refusing to grant defendant a divorce? and, second, is the order, now attacked by defendant, allowing plaintiff suit money at the final hearing, properly before us for review?

In order to procure a decision of the first of these questions favorable to defendant it devolves upon him to convince us that the evidence in the record, as a whole, supports his contention that he was faithful in the discharge of his marital duties, and that plaintiff, his wife, was guilty of such acts of misconduct towards him as would constitute indignities within the meaning of that term as employed in the statutes.

The material facts in the record bearing on these issues may be stated as follows: The parties lived together 36 years in harmony upon their farm near Forbes, in Holt county. They were industrious, economical, and honest, and bore a good reputation in the community. Serious discord did not appear until after the marriage of their youngest son, Roy, in the spring of 1914. Defendant objected to the marriage of his son, who was over 25 years of age, and also objected to his choice of a mate. The young couple made their home with defendant and did their proper share of the farm and housework. Since 1907 defendant had been frail and delicate physically, and had suffered from a mild form of melancholia. He kept to his bed most of the time, and was attended by his wife, who, in addition to her other labors, took upon herself those of a nurse to a helpless invalid, which all the evidence shows she well and faithfully discharged. Sometimes defendant would dine at the table with the family, but generally all of his meals were served to him in bed.

We conclude from a careful consideration of all the facts and circumstances in proof that, failing to understand the real nature of the nervous disease which afflicted the defendant, Roy and his wife came to regard him as a malingeringer, and the son conceived a deep aversion towards his father, which he sometimes expressed in most unfilial language. But we think the evidence falls short of showing that plaintiff participated in her son's harsh treatment or in any way countenanced it. One of the witnesses for defendant, in describing one of these incidents, admitted that plaintiff reproved her son, saying, "Roy, you ought to be ashamed of yourself talking to your father the way you do." Plaintiff seems to have been attached to this son, and to have been most desirous of pleasing him, but, as stated, we do not think she exhibited approval of his harsh attitude towards his father. Shortly after defendant fell into ill health, and voluntarily or otherwise became bedfast, the probate court, in 1907, adjudged him unsound in mind and incompetent to manage his affairs, and appointed plaintiff his guardian.

This proceeding was instituted by John R. Wilson, the eldest son, who filed an affidavit in which he stated that defendant, his father, was "a person of unsound mind and is incapable of managing his affairs." Plaintiff qualified as guardian under this appointment, took charge of the estate, and managed it for 8 years with fidelity and ability. Her management, after all expenses were paid, added about \$3,000 to the personal estate. The probate court for 5 years of this period allowed her \$800 per annum out of the estate for the support of her husband and herself. She saved enough out of this allowance to buy an automobile and to leave in her hands at the time of the separation the sum of \$700. No objection was offered by any one to the adjudication of incompetency, and the evidence suggests no doubt of the wisdom of that decision. Defendant was not irrational or violent, but was so frail physically and so depressed mentally that he lost all interest in life or ability to attend to his affairs, and continued in that melancholy condition for 8 years, and there is a serious question in our minds over the completeness of his alleged recovery. But the probate court in February, 1915, adjudged him to be of sound mind and capable of managing his own affairs and terminated the guardianship of plaintiff, who restored to him all of his estate except the residue of her annual allowance and the automobile she bought with proceeds thereof.

In the autumn of 1914 plaintiff fell under the necessity of having a surgical operation performed upon herself and arranged to have the operation performed at a hospital in St. Joseph. An inference may be drawn from the evidence that this necessity offered Roy and his wife a favorable opportunity for urging upon plaintiff the removal of defendant to the State Hospital for the Insane at St. Joseph. Moved by this advice, which was earnestly pressed and backed by a threat of the young couple to leave the farm if it were not accepted, plaintiff called in the physician who had examined defendant in 1907, and this physician, accompanied by another, came to the house and examined defendant. He testified that he did not find defendant to be irrational or violent but he concluded—

"from the condition he was in that he was not getting the treatment at home that he should have, didn't have any chance to receive any benefit or get in better condition mentally or physically than he was in, and I thought it nothing more than right to send him to the asylum and give him a chance to be treated by men competent to treat him. * * * He was getting weak physically; * * * about the same condition mentally; melancholy condition there. * * * I thought that he ought to be sent to the asylum where he could be treated physically and mentally and give the man a chance to be benefited, not because he was violent or anything like that; he didn't need to be sent there for that purpose, but for his own benefit. * * * It was medical treatment I wanted him sent to the asylum for."

The two physicians signed the requisite certificate, and defendant was sent to the asylum in charge of the sheriff. The only complaint defendant offered to this proceeding was against being placed at expense to his estate in charge of the sheriff, when, as he thought, he could have gone to the asylum alone, and at the trial of the present case the only complaint he made in his testimony was that his wife had brought this suit against him.

"Q. What complaint against your wife is it that you make? A. I haven't made any complaint against her. Q. You don't make any now? A. No, sir. Q. Don't want to make any? A. I don't think she treated me right in bringing suit against me. Q. That is the only complaint you have against her? A. Yes."

Plaintiff employed counsel and vigorously resisted the application of defendant to the probate court to be adjudged sane and capable of managing his own affairs. After this proceeding was decided in favor of defendant and plaintiff was ordered to make final settlement as guardian, she consulted a lawyer at St. Joseph about appealing the case, and on his advice gave him a check for \$1,000 on funds on deposit in bank to her credit as guardian, and further, pursuant to the advice of the lawyer, she failed to obey the order to make final settlement and did not file such settlement and restore the estate to defendant until compelled to do so by means of an attachment to bring her into court. The bank refused to pay the check given to the lawyer, who explained that he did not exact it as a fee, but thought that plaintiff should provide herself with means to support herself and carry on the case if he found that it was appealable. While solving this last question in his own mind, he directed plaintiff to disregard the order to make final settlement, and did not discover that the case was not appealable until after she had subjected herself to attachment for disobedience of the order.

As soon as defendant repossessed himself of the estate he began a course of conduct towards his wife which, to say the least, did not conform to the reputation his witnesses give him of being the most timid and meek of men. Without consulting his wife he sold the work animals and rented the home place to a tenant, thereby turning her and Roy and his wife adrift. Despite his weak efforts to prove to the contrary, he refused to provide her a suitable place to live, refused to live with her, and failed to provide her any means of subsistence. This stern and unforgiving attitude we think proceeded from the advice and influence of the eldest son, John, and we cannot regard this unfortunate controversy which has so recently arisen between a husband and wife who lived together in peace and contentment for over a third of a century otherwise than as the result of an unseemly conflict between the two sons—the only children of the old couple

—who are striving each to gain a mastery over the parent from which he expects to obtain an unjust advantage to himself. Roy sought to keep his father in bondage and to dominate his mother, while John chose the role of his father's champion and turned against his mother. We cannot avoid the conviction that the hard and unforgiving treatment of plaintiff by defendant, so at variance with his nature, was prompted by the ambition of the son who obtained a mastery over him just as plaintiff's grievous, but we believe honest, error in sending her husband who was not irrational to a hospital for the insane was the result of the machinations of their son, who by that evil course endeavored to secure an advantage to himself. Since he came into the possession of his estate defendant has dissipated \$3,000 of the \$7,000 he received in personal property, which appears to be proof enough that, if not still incapable of managing his affairs, his wife was not without reasonable cause in opposing the termination of the guardianship.

[1] With the case in this posture we do not hesitate in approving the judgment of the learned trial court refusing each party a divorce.

[2] We are not bound by the findings of the trial court in cases of this character (*Strahorn v. Strahorn*, 82 Mo. App. 580; *English v. English*, 158 Mo. App. loc. cit. 334, 139 S. W. 814; *Mahn v. Mahn*, 70 Mo. App. 337); but, where the evidence is conflicting and does not greatly preponderate in favor of either party, we defer largely to the judgment of the trial judge, who enjoyed the advantage of personal contact with the parties and their witnesses (*Thurmond v. Thurmond*, 186 S. W. 1; *Cherry v. Cherry*, 258 Mo. loc. cit. 403, 167 S. W. 539; *Long v. Long*, 171 Mo. App. 202, 156 S. W. 487; *Wyrick v. Wyrick*, 162 Mo. App. loc. cit. 732, 145 S. W. 144; *Allfree v. Allfree*, 175 Mo. App. loc. cit. 349).

[3,4] We share the view the trial judge must have entertained that this aged woman, who was a faithful wife for nearly 40 years, and who gave her husband careful and loving attention throughout the long years of his helplessness, did not finally turn against him and violate her marital duty by willfully consigning him to unnecessary and injurious confinement in a hospital for the insane. She thought she was acting for his benefit, and her innocent wrong cannot be construed as an indignity within the meaning of the divorce statutes. There is no merit in the contention that she was guilty of an indignity in opposing the termination of the guardianship, since it is in evidence that she was acting in good faith with the support of probable cause. All her errors which, considering her situation and the malign influences to which she was subjected, were not many, being innocent and not intentionally wrongful, afford no good ground for pronouncing her recreant

to her marital duty and undeserving of any right or interest in the estate she helped to create and so greatly increased during her sole stewardship. Clearly defendant is not entitled to a divorce, and, since plaintiff has not appealed, the question of whether or not a decree should have been rendered in her favor is not before us.

[5] It is sufficient to say of the order allowing suit money that defendant consented in open court to the making of an allowance and did not object or except to the order. The question involved relates to a matter of exception, and the rule is well settled that the trial court cannot be convicted of error in such matters unless there be an objection interposed and exception saved to the ruling.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

HAIRE v. SCHAFF. (No. 12207.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. TRIAL §252(20) — INSTRUCTIONS — DAMAGES — APPLICABILITY TO EVIDENCE.

In a railroad employe's action for injuries, where there was no proof of the plaintiff's earnings, an instruction which directed the jury, if the verdict was for him, to include therein "his loss of time and earnings," was erroneous, although defendant did not ask an instruction limiting recovery under this head to a nominal sum.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. §252(20).]

2. TRIAL §191(10) — INSTRUCTIONS — ASSUMING FACTS.

In a railroad servant's action for injuries caused to his eye by a sliver of metal, while he was holding a rail which was being cut by a metal hammer and a chisel, instructions which assumed negligence of defendant and of its foreman in allowing the chisel to get out of the groove in the rail were erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 431; Dec. Dig. §191(10).]

3. APPEAL AND ERROR §1078(1) — BRIEFS — SCOPE.

The appellate court will not examine an objection referred to in the statement only, and not stated in the briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. §1078(1).]

4. WITNESSES §330(1) — CROSS-EXAMINATION — IMPEACHMENT.

The cross-examination of a witness as to what he said after plaintiff was hurt was proper, on the ground of contradicting him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. §330(1).]

5. MASTER AND SERVANT §276(3) — INJURY TO SERVANT — EVIDENCE — SUFFICIENCY.

In a railroad servant's action for injuries caused to his eye by a sliver of metal, while he was holding a rail which was being cut by a metal hammer and a chisel, where the sliver and chisel were exhibited to jury, evidence held to justify a finding that the sliver came from the rail, as alleged by plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. §276(3).]

6. MASTER AND SERVANT §219(5) — INJURIES TO SERVANT — SIMPLE TOOL RULE.

As plaintiff was not handling any of the instruments, but was performing a service apart, while other servants were manipulating them, the simple tool rule had no application.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 614; Dec. Dig. §219(5).]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"Not to be officially published."

Action by G. W. Haire against Charles E. Schaff, receiver of the Missouri, Kansas & Texas Railroad. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. W. Jamison, of St. Louis, and Montgomery & Montgomery, of Sedalia, for appellant. Claude Wilkerson, of Sedalia, for respondent.

ELLISON, P. J. Plaintiff was an employe of defendant, the receiver of the Missouri, Kansas & Texas Railroad, and while engaged under the direction of one of defendant's foremen he suffered an injury to one of his eyes, which he charges was due to the negligence of the foreman. He brought this action for damages, and recovered judgment in the trial court.

It appears that defendant's foreman was engaged in cutting in two a long railroad rail. In doing this he held a steel instrument, which has been designated as a chisel, on the rail at the place it was desired to sever it, while one of his men would strike it with a heavy iron or steel maul or hammer. Plaintiff was ordered to steady the rail by taking hold a few feet from where it was being cut. By this process a groove would be cut around the rail sufficient to enable the men to break it. After cutting for a time, a stroke of the hammer caused a sliver of metal to fly off the battered end of the chisel, or from the edge of the groove on the rail, and strike plaintiff in the eye, practically destroying the sight.

[1] Among other elements of damage it was alleged in the petition that plaintiff was earning large sums of money per month, and that he has lost all his earnings since his injury, and that on account of the permanent nature of his injuries he will lose earnings in the future. There was no proof of his earnings, and yet he asked and had given an instruction which directed the jury, if the verdict was for him, to include therein "his loss of time and earnings." This was error. Davidson v. Transit-Co., 211 Mo. 320, 109 S. W. 583; Stoetzel v. Swearingen, 90 Mo. App. 592; Boyce v. Railroad, 120 Mo. App. 168, 96 S. W. 870. The case of Murray v. Railroad, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601, to the contrary, was overruled in Cobb v. Railroad, 149 Mo. 609, 630, 50 S. W. 894.

It is suggested that there was evidence which would justify the jury in finding a nominal sum under this head, and that, if defendant wished the amount limited to such sum, he should have asked an instruction to that effect, and *Shinn v. Railroad*, 248 Mo. 173, 154 S. W. 103, and *Carter v. Railroad*, 193 Mo. App. 223, 182 S. W. 1061, are cited in support of that point. The cases are not applicable. In neither of those cases did the defendant complain that the verdict was excessive, while here that was urged in the trial court and in this court.

[2] There was also error in giving plaintiff's second instruction, in that it assumes that defendant was guilty of negligence. *Moon v. Transit Co.*, 247 Mo. 227, 237, 152 S. W. 303; *Fullerton v. Fordyce*, 121 Mo. 1, 13, 25 S. W. 587, 42 Am. St. Rep. 516; *Orscheln v. Scott*, 79 Mo. App. 534, 540. This remark and these authorities apply to plaintiff's instruction No. 1. For it is there assumed that it was negligence for the foreman to allow the chisel to get out of the groove. Furthermore, such assumption put the instruction in conflict with defendant's instruction five.

[3] Drawing from the knowledge of experts, witnesses were asked and answered questions which came perilously near putting them in the place of the jury. But as counsel have not stated this objection in the brief, and have referred to it in their statement only, we will not examine the matter.

[4] The cross-examination of witness Wright, as to what he stated after the plaintiff was hurt, was proper, on the ground of contradicting him.

[5] It will be noticed that we have stated the silver that struck plaintiff's eye came either from the battered head of the chisel or from the rail. Plaintiff has chosen to allege in his petition that it came from the rail, and upon that he has built his case in this way: That the foreman carelessly allowed the edge of the chisel to leave the depression made in the rail and rest upon the edge of the groove, so that the stroke of the hammer forced the chisel to cut or knock off the silver. Defendant insists that at this point plaintiff failed in his case, for the reason that it is impossible for any one to say, the evidence considered, whether the silver was from the head of the chisel or the rail, thus leaving the jury with only the merest conjecture. We do not adopt this view. The silver was taken from plaintiff's eye and preserved. It and the chisel were in evidence, and we think the presentation of these objects themselves to the jury (by agreement they have also been exhibited to this court), together with the circumstances, was sufficient to justify the jury in finding that the silver came from the rail.

[6] We have difficulty in understanding how the simple tool rule, invoked by de-

fendant, can apply to the case. Plaintiff was not handling any of these instruments. He was performing a service apart from the operation of the tools, and his charge is that defendant, through his servants, so manipulated the tools that a small piece of metal was thrown into his eye.

In view of the fact that the parties agree that the case falls under the federal Employers' Liability Act, they should be careful to try it under the rulings of the federal courts concerning all questions arising therein.

In view of another trial, it will not be necessary to refer to the suggestion that plaintiff's counsel went beyond the limit of proper argument to the jury.

The judgment is reversed, and the cause remanded. All concur.

HUNTER v. SLOAN et al. (No. 12175.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 18, 1916.)

1. APPEAL AND ERROR §1042(3)—CURE OF ERRORS.

Error, if any, in overruling motion to strike out certain counts of the amended petition as stating different causes from that in the original petition was cured by subsequent dismissal by the plaintiff of all counts so objected to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4112; Dec. Dig. §1042(3); Pleading, Cent. Dig. § 1144.]

2. PLEADING §34(1) — NATURE OF CAUSE — HOW DETERMINED.

The court, in construing pleadings, need not adopt the conclusions of the pleader, nor be much influenced by the prayer for relief, but must ascertain the nature and class of the asserted cause by synthesizing the alleged ultimate facts and reaching its own conclusion thereon.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66, 67, 71; Dec. Dig. §34(1).]

3. ACTION §27(1)—NATURE OF ACTION—TORT OR CONTRACT.

In a petition complaining of the plaintiff's being deprived of part of his security for a note by fraudulent sales of land, which were made possible by innocent mutual mistake in deeds, the allegation that one defendant in working out the fraud agreed to assume the debt and then attempted to conceal the agreement does not make the cause sound in contract, but is merely evidence of the manner in which the fraud was accomplished.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-176, 195; Dec. Dig. §27(1).]

4. FRAUD §59(1)—DAMAGES—MEASURE.

The measure of damages for alleged fraudulent sale of land by which the plaintiff was deprived of his security for a note is the amount of the note.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 60; Dec. Dig. §59(1).]

5. FRAUD §67 — ACTIONS — DUTIES OF PARTIES.

In an action for damages for fraud by a sale of land which destroyed the security of a note, the measure being the amount of the note, it was proper for the note and deed of trust securing it to be delivered to the court and disposed of by the judgment.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. §67.]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Suit by J. H. Hunter against Edgar B. Sloan and wife and Edward O. Dennis. Judgment for plaintiff, and Dennis appeals. Affirmed.

J. W. Clapp and D. M. Wilson, both of Milan, for appellant. J. M. Wattenbarger and D. C. Payne, both of Milan, for respondent.

JOHNSON, J. Plaintiff began this suit July 10, 1915, to recover \$1,600, with interest from March 24, 1914, from defendants Edgar B. Sloan and Tressa E. Sloan, husband and wife, and their codefendant Edward O. Dennis. The original petition alleges certain fraudulent practices on the part of defendants, by which plaintiff was deprived of a material part of the security he was entitled to hold for the payment of a note of \$1,600, executed to him September 1, 1914, by George E. Norman and Allie E. Norman, and prays judgment against all of the defendants "for his debt of \$1,600, together with 6 per cent. interest thereon, * * * and for all other and proper relief." After summons was issued and served plaintiff filed an amended petition in four counts. The first was a repetition of the original petition, with an additional allegation that in a conveyance of land to defendant Dennis, on which the Normans had given a trust deed to secure the payment of the \$1,600 note, Dennis "assumed the payment of plaintiff's said debt as a part of the consideration therefor." The second count repeats the allegations in the original petition, does not allege that Dennis assumed the payment of the \$1,600 note, and concludes with the allegation that plaintiff has been damaged by the wrongful acts of all the defendants in the sum of \$1,600, and prays judgment for such damages, with interest. The third and fourth counts were dismissed by plaintiff before trial, and there is no need of stating the respective causes of action they attempted to set forth. At the conclusion of all the evidence the court gave the jury a peremptory instruction to return a verdict against defendants Edgar B. Sloan and Tressa E. Sloan for the full amount of the demand pleaded in the first count, and announced his intention of directing a verdict for all of the defendants on the second count. Whereupon plaintiff offered and was permitted, over the objection of defendant Dennis to dismiss that count. The request of Dennis for a peremptory instruction on the first count was refused and issues of fact were submitted to the jury. The jury returned a verdict against all of the defendants for \$1,600, and the court rendered the following judgment on the verdict:

"It is ordered by the court that the plaintiff, J. H. Hunter, recover of and from the defendants, Edward O. Dennis, Edgar B. Sloan, and Tressa E. Sloan, the sum of \$1,600, with interest at the rate of 6 per cent. from date of judgment; and it is further ordered by the court that the

full payment of said judgment and costs by the defendants, or either of them, shall vest in said defendant, or either of them, the absolute title to the \$1,600 note and deed of trust described in the pleadings and tendered by the plaintiff in the court, and now held by the clerk of this court, and which said note upon such payment the clerk is directed to deliver to the defendant or defendants so paying such judgment."

Dennis alone filed motions for a new trial and in arrest of judgment, which afterward were overruled, and he alone appealed.

The evidence discloses the following material facts: Edgar B. Sloan owned a tract of land near Milan, which was described by metes and bounds, and contained over four acres, and for a sufficient consideration he and his wife sold and undertook to convey to plaintiff by warranty deed the whole of that tract. By mutual mistake the description in the deed left out 91 feet of the north side of the tract. The most valuable improvements were on this strip, which had a value of two-thirds the value of the whole tract of which it was a part. Plaintiff recorded the deed and afterward sold the whole tract, which then was subject to an incumbrance of \$300 to Norman, who, in part payment of the purchase price, gave to plaintiff the promissory note for \$1,600 above mentioned, and joined with his wife in the execution of a deed of trust, conveying the tract he had just purchased to secure the payment of the note. But the deed to Norman and the trust deed back to plaintiff, by mutual mistake, contained the same error in the description of the land, and did not purport to affect the title to the north 91 feet, the record title to which still remained in Sloan. Afterward the Normans sold what they supposed was the entire tract to Sloan, who in the deed of conveyance assumed the payment of the \$1,600 note in part payment of the purchase price. By mutual mistake the same erroneous description of the land was inserted in this last deed, and the evidence shows quite convincingly that neither plaintiff, the Sloans, nor the Normans had any knowledge of this series of errors which were unintentionally committed, but all intended that the lien of the deed of trust should cover the whole tract, including the 91 feet, and thought that such intention had been expressed in the various conveyances. Afterward Sloan and his wife sold the whole tract to defendant Dennis, and during the transaction the fact became known to Dennis and the Sloans that the record title to the 91 feet had not been affected by the conveyances, which started with the deed from Sloan to plaintiff, but had continuously remained in Sloan, and that on its face the deed of trust, securing the \$1,600 note, did not convey that strip. Dennis and Sloan, after receiving this knowledge, conducted themselves in a manner to indicate a common plan and purpose to defraud plaintiff out of the security of the 91 feet which in equity and good conscience he was entitled to hold for the payment of the

\$1,600 note. Sloan in his testimony would make it appear that he was the innocent dupe of Dennis. He states that in the first deed he and his wife executed to Dennis the latter assumed the payment of the \$1,600 note, and that a week later Dennis, accompanied by a justice of the peace, came to his house at night, and induced him and his wife to execute a new deed which, without his knowledge, provided only for the purchase of the land by Dennis, subject to the \$1,600 deed of trust.

But, in the view we take of the case, the issue of whether or not Dennis did assume the debt at first and then afterward procured a different deed, relieving him from that burden, at most should be regarded as relating to an evidentiary rather than to a constitutive fact of the cause of action which inured to plaintiff by reason of the fraudulent deprivation of a substantial part of his security which the proof shows, beyond question, he suffered. In carrying out the fraudulent scheme hatched by Dennis and Sloan, the latter and his wife deeded the strip of 91 feet to a sister of Dennis, and deeded the remainder of the tract to Dennis, subject only to the deed of trust. Afterwards Dennis sold the strip of 91 feet to an innocent purchaser, who received and recorded a warranty deed executed by the sister of Dennis. The result of this sale and conveyance was to place the strip beyond the reach of an action to correct the mistake in the deed of trust and to deprive plaintiff of the security which his right to a lien on that strip afforded him. The value of the remaining security was about one-half the amount of the \$1,600 note, and the net result of the fraud, if it should be allowed to stand, would be a saving to defendants of, at least, half of the note of \$1,600.

[1] Counsel for Dennis, the appellant, first complain of the overruling of a motion they filed to strike out the second, third, and fourth counts of the amended petition, for the reason that each of said counts stated an entirely different cause of action from that pleaded in the original petition. We think these counts were not subject to this criticism, but, if they were, the error, if any, in overruling the motion was cured by the subsequent dismissal by plaintiff of all of them.

[2] A number of other questions urged upon our consideration by appellant will be sufficiently answered in what we shall say in defining the cause of action pleaded in the first count, which was the cause submitted to the jury. From the facts that this count contains the allegation that Dennis assumed the payment of the note, and that the prayer

is for judgment for plaintiff's "debt" of \$1,600, it is contended that the cause of action alleged is grounded in contract, and is for the enforcement of Dennis' agreement to assume the payment of the debt. We are not unmindful of the fact that the second count, which repeated the allegations of the first, with the single exception we have noted, prays for the recovery of damages, and would seem to support the view that the pleader had in mind, alleging a cause *ex contractu* in the first count and one *ex delicto* in the second. But in our construction of the pleadings we are not bound to adopt the conclusions of the pleader, nor are we to be much influenced by the nature of the prayer for relief which is no part of the statement of the cause of action. Given a pleaded group or collection of facts which the pleader treats as constitutive of his cause of action, it becomes the duty of the court to ascertain the nature and class of the asserted cause by synthesizing the alleged ultimate facts, and not to fall into any error of classification exhibited by the pleader in the prayer for relief, which, as stated, constitutes no part of the statement of the cause of action.

[3] Applying this rule of construction, we find the first count states a cause of action in tort and not on contract. Plaintiff is complaining of a wrong, i. e., of being stripped of a part of his security by the fraudulent manipulations of defendants, which were given a field of operation by an innocent mutual mistake in the deeds of conveyance. The fact, if it were a fact, that in the course of working out the scheme Dennis agreed to assume the debt and afterwards attempted to conceal that agreement does not classify the cause which inured from the wrongful spoliation of plaintiff as one sounding in contract, but was merely evidence of the manner in which the fraud was accomplished.

[4] And the measure of plaintiff's damages would be the amount of his demand, evidenced by the note—his "debt" against the land—which was so vitally impaired by the wrongful acts of defendants.

[5] In what we have said we have answered most of the points urged by defendant. There was no prejudicial error in the rulings on the instructions, and the judgment was responsive to the verdict. This being an action for damages which, as stated, were to be measured by the amount of the note with interest, it devolved on plaintiff to do as he did do—tender the note and deed of trust into court—and it was proper for the judgment to dispose of them. Manifestly the judgment is for the right party, and should be affirmed. It is so ordered. All concur.

CITY OF BRUNSWICK v. PEOPLE'S SAVINGS BANK. (No. 12223.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916.)

1. BILLS AND NOTES \Leftrightarrow 437—CHECKS—CERTIFIED CHECKS—RIGHTS OF PARTIES.

When a bank at the request of the drawer certifies a check before delivery to the payee, the certification does not discharge the drawer if the check is not paid on due presentment, but simply vouches for its genuineness and adds to its ease of negotiation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1275, 1276, 1279, 1280; Dec. Dig. \Leftrightarrow 437.]

2. BILLS AND NOTES \Leftrightarrow 437—CHECKS—CERTIFIED CHECKS—RIGHTS OF PARTIES.

If the holder receives an uncertified check, but, instead of drawing the money, has it certified, he discharges the drawer under specific provision of Rev. St. 1909, § 10153.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1275, 1276, 1279, 1280; Dec. Dig. \Leftrightarrow 437.]

3. BILLS AND NOTES \Leftrightarrow 407—CHECKS—CERTIFIED CHECKS—RIGHTS OF PARTIES.

If the drawer gets the bank to certify his check, and then delivers it to the holder, who neglects to present it for payment in due course, the drawer is discharged to the extent he suffers by the delay under Rev. St. 1909, § 10156, requiring presentment for payment within reasonable time.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1110-1112; Dec. Dig. \Leftrightarrow 407.]

4. INTERPLEADER \Leftrightarrow 8(2)—GROUNDS OF RELIEF.

In suit on a certified check against the bank, which answered that the drawer procured a certified check and deposited it with plaintiff city as earnest money on a paving contract, and that the city held the check three weeks before presentment, and wherein the bank paid the amount into court, praying that the drawer be impleaded, the prayer should have been granted, under Acts 1915, p. 143, § 94, providing for interpleader in actions against banks wherein others than the plaintiff claim the fund involved.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 9, 11; Dec. Dig. \Leftrightarrow 8(2).]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

Action by the City of Brunswick against the People's Savings Bank. Defendant filed an answer in the nature of an interpleader, to which plaintiff demurred, which demurrer the trial court overruled, and rendered judgment requiring John F. Meek to interplead, and plaintiff appeals. Affirmed.

C. W. Bowen, of Brunswick, and L. A. Chapman, of Chillicothe, for appellant. Paul D. Kitt, of Chillicothe, for respondent.

ELLISON, P. J. This is an action on a certified bank check, and defendant's answer was in the nature of an interpleader.

Plaintiff city was about to let a paving contract, and one John F. Meek was a prospective bidder for the work. Under the regulations of the city it was necessary that a bidder should pay \$500, or deposit a certified check for that sum as an assurance of

his good faith in bidding and his intention to do the work, if the contract should be awarded to him. Meek thereupon drew his check on defendant bank in favor of plaintiff for \$500 and had the bank certify it for him, and the bank charged that amount of money off his account, placing it on the certified check account. Meek then delivered the check to the plaintiff city, and was afterwards the successful bidder for the paving.

But it appears the preliminary proceedings taken by the city for the paving appeared to Meek and his attorney to be so irregular and illegal that Meek refused the work and notified defendant bank not to pay the check; that if it did so he would institute suit for the money. Some time afterwards plaintiff demanded payment of the check of the defendant bank, and, being refused, instituted this action. As above stated, defendant's answer was in the nature of a bill of interpleader, wherein, after setting up facts substantially as here stated and stating its willingness to pay to the party entitled, it asked that Meek be required to interplead and the court give judgment to the party legally entitled to the money.

Plaintiff demurred to the answer, and the trial court overruled it; whereupon plaintiff refused to make further plea, and judgment was entered requiring Meek to interplead and plaintiff appealed, and as ground therefor says that the bill of interpleader shows on its face an absolute indebtedness to plaintiff, and that no facts are disclosed therein showing any legal claim against the defendant bank by Meek.

[1] When a bank at the request of the drawer of a check certifies it before delivery to the payee, and it is then delivered, the certification does not discharge the drawer if the check is not paid on due presentment. The certification simply vouches for the genuineness of the check and that it will be paid on presentment, and merely adds to its easy negotiation by adding the promise of the bank. *Born v. Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Oyster & Fish Co. v. Bank*, 51 Ohio St. 106, 36 N. E. 833; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; *Blake v. Hamilton Dine Sav. Bk. Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 691 and 696, 16 Ann. Cas. 210.

[2] But if the holder receive an uncertified check, and instead of drawing the money has it certified, he discharges the drawer, for he has accepted the bank as his sole debtor; the same as if he had drawn the money, then deposited it, and taken a certificate of deposit for it. *Met. Nat. Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; *Born v. Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Oyster & Fish Co. v.*

Bank, 51 Ohio St. 106, 36 N. E. 833, 128 Am. St. Rep. 691 and 696. And this has been embodied in our Negotiable Instrument act (section 10158, R. S. 1909).

[3] If the drawer gets the bank to certify his check and then delivers it to the holder, and the latter neglects to present it to the bank for payment in due course, the drawer is discharged to the extent he suffers by the delay. Section 10156, R. S. 1909; *Heartt v. Rhodes*, 66 Ill. 351; *Blair v. Wilson*, 28 Gratt. (69 Va.) 165, 171; *Larsen v. Breene*, 12 Colo. 480, 484, 21 Pac. 498.

[4] In the present case the plaintiff city held the check for nearly three weeks before presenting it to the bank. This discharged Meeks from his obligation as drawer (if he was under any obligation), and left the city to look to the bank alone, if it had a right to look to anybody. So if Meek, on account of transpiring facts as to the invalidity of the proceeding for paving, was not under any obligation to the city, he did not need the circumstance of delayed presentation to discharge him; for he owed nothing to the city. If he owed nothing to the city, it would be a wrong upon him for the bank to pay out his money which had been set apart for the payment of the check, and he had a right to demand it back from the bank.

The matter then stands with a dispute between Meek and the city, the bank caught between the two, and willing to pay to either, as the law may determine on a contest between them as contemplated by the law in relation to interpleader. *McGinn v. Bank*, 178 Mo. App. 347, 166 S. W. 345. Session Acts 1915, p. 148, § 94. In the present status of the case we have no interest in that contest, and know nothing of its merits. *Gee v. Leaver*, 172 Mo. App. 191, 196, 157 S. W. 842.

We conclude the trial court was right in overruling the demurrer, and affirm the judgment. All concur.

WALTHER et al. v. WOODSON. (No. 12180.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. CONTRACTS — 71(2) — CONSTRUCTION OF AGREEMENT — EXTENSION OF TIME FOR PAYMENT.

An agreement between a debtor, his creditors, and the debtor's father, whereby the father agreed to retain out of the debtor's salary a certain amount a month to be applied on the creditors' demands in the order in which their claims were filed with him, was a valid agreement, based on a sufficient consideration, to extend the time of payment until their claims should be reached in the order in which they were filed with the debtor's father.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 317, 318; Dec. Dig. — 71(2).]

2. COSTS — 48 — PREMATURE ACTION.

Where a creditor sued his debtor before its claim, in the order filed under an agreement

with the debtor's father, was reached, its action was prematurely commenced, and it was not entitled to costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 129, 192-210; Dec. Dig. — 48.]

3. JUSTICES OF THE PEACE — 171(1) — APPEAL — TRIAL DE NOVO.

An appeal from a judgment of the justice's court on the merits, and on the question of costs, removed the entire case bodily to the circuit court for trial de novo, without regard to any error or imperfection in the judgment below.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 655; Dec. Dig. — 171(1).]

4. JUSTICES OF THE PEACE — 166(5) — APPEAL — VACATION OF JUDGMENT.

An appeal to the circuit court vacated the judgment of the justice's court, at least until the appeal was finally disposed of; but, on dismissal of the appeal the judgment, or whatever part of it was valid, became a finality.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 645; Dec. Dig. — 166(5).]

5. APPEAL AND ERROR — 781(6) — DISMISSAL — SETTLEMENT.

Where plaintiff appealed from a judgment of the justice's court to the circuit court, and, pending the appeal, accepted the amount of its claim and gave a receipt in full, and the matter is called to the attention of the Court of Appeals, either by record or admission of counsel, there being nothing left to adjudicate, the case will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3122; Dec. Dig. — 781(6).]

Appeal from Circuit Court, Cole County; Jack G. Slate, Judge.

"Not to be officially published."

Action by L. M. Walther and another against Arch Woodson, Jr. From a judgment of the circuit court, dismissing plaintiffs' appeal from a judgment for defendant in justice's court, plaintiffs appeal. Affirmed.

Pope & Lohman, of Jefferson City, for appellants. W. C. Irwin and A. T. Dumm, both of Jefferson City, for respondent.

TRIMBLE, J. On June 21, 1915, plaintiffs commenced this suit before a justice on an account for furniture sold the defendant between the dates of May 13 and August 27, 1913, amounting in all (less a credit of \$25 paid in February, 1914) to \$82.88. It seems that in July or August, 1914, defendant had become indebted to a number of creditors to such an extent as to become financially embarrassed and unable to pay them. A number of them appealed to defendant's father to assist them in collecting their claims. The defendant was working for his father and receiving a salary of \$125 per month. The father, in order to assist defendant and his creditors in adjusting their affairs, agreed to retain out of the son's salary the sum of \$50 per month, to be applied on the creditors' demands in the order in which said claims were filed with the father. The creditors, among whom were plaintiffs, agreed to this

arrangement and filed their respective claims with the father; plaintiffs' being filed also. As a part of said agreement with the creditors, the father agreed further that, if the remainder of his son's monthly salary was not sufficient to maintain the son's family, the father would assist the family out of his own pocket. The arrangement thus entered into was also agreed to by defendant, and it took away from him all means of paying his creditors except through the \$50 monthly payments made by the father out of the son's salary on the demands in the order in which they were filed with the father, all of which plaintiffs well knew. It also appears that the father proceeded to pay the \$50 monthly on the demands in their proper order, but that plaintiffs' demand had not been reached by June 15, 1915, the date suit was brought. It seems that this agreement between the defendant and his creditors, including plaintiffs, and the father, was set up in the trial of the case in the justice court. The jury returned a verdict finding the issues for the plaintiffs and assessing their damage at the full amount sued for, "to be paid according to the agreement with the creditors" and defendant's father, and directing the costs to be paid by plaintiffs. The justice rendered judgment for plaintiff in strict accord with the verdict, namely, judgment for plaintiffs in the sum of \$82.88 for the debt, "to be paid according to agreement with creditors" and defendant's father, and "with cost of this suit to be paid by plaintiffs."

Thereupon plaintiffs appealed upon the merits, and also from the order taxing costs. In the meantime, and before the case was docketed for a hearing in the circuit court, the claim of plaintiffs was reached in its order by the defendant's father, and was paid in full, with 6 per cent. interest thereon, in strict accord with the agreement. Plaintiffs accepted the full amount of their claim and receipted therefor. Thereafter, at the term when the case appealed from the justice was docketed for trial in the circuit court, defendant filed a motion to dismiss, based upon the above facts, and, after a hearing thereon, the court sustained the same. Whereupon plaintiffs duly appealed to this court.

[1, 2] Whatever may be said of the verdict and judgment in the justice court, whether valid or invalid, the verdict was a finding by the jury in exact accord with defendant's contention before the justice. If it was anything at all, it was a finding for defendant. And if the judgment was anything at all, it was a judicial establishment of the agreement between plaintiffs and the other creditors on one side and defendant and his father on the other as to the time and method of paying the claims, including the one sued on. This arrangement between the creditors on one side and the father and son on the other

was a valid agreement, based upon a sufficient consideration, and was, in legal effect, an agreement on the part of plaintiffs to *extend the time of payment* to the time when plaintiffs' claim should be reached in the order in which it had been filed with the father. The suit being brought before that time, it was prematurely commenced, and plaintiffs were certainly not entitled to costs, if indeed they could even be said to be entitled to anything at that time. In the way the verdict and judgment were drawn, defendant got all he asked, and there was no occasion for him to appeal, or to object to the verdict and judgment.

[3, 4] The appeal on the merits and on the question of costs removed the entire case bodily to the circuit court for trial de novo, without regard to any error or imperfection in the judgment below. *Hull v. Beard*, 80 Mo. App. 200. And it vacated the judgment, at least until the appeal was disposed of; but on dismissal of the appeal the judgment, or whatever portion of it is valid, became a finality. *Sublette v. St. Louis, etc., R. Co.*, 96 Mo. App. 113, 69 S. W. 745; *Pullis v. Pullis*, 157 Mo. 565, 587, 590, 57 S. W. 1095. It would seem that, if the suit was prematurely brought, as stated above, then at least the judgment against plaintiffs for costs was proper. It is the judgment that would have been rendered, had the justice dismissed the case as having been prematurely brought.

[5] Now, while the case was pending in the circuit court, the time for payment according to the agreement arrives, and the full amount of the debt, with interest, is paid according to the agreement, and the plaintiffs give a receipt in full therefor. What, then, is left for the court to adjudicate? Where plaintiff, during the pendency of the suit, accepts the thing or sum sued for, and the matter is called to the attention of the court, either by the record or admission of counsel, the court will dismiss the case. *Cape Girardeau, etc., R. Co. v. Southern, etc., Bridge Co.*, 215 Mo. 286, 297, 114 S. W. 1084; *Austin v. Loring*, 63 Mo. 19; *Smith v. Ward*, 19 Pa. 424.

The only thing plaintiffs could hope to gain in addition to what they have already obtained would be a judgment in their favor for the costs; but, as we have seen, they are not entitled to that.

The judgment is affirmed. All concur.

WHIMSTER v. HOLMES. (No. 11831.)
(Kansas City Court of Appeals. Missouri. Nov. 27, 1916.)

1. MASTER AND SERVANT §302(1)—INJURY TO THIRD PERSON—AUTOMOBILE ACCIDENT—SCOPE OF EMPLOYMENT OF CHAUFFEUR.

Where, after his employer had left the city, a chauffeur consulted an expert repairman as directed by his employer, and, while returning to

look for garage keys which he thought he had lost on such errand, collided with and injured a pedestrian, the accident occurred in the scope of his employment, although he was intoxicated at the time and he had not in fact lost the keys, but had them on his person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217, 1225; Dec. Dig. ☞ 302(1).]

2. APPEAL AND ERROR ☞882(12) — INVITED ERROR.

An instruction given at appellant's request, if erroneous, is invited error, and cannot serve him as ground for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ☞882(12).]

Johnson, J., dissenting.

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by David B. Whimster against Conway F. Holmes. From judgment for plaintiff, defendant appeals. Affirmed, and case certified to Supreme Court.

Morrison, Nugent & Wylder, of Kansas City, for appellant. Hogsett & Boyle, of Kansas City, for respondent.

ELLISON, P. J. Defendant was the owner of an automobile which he kept in his garage at his home in Kansas City. He had in his employ as his chauffeur one Hettenbaugh, who lived on his own premises, about a mile from defendant. His business was not only to operate the machine for defendant, but to make ordinary repairs and to keep it in order. On the 10th of July, 1912, at about 7:30 p. m., Hettenbaugh was driving the machine south on Grand avenue, when on or near the crossing at Nineteenth street he negligently ran upon and injured David Whimster, an aged Presbyterian minister, who afterwards brought this action for damages and obtained judgment, from which defendant appealed to this court, and we held that the trial court properly overruled a demurrer to the evidence; but we reversed the judgment and remanded the case on account of an erroneous instruction in plaintiff's behalf. Another trial resulted again against defendant, and he has again appealed. Since the appeal was taken plaintiff died, and Judge Joseph A. Guthrie has been appointed his administrator and has entered his appearance.

The case on the first appeal is reported in 177 Mo. App. 180, 164 S. W. 236, where will be found a statement of the facts. The evidence at the second trial was largely the same as at the first. There was some additional testimony offered by defendant, but we think the jury could reasonably have accepted it as tending to strengthen plaintiff's case.

By reference to the report of the appeal from the first judgment it will be seen that defendant and his family left the city on a train due to leave at 1:30 p. m., the family

to be absent several weeks, and defendant about ten days or less, and that the family got in the machine at defendant's residence and were driven by Hettenbaugh to the railway station, but found the train was late, that the evening before defendant told him he would be absent only a short time, and directed him to "overhaul both cars [defendant kept two] while he was gone and have them in readiness when he got back," and that he was to go to the street car shops and have some parts made for the machine. However, prior to this, on more than one occasion, he had directed him to consult with one Rogers, an expert in the public garage at Thirty-Fourth and Broadway, maintained by the machine company that had sold the car to defendant, though he did not so direct at the time he was leaving. While at the station, just before leaving, defendant directed him to take the machine home to the garage and at the same time to take two of defendant's friends from the station up into the city. He took these gentlemen and let them out at the places they desired, and then went to the Pioneer Trust Company (which was located near where he left defendant's friends, and of which defendant was an officer) to get his pay check. He waited there more than an hour before receiving his check. Then he started out south to consult Rogers at Thirty-Fourth and Broadway as to repairs on the car. On the way there he stopped at a laundry office on Twelfth and Grand avenue to get his collars. He then stopped at Seventeenth and Grand avenue at a saloon and had a drink of liquor. He then went on to Thirty-Fourth and Broadway, took Rogers in, and drove south six or eight blocks in order to determine what caused a "knock in the car" and "the best way to get at it." On that drive he and Rogers stopped at a saloon and each had a drink. He brought Rogers back to Thirty-Fourth and Broadway, and, his own home being in that part of the city, he went there and had his supper. He left his home, and started back to the garage at Thirty-Fourth and Broadway to get Rogers and take him home. He met or overtook Rogers on Broadway on his way to take a street car and took him in. On the way to Rogers' home they crossed Fifteenth and Grand avenue, stopped, went into a saloon, and each took a drink. On getting into the car again Rogers took the wheel, as, according to his statement, Hettenbaugh "was very talkative and gave me the impression that he was rather under the influence of liquor," though he had not noticed it before. They then drove in a southeasterly direction to Rogers' home at Twenty-Fourth and Park. There Rogers got out and Hettenbaugh started south on the way to defendant's residence at Armour boulevard and Harrison street to put the machine in the garage.

At this place we will state that Hetten-

baugh's deposition was taken for the first trial, and another was taken for the second trial. In the first one he stated that after dropping Rogers, "my recollection is that I went on south from there, intending to go to the garage, that is, to his [defendant's] home, and put the car away, but it seems to me that when I got nearly to the place I missed my keys [to the garage and machine], and whether I left them one place or another I don't know, and never found them, and haven't found them yet, as far as that goes." Again he was asked if he had "any recollection of starting out to look for his keys," and he answered, "No; I have no other recollection of going to look for the keys; but, as I remember it, I went back to the garage and looked for my keys there, and they were gone. Further than that I cannot remember." In the course of the opinion on the former appeal we placed emphasis (page 133) on his statement that on missing his keys he "went back to the garage," as showing that he went back to the garage at Thirty-Fourth and Broadway. Doubtless to destroy whatever effect there might be in going to Thirty-Fourth and Broadway in looking for his keys, defendant re-examined him in the second deposition read at the second trial. There he stated that the "typist" (the stenographer) had made a "miscue" or mistake; that he did not mean to state "in particular," as a fact, that he went back to the garage at Thirty-Fourth and Broadway. However, he stated that he may have gone there; that what he meant to say was that he "went to the (defendant's) garage, and when I got there I missed my keys and then went to look for them." At another part of the deposition he says he does not know "definitely," where he went to look for them. He stated that: "I have a recollection that I went there and missed the keys and then went to look for them. Now, I would have no other mission out with the car that time in the evening." On cross-examination he was asked, "Do you have a distinct recollection of looking for your keys?" And he answered, "Yes; I have a recollection of going to look for my keys—going to the [defendant's] garage first and missing my keys and then going to look for them." But he stated he did not recollect what particular place, or places, he looked, stating that he might have gone as far back as the public garage at Thirty-Fourth and Broadway. The next he was seen was at 7:30 p. m., when he ran against plaintiff, the corner of the car striking him on the hip, at Nineteenth and Grand avenue. He testified that he did not know that he struck him, but did recollect that at 7:45 he collided with another machine at Fifty-Second and Oak streets. No women were in the car, at least at this time, but beer bottles were found in it. The owner of the other car saw him coming on the wrong side in a cross street, but supposed he would get right before reaching the corner. When the collision oc-

curred (about 7:45 p. m.) the owner of the other car got out and started round to him asking why he had collided, whereupon he jumped out of his car, making no answer, and ran and jumped on the running board of a passing machine, got into a quarrel with the two men on the front seat, when one of them struck him and knocked him onto the street, where his head struck a sharp stone, cutting his scalp an inch and a half. Policemen and an ambulance arrived and took him to the hospital. The owner of the car with which he collided testified that "by his physical action I would judge that he had perfect control over himself," and that "his equilibrium was good." As was stated on the first appeal, there was evidence tending to show that one or more women were in the car when plaintiff was struck. The evidence as to women is not of a positive character, and, there being none in the car at the time of the collision at Fifty-Second street, within 15 minutes afterwards, tends to show there were none.

The sum of the foregoing is that Hettenbaugh was defendant's servant engaged in driving his automobile, and, having mechanical knowledge, it was also his duty to repair it as needed, and in so doing he was directed to consult Rogers an expert in the public garage maintained by the company which sold this make of machine. He was specifically directed to overhaul the machine while defendant was absent with his family. On leaving the defendant at the station and knowing there was "a knock" in the machine (or then discovering there was), he, after dropping defendant's two friends and getting his pay check at defendant's office, started to Thirty-Fourth and Broadway (perhaps near two miles) to consult Rogers. The way to that point took him by Twelfth and Grand avenue and Seventeenth and Grand avenue. He stopped at the former place for his laundry and at the latter to get a drink at a saloon. He then proceeded to Thirty-Fourth and Broadway, talked with Rogers, then took him in that he might observe the way the machine acted, and ran about six blocks to Westport avenue and back, stopping on the way at a saloon where each had a drink. He let Rogers out. Now Thirty-Fourth and Broadway is in the immediate neighborhood of Thirty-Seventh and Main, where Hettenbaugh lived. It was already late in the afternoon, and, instead of going to defendant's home, which was off in another part of the city, he went to his own home, getting there about 5 o'clock, and waited for his supper, after which he concluded to go by Thirty-Fourth and Broadway and take Rogers to his home at Twenty-Fourth and Park streets, a distance of about 1½ miles. They stopped as they crossed Fifteenth and Grand avenue, and again each had a drink at a saloon. After Rogers got out at his home, at about 7 o'clock, Hettenbaugh started towards defend-

ant's home, more than a mile away, to put the machine in defendant's garage. But when he approached the place he discovered that he had lost his keys. He could not think at what place he had left them, and went to look for them. Now, notwithstanding that, on account of his growing intoxication, he could not remember where he looked, even not knowing whether he went as far back as Thirty-Fourth and Broadway, it is certainly a reasonable inference that he went to the laundry at Twelfth and Grand avenue, where, if he did not get them, he continued south to the saloon at Seventeenth and Grand, where he had stopped when going out to Thirty-Fourth and Broadway in the first place, for at about the proper time (7:30) he struck plaintiff at Nineteenth and Grand avenue while going south. This was a direct way, or route, back to defendant's residence. Notwithstanding he testified that he did not know he struck plaintiff, there was evidence from which the jury could believe that after striking him he "speeded up" and got away, and in about the proper time (7:45) collided with a car at Fifty-Second street, in the south part of the city.

Defendant introduced evidence on the second trial not brought out on the first upon which he put much stress at the argument, to the effect that, when Hettenbaugh was taken by the police, keys were found in his pocket. This was for the purpose of showing that Hettenbaugh had not lost the keys to the defendant's garage and machine, and therefore had not turned back to look for them. Passing by the fact that these keys in Hettenbaugh's possession were not identified as the garage keys, yet, if they had been, it would not have been proof that he had not lost them, but rather proof that he had found them at Twelfth and Grand or Seventeenth and Grand. It is true that his intoxication had grown by this time so that he could not remember whether he found them or not; yet the circumstance that the place where plaintiff was struck was south of those places leads to the reasonable inference that, if the unidentified keys found on him were, in fact, the keys to defendant's garage and machine, he had found them after turning back to look for them.

From the whole record it is quite apparent that the entire defense is built on the assumption that Hettenbaugh was not acting within the scope of his employment when he went out to Thirty-Fourth and Broadway to consult Rogers and the circumstance that he afterwards became intoxicated. As to his consulting Rogers, defendant himself testified on cross-examination, that Hettenbaugh, in addition to being his chauffeur, "was a machinist and repair man," and that he "told him to make some repairs on both machines" (the one in controversy and a smaller one). Defendant repeatedly admitted that he gave him such orders. He further testified that

the car involved here needed "possibly the grinding of the valves and the scraping out of the carbon and the brakes repaired. The brakes rattled considerably. I figured on them being rimmed out and new pin shafts put in." It will be remembered that Hettenbaugh said there was "a knock" somewhere as the car was running, and he went out to advise with Rogers about it. And defendant testified that "carbon in the cylinder will cause a knock in the operation of the car." He further testified the defects in the car that he mentioned "required the services of a machine shop and a mechanic." He further testified that he instructed Hettenbaugh, "in addition to grinding the valves, cleaning out the carbon, and tightening up the bolts, to give this car a general overhauling." Then Hettenbaugh testified that, while defendant had not told him to consult with Rogers at this particular time, he had "at two, or probably three, other times." And this was not denied by defendant. Now, in the face of these duties of Hettenbaugh, of these defects in the car, and these orders given him by defendant, to contend that he was acting without right and beyond the scope of his employment when he drove out to consult Rogers is not reasonable.

We have then positive testimony as to the scope of Hettenbaugh's service for defendant, and that in performing that service he drove out to consult Rogers, no one pretending that he was intoxicated at this time. Rogers stated that he was not. Then, seeing that he was near his own home that late in the afternoon, he went there and waited for his supper, a most natural and reasonable thing to do before going to defendant's garage in another part of the city, and then returning for his supper. This act surely did not have the effect to throw him out of defendant's service. Then, in the silence of the evidence, the jury could well conclude that he started to defendant's home, but went by Thirty-Fourth and Broadway to take Rogers home. Now, if it should be conceded that it was a departure from defendant's service to go somewhat out of his way to favor Rogers, it is certain that when he left Rogers at the latter's house he resumed his trip to defendant's, and that when he got there he found he had lost or mislaid his keys. While he made several statements showing or admitting his growing intoxication, yet he repeated positively in both his depositions that as he approached the garage he found he had lost his keys, and did not know at what place he may have left them, and turned and went to look for them. On account of the further growth of his intoxication he does not remember where he looked, but certain it is that he was on the proper route for them when next seen at Nineteenth and Grand, where he struck plaintiff. The jury might well find from the evidence and the circumstances that he either had found them at

Twelfth and Grand avenue, or Seventeenth and Grand avenue, and was going south on the route to defendant's home, or, not finding them, was on his way back to Thirty-Fourth and Broadway to see if they were there, when he struck plaintiff at Nineteenth street.

The demurrer to the evidence was properly overruled.

Defendant says, if he is wrong in his position that no case was made for the jury, as a matter of law, yet the cause should be remanded for error in instruction A given for plaintiff. The ground of objection to that instruction is that it includes in the hypothesis of Hettenbaugh having lost the key to the garage this further hypothesis, viz., "or thought he had lost it." We think that was properly included. Defendant had endeavored to show that he had not, in fact, lost the key, and it was therefore proper to advise the jury that, though he had not, if he thought that he had, he did not put himself out of the scope of his employment by turning back to look for it. We borrow from plaintiff's brief several suggestions illustrating the correctness of this view.

Suppose a chauffeur (while intoxicated) mislaid a certain tool needed to repair his master's car, and thought he had lost it, and should drive the automobile to a shop to procure another tool in order to make the repairs ordered by his master, and on the way he should negligently injure a pedestrian; could the master relieve himself of responsibility for the servant's act by showing the tool was not lost at all, but was in the car all the time?

Again, suppose on the day in question Hettenbaugh had mistakenly thought he had left his keys at his home in the pocket of his other coat, although in fact they were on his person, and on his way home to get them (in order to put up the car as his master ordered) he had negligently injured a pedestrian; could the master relieve himself by showing Hettenbaugh in fact had the keys on his person and was mistaken in thinking they were at another place?

Again, suppose a chauffeur, having standing orders to keep his master's car in repair, had, while intoxicated, misused the engine of the car in some way, and erroneously thought he had so damaged it as to require the attention of an expert repairman, and while laboring under that erroneous impression should take the car to a shop for expert attention, and on the way should negligently injure a pedestrian; could the master excuse himself from responsibility by showing the servant was wrong about it, or was mistaken about it, and that the repairs required were trivial, and that the trip to the expert's shop was unnecessary?

[2] At defendant's request the court gave an instruction for him not in harmony with that for plaintiff, but that was an error in-

vited by him, and cannot serve him as a ground for a new trial.

The law of the case was considered at length on the former appeal and properly declared. It need not be restated at this time.

The judgment is affirmed, and cause certified to Supreme Court.

JOHNSON, J. (dissenting). This case was here on a former appeal, and was remanded for another trial because of error in the instructions. 177 Mo. App. 130, 164 S. W. 236. The evidence introduced at the second trial was largely the same as that we examined on the former appeal, but there were some differences to which we shall refer. We hold the evidence, in its aspect most favorable to plaintiff, warranted the trial court in refusing defendant's request for a peremptory instruction. On the present appeal counsel for defendant contend, first, that on the question of the sufficiency of the evidence to take the case to the jury our decision was erroneous, but that, whether sound or unsound, the evidence in the present record shows conclusively that plaintiff has no case, and therefore that the demurrer should have been sustained.

Passing, for the present, the question of res adjudicata raised by defendant, I shall first state the facts of the case as they appear in the present record. Plaintiff, an aged clergyman, was struck and injured at Nineteenth street and Grand avenue, in Kansas City, by a seven-passenger Packard car, owned by defendant and driven by his chauffeur, the witness Hettenbaugh. The car was going south on Grand avenue at 20 miles an hour, and it is conceded that the sole cause of the injury was negligence of the chauffeur, who was so intoxicated that he did not know what he was doing, and has not been able since then to remember anything about the events which culminated so disastrously to plaintiff. The main question in the case is whether or not the evidence most favorable to plaintiff will support a reasonable inference that the chauffeur was acting within the scope of his employment at the time of the injury.

At about 1:30 p. m. on the day of the injury defendant, certain members of his family and some friends departed from the railway station at Second street and Grand avenue on a trip to Minnesota. The chauffeur took members of the family to the station from defendant's home on Armour and Harrison boulevards, and met defendant at the station. Defendant ordered him to return home with the car and put it in the garage on the premises after taking some friends to places in the business district where they wished to go. After carrying out the latter order, the chauffeur went to the office of a trust company and cashed his pay check. He left that place at 3:30 p. m., drove to Twelfth and

Grand avenue, where he stopped a moment on personal business, and then drove to Seventeenth street and Grand avenue, where he stopped and went into a dramshop. From this place he went to Thirty-Fourth street and Broadway avenue to a garage, arriving there some time between 8:45 and 4 o'clock. The witness Rogers was employed there, and the chauffeur testified that his mission was to consult Rogers (who was an expert in the construction and repair of Packard cars) about the cause of a defect in the engine. He states he asked Rogers to ride in the car to observe the way the engine was working. Rogers states that the only invitation he received was one to ride to a saloon for a drink, which he accepted. They drove south on Broadway about a mile to a saloon in Westport and returned to the garage at Thirty-Fourth and Broadway, where Rogers left the car and returned to his business. He states the chauffeur was not intoxicated then, and that he turned around and drove back south in the direction of Westport.

The evidence does not show very clearly what the chauffeur did during the following two hours. He states that at about 5 o'clock he drove to his own home at Thirty-Seventh and Main streets, where he had supper, and then drove over to the garage at Thirty-Fourth and Broadway to see Rogers again. That was about 6 o'clock, and Rogers had started home, intending to take a street car. The chauffeur, accompanied by a male companion, overtook him at Thirty-First street and Hunter avenue, Rogers entered the car, and the three drove north to Fifteenth street and Grand avenue, where they stopped at a saloon and had a drink. The chauffeur was intoxicated and when they re-entered the car Rogers took the wheel and drove to his home at Twenty-Fourth and Park, a place about a mile and a half northeast of defendant's residence. Rogers states he arrived there at about 6:40 p. m., and that the chauffeur took his place at the wheel and continued on south in the direction of defendant's residence.

The only account we have of the movements and purposes of the chauffeur from this point on is in his testimony which shows that he was too drunk to know what he was doing, and that his recollection of events is so vague and indistinct as to be wholly void of any probative force, and to indicate that it is the product of a subsequent sober attempt to remember, rather than of reliable memory. I quote from his first deposition, which was used at the former as well as at the latter trial:

"Q. Well, now, where did you go from Rogers' place, Mr. Hettenbaugh? A. I don't know; I could not answer that question properly. Q. Have you any recollection at all about it? A. Well, I have a faint recollection, but I could not be positive. Q. Well, what is your best recollection? A. My recollection is that I went on south from there, intending to go to the garage; that is, to his home, and put the car away, but

it seems to me that when I got nearly to the place I missed my keys, and whether I left them one place or another, I don't know, and never found them, and haven't found them yet, as far as that goes. Q. What keys do you refer to? A. The keys to the cars and the garage. They were on a ring. Q. Was the garage kept locked at all times? A. Yes, sir. Q. State whether or not you had received instructions from Mr. Holmes to keep the garage locked. A. Yes, sir; that was the first instruction that I got when I went to work for him. * * * Q. What did you do then when you missed your keys, Mr. Hettenbaugh? A. I couldn't answer that question for certain. Q. What is your best recollection? A. The only recollection that I have I missed my keys; it seems to me I did. Further than that I don't remember any more. I don't know where I went after that. Q. Well, do you have any recollection of starting out to look for your keys? * * * A. No; I have no other recollection of going to look for the keys, but, as I remember it, I went back to the garage, and looked for my keys there, and they were gone. Further than that I cannot remember. Q. What is the next thing you do remember, Mr. Hettenbaugh? A. Well, the next thing I can remember was that I woke up in No. 1 police station. That is about all I can tell you. I didn't know where I was then, but I found out pretty soon."

In a second deposition taken after we remanded the case he testified:

"Q. The keys you referred to were the keys of the garage, I believe, Mr. Holmes' garage? A. Yes, sir; also some of my own keys on the ring. Q. I suppose you had a ring on which you kept your private keys? A. Yes. Q. And the keys to the garage? A. Yes. Q. Do you remember what you did after you missed your keys? A. The only thing I remember that I might have did was to have gone to look for the keys. But I don't know where; I have no recollection of where I went definitely. Q. You don't remember definitely whether you went to Mr. Holmes' garage or to the Packard garage, or where you went, any place, do you? A. No. Q. And you have no definite recollection of even looking for the keys, have you, Mr. Hettenbaugh? A. Well, I have a recollection that I went there and missed the keys, and then went to look for them. Now I would have no other mission out with the car that time in the evening. Q. Well, I mean you have a recollection that you missed them just before you got to his garage? A. Yes. Q. You haven't any recollection whether you went on to the garage or not? A. Well, I couldn't say for sure that I stopped at the garage or that I didn't. As a possible chance, I may have stopped at the garage, but I would not want to say positively. Q. What I mean is everything is a sort of blank, or hazy, after that, isn't it? A. Yes, sir; I don't remember clearly. Anyway, I could not prove it. If I thought I remembered something, I could not have any proof for it. Q. And you have no recollection of looking any place, have you? A. Any particular place? A. No. Q. You have no definite recollection, as I understand, of having reached Mr. Holmes' garage? A. Well, no; not except near there. Q. Well, that is what I mean. But I mean getting right up to it? A. I remember being on the street where the garage was located; but I couldn't swear that I even went up into the garage, because, if I missed my keys, it would stand to reason I couldn't get in the garage if I didn't have my keys. Q. Well, you don't remember now that you even got up there to see if the door was locked? A. No; I couldn't state positively that I went up to look if it was locked or not. Q. Now you have no definite recollection of returning to the Packard garage either, have you? A. Not definitely; no."

Such testimony is wholly worthless, and it should be held that there is no proof in the record of the movements of the chauffeur from the time he and his companion left Rogers at Twenty-Fourth and Park at 6:40 p. m. until 7:30, the time of the injury. This we do know: He returned down town, gathered up more companions, and proceeded south on Grand avenue, not to return to defendant's residence—there is no evidence of such intention—but to drive out into the country south of Kansas City. There is evidence that some of the occupants of the car were women and there were bottles of beer aboard. Finally at about 8 o'clock p. m. they met disaster at Fifty-Second and Oak streets about $2\frac{1}{2}$ or 3 miles south of defendant's home, where they had a head-on collision with another car. The chauffeur, drunk and excited, tried to escape from the scene, but in a fight that followed was knocked senseless and afterwards taken to police headquarters and lodged in jail. One of the city physicians, who was not a witness at the former trial, testified that he went in the ambulance to the scene of the wreck and found the chauffeur lying on the pavement wounded on the head and in a state of intoxication. He searched his pockets, finding money, an abstract of title, automobile tools, and two bunches of keys. He took charge of the money and abstract for safe-keeping, and returned the tools and keys to the chauffeur's pockets. The property clerk at police headquarters, also a new witness introduced by defendant, produced the records of his office, which show that a chain, a wrench and "two keys" were taken from the chauffeur's pockets, and, not being called for, were afterwards sold at an auction sale.

The day before he left for the North defendant ordered the chauffeur to put his Packard runabout and the touring car in good repair during his absence, but did not direct him to consult or employ Rogers. Let it be conceded, however, for present purposes, that the chauffeur went to the garage at Thirty-Fourth and Broadway to consult Rogers about his master's affairs, and in so doing was acting within the scope of his employment. When that duty was fully performed—and it was so performed when he left Rogers about 4 o'clock—it became his duty to drive the car to defendant's garage, which was straight east only a mile away. Instead of doing this he kept the car in his own service two hours, during which he became intoxicated, and then reappeared with it at the Broadway garage, and from near there picked up Rogers and drove north down town for no other purpose than the gratification of his own pleasure. There is not the slightest pretense in the evidence that from about 4 o'clock until 6:40, when they arrived at Rogers' home, the chauffeur was directly or indirectly in the service of defendant, and, as shown, there is no credible

evidence that, on leaving Rogers, he started to take the car to defendant's garage and thereby returned to the performance of a duty he owed defendant.

All that is shown with an degree of definiteness is that the chauffeur and his companion, still in pursuit of a drunken carouse, returned down town, secured dissolute companions, procured a supply of intoxicants, and headed straight for the country, injuring plaintiff on their way. The chauffeur had no knowledge of the collision with plaintiff, and therefore no cause to change his plans. Confessedly he was not in quest of lost keys when he struck plaintiff, and obviously he had no purpose of returning the car to defendant's garage until after the debauch had burnt itself out. He does not say he was on his way home, but says he has no recollection of what occurred or what he was doing. He never did reach the point of returning to defendant's service, since when he wrecked defendant's car by reckless driving, he was still in pursuit of his own pleasure.

The law applicable to such facts is simple and well settled, and is properly stated in our former opinion. The doctrine of liability of the master for the wrongful acts of his servant proceeds from the maxims of "respondent superior" and "qui facit per alium facit per se," and therefore is a doctrine of the law of agency which holds the master responsible for the torts of his servant committed within the actual or apparent scope of his servant's employment.

It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is acting beyond the scope of his employment for his own purposes, although he may be using the vehicle furnished him by the master with which to perform the ordinary duties of his employment. Where the servant, in carrying out the master's orders, merely deviates on some errand of his own from the strict course of duty, but while thus going extra viam is really engaged in the execution of some duty of his employment, or where he forsakes duty entirely for a time but returns to its path, the master will be liable for his negligence which injures a third person, under the doctrine of respondent superior. See authorities reviewed in former opinion.

The facts of the present case lend no support to an inference that the chauffeur either was going extra viam while performing a duty of his service, or had returned to such service at the time of his injury. He was clearly and indisputably beyond the actual or apparent scope of his employment, and without his master's knowledge or consent had appropriated and was using the latter's car for his own exclusive purposes without any show or pretense of service of the master. In such a case there can be no liability under the rule of respondent superior, since

no agency of the servant may be implied to do a thing so excessive. *Slater v. Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; *Storey v. Ashton*, L. R. 4 Q. B. C. 476; *Cavanagh v. Dinamore*, 12 Hun (N. Y.) 465; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Douglass v. Stephens*, 18 Mo. loc. cit. 368; *Garretzen v. Duenczel*, 50 Mo. loc. cit. 107, 11 Am. Rep. 405; *Walker v. Railway*, 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547; *Evans v. Auto Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Vanneman v. Laundry Co.*, 166 Mo. App. 685, 150 S. W. 1128.

The demurrer to the evidence should have been sustained.

This brings us to the question of *res adjudicata*. The settled rule is that, where the pleadings and the facts are the same, the appellate court on the second appeal of a cause will not notice questions determined in the former decision, regardless of whether or not they were correctly decided. The former decision is the law of the case, and its force as an adjudication of the questions considered and determined cannot be questioned, except where it appears that manifest error of the gravest and most far-reaching consequences has been committed.

The Supreme Court say in *Hamilton v. Marks*, 63 Mo. loc. cit. 172:

"When a case has once been in the appellate court and is sent back, if it is retried in conformity with the principles announced in the higher tribunal, and is again taken up, cogent and convincing reasons must exist to induce a re-examination of what ought to be considered as *res adjudicata*."

See, also, *Leicher v. Keeney*, 110 Mo. App. 292, 85 S. W. 920.

And in *Gracey v. St. Louis*, 221 Mo. 1, 119 S. W. 949, it is held:

"Where manifest and far-reaching error has been committed, no cast-iron or immutable rule bars a re-examination of a question illy decided. In such a case it goes without saying that this court, as a debt due to justice and as one of the foundation stones of its own dignity, reserves to itself the right to reconsider, re-examine, and redetermine. *Padgett v. Smith*, 206 Mo. loc. cit. 311 et seq. [103 S. W. 943]; *Id.*, 205 Mo. loc. cit. 125 [103 S. W. 942]; *Hamilton v. Marks*, 63 Mo. loc. cit. 172; *Wilson v. Beckwith*, 140 Mo. loc. cit. 369 [41 S. W. 935]."

To the same effect are the later decisions of the Supreme Court in *De Ford v. Johnson*, 177 S. W. 577; *Green Co. v. Lydy*, 263 Mo. 77, 172 S. W. 376.

As far as the question of *res adjudicata* is concerned, the pleadings are the same, but there is enough difference in the facts appearing in the respective records to change what we held to be a debatable issue into a fact about which there could be no rea-

sonable difference of opinion. The fact that plaintiff introduced the deposition of the chauffeur at the second trial, and thereby made him his witness, vouching for his credibility and becoming bound by his uncontroverted testimony (*Rollison v. Railroad*, 252 Mo. loc. cit. 539, 160 S. W. 994; *Claffin v. Dodson*, 111 Mo. loc. cit. 201, 19 S. W. 711; *Chandler v. Fleeman*, 50 Mo. loc. cit. 240), coupled with the testimony in the second deposition, which, while not contradicting the testimony in the first, made it clear that the chauffeur had no knowledge of anything that took place after leaving Rogers' home and left uncontradicted the proof that he was not directly or indirectly in any service of defendant when he injured plaintiff, affords sufficient ground for invoking the exception to the rule of *res adjudicata* and gives us "the right to reconsider, re-examine and redetermine." In view of indisputable proof that when plaintiff was injured the chauffeur had forsaken the path of duty and was actuated by no present purpose of returning to it, to allow this judgment to stand, on the theory that we are bound by our former decision, would be to sacrifice justice to a hard and fast rule, and would be violative of the principle of the decisions of the Supreme Court to which we have just referred.

The judgment should be reversed. I deem the conclusion reached in the majority opinion to be in conflict with the prior decisions of the Supreme Court in *Douglass v. Stephens*, 18 Mo. loc. cit. 368, *Garretzen v. Duenczel*, 50 Mo. loc. cit. 107, 11 Am. Rep. 405, and *Walker v. Railway*, 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547, and of the St. Louis Court of Appeals in *Evans v. Auto Co.*, 121 Mo. App. 266, 101 S. W. 1132, and ask that the case be certified to the Supreme Court.

SMITH v. PRYOR. (No. 11958.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916.)

1. MASTER AND SERVANT §279(5)—EMPLOYERS' LIABILITY ACT—QUESTION FOR JURY—NEGLIGENCE.

In an action under the federal Employers' Liability Act (Act April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), for the death of a section hand, evidence held not to show negligence of his foreman in not knowing, or by the exercise of ordinary care knowing, that the track was not clear, and that a freight train was approaching, in time to have avoided a collision with their hand car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. § 279(5).]

2. DEATH §32—EMPLOYERS' LIABILITY ACT—"DEPENDENT"—"DEPENDENCY."

Under the federal Employers' Liability Act, giving a right of action to next of kin only when they are dependent upon such employé, "dependency" need not be complete or entire, but, either in whole or in part, must exist; "dependency" being the state of relying upon something

or some one as for anything necessary or desirable and carrying the idea of continuity of such reliance, and thereunder the sister of a deceased employé, his next of kin, who had received occasional gifts from him and who probably would have received other gifts had he lived and who in fact suffered a possible pecuniary loss in his death, was not a "dependent."

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. ¶ 32.]

For other definitions, see Words and Phrases, First and Second Series, Dependency; Dependent.]

3. DEATH ¶ 99(5) — EMPLOYERS' LIABILITY ACT—DAMAGES—PRESENT VALUE.

A verdict of \$1,500, in an action under the federal Employers' Liability Act, brought by the administrator of a deceased employé for the benefit of a sister as his next of kin, which even were it assumed that he gave her \$37 a year amounted to twice the present value of such yearly contribution during her life expectancy, was excessive; as a dependent is only entitled to recover the present value of his loss.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 130; Dec. Dig. ¶ 99(5).]

Appeal from Circuit Court, Clay County; Frank P. Divilbiss, Judge.

Action by Richard J. Smith, administrator of the estate of Juan Leal, against Edward B. Pryor, receiver of the Wabash Railroad Company. Verdict for plaintiff set aside and new trial granted, and plaintiff appeals. Affirmed.

Ralph Hughes, of Liberty, and Edward E. Naber, of Kansas City, for appellant. N. S. Brown, of St. Louis, and Craven & Moore, of Excelsior Springs, for respondent.

TRIMBLE, J. This is an action under the Employers' Liability Act for the death of Juan Leal, brought by the administrator of his estate for the benefit of Cornelia Sanchez as next of kin dependent upon said deceased employé.

Deceased was one of a crew of six men, consisting of the foreman and five others, engaged in doing repair work on that portion of defendant's interstate track lying between the stations of Randolph and Harlem in Clay county. They were on a hand car going to their work through a very heavy fog when a freight train, coming in the opposite direction, collided with the hand car, and Leal was instantly killed. In fact, the collision resulted in the death of the foreman and all of the men but one.

After a trial, the jury returned a verdict of \$1,500 in plaintiff's favor, but the court sustained the motion for a new trial, giving the following reasons: (1) The verdict is excessive. (2) The court should have sustained defendant's demurrer to the evidence, and should have directed the jury to return a verdict for defendant. Plaintiff then appealed.

[1] As submitted, the case was based upon a particular and specific charge of negligence in the foreman, namely, that he knew, or by the exercise of ordinary care could have

known, that the track was not clear, and that a freight train was approaching in time to have avoided the collision.

The tragedy occurred on the morning of January 19, 1914. A few minutes before 7, the foreman, and his men assembled their tools and proceeded on the hand car down the side track till they came to its junction with the main line. Here the foreman ordered the hand car to stop, saying they had better wait until after a certain train (No. 52) had passed, as it was near her time. He directed that they wait until it passed, and said that he would go into the depot and ascertain if any train was out of Harlem, and "as soon as 52 goes, if there's nothing out on our line we will go." (They were then near the depot at Randolph and their place of work was west of there toward Harlem, which station was five miles distant.) While the foreman was in the depot the expected train 52 passed. The foreman came out and gave the order to start, saying, "There's nothing out of Harlem." They started. As the hand car went down the track one of the men asked if they "hadn't better look out for No. 4 (an east-bound train); its pretty near time." The foreman looked at his watch and replied that No. 4 was not yet out of Harlem. No. 4 was a Burlington train. (From a point east of Randolph west of Harlem, the Burlington and Wabash tracks lie side by side, and the tracks were used by both roads as a "double track," all west-bound trains going on the Burlington track, and the east-bound going on the Wabash.) Just after a Burlington train, going west on its track, passed the hand car with considerable noise, an east-bound train, not the Burlington No. 4, but a Wabash train, No. 72, which was an hour late, met and struck the hand car with the result above stated.

Plaintiff's evidence discloses the above facts and further shows that there was "a very dense fog" prevailing. Plaintiff's witness, Rigley, who was the only survivor, says he and the foreman were looking west; that the hand car was going 6 or 8 miles an hour; that when he first saw the headlight of the approaching train it was 30 or 35 feet away, and he tried to jump, but the collision occurred before he could do so; that the fog was very dense, and that one could see a headlight about 30 or 35 feet, but could not see that far if it wasn't for the headlight. He did not know how fast the train was going, but the engineer thereon says its usual speed was 30 miles an hour, and that it was going 25 miles on that morning. The engineer says the fog was so thick he could not see the pilot on his engine. It is difficult to understand how the foreman could have seen the train in time to have avoided the collision or how he could have heard it and distinguished it from the noise of the Burlington train on the adjacent track. The

foreman went into the depot to ascertain if the track was clear and came out saying it was. There is no evidence as to what the agent informed him, and, in the absence of some showing that the foreman ought to have known that No. 72 had not passed but was late and was liable to come along or that he disregarded the information given him by the agent, it cannot be presumed that he did. Nor could the jury conjecture or guess that he did. It is therefore difficult to see wherein the foreman was guilty of the particular specification of negligence on which the case was submitted.

[2] But, aside from this, there is another question affecting plaintiff's right to recover on the evidence as it now stands. And that is whether the one for whom the suit was brought was dependent upon the employé. The evidence properly shows that deceased had never married and had neither wife nor child, and that his parents were dead, as were also all of his brothers and sisters except Mrs. Sanchez, who was his half-sister through his mother. Mrs. Sanchez was therefore his next of kin, but the federal act gives a right of action to the next of kin only in the event that they are "dependent upon such employé."

Mrs. Sanchez was 48 years of age, had been a widow for 16 years, and had four children, two sons and two daughters, all of whom were grown and living in Uriangato, state of Guanajuato, Mexico, where she resided. Her parents in life had been Mexican laborers. She and all of her family had always been in that station. The only evidence on the question of dependency is contained in her deposition, and is as follows:

"State if such brother [referring to deceased] contributed anything to your support. Answer: Yes, sir. If he contributed to your support, state to what extent, if any, he contributed. Answer: He always sent me different quantities [sums], \$10, \$12, \$15. If he contributed to your support, state how much money, if any, he sent you each year. Answer: I cannot calculate because he was not one year in the United States. If he contributed any to your support, state when you received the last money, if any, from him and the amount thereof. Answer: The last time was in the month of December, 1913, and the amount was \$10 gold. Have you any means of support other than your own efforts? Answer: I haven't a single cent and have to work to support [maintain] myself."

There was no evidence of any change in her situation or condition which might have a tendency to show either an arrangement or an obligation, moral or otherwise, whereby her half-brother, who was also a laborer, a section hand, and presumably without accumulated means, took upon himself the burden of providing for her maintenance, or any reason in the nature of things why he should feel impelled to do so or that she should look to him therefor, or have any reason to expect same. There was no evidence of any inability on her part to make her own living, no ill health or bodily misfortune befalling her so as to call for him to step into

the breach, no inability or refusal on the part of her children to do for her if she had need therefor. The only definite sum she mentions is \$10 in gold sent her in December, 1913, presumably a Christmas gift. She says he sent her different sums, and, taking the total of the amounts mentioned, it aggregates only \$37, and she is unable to say how much was given in a year. He was 86 years old, and there is no evidence as to how long a time was covered in the giving of the amounts mentioned.

The most that the evidence shows is that the deceased several times gave her a sum of money. But mere occasional gifts do not make the recipient "dependent" upon the giver within the meaning of the statute. True, the act does not require that the dependency must be complete or entire. A partial dependency will be sufficient to furnish the basis of an award in some amount. But dependency, either in whole or in part, must exist. It is a state or relation. Dependence is "the state of relying upon something or some one, as for anything necessary or desirable." *New Standard Dictionary*. It has in it also something of the idea of continuity of reliance so to speak. The term "dependent" in the statute is somewhat similar in meaning to the term used in the charter of associations which provide for the payment of benefits to persons dependent upon deceased members. "A dependent, as the term is used in reference to these benevolent associations, is one who is sustained by another, or *relies* for support upon the aid of another." (*Italics ours*). *Alexander v. Parker*, 144 Ill. 355, loc. cit. 368, 33 N. E. 183, 184 (19 L. R. A. 187). A person is dependent upon another when he has the moral right to rely and does rely upon such other for support either in whole or in part. *Murphy v. Nowak*, 223 Ill. 301, 307, 79 N. E. 112, 7 L. R. A. (N. S.) 398. Now the mere fact that deceased had at different times sent her an occasional sum does not establish dependency. The evidence, at the most, shows only that she would probably have received other sums as gifts in the future had he lived. In other words, she may have suffered a possible pecuniary loss in the death of her brother, but nothing more than that. But, while it is necessary to show only pecuniary loss in the case of a husband, wife, children, or parents, yet, in the case of one who is not in the above category, dependency must also be shown and be proved like any other fact. *Dooley v. Seaboard Air Line Railway Co.*, 163 N. C. 454, 79 S. E. 970; *Collins v. Penn. Ry. Co.*, 163 App. Div. 452, 148 N. Y. Supp. 777; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 68, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914O, 176; *American R. Co. v. Didricksen*, 227 U. S. 145, 149, 33 Sup. Ct. 224, 57 L. Ed. 456; *Gulf, etc., R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785; *Moffett v. Baltimore & Ohio R. Co.*, 222 Fed. 39, 43, 135 O. O. A.

607; McCoullough v. Chicago, etc., R. Co., 160 Iowa, 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23. An occasional gift or contribution does not create dependency. Bortle v. Northern Pacific Ry., 60 Wash. 552, 111 Pac. 788, Ann. Cas. 1912B, 731; Hodnett v. Boston & Albany R. Co., 156 Mass. 86, 30 N. E. 224.

[3] It may also be observed that, had dependency been proved, the trial court's ruling that \$1,500 was excessive should not be disturbed. The verdict must be based upon the probable pecuniary loss the beneficiary has sustained in the death. Authorities supra. The jury must have a reasonable basis of facts upon which to compute the damage, and it is the duty of plaintiff to supply those facts. Now the most that can be gathered from the testimony is that deceased contributed \$37 to Mrs. Sanchez throughout the past. Even if it should be assumed that he gave this in one year and the amount should be taken as a basis for succeeding years, it would take nearly twice \$37 per year to make the present value of the yearly payments, anticipated during the life expectancy of Mrs. Sanchez, equal \$1,500. And it is only the present value thereof that plaintiff would be entitled to recover if she were dependent upon the deceased. Chesapeake, etc., R. Co. v. Gainey, 241 U. S. 494, 38 Sup. Ct. 633, 60 L. Ed. 1124.

It cannot be said, therefore, that the court erred in thinking \$1,500 was excessive.

For these reasons, the judgment is affirmed, and the cause remanded for the new trial awarded by the trial court. All concur.

GREER v. SUPREME TRIBE OF BEN HUR. (No. 1789.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. INSURANCE — 787 — BENEFICIAL INSURANCE—FORFEITURE — MURDER BY BENEFICIARY.

The by-law of a fraternal beneficial association, providing that if death of a member be caused by his beneficiary the certificate shall be forfeited to the society, and shall not be paid to the beneficiary, or to the heirs, assigns, or personal representatives of the member, and one providing that no benefit shall be paid on the death of a member killed by any of the beneficiaries, apply where the named beneficiary murders the member, though then committing suicide and dying before the member, notwithstanding a by-law providing that if the designated beneficiary dies before the member, and the member makes no disposition of the certificate, it shall be paid to the member's representatives.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. — 787.]

2. INSURANCE — 787—BENEFICIAL ASSOCIATION—FORFEITURE—"BENEFICIARY."

In an insurance policy containing provisions forfeiting the same absolutely in case the death of the insured is caused by the beneficiary, the term "beneficiary" means the person who is designated such directly or indirectly by the policy, and is not limited to such persons who survive the insured.

[Ed. Note.—For other cases, see Insurance, Cent.

Dig. §§ 1955, 1957-1959; Dec. Dig. — 787. For other definitions, see Words and Phrases, First and Second Series, Beneficiary.]

3. INSURANCE — 787—BENEFICIAL ASSOCIATION—BY-LAWS.

Provisions in the by-laws of benefit societies, providing for absolute forfeiture in case the death of the member is caused by the beneficiary, are not in conflict with another provision of the by-laws dealing with policies which survive the member's death, and providing who shall receive the benefits in case of the prior death of the named beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. — 787.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by A. W. Greer, administrator of Mabel S. Atkins, deceased, against the Supreme Tribe of Ben Hur, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Sheppard & Sheppard, of Poplar Bluff, and C. E. Pope and H. F. Driemeyer, both of East St. Louis, Ill., for appellant. L. M. Hen-son, of Poplar Bluff, for respondent.

STURGIS, J. This case was tried on an agreed statement of facts, so that whatever is here stated as to the facts should be understood as being undisputed. We also desire to commend the attorneys for thus eliminating useless controversy over unimportant matters and conceding the facts which both parties knew to be true and thereby presenting the real issue in a concise and clear-cut manner.

The defendant is a fraternal beneficial association on the lodge system with ritualistic work. Its home office is in Indiana, and it complied with the laws of this state authorizing it to do business here. This suit is on one of its policies of insurance, or more properly benefit certificates, duly and regularly issued on the life of Mabel S. Atkins by her maiden name, she then being unmarried, Mabel S. Hall, who continued to be until her death a member in good standing of a local lodge of this order in Butler county. The policy or certificate was issued March 31, 1911, and named certain relatives of the insured as beneficiaries. After her marriage to William Atkins, the insured, on February 25, 1913, properly designated him as the beneficiary, as the policy and laws of the order permitted her to do. After the death of Mabel S. Atkins in good standing and all dues fully paid, on April 23, 1915, due and proper proof of her death was made and accepted by defendant. Her said husband and beneficiary being then also dead, under circumstances we shall presently state, the plaintiff was duly appointed administrator of the insured's estate. This administrator is suing for the benefit of the heirs of the insured, her brothers and a niece, and defendant concedes that if it is liable plaintiff shall recover. The case was submitted to the court as a jury on the agreed facts, and judgment was rendered for plaintiff for \$1,000, the amount of the policy.

The only defense which is made grows out of the provisions of the by-laws of this defendant order, which are made part of the policy contract, and the fact that the death of the insured was caused by the named beneficiary in the policy. The agreed facts are that on the 23d day of April, 1915, William Atkins, the husband of the said Mabel S. Atkins, and who had heretofore been designated as the beneficiary in said beneficial certificate, assaulted his said wife, Mabel S. Atkins, and inflicted injuries upon her, as a result of which she died; that, immediately after committing the assault upon his said wife, the said William Atkins cut his throat with a razor or other sharp instrument, and as a result thereof he died 20 minutes before the time of the death of his said wife, Mabel S. Atkins; that no beneficiary other than the said William S. Atkins was named by the said Mabel S. Atkins prior to her death; and that at the time of her death she left surviving her certain named brothers and a niece, being the daughter of a deceased sister, said brothers and niece being her only heirs at law.

The provisions of the policy and by-laws forming part thereof which defendant claims bar any recovery on this policy are as follows:

"When Interest Is Forfeited. Section 111. Should a member die by reason of, or as a result of, his unlawful act, his certificate of beneficial membership is not only void as set forth in these laws, but the benefits thereto are forfeited to the Supreme Tribe of Ben Hur. If the death of a beneficial member be caused or procured by his beneficiary or beneficiaries, or any of them, then, and in that event, the amount payable under the terms of his beneficial certificate shall be forfeited to the society, and shall become a part of the benefit fund in the class in which he holds his membership in the society for the use of its surviving members, and shall not be paid to the beneficiary or beneficiaries, or his or their heirs, assigns, or personal representatives or to the heirs, assigns, or personal representatives of such beneficial member." (Italics ours.)

"Membership—When Void. Section 101. No benefit shall be paid on account of the death of a member, which death occurred * * * (5) or on account of, or in consequence of, or as a result of, the violation of any ordinance of any city or town, or of any law, either civil or criminal, of any state, territory, province or country in which such member may be, which violation of ordinance or law is the proximate cause of such death or disability, or if the death or disability follows such violation of any ordinance or law, and would not have occurred except for the violation of such ordinance or law, or if killed by any of the beneficiaries; (6) or if he shall die by his own hand, whether sane or insane, whether voluntarily or involuntarily, at the time, except when the insanity of such member shall, prior thereto, have been judicially determined by the proper court."

The plaintiff, as justifying a recovery, invokes the following provision of the by-laws:

"Death or Divorce of Beneficiaries. Section 121. In the event of the death of a designated beneficiary, prior to the death of the member, and the member dies without having made disposition of said portion or all of his certificate, the same shall be paid to the legal representative of said deceased member for the use and benefit of the deceased member's heirs, if any

survive. In the event of the death of all the beneficiaries named in the certificate, and no person or persons shall be found entitled to receive the same by the laws, rules and regulations of the Order, then the benefit payable under said certificate shall revert to the benefit fund of the Supreme Tribe, in the class to which the member belonged. If the beneficiary or beneficiaries designated in any certificate shall not be entitled to receive the same, the benefit shall revert in case of death to the benefit fund for the benefit and use of all the surviving members of the class in which the deceased member belonged. In the event of the divorce of a beneficial member," etc. (Italics ours.)

[1-3] The plaintiff contends that the above policy provisions are somewhat conflicting, or at least ambiguous, and should be construed most favorably to uphold the contract and against a forfeiture. 1 Bacon, Benefit Societies, §§ 178 and 179; 4 R. C. L. p. 926. The contention is that William Atkins, who is named beneficiary in the policy and who killed his wife, the insured or beneficial member, never in fact became the beneficiary under the policy, since he died first by 20 minutes; that he was only a contingent beneficiary when he inflicted the mortal blow; that, when the insured died, the named beneficiary being also dead, her heirs, the real plaintiffs here, became, under the policy contract, the beneficiaries; and that they did not cause her death. As a corollary to this, plaintiff says that the by-laws, section 111, supra, providing for the forfeiture of the policy in case the insured's death is caused by the beneficiary, applies only when the designated beneficiary survives the insured member and thereby becomes a beneficiary in fact. This is certainly a very sharp and technical construction of this by-law, and, if followed to its necessary conclusion, a beneficial member can never be killed by one who is more than a contingent beneficiary when the mortal blow is inflicted; for, perchance, lightning or some such quick agency might end the life of the slayer before that of his victim. Using the illustration suggested by plaintiff that a boy is never his father's heir until after the father's death, so the beneficiary, as or being such, never kills the member because he is not a beneficiary until after the killing is over. This reminds us of the reasoning adopted by the builder of the "One Hoss Shay," q. v.

It seems to us, however, that there is no conflict in the provisions above mentioned, as they were written for different purposes and accomplish different objects. The provisions of section 121, as the title indicates, relate to live policies—policies which are valid obligations after the insured's death and are matured by such death—and provide who shall be entitled to the benefits of such policy in case of the prior death or divorce of the named beneficiary. The provisions of section 111, supra (and also section 101), of the by-laws, as the title indicates, relate to a totally different subject, to wit, the forfeiture of policies and the acts and conditions which make same void and have to do

with dead policies incapable of enforcement by any one. There are a number of acts there specified as forfeiting the policy and making it void (in addition to the common one of nonpayment of dues and assessments), such as suicide, sane or insane; death caused by violation of law; death from participating in a mob or riot; intemperate use of intoxicants, morphine, etc. Among these acts rendering the policy void and discharging the defendant from any liability to any one by reason thereof is that of the death of the insured caused by the beneficiary. The by-law in the most positive terms provides that, if the death is caused or produced by the beneficiary, the amount otherwise payable shall be forfeited to the society and become a part of its funds for the use of the other members; and to avoid any possible misunderstanding further specify that such amount shall not be paid to the beneficiary or his heirs, or to the heirs, assigns, or personal representative of such beneficial member, the very persons who are now claiming.

Suppose the beneficial member and her guilty husband in the present case had left children: Then they, under the provision invoked by plaintiff if it alone is to prevail, being the insured's heirs, would be entitled to the insurance, though they are also the heirs of the offending beneficiary and would profit by his wrong. This would clearly subvert the purpose of the policy provision, "to remove the temptation of anxious expectants to bring about premature death of the insured," for it is well known that a person will do for the benefit of his children even more than for himself.

We are not particularly concerned with the wisdom of this policy provision, and to our minds its purpose might as well or better be accomplished by prohibiting the offending beneficiary, and perhaps those claiming under him, from profiting by his wrong; but that is no reason why the contract should not be enforced as written unless such provision is against public policy. We might also think, as have many other courts, that a similar provision against suicide is best subserved by limiting it to conscious and intentional suicide and excluding suicide by one insane. *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236; 2 Bacon, Benefit Societies, § 334; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317, 39 Am. Rep. 660. But when the policy plainly says that suicide, sane or insane, renders the policy void, the courts will enforce it. 2 Bacon, Benefit Societies, § 336. The Supreme Court of Indiana, speaking of the same question, said:

"While forfeitures are never favored, yet, if, upon a reasonable construction, it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy should become void." *Northwestern Life Ins. Co. v. Hazelett*, 105 Ind. 212, 216, 4 N. E. 582, 584 (55 Am. Rep.

192); *Douglas v. Life Ins. Co.*, 83 N. Y. 492; 14 R. C. L. pp. 928-931.

There can be no doubt, we think, that, when a policy contains a provision designed to remove a temptation of the beneficiary to prematurely end the insured's life, it means the beneficiary who is, on the face of the policy, named or made such directly or indirectly. The case of *Grand Circle Women of Woodcraft v. Rausch*, 24 Colo. App. 304, 134 Pac. 141, is the only case similar to this one which we are able to find, and it fully sustains our position that this policy, under the facts, became forfeited and void. The policy or benefit certificate sued on in that case is similar to this one and contains this provision:

"If the member to whom this certificate shall be issued shall be murdered by any beneficiary named herein, * * * or should any beneficiary named in this certificate, * * * cause the death of such member directly or indirectly, intentionally or accidentally, then any benefits which such beneficiary might otherwise have received * * * shall revert to the Grand Circle."

The facts there were that the named beneficiary, while insane, killed his wife, the insured, and then committed suicide. It was not absolutely shown which died first, and the court did not think that an essential point, though the court said of the evidence that:

"It seems hardly possible that the beneficiary could have so crushed the skull of the insured that her brains should have protruded without causing instant death, or death before the beneficiary could have taken poison and suffered the death that his condition would seem to indicate."

It will be noted that the provision of the by-laws, sustained as a defense in that case, is not as strong as the one here, since it does not contain the express provision prohibiting payment to the heirs of the insured in case death is caused by the beneficiary, though the court arrived at this conclusion from the words making the benefits revert to the insurer. The judgment appealed from in that case was for plaintiff, and the Colorado Court of Appeals, in reversing the case, said:

"Feeling that we must uphold the conditions in the certificate or policy or make a new contract for the parties, and believing that it does not contravene any principle of sound public policy, the judgment should be and is hereby reversed, with an instruction to the trial court to dismiss the same, with costs."

The dissenting opinion in that case is based only on the proposition that, because of the use of the word "murder" and other expressions indicating that the policy was only aimed at the wrongful taking of the life of the insured by the beneficiary, it would not apply to an insane beneficiary, incapable of committing a wrongful act. The policy provisions here, however, are different in this respect, and there is no such claim of insanity.

The result is that the judgment is reversed.

FARRINGTON, J., concurs; ROBERTSON, P. J., not sitting.

STATE ex rel. FEHRENBACH et al. v. LOGAN et al. (No. 1793.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS — ACCRUAL OF ACTION.

A statute of limitation generally begins to run only when the cause of action asserted accrued to the person asserting it, and it does not accrue in the legal sense until it comes into being and the parties benefited have a right to assert same in court.

[For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. —43.]

2. LIMITATION OF ACTIONS — ACCRUAL OF ACTION.

A right of action accrues whenever such a breach of duty has accrued, or such a wrong has been sustained, as will give a right to then bring and sustain a suit.

[For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. —43.]

3. LIMITATION OF ACTIONS — ACCRUAL OF ACTION.

A statute of limitation will be so construed as not to bar an action until the statutory period has elapsed after the cause of action has come into substantial being and the party asserting it has a right to sue thereon (citing section 1887, Rev. St. 1909).

[For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. —43.]

4. LIMITATION OF ACTIONS — 57(1)—ACCRUAL OF ACTION—PUBLIC OFFICERS.

There is a distinction between breaches of public duty and breaches of private duty as applied to public officers. In the case of a public duty, although indirectly due to an individual, the violation gives rise to a right of action in favor of the individual against the officer only when the former sustains damages as a consequence thereof, and the statute runs from that time, not from the time when the duty is violated.

[For other cases, see Limitation of Actions, Cent. Dig. §§ 312, 313, 315-320, 322; Dec. Dig. —57(1).]

5. LIMITATION OF ACTIONS — 57(1)—ACCRUAL OF ACTION—PUBLIC OFFICERS.

Where a public officer commits a wrongful act, not directly against an individual, a cause of action does not instantly exist for the wrong, so as to set in motion the statute of limitations. Where an officer's wrongful conduct is a general violation of official duty, as distinguished from a wrong directed at an individual, the wrong does not complete the cause of action, but the subsequent damage aids, or rather creates, the cause of action itself.

[For other cases, see Limitation of Actions, Cent. Dig. §§ 312, 313, 315-320, 322; Dec. Dig. —57(1).]

6. LIMITATION OF ACTIONS — 57(1)—ACCRUAL OF ACTION—OFFICIAL BOND.

Action on the official bond of a county recorder for breach of duty in entering satisfaction of a trust deed without production of the note secured. Plaintiff did not acquire an interest in the land until more than three years after said satisfaction was entered. He was not barred from suing on the recorder's bond by the three-year statute of limitation, because plaintiff's right did not accrue until after acquisition of an interest in the land, and the statute did not begin to run until plaintiff's right accrued.

[For other cases, see Limitation of Actions, Cent. Dig. §§ 312, 313, 315-320, 322; Dec. Dig. —57(1).]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by the State of Missouri, on the relation of William Fehrenbach and others, against Frank B. Logan and others. From

a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Wolfe & Burnett, of Joplin, for appellants. Gray & Gray, of Carthage, for respondents.

STURGIS, J. This is an action on the official bond of the recorder of deeds of Jasper county, and is the sequence of the decision of this court in *Wilkins v. Fehrenbach*, 180 S. W. 22. We held in that case that a mortgage or deed of trust did not lose its force and priority as a lien against the real estate conveyed by reason of a wrongful release of the same on the margin of the record by one not owning the secured note and not producing and having such note canceled as required by section 2844, R. S. 1909, notwithstanding the recorder had permitted such release to be made and had certified that the secured note had been produced and canceled as the law directs. That suit was against the present relators as owners of the land, having purchased same by mesne conveyances from the maker of the deed of trust wrongfully released, and resulted in a judgment canceling the release and foreclosing the deed of trust. The opinion in that case conceded that defendants, relators here, purchased said land in good faith believing same to be clear of said incumbrance, which belief was induced by the wrongful and void release and certificate of the recorder. The present cause of action is predicated on the wrongful acts of the recorder in making such release.

A demurrer was sustained to relators' petition on the ground that on the facts stated the relators' cause of action is barred by the statute of limitations of three years contained in section 1890, R. S. 1909. It will be sufficient to say that the petition alleges that the wrongful marginal release and certificate thereto by the recorder was made December 31, 1910; that thereafter, in 1913, the relators in good faith, and relying on the fact that the records showed said land to be clear and free of said incumbrance, first loaned money on said land to the then record owner, and later, in March, 1914, became the owners of said land by purchase under foreclosure proceedings and deeds duly made and recorded; that, after unsuccessfully defending the suit of *Wilkins v. Fehrenbach*, supra, both in the circuit court and this court, whereby said released deed of trust was declared a valid lien against relators' said property, the relators were compelled to and did discharge the lien and judgment in the amount of \$1,000, to their damage in that sum. The official bond of defendant as recorder, set forth in the petition, is conditioned that he will faithfully perform the duties enjoined by law as recorder, and the breach thereof is set forth thus:

"Plaintiffs further state that the said defendant Frank B. Logan has failed and neglected to perform the conditions of his said bond, in that he has not faithfully performed the duties enjoined on him by law as such recorder, in this, to wit: That on the 31st day of Decem-

ber, 1910, the said Frank B. Logan negligently, carelessly, wrongfully, and against and in contravention of the statutes of the state of Missouri in such cases made and provided, permitted and allowed one Rose McSherry to satisfy of record in his said office a certain deed of trust [describing it] for the purpose of securing the payment of a certain promissory note in said deed of trust described, in the sum of \$800, which said deed of trust had theretofore been duly and legally recorded in said office, in which said note said W. F. Shannon was the payee, without requiring the said W. F. Shannon or the said Rose McSherry, or any one for the said W. F. Shannon, to produce and cancel the said promissory note in the presence of him, the said recorder, and that said promissory note was not, and never has been, so produced and canceled. But plaintiffs state that said Frank B. Logan, as said recorder, at the time of permitting said Rose McSherry to enter satisfaction of said deed of trust on the record thereof in his said office, as aforesaid, wrongfully and falsely caused to be entered thereon the certificate of said recorder that the said note described in the said deed of trust was produced and canceled in the presence of said recorder."

It will thus be seen that the wrongful release of this deed of trust on which relators rightfully relied in purchasing this land as showing same free and clear of this incumbrance, and which they were afterwards compelled to pay, was made more than three years prior to such purchase and almost three years before relators had any interest in or dealing with such land. This suit was brought, however, within three years after relators first acquired an interest in said land, and within a few months after they were compelled to and did discharge such incumbrance.

Defendants' contention is that, since this suit was not instituted for more than three years after the wrongful act of the recorder was committed, the same is barred by the provisions of sections 1887 and 1890, R. S. 1909, as follows:

"Sec. 1887. Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"Sec. 1890. Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise."

[1] It will be seen that, according to defendants' contention, relators' cause of action was barred before it came into being; for certainly relators never had any cause of action prior to their having any dealings with or interest in this land. To so construe the statute is violative of the fundamental rule applicable to the construction of all limitation statutes, to wit: That the same begins to run only when the cause of action asserted accrued to the person asserting it, and it does not accrue in the legal sense until it comes into being and the parties benefited have a right to assert same in court. 25 Cyc. 1067. In refuting the idea that the statute of limitations could run against one before

he is entitled to sue thereon, the Supreme Court, in *Dyer v. Brannock*, 68 Mo. 391, 422 (27 Am. Rep. 359) said:

"If the statute of limitations is construed to run against them from the death of the mother, it operated against parties who had no right of action, and who would have been trespassers had they undertaken to enter. Indeed, upon this construction of our statute, had the husband lived three years or more after the death of his wife, the title of the heirs would be totally destroyed, since they cannot sue during the continuance of the particular estate, and before its termination the three years from the death of the mother have gone by. * * * It is generally understood that the statute of limitations does not run against any one who has no right of possession. * * * The person barred by the statute is one whose right of entry has accrued, and who neglects to sue during the three years allowed after his right of action accrues."

In *Dyer v. Wittler*, 89 Mo. 81, 14 S. W. 518, 58 Am. Rep. 85, the court reaffirms this doctrine at pages 90 and 95. In *Campbell v. Laclede Gas Co.*, 84 Mo. 352, 378, a majority of the Supreme Court took occasion to say that:

"A statute which deprives a married woman of her property for failing to sue for it in 24 years, when during all that time she had no right to the possession, and could not, therefore, maintain an action for such possession, is, in my judgment, plainly unconstitutional."

[2] In *Aachen Ins. Co. v. Morton*, 156 Fed. 654, 84 C. C. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692, the court, through Justice Lurton, said:

"A right of action accrues whenever such a breach of duty * * * has occurred or such a wrong has been sustained as will give a right to then bring and sustain a suit."

[3] Many decisions will be found asserting the doctrine that any statute of limitations will be so construed as not to bar an action until the statutory period has elapsed after the cause of action has come into substantial being and the party asserting it has a right to sue thereon.

In fact, the reading of the statute itself, section 1887, now in question, so asserts, since it says that civil actions not for the recovery of real estate can be commenced within the period prescribed in the following sections "after the cause of action shall have accrued." The cause of action here did not accrue—that is, come into being with some one capable of asserting it in court—till within three years before this suit was filed.

[4] The defect with defendants' theory and argument is that they assume that the wrongful act of the recorder is synchronous with the injury to relators. They fail to observe the well-recognized distinction between actions founded on direct and certain injury following some wrongful or negligent act and those based on consequential and indirect damage flowing from such an act. 19 Enc. Law (2d Ed.) 200. This distinction is especially applicable in cases arising from official neglect or misfea-

sance. Thus Wood on Limitations, § 178, states the law thus:

"Every breach of duty does not create an individual right of action; and the distinction drawn by moralists between duties of perfect and imperfect obligation may be observed in duties arising from the law. Thus a breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy nor his liability to be precluded by time from its prosecution will commence till he has suffered some actual inconvenience. But it is otherwise where there is a private relation between the parties, where the wrongdoing of one at once creates a right of action in the other."

In 25 Cyc. 1149, we find this statement:

"On the other hand, a distinction has been made between breaches of public duty and breaches of private duty; it being held that in the case of public duty, although indirectly due to an individual, the violation gives rise to a right of action in favor of the individual against the officer only when the former sustains damage as a consequence thereof, and that the statute runs from that time, not from the time when the duty is violated."

The very question before us received careful consideration in *State, to Use of Cardin, v. McClellan et al.*, 113 Tenn. 616, 85 S. W. 267, 3 Ann. Cas. 902, a suit on the official bond of the register of deeds for failure to correctly record a deed, and we quote from that case:

"The second assignment of error which is filed in behalf of defendant's sureties presents a question of more difficulty, and one that we have no case deciding. It is whether the cause of action of one who is injured by a breach of public duty by a public officer accrues and is complete when the breach or wrong is done, or when the consequential injury occurs. * * * The complainant insists that the failure of the register to correctly register the deed was a breach of a duty which he primarily owed to the public, and that he was not injured, and had no cause of action therefor, until his property was levied upon and sold by a creditor of his vendor, when his loss was sustained, and his right of action accrued and was complete, which was within six years next before he filed his bill, and therefore it is not barred. * * * Therefore a right of action against a public officer growing out of a breach of an official duty involving individual rights is not complete and does not accrue until the happening of a consequential injury resulting proximately from the breach. * * * The action not accruing and being complete until the injury to the individual occurs, under the elementary principle that no time runs to the plaintiff until he has the right to sue, the statute of limitations does not begin to run until that time. If the rule was otherwise, meritorious actions might be barred before the plaintiff had the right to bring his suit. This would work gross injustice. It would be a denial to the injured party of his day in court. * * * It would seem like a mockery of justice to say that the law required him to sue before he had anything to sue for. The cases cited by appellant's counsel to the effect that the right of action for breach of contract accrues at the time of the breach are clearly distinguishable from an action for official negligence, and the distinction is set forth in the cases from which we have quoted."

In commenting on the above case, Justice Lurton, in *Aachen Fire Ins. Co. v. Morton*, 156 Fed. 654, 84 C. O. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692, said:

"That was an action upon the official bond of a register of deeds, etc., for damages resulting from his failure to correctly register a deed placed in his hands for that purpose by the plaintiff. It was held that the statute of limitations did not begin to run until the plaintiff had sustained some injury in consequence. But this was placed upon the well-recognized distinction between the liability of a public official for a breach of official duty and the right of action which may arise between persons having only private relations with each other when there has been a breach of some contract or duty which one personally owes to the other."

Other cases holding this same doctrine as to the statute of limitations in actions based on misfeasance of a public officer are *People v. Cramer*, 15 Colo. 159, 25 Pac. 302; *Steel v. Bryant*, 49 Iowa, 116; *Bank of Hartford v. Waterman*, 26 Conn. 324; *Lee v. Wood*, 85 Ala. 169, 4 South. 693. The case of *State ex rel. v. Grizzard*, 117 N. C. 105, 23 S. E. 93, cited by defendant, does hold a contrary doctrine, but we agree with the Supreme Court of Tennessee in the *McClellan Case*, supra, that the better reasoning and weight of authority are against the view taken by the North Carolina court.

It might well be held, as illustrating the two lines of cases with reference to the time when the statute of limitations commences to run, that had the owner of the deed of trust wrongfully released brought an action against the recorder for any damage to her, such damage would be direct and immediate, and the statute of limitations would commence to run when the wrongful act was committed (*State v. Walters*, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244; *McKay v. Coolidge*, 218 Mass. 65, 105 N. E. 455, 52 L. R. A. [N. S.] 701, Ann. Cas. 1916A, 888), but as to relators no damage was then done, and none was done till they dealt with the property on the false showing that the same was free and clear of this incumbrance. In the *McKay Case*, supra, which was a suit on the official bond of a clerk, the court distinctly says that while the misconduct of the clerk was the initial wrong—

"that violation of his rights was personal to the plaintiff. It was of such nature that the law implied a damage, even though in fact only nominal, for which an action might have been brought at once. The duty which the clerk is alleged to have violated is one directly and instantly affecting the rights of the plaintiff. * * * Hence it is not necessary to discuss the distinction sometimes suggested, to the effect that a public officer is not liable to an individual for breach of a public and official duty until there has been suffered a special and peculiar injury not common to the general public—a proposition which finds support in" the cases above cited.

We find no case in this state holding the contrary of these views. A number are in line. *State ex rel. v. Tittmann*, 134 Mo. 162, 168, 35 S. W. 579, was a suit on a curator's bond, and the court held that, where the breach of the bond was merely formal and no damage then arose, the statute of limitations would not begin to run until the time substantial damages occur. The principle involved in *Lesem v. Neal*, 53 Mo. 412, is

applicable here. That was an action on a sheriff's bond for the unauthorized release of attached property, and there was a plea of the statute of limitations, the question being as to when the statute began to run, whether from the date of the release of the property or from the date of final judgment in the attachment suit, when the fact of damage was ascertained. The court held the latter, and in the course of the opinion uses this language:

"In the case under consideration, at the time the goods were released by the defendant from the attachment, no right of action could accrue to the plaintiffs to sue therefor, even if the release was wrongful. Until they recovered their judgment in the attachment suit, they had no right to sue; and, in fact, a right of action might never have accrued to them for said release."

In *State ex rel. v. Finn*, 98 Mo. 532, 541, 11 S. W. 994, 996 (14 Am. St. Rep. 654) on a similar state of facts, the court said:

"Until plaintiff recover its judgment in the attachment suit, it was not known whether or not it had any valid demand * * * or had suffered any substantial damage."

[5] The case most relied on by defendant is that of *State ex rel. v. Musick*, 145 Mo. App. 33, 130 S. W. 398, s. c., 165 Mo. App. 214, 145 S. W. 1184, a suit on a notary's bond for falsely certifying the acknowledgment of a deed. In that case the court held that there is no statutory provision defining or fixing when a cause of action accrues, and the solution of that question must be by recourse to the common law. The statement of the cause of action there in suit shows that, by reason of this false acknowledgment, which plaintiff believed to be genuine, and which was made for that purpose, she accepted such deed to her damage. The damage was therefore directly in consequence of the false acknowledgment and contemporaneous therewith. The court therefore properly held that the statute began to run with the doing of the wrong, and that, as there was no active concealment by the wrongdoer, such time would not be postponed until after the discovery of the wrong. To the same effect is *State ex rel. v. Stonestreet*, 92 Mo. App. 214, and we fully indorse what is there said at pages 218 and 219, as follows:

"Where there is no cause of action in the plaintiff until the damage happens, then the statute will only begin to run from the date of the damage. But where an officer commits a wrongful act directly against an individual, it seems to be clear that a cause of action then instantly exists for the wrong, notwithstanding all of the injury has not yet followed. The cause of action is at once complete when the act directed at the individual is committed. The subsequent damage which may follow is but additional measure of the injury. * * * Where an officer's wrongful conduct is not a mere general violation of official duty, but, as before stated, is a wrong directed at an individual, the wrong as such is complete when committed and completes a cause of action; the subsequent damage being consequences in no way aiding the cause of action itself, though aggravating and measuring the injury."

[6] It will be seen that the court carefully noted the line of demarcation between cases

where the wrongful act of the public officer is directed against an individual and affects him immediately and where such act causes damage only indirectly and consequentially at a later date. There is no doubt but that the court rendering that opinion would hold the converse of what is there said, to wit: That where, as here, a public officer commits a wrongful act not directly against an individual, a cause of action does not instantly exist for the wrong; and the cause of action is not complete when the act not directed at the individual is committed; and where an officer's wrongful conduct is a general violation of official duty as distinguished from a wrong directed at an individual the wrong does not complete the cause of action, and the subsequent damage does aid, or rather create, the cause of action itself. *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576, and *Rankin v. Schaeffer*, 4 Mo. App. 108, did not involve wrongful acts of a public officer, and merely follow the general rule that a wrongful act causing damage which may be sued for at the time sets the statute in motion, and the same is not postponed because the amount or extent of the damages is not then ascertained or ascertainable.

Our conclusion is that on the facts stated relators' cause of action is not barred by limitation, and the judgment of the circuit court sustaining the demurrer is reversed, and the cause remanded for further proceedings in accordance with this opinion.

FARRINGTON, J., concurs. ROBERTSON, P. J., not sitting.

AREL v. FIRST NAT. FIRE INS. CO. (No. 1752.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

1. INSURANCE — §553(1) — FORFEITURE — PROOF OF LOSS — FALSE SWEARING.

In an action on a fire insurance policy which provided that, in case of any false swearing by the insured relating to the insurance, either before or after a loss, the policy should be void, where there was evidence that insured made a sworn claim for the full value of a boiler which amounted to one-sixth of the amount of the insurance, and he himself testified that the boiler was not injured by the fire, but was included because it was a loss to him on account of the loss of his business, and that he knew when he made the claim that it had not been damaged by the fire, there could be no recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1362-1366; Dec. Dig. § 553(1).]

2. TRIAL — §141 — DIRECTING VERDICT — TESTIMONY OF PLAINTIFF.

Where plaintiff's own testimony, which is uncontroverted, shows that he is entitled to no relief, the trial court must direct a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by N. A. Arel against the First National Fire Insurance Company. From an order granting plaintiff a new trial after di-

rection of a verdict for defendant, defendant appeals. Remanded, with directions to set aside the order and reinstate the judgment for defendant.

John Schmook, of Springfield, and Hogsett & Boyle, of Kansas City, for appellant. Walker & Musgrave and G. G. Lydy, all of Springfield, for respondent.

FARRINGTON, J. [1] Respondent, Arel, brought suit to collect the amount of insurance named in a fire insurance policy issued by the defendant on the machinery and equipment of a steam laundry in Springfield. He did not own the building in which the laundry was operated. The policies taken out by him, one with the defendant, covered only the machinery and equipment used in the laundry, the description of the property insured as set forth in the policy being as follows:

"\$1,550.00 on laundry machinery, fixed and movable, and its spare parts, including boiler, engine, smokestack, wringers, drying room, ironing machines, starching machines, mangles, collar, cuff and other machines, washing machines, shafting, gearing, pulleys, hangers, steam and water pipes, and the fittings and fixtures, tools of trade, tables, shelving, sewing machines, racks and supplies, office furniture and fixtures and supplies as are usually used in steam laundries, all while contained in the two-story brick and stone building and its additions adjoining and communicating, and situated at 213 South Market street, Springfield, Missouri.

"\$50.00 on soap, starch, paper, twine, and other laundry supplies while contained in the above-described building."

A number of defenses were set up in the answer, to wit: That plaintiff caused the insured property to be set afire; fraud in the procurement of the policy; that plaintiff in the proof of loss made after the fire had intentionally, willfully, falsely and fraudulently overvalued the goods and property lost and damaged by the fire and the extent of the loss by said fire; that his proof of loss contained representations as to articles which were lost or damaged by reason of the fire when in fact such articles so claimed by him as lost or damaged were not damaged at all by said fire; and that the plaintiff knew when he made up his proof of loss that some of the articles which he claimed were totally destroyed and lost by the fire were in fact not damaged by reason of the fire in any particular.

The court admitted testimony in support of the defenses much of which need not be detailed in disposing of the case under the view we take.

At the close of plaintiff's evidence in chief the trial court sustained a demurrer to the evidence and rendered a judgment in favor of the defendant so far as plaintiff, Arel, was concerned. The Drovers' Bank of Springfield was a party plaintiff below, and the court rendered a judgment in its favor on account of an interest the bank had in the property insured by reason of a chattel mortgage, but the judgment as to the bank is not included in this appeal.

Plaintiff filed a motion for a new trial which the court sustained for the reason that the court concluded it had erred in sustaining the demurrer to plaintiff's evidence. It is from the order granting plaintiff a new trial that defendant has appealed to this court.

We are of the opinion that the plaintiff's documentary evidence supported by his own testimony defeats any recovery under this policy, and we will refer to such of his evidence as is vital to the case.

As stated, the property insured was machinery and equipment of a laundry plant; plaintiff not owning the building in which it was operated. The clause in the policy covering the property covered it as laundry machinery, enumerating the various articles making up such a plant. The following clause was in the policy:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

We have italicized that portion relied on herein as a defense.

The proof of loss sworn to by the plaintiff and filed with the insurance company contained the following statement with reference to the loss and the property damaged:

"The actual cash value of each specific subject thus situated and described by the aforesaid policy at the time of loss, and the actual loss and damage by said fire to the same, as shown by annexed schedule, and for which claim is hereby made, was as follows. * * *

Attached to this and made a part thereof the plaintiff furnished a list of the various articles owned by him and covered by the policy. Opposite each article he placed the value thereof. The first item appearing on this list is:

"One 40 H. P. boiler with injector and appurtenances..... \$750.00."

There was much testimony by the witnesses as to the extent of the loss and the value of the property. However, not one testified that there was any damage whatever to this boiler, for the reason that it was in a part of the building that was not reached by the fire. After the fire straw and shavings were found on the floor around the boiler which had not been ignited. But the plaintiff after a long examination and cross-examination, when questioned by the trial judge, testified as follows:

"By the Court: Q. Mr. Arel, tell the court and the jury what effect the fire had on the boiler connected with your place of business. A. The cause of the fire directly wasn't very great on the boiler as far as the fire is concerned. That's what you want to know, isn't it? Q. What was it? What did it consist of, if anything? A. Well, I don't know whether you would allow me to state what I want, but I have answered that as far as the fire is concerned it didn't damage the boiler anything to speak of, but it was the fire put me out of business. Q. The boiler was as good after the fire as it was the day before? A. It was. I would say it was worth as much for running

purposes, for running there, but I was out of business and couldn't run, so it was worthless to me on account of the fire. Q. And the loss to the boiler, the damage to the boiler was occasioned or you calculated that on the basis that your laundry couldn't be operated, and it was worthless as a part and parcel of the laundry, but was not directly injured by the fire itself? Do you claim it was injured by the water and smoke? A. I think not. Think I testified it wasn't. There was no fire in the boiler room. I think I testified to that. There was some straw in the boiler room yet. I think I testified to that.

"By Mr. Hogsett: Q. Mr. Arel, you knew the facts that you have just testified to here, at the time, the next day after the fire, didn't you? A. Yes, sir. Q. You learned these facts at the time? A. Yes, sir. Q. You knew these facts on January 7, 1915, when you swore to the proof of loss? A. Yes, sir."

It will be seen from this testimony that the plaintiff himself admitted that he had represented in his proof of loss to the company that there had been a total loss of \$750 as to this boiler which he said at the trial was not damaged in the least by the fire, and which he knew at the time he made up and swore to the proof of loss had not been touched by the fire. It will be noted from the provision in the policy above quoted that the policy is void in case of any fraud or false swearing by the insured either before or after the loss.

Plaintiff in his testimony admits that the sworn proof of loss was false as to the claimed damage to this boiler, and he further admits that he knew at the time he made the proof of loss that there was no damage to the boiler.

False and fraudulent swearing as to any matter in a policy avoids the entire policy. *Hall v. Western Underwriters' Ass'n*, 106 Mo. App. 470, 81 S. W. 227. The rule as declared in that case is a wholesome one for the reason that, should those claiming loss under fire insurance policies be permitted to make statements in proofs of loss concerning lost or damaged articles which they know were not lost or damaged at all by the fire for the purpose of getting insurance to which they were not entitled, and be permitted to collect anything under the policy in the face of a policy provision such as we have in this case, it would amount to a travesty on justice, be a denial of the right of parties to make their own contracts, and furnish an incentive for wrongdoing. See, also, *Hamberg v. Insurance Co.*, 68 Minn. 335, 71 N. W. 388; *Fowler v. Phoenix Ins. Co.*, 35 Or. 559, 57 Pac. 421; *Home Insurance Co. v. Connelly*, 104 Tenn. 93, 56 S. W. 828.

The following cases, where false or fraudulent statements had been made deny recovery against the insurance companies: *Rovinsky v. Northern Assur. Co.*, 100 Me. 112, 60 Atl. 1025; *Simon Cloak Co. v. Aetna Ins. Co.* (City Ct. N. Y.) 141 N. Y. Supp. 553; *Pottle v. Liverpool & London & Globe Ins. Co.*, 85 Atl. 1058¹; *Claffin v. Insurance Co.*,

110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76; *Anibal v. Insurance Co.*, 84 App. Div. 634, 82 N. Y. Supp. 600; and 4 *Cooley's Briefs on the Law of Insurance*, pp. 3423 and 3431.

[2] Where plaintiff's own statement of the facts, which is uncontroverted, shows that he is entitled to no relief, it is the duty of the trial court to direct a verdict for the defendant. *May v. Crawford*, 150 Mo. loc. cit. 527, 51 S. W. 693; *Gee v. Van Natta-Lynds Drug Co.*, 105 Mo. App. 27, 78 S. W. 288; *Carter-Montgomery v. Steele*, 83 Mo. App. loc. cit. 215; *Gilmore v. M. B. of A.*, 186 Mo. App. 445, 171 S. W. 629; *Snyder v. Free*, 114 Mo. loc. cit. 376, 21 S. W. 847.

The facts of this case must be distinguished from the facts appearing in those cases wherein there is a discrepancy between the amount claimed in the proof of loss and the amount found by the jury at the trial to be due. In our case it was known to the plaintiff, and he testified at the trial that he knew, that at the time he made up and swore to the proof of loss there was no damage whatever by fire to the boiler.

Respondent cites the case of *Walker v. Phoenix Ins. Co.*, 62 Mo. App. loc. cit. 226, where the court declares the rule that it is not intended by the policy that a mistake or an unintentional error or a misstatement of an immaterial matter in the affidavit in the proof of loss should avoid the policy.

The facts of our case, by the plaintiff's own testimony, show that the error was intentional and was a misstatement of a material matter, to wit, claiming \$750 loss where there had been no loss, or a sum equal to about one-sixth of the total amount of insurance carried.

In *Schulter v. Insurance Co.*, 62 Mo. 236, cited by respondent, the policy provided that it should be forfeited if the assured should be guilty of fraud and false swearing in making the proof of loss after the fire. In our case the policy provides for forfeiture in case of fraudulent or false statements. Neither was the statement in that case, like the one at bar, one about which there could be no difference of opinion. The boiler was either totally destroyed or damaged by fire or was not. The plaintiff in his proof of loss claimed total loss; while in his testimony at the trial of the case he admitted that there was no damage or loss whatever to the boiler by reason of the fire.

Nor is the case of *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570, cited by respondent, applicable here; for in that case the court found that the amount of machinery that was not in the burned portion of the mill was a mere trifle when compared with the total amount actually lost; and in that case there was no question of a false statement in the proof of loss, and the court in fact gave credit for the machinery that was not damaged. Our case turns on the question of

¹ Reported in full in the Atlantic Reporter; reported as a memorandum decision without opinion in 100 Me. 584.

whether the plaintiff knew when he made his sworn proof of loss that there was contained therein a statement of fact which he knew did not exist.

The action of the trial court in sustaining the demurrer to the evidence and entering a judgment for the defendant as against the plaintiff was entirely proper, and, as the uncontroverted evidence of the plaintiff shows that he is barred from a recovery, the action of the trial court in granting his motion for a new trial was erroneous.

It results that the cause must be remanded, with directions to the circuit court to set aside its order granting plaintiff a new trial and reinstate the judgment heretofore entered for the defendant.

ROBERTSON, P. J., and STURGIS, J., concur.

AREL v. GIRARD FIRE & MARINE INS. CO. (No. 1753.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by N. A. Arel against the Girard Fire & Marine Insurance Company. From an order granting plaintiff a new trial after direction of a verdict for defendant, defendant appeals. Remanded, with directions to set aside the order and reinstate the judgment for defendant.

John Schmook, of Springfield, and Hogsett & Boyle, of Kansas City, for appellant. Walker & Musgrave and G. G. Lydy, all of Springfield, for respondent.

FARRINGTON, J. This is a companion case to that of Arel v. First National Fire Insurance Company, 190 S. W. 78, in which an opinion has this day been handed down. The same issues were presented and the same contentions made in this case as in that, so that this case is in all things governed by that opinion. For the reasons therein stated, this cause is remanded, with directions to the circuit court to set aside its order granting plaintiff a new trial and reinstate the judgment heretofore entered for the defendant.

ROBERTSON, P. J., and STURGIS, J., concur.

Ex parte CROCKETT. (No. 11687.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 18, 1916.)

1. HABEAS CORPUS \S 85(1) — CUSTODY OF CHILD—EVIDENCE.

Evidence in habeas corpus proceeding held to show that the child's best interests would not be promoted by transferring custody to father from grandparents, with whom she had lived all her life, and to whose custody the father had for a long period assented.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. \S 85(1).]

2. HABEAS CORPUS \S 85(1) — CUSTODY OF CHILD—EVIDENCE.

While it is the universal presumption that, as between the father and grandparents of an infant, the father is entitled to the custody, such presumption should not be indulged to override evidence to the contrary.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. \S 85(1).]

Ellison, P. J., dissenting.

190 S.W.—6

Original proceeding by habeas corpus by George R. Crockett to secure custody of his daughter, Lura Marie Crockett. On exceptions to the report of the special commissioner that it would be for the best interests of the daughter that she be surrendered by the respondents, her grandparents. Peremptory writ denied, and infant remanded to custody of respondents.

Virgil V. Huff, of Marshall, and Williams & Williams, of Boonville, for petitioner. John A. Rich and C. P. Storts, both of Slater, and Duggins & Duggins, of Marshall, for respondents.

JOHNSON, J. This is an original proceeding by habeas corpus, begun July 2, 1915, by George R. Crockett, of Marshall, to secure the custody of his infant daughter, Lura Marie. The respondents are the maternal grandparents of the child, who has been a member of their family since her birth, which occurred at respondents' home in Slater on January 28, 1908. The pleadings are voluminous, and recite the details of the controversy with particularity; but the parties concede in their brief and argument that the principal question at issue is whether the true welfare of the child will be promoted by taking her from her grandparents, to whom she is strongly attached, and giving her to her father. Our special commissioner heard and reported the evidence, and submitted conclusions of fact and law, in which he reached the final conclusion that the petitioner "is a fit and competent person to take charge of his child, and that no special or extraordinary reason has been shown by respondents why he should not have the custody and control of her, and that it would be for her best interest and welfare that she be surrendered by respondents." Exceptions were filed to the report, and the case was argued orally; the interested parties being present at the argument. The material facts of the case are as follows:

The petitioner resided in Marshall, where he is engaged in the real estate business. He is successful in business, belongs to one of the oldest and most highly respected families in the community, and is a young man of high character. By his own efforts he has accumulated an estate of more than \$4,000, and has a yearly income from his business of \$2,000. There is no question of his ability to support and rear his child in a proper and suitable manner. His parents live at Marshall, have reared three children, and his father's wealth is estimated at \$40,000. The petitioner and Myrtle, the only daughter of respondents, were married at respondents' home in Slater, April 17, 1907, and the young couple made their home in Marshall, where the petitioner was engaged in the grocery business. They purchased and furnished a residence, and kept house until the Christmas holidays, when they went to Slater to visit

respondents. The young wife was enfeebled and in poor health. The couple were well mated and happy, the relations between petitioner and respondents were of an unusually affectionate character, and the relations between respondents and the parents of the petitioner were most cordial.

The only thing that cast a shadow over the happiness of the family was the condition of Myrtle's health, which grew worse during the holiday visit, and became so serious that she could not return to her home in Marshall. After the birth of her child, her health did not permanently improve, but steadily grew worse. She became afflicted with tuberculosis, and died at St. Louis September 21, 1909. She had been taken to that city for medical treatment, and the expenses of her last sickness and burial were great, and in large part were defrayed by the respondent grandfather, who is a man of large means; his wealth being estimated at more than \$50,000. He had loaned the petitioner \$3,300 to pay on the purchase price of the residence in Marshall, and voluntarily assumed the burden of sharing the expenses of his daughter's last sickness and burial. There is no suggestion in the evidence that the petitioner, whose ready money was exhausted, tried to shirk any duty or was lacking in devotion to his wife. The conduct of all the parties was exemplary and most creditable.

The care of the infant daughter from its birth devolved upon the grandmother, and the incidental burdens were unusually onerous. The child was prematurely born, weighed only 4½ pounds, and was frail and delicate. Before its birth, Myrtle said to her mother:

"Mamma, in case I don't get well, I want you to get my baby. I feel that in your years, after you have raised yours, it is asking a good deal; but I know your ways and your ideals, and you know how to raise a baby."

Before leaving for St. Louis, Myrtle, having a premonition of approaching death, repeated this desire to her mother, and again just before her death. Petitioner did not know of these requests, but his own opinion and desire were the same. His parents would have gladly assumed the care of the orphan, but agreed with him that respondents, who, of course, were anxious to keep the child, were entitled to that honor, as they all esteemed it to be. The discussion of this tender subject ended in the father saying to the maternal grandmother:

"I will leave her here. All I ask is that you raise her like Myrtle. She could not have a better home. I don't think it could be improved on."

The family of respondents thereafter consisted of themselves and their grandchild, whom they took into their lives and hearts as their own daughter. A grown son, who has his own home, is their only living child, and the grandfather in his will has made his grandchild an equal heir with his own son.

The petitioner continued to live at Marshall, which is about 12 miles from Slater, the two cities being connected by railroad, and during the first three years following the death of his wife his custom was to make week-end visits at respondents' home, where he was always affectionately received. He contributed nothing to the support of his child, not from any disinclination, but because respondents were abundantly able and willing to bear that small burden themselves. Father and child loved each other, and both looked forward to the weekly visits, but naturally the child's strongest attachment was for her grandparents. She is not robust, is nervous, physically resembles her mother, and has required the services of a physician many times for childish ailments.

On October 9, 1913, the petitioner married Mary Graham, a young widow, at Mexico, after a year's courtship, during which his Sunday visits alternated between the homes of respondents and Mrs. Graham. He first mentioned to respondents the subject of his approaching marriage in a letter dated October 1, 1913, in which he said:

"I fully intended to talk it over with both of you for the past several weeks, but have failed to do so. It is a most serious question with me, and especially so when I am in the presence of my darling little girl and in Myrtle's home. I am taking this step, not unthoughtfully, but after thinking it over a great deal, and after seeking Divine guidance. * * * I have talked frankly with her [Mrs. Graham], and have told her no one could fill Myrtle's place in my life. * * * She understands I worship Lura Marie. * * * She will be a tender-hearted, true-hearted step-mother. If I were not sure of this one thing, I could not take this step. * * * While this step is bound to touch a tender chord in each of your hearts, yet I do trust I am not doing something that meets with your disapproval. I feel toward you almost the same as toward my own father and mother, and I shall always feel the same toward you as I do now. I wish I knew how to express my appreciation of all you have done for me and for Lura Marie, but words are insufficient. I want you to talk this matter over with Lura Marie, and explain to her the best you can, for her future happiness and yours and mine shall depend very largely on the way she and Mary feel toward each other."

On returning from his wedding trip, petitioner wrote the grandmother from Marshall, saying:

"I am getting so anxious to see all of you; want you to meet Mary, and she wants to know you. I feel sure that, after you know her, you will think a great deal of her, and I want to bring her to Slater as soon as it will suit you for me to bring her."

In the answer to this letter the grandmother said, in part:

"This is still Myrtle's home, and her own dear parents and her own dear baby and her sweet memories, wishes, and requests are still fresh in our hearts; so do you think we could just now welcome Mary into our home as you, she, or we would like to? No; not at present. We are not mad, nor have any hard feelings toward her in the least, only would like for her to feel welcome, and I know she will think it best right now, for she has a woman's heart. Want you to come when it suits you, and whenever you want to see Lura Marie. Think it would be best

for you to come alone this time, and let us have a heart to heart talk, and feel the happiness of us all will depend on you right now. We think Lura Marie's happiness and welfare is of the greatest importance now."

In response to this letter, the petitioner went alone to Slater, and had an interview with respondents at their home. All were deeply affected, and at times gave way to their emotions. From the petitioner's testimony it appears that the grandmother, remembering her daughter had spoken against second marriages, could not bear the thought of beholding another in her daughter's place, and said that she could not receive Mary at that time; but she evinced a resolution to control her feelings, and expressed the hope that she would then receive Mary in a befitting manner. In the course of the conversation the petitioner states he said:

"Possibly you are laboring under the impression that I am going to take Lura Marie; but I talked this over with my wife before we were married, and I told her that I was devoted to my child, thought the world and all of her, and I would give anything in the world if I could have her with me; but I appreciated what Mr. and Mrs. Baker have done, and I know that they are attached to the child, and for that reason I have made up my mind that, as long as they want to keep Lura Marie, I am going to leave her with them."

The grandmother testified in part:

"I told him just to give me a little time, until I could control my feelings, and I felt it would all be well, that I would try; and he talked nicely to us, with the kindest of feeling, that he could sympathize with us, and knew how it was. Not an unkind word was said. * * * I said: 'Now, George, I shall never throw a straw in the way of your happiness, and I want you to visit this baby just as often as you want to; you are just as welcome as you ever were in your life. * * * We will let the baby come to see you; there will be passings back and forth to Marshall; relatives and friends can take her, and soon she will be large enough to go home, and she can stay as long as you want her or she wants to stay. You are welcome whenever you want to come, and possibly in a short time I will be able to meet your wife as you would like me to, and be pleasant; if I was weeping all the time, it would be embarrassing to her.'"

It will be observed the parties substantially agree about that interview, which ended in apparent concord, and with the understanding that the child would be allowed to remain with her grandparents, and that the petitioner's wife would be received in that home as soon as the grandmother could bring herself under control. But a misunderstanding was to develop which culminated in this litigation. Slowly and by degrees the petitioner reached the conviction that Mrs. Baker never would receive his wife in her home as a respected and welcome guest. On the other hand, respondents became convinced that the petitioner was insisting upon his wife being received as their daughter.

We do not find it necessary to go into the details of the events which intervened between this interview we have related and the resort by petitioner to legal redress. Once, at the request of the petitioner, his partner

and the president of the Missouri Valley College called upon respondents. The president testified:

"I did all I could to make clear the importance of being hospitably inclined toward Mary for their sake, and George's sake, and the child's sake. So far as their attitude toward George was concerned, they stated they were glad to have him come any time, as he always had, but that, so far as Mary was concerned, the death of Myrtle had been so grievous to them that they did not feel like welcoming anybody into the home that held the place that she held."

Finally, on June 27, 1914, petitioner wrote respondents a letter, informing them that he had employed counsel and demanded the custody of his child, and in September following he began proceedings in the circuit court of Saline county by habeas corpus to enforce his demand, and a temporary order was made by Judge Davis, which provided:

"That for the present, and until further order herein, the home of the said infant child, Lura Marie Crockett, shall remain with her grandparents, the respondents, W. H. Baker and Lura Baker, and that the father of said child, petitioner, George R. Crockett, and his wife, Mary Crockett, or either of them, shall have the privilege of visiting her there at all times, and the said father shall have the right to have her visit him and his wife at their home when he thinks proper; and it is further ordered that, when said child is making her home with her grandparents, she shall be taught to love and respect her father and his wife, and, when visiting the latter, that she shall inculcate love and respect in said grandchild for her grandparents, and neither party shall by word or act estrange said child from the other, and permit it to be done while said child shall be in their charge; and the good faith with which this order is complied with by the respective parties will be considered in determining any objection that may be made to a continuance of this temporary arrangement pending the final hearing. It is further ordered that this shall only be taken as a temporary arrangement, pending hearing upon the merits, without in any manner prejudicing the rights of any of the parties, and is for the purpose of enabling the parties to make an amicable agreement in regard to said child."

This order was continued in force, and the cause was continued until June 12, 1915, when it was dismissed by the petitioner, and shortly thereafter the present suit was instituted. It will be noted that more than two years have passed since the subject of Mary's position with respondents became a matter of deep concern to the parties. During that time the petitioner frequently visited his child at respondent's home, and the child visited the petitioner and his wife at Marshall, but she has never been allowed to remain overnight. We find in the evidence no good ground for a belief that respondents failed to carry out the temporary order issued by Judge Davis in spirit as well as letter. Twice the petitioner and his wife called together at respondents' home and were courteously received. In their return to the writ respondents—

"most respectfully and most earnestly pray that they may be permitted and authorized to continue in the custody of said child, and, there being no other child in their home, they promise, if their prayer be granted, to unreservedly give themselves, their time, their money, to the prop-

er rearing of said child, to faithfully teach it to love its father and stepmother, and to permit them to visit it at their pleasure in the home of these respondents, and to permit it to visit them according to their pleasure, and as the health and well-being of the child may warrant."

And respondents in their testimony assert their willingness to carry out this solemn promise. Fortunately the parties, through the entire course of the misunderstanding, have been singularly free from bitterness or rancor towards each other. No wounds have been made which will not quickly heal, or prevent the restoration of complete trust and confidence. One cannot read the record without being impressed with the fact that the depths of the affection between the petitioner and the respondents have not even been ruffled. We cannot speak too strongly in admiration of the respect and consideration they have displayed towards each other throughout this trying experience, and of their candor and sincerity. And while we are bestowing praise the character and conduct of the second wife must not be overlooked. Her good sense, womanly understanding, and tact will win the love of the child and its grandparents, as it must already have secured their respect and admiration.

There is no danger of the child becoming alienated from her father if she continues to live with her grandparents, whose love for her, reinforced by ample means and guided by a strong and intelligent sense of duty, will secure the realization of the ends of her true welfare. If taken from her grandparents and given to her father, we fear the consequences would be highly injurious to her and to them. For eight years the child has known no other parental care than that lavished upon her by the grandparents, both of whom are in vigorous health and apparently far removed from the disabilities of old age. We do not perceive how the father wisely and humanely could have done otherwise than leave her with them, but the necessities of his situation compelled a course which resulted in the creation of a status between his child and her grandparents which could not be rudely destroyed without lasting injury to this frail, nervous, imaginative, and strongly emotional little girl, whose love for her grandparents is of pathetic intensity. The father's testimony, from which we have quoted, shows he understood and fully appreciated the situation, and we give him the credit of refraining from attempting to dissolve such sacred ties until he felt that he must resort to that expedient, or resign his right of parentage, or, worse still, be recreant to his duty to his wife. In this we think he was mistaken, and we attribute the unfortunate situation which arose between him and respondents to his own impatience and failure to appreciate sentiments which stood in the way of his desire. He pressed his mother-in-law too

hard, and thereby led her to believe he was exacting of her the impossible thing of substituting Mary for Myrtle. Of course, he entertained no such cruel purpose, but the result of what he did was the same.

[1] The facts of the case may be reduced to this situation: The petitioner was willing from the first for his child to remain with respondents, provided they opened their doors to his wife the same as to him. Respondents are willing to do this, and to accord to him and his wife the enjoyment of all parental rights consistent with the established status. The proper rearing and development of the child is assured if she remain with her grandparents, but her peace of mind certainly, and her physical well-being probably, will be seriously affected if the status her father knowingly and willingly allowed to be created and firmly rooted should be destroyed. In such situation we do not hesitate in reaching the conclusion that the true welfare of the child, which is the primary consideration, will be best promoted by denying the writ.

[2] This conclusion does not overlook or ignore the rule of universal acceptance that, as between the father and grandparents of an infant, the father, being the natural guardian of his child, is entitled to the custody of its person, "unless it is made manifest to the court that the father, for some reason, is unfit or incompetent to take charge of it, or unless the welfare of the child itself, for some special or extraordinary reason, demands a different disposition of it, at the hands of the court." In the Matter of Scarritt, 76 Mo. 565, 43 Am. Rep. 768. As is aptly said in *Weir v. Marley*, 99 Mo. loc. cit. 494, 12 S. W. 800, 6 L. R. A. 672:

"The law, at the birth of an infant, imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompts, and clothes him with the right of custody, that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society; conceding, however, that the primary object is the interest of the child, the presumption of the law is that its interest is to be in the custody of its parent."

Such presumption is as strong as the natural instinct from which it arises, and always should be applied by the courts, not in aid of any asserted right of custody, as though it were a legal right of property, but in furtherance of the true aim of normal parental care and affection, which has regard only for the welfare of the child. It must be kept in mind that society, as the supreme parent of all its children, has a vital interest in every controversy of this character, and its chief care, which finds concrete expression in the pertinent juridical policies and rules, is to serve the welfare of the child. This thought was well expressed by Senator Paige in *Mercein v. People*, 25 Wend. (N. Y.) loc. cit. 103, 35 Am. Dec. 653:

"It seems, then, that by the law of nature the father has no paramount, inalienable right to

the custody of his child. And the civil or municipal law, in setting bounds to his parental authority, and in entirely or partially depriving him of it in cases where the interests and welfare of his child require it, does not come in conflict with or subvert any of the principles of the natural law. The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated, by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority."

Judge Trimble, in the recent case of *Meredith v. Krauthoff*, 191 Mo. App. 170, 177 S. W. 1119, tersely summed up the judicial attitude in the sentence:

"While the rights of neither parent should be disregarded or overlooked, yet the welfare of the child is superior to the claims of either parent."

From these references to reported decisions the conclusion must be drawn that the initial presumption in favor of parental custody is referable and subservient to the paramount consideration of the interests and welfare of the child, and that the courts in dealing with such tender cases are not hampered or bound by mere presumptions. That an infant stands in need of the love and care of its natural parents, whose place cannot be wholly supplied by ancestors of the preceding generation, must be conceded; but the disadvantages to the child resulting from the absence of normal relations with its parents may be overbalanced by those which might follow the destruction of a deeply-rooted status created by its long-continued deprivation of normal, natural contact with its parents. Aside from considerations of the welfare of the child, which, as stated, are supreme, the incidental rights of those who for many years have discharged all the duties of parentage are not to be wholly ignored, or even subordinated to any claim of the natural parent, who, either from indifference or necessity, has failed to exercise his sacred privileges and suffered his child to grow into the attitude of regarding others as its natural benefactors.

One of the most eminent jurists of modern times (Judge Brewer) said in *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321:

"* * * Ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel."

And further:

"The right of the father must be considered; the right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right; and yet they, who for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy, when the burden is especially heavy, when the labor and care are of a kind whose value cannot be expressed in money, when all these labors have been performed, and the child has bloomed into bright and happy girlhood, it is but fair and proper that

their previous faithfulness, and the interest and affection which these labors have created in them, should be respected. Above all things, the paramount consideration is: What will promote the welfare of the child?"

The dying mother of Lura Marie, with true maternal prescience, *knew* that the welfare of her baby demanded the loving maternal care of her mother, and when she passed away all who joined in the sorrowful family council, including the father of the child, were of the same opinion. His opinion was unchanged, so he states, when he courted and married his second wife, and afterward when the subject of her position in the family group became a matter of discussion and negotiation. He has never "fathered" his child, and while she has been taught to love and honor him as her father, she naturally looks to, and leans upon, her grandparents as her natural guardians and benefactors. They are not to blame for this situation; neither is the father, who was driven by necessity to renounce the privileges and joys of real fatherhood until his child had become bound by ties which now to dis sever would not only injure her physically, but strike at the very foundation of her developing moral and spiritual being.

What has occurred to change the conviction of the petitioner that respondents' home, and not his own, would be the best culture ground for his child? Nothing, except his displeasure over the attitude of the grandmother towards his wife. It is not necessary to discuss whether or not he should imperil the interests and happiness of his child for such a cause, since the cause itself has been removed. We accept at par the solemn assurance of respondents that they will welcome and treat Mary as an honored and worthy member of the family circle, and will recognize and satisfy every reasonable parental right of the petitioner and his wife. If these assurances were not made in all sincerity, or if respondents should fail to observe their binding force, and should disappoint our confident expectations, we will know how to deal with them. As the case stands, we hold that the welfare of the child requires the continuation of respondents' custody of her.

The peremptory writ is denied, and the infant is remanded to the custody of respondents.

TRIMBLE, J., concurs.

ELLISON, P. J. (dissenting). After our writ of habeas corpus was served, and return was made, the parties agreed upon T. H. Harvey, Esq., of the Saline county bar, as special commissioner to take the testimony. We appointed him, with directions to make return of the evidence and his conclusions to the court. Mr. Harvey heard the evidence, and, after thoroughly considering it and the law applicable thereto, reported that he found the father was a fit and competent person to take charge of his child, that it would be for

her best interest and welfare that she be given into his custody, and that no good reason had been shown to exist why that should not be done. His report shows he has given the case, in all its bearings, careful consideration. He has set out reasons for his conclusions which appear to me to be borne out by the evidence.

Each of the parties concede that the best interests of the child should control the action of the court in disposing of its custody. The record shows, and it is conceded, that the character of each is the very highest, and that the best moral atmosphere, ideals, and example would surround the child at the home of either; and the evidence shows, without dispute, that Mr. Crockett's present wife is a refined and an intelligent woman, even-tempered, kind, and gentle. They have no children, and nothing appears to cause a thought that she would not be attentive, watchful, and loving. The evidence further shows that each of the parties is financially able to provide for the child and properly educate her, though it does appear from the evidence that the grandfather is a man of much larger means than the father. This, evidently, was brought out to show that it was for the best interest of the child and her welfare that she be given into the custody of the grandparents. It would be stretching the meaning of law, intended to be beneficent, to such length as to destroy its character, if we are to say that the best interest of a child lies with the custodian who has the most money. There are some grandparents, or other kinsmen, in this country who could provide extraordinary luxuries for children at enormous cost, and it would be a cruel prospect for an affectionate father, who found himself outstripped in such measurement of material benefits. Manifestly the legal expression, "best interests of the child," was never intended to penalize a parent for living a simple life, so long as he was an honest and respectable man, with disposition and capacity to maintain and educate his child.

This being the situation and these the circumstances, I am led to ask: What stands in the way of the father? Why should a good, affectionate, and capable father be deprived of the custody and care of his child? Certainly not the law of nature, and neither does the law of the land. The truth is the record shows that nothing is in the way, save the tender impulse and sentiment of the grandmother for her child, who came to an untimely death. So far did she allow this love of the memory of her daughter to control her actions that she treated Mrs. Crockett with little respect and scant politeness. It so far blinded her to Mr. Crockett's rights that, though the father, he was not accorded much more privilege and association with his child than if he had been a mere acquaintance. The constant efforts he made and the differ-

ent disappointments he had in seeing her, together with the slight and trivial excuses offered, make up several sad pages in the record.

I think the commissioner's report should be approved, and the proper judgment entered upon it.

ALLEN v. QUERCUS LUMBER CO. (No. 1704.)

(Springfield Court of Appeals. Missouri. Nov. 20, 1916. Rehearing Denied Dec. 21, 1916.)

1. MASTER AND SERVANT §107(2)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

If a master is negligent by building skids for loading timbers in an improper way and in loading the skids negligently with all sizes and lengths timber, so as to create a dangerous place in which to work, and the servant is thereby injured, he has a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 200, 254; Dec. Dig. § 107(2).]

2. MASTER AND SERVANT §289(27)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A servant engaged in loading timbers was not as a matter of law guilty of contributory negligence in loading them in a certain way so that they interlaced and created a dangerous condition, where he did not know that they would create such condition; nor in attempting to disentangle them from one end, though that was dangerous and it would not have been dangerous from the other end, when he did not know that such was the fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1119; Dec. Dig. § 289(27).]

3. MASTER AND SERVANT §191(2)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—"FELLOW SERVANT."

An injured servant's recovery for negligence cannot be defeated on the ground that it is the negligence of his fellow-servants, where the servants who are negligent are under another foreman though employed by the same master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 476; Dec. Dig. § 191(2).]

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant.]

4. TRIAL §260(1)—INSTRUCTIONS—SUBSTANCE—PREJUDICE.

Refusal to give a requested instruction, though it properly states the law, is excused by the giving of another instruction covering the same subject-matter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260(1).]

5. APPEAL AND ERROR §1078(4)—SCOPE—PRESERVATION OF EXCEPTIONS.

Where the appellant in his points and authorities and in his argument in the brief as well as in oral argument made no complaint nor cited authority condemning the action of the court in giving an instruction, he waived his right to urge error thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4259; Dec. Dig. § 1078(4).]

6. APPEAL AND ERROR §1060(4)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Argument of plaintiff's counsel, though improper, was nonprejudicial, where on the first trial plaintiff secured a verdict of \$4,000, but on the

retrial in the face of such argument the verdict was for only \$3,250.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060(4).]

7. DAMAGES § 132(6)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict of \$3,250 for injuries to a servant by which the muscles in his leg between the ankle and the knee were mashed in two, was not so excessive as to indicate passion or prejudice or improper persuasion.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 377; Dec. Dig. § 132(6).]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by William Allen against the Quercus Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sheppard & Sheppard, of Poplar Bluff, for appellant. Abington & Phillips, of Poplar Bluff, for respondent.

FARRINGTON, J. This case is here on a second appeal; the former opinion being reported in 190 Mo. App. 399, 177 S. W. 753, to which we refer for a statement of the facts as to how the plaintiff was injured. On retrial plaintiff recovered a judgment for \$3,250, and the defendant appeals, alleging a multitude of errors.

It will be seen by reading our former opinion that there were but two questions considered and ruled on, as follows: First, the judgment was reversed and the cause remanded because of error in an instruction in that it failed to furnish a proper guide to the jury on the issue of negligence. That question is out of the present appeal. Second, whether the order of Bebee, the timber inspector, was an order of the defendant, and if it were a negligent order whether the defendant would be guilty of negligence. This question is again raised by appellant, and our former ruling is vigorously assailed. However, we have not concluded to change our former decision and will pass that adhering to the rule announced which is that the foreman who had charge of the gang of men to which plaintiff belonged had the apparent authority to designate Bebee, the timber inspector, whose work would consist of inspecting and giving orders to plaintiff as a temporary foreman while the foreman went to other parts of defendant's yards on business for the defendant; that is, it is admitted that defendant's foreman had authority to order and did order the plaintiff to load the car, that he had authority to order and did order the plaintiff to obey Bebee as to such handling of the timber as was necessary for Bebee's inspection, and, from this general authority that the foreman exercised over plaintiff, we hold that he had the apparent authority to designate Bebee to take his place during a temporary absence in doing all things that concerned unloading the skids or loading the car. And it is the apparent

authority of this foreman who had charge of unloading the skids and loading the car that distinguishes this case from *Mangan v. Foley*, 83 Mo. App. 250, *James v. Muehlebach*, 84 Mo. App. 512, and others cited by the appellant. We agree with the holdings of those cases to the effect that a servant hired to drive a wagon for his master has no apparent authority to employ other drivers.

[1] We next hold that the grounds of negligence alleged in the petition, as shown in our former opinion, state a cause of action; also, as the abstract before us shows that the case was retried on all three grounds alleged, that there is evidence tending to prove all three of the charges. When analyzed, the ground of negligence charging that the skids were negligently and improperly built, and the ground that they were negligently loaded with timbers of all sizes and lengths so that they would slide down the ends and interlace and create a dangerous place in which to work, amount to but one negligent act stated in different ways, this, because the only evidence of improper building of the skids was that they were not placed far enough apart to safely take care of the timbers as placed on the same by the defendant. Had plaintiff used only one of the skids at a time, the nearness to which the ends of the timbers on the loaded skid came to the unloaded skid would not have caused the injury complained of. On the other hand, had the skids been far enough apart so that timbers coming down on the one could not interlace with the timbers indiscriminately piled on the other, the injury could not have occurred. So the evidence tending to show the actual condition that existed, that is, that the indiscriminate loading of both skids as they were built would permit the ends of the timbers to interlock and create a dangerous condition, necessarily proves both charges.

[2] We are unwilling to hold, with appellant's counsel, that the loosening of the timber as plaintiff did it was so glaringly dangerous that we must hold him as a matter of law guilty of contributory negligence. Nor can we say as a matter of law that he was guilty of negligence in going to one end of the skid and loosening the timber when by going to the other end would have been a safer method. Plaintiff and all those working there testified that they did not discover that the timbers would interlace and bring about the condition that was brought about as it was done. He did not know of the dangers attending the way he was doing the work. In *Rogers v. Tegarden Packing Co.*, 185 Mo. App. 99, 170 S. W. 675, and in *Schiller v. Kansas City Breweries Co.*, 156 Mo. App. 569, 580, 137 S. W. 607, the plaintiffs were held as a matter of law guilty of contributory negligence because (in both opinions it is stated that) the plaintiffs there

knew of the dangerous way, and must be held to have also known and anticipated the result that would follow from the known condition. In the case at bar it becomes a question of fact to be determined by the jury, in the absence of any admitted knowledge of the danger on plaintiff's part, whether an ordinarily careful and observing person would have known of the condition. The facts are that plaintiff had been working in a different part of the plant and had had no reason, prior to the time he was brought there to work (something like an hour before he was injured), to observe the manner in which the timbers lay on the skids, and this, coupled with the fact that none of the employees who were working at that particular place anticipated what actually took place, leaves the question of plaintiff's duty to know of it—or leaves the question of his constructive knowledge of it—an open question for a jury to decide.

This was a dangerous place where defendant set its men to work and where it would take a considerable period of time to perform the task. We find nothing in the evidence to bring the case within any of the exceptions to the safe place rule. Plaintiff, therefore, did not assume the risk of being injured as he was.

[3] Plaintiff cannot be denied a recovery on the ground that although the condition of the skids was dangerous and negligent, yet that condition was brought about by his fellow workmen. The evidence shows that defendant's servants who loaded these skids served under a different foreman connected with another part of the plant from that in which plaintiff worked, and that plaintiff did not have the opportunity of working with them and discovering their omissions and commissions that would amount to negligence. See *Lanning v. Railway Co.*, 196 Mo. 647, 94 S. W. 491, *Koerner v. St. Louis Car Co.*, 209 Mo. loc. cit. 151, 107 S. W. 481, 17 L. R. A. (N. S.) 292, and *Parker v. Railway Co.*, 109 Mo. loc. cit. 408, 19 S. W. 1119, 18 L. R. A. 802.

[4, 5] What has been said disposes of points made on defendant's refused instructions C, H, and J. Defendant's refused instruction I on the question of plaintiff's contributory negligence by voluntarily adopting an unsafe way of loosening the timber when there was a safe way at hand correctly declares the law, but this same subject-matter is covered in plaintiff's instruction No. 1, which excuses the trial court for not giving defendant's instruction. In the third of appellant's assignments of error it is urged that the court erred in giving plaintiff's instructions numbered 1, 2, 3, and 4. However, in appellant's "Points and Authorities" and in its "Argument" in the brief as well as in its oral argument no complaint is made concerning nor any authority cited condemn-

ing the action of the court in giving instruction No. 1 asked by the plaintiff, so that appellant has waived its right to urge error as to that instruction.

[6, 7] Appellant also assigns as error improper remarks made by the attorneys for plaintiff in arguing the case before the jury. We could not sanction or approve some of the arguments complained of, and would reverse the judgment and remand the case on that account were it not also shown to our entire satisfaction that such remarks in no way prejudiced the defendant's case or improperly influenced the jury. At the former trial of this case, wherein there was no complaint of improper argument, the jury gave plaintiff a verdict for \$4,000, and on the retrial, in the face of such argument, the jury gave plaintiff a verdict for \$3,250. The plaintiff was seriously and permanently injured; the muscle in his leg between the ankle and knee having been mashed in two. The amount of the verdict, considering the extent of the injury, fails to indicate that the jury in arriving at a verdict of \$3,250 damages was prompted by passion or prejudice or improper persuasion.

A number of objections are made in the brief to the alleged improper admission, and exclusion, of testimony. Granting that appellant is correct in its contentions as to these points we are not of the opinion that such errors materially affected the merits of the action.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

WANK et al. v. PEET et al. (No. 12141.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 18, 1916.)

1. APPEAL AND ERROR \S 528(1)—RECORD—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS.

Under Rev. St. 1909, \S 2083, making it unnecessary in order to review any action of the trial court that any motion, etc., be copied into the bill of exceptions, provided the bill contain a direction to copy the same and it is copied into the record and sent up, matters raised by motion for new trial cannot be considered on appeal, where such motion is not copied into the bill of exceptions, and there is no direction to the clerk to copy it in the record, although the motion is set out in full in the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 2384, 2385, 2387; Dec. Dig. \S 528(1).]

2. APPEAL AND ERROR \S 590—RECORD—AMENDMENT—TIME FOR AMENDMENT.

An amended abstract cannot be filed when the case is called for argument several days after appellees have made the point of insufficiency against the abstract and briefed the case as it stood without a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 2611–2615; Dec. Dig. \S 590.]

3. JURY \S 14(1)—SUIT IN EQUITY—DISSOLUTION OF CORPORATION—ACTION FOR ACCOUNTING.

Upon dissolution of a corporation, a suit by directors and stockholders for accounting against other directors who were directed as trustees to convert the corporation property into cash to pay off creditors and divide the remainder among the stockholders, and asking an injunction, was a suit in equity.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 66, 72, 81, 83; Dec. Dig. \S 14(1).]

4. CORPORATIONS \S 619—DISSOLUTION—ACTION FOR ACCOUNTING—ATTORNEY'S CHARGES.

In such suit the court had power to investigate the charges made by an attorney for services in winding up the corporation and to make him an allowance therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2459, 2460; Dec. Dig. \S 619.]

5. CORPORATIONS \S 621(1)—DISSOLUTION—ACCOUNTING—RECEIVERS.

In such suit the court had power to appoint a receiver to take over the assets and distribute them as directed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2461-2464, 2471; Dec. Dig. \S 621(1).]

6. APPEAL AND ERROR \S 911(3)—PRESUMPTION—JUDICIAL ACTION.

Where the record proper shows the court had jurisdiction, such jurisdiction will be presumed to have been properly exercised, in the absence of showing to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3686-3688; Dec. Dig. \S 911(3).]

7. CORPORATIONS \S 620—DISSOLUTION—STATUTORY TRUSTEES—SUIT AGAINST.

Statutory trustees of a dissolved corporation are amenable to a court of equity, and stockholders are entitled to injunction against an inequitable disposition of the assets by such trustees.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2447; Dec. Dig. \S 620.]

8. CORPORATIONS \S 619—DISSOLUTION—STATUTORY TRUSTEES—SUIT AGAINST.

Statutory trustees of a dissolved corporation are liable to suit in equity by the stockholders for an accounting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2459, 2460; Dec. Dig. \S 619.]

9. CORPORATIONS \S 617(1)—DISSOLUTION—TRUST FUND.

After dissolution of a corporation the assets may be administered in a proper case by a court of equity as a trust fund.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2448, 2452, 2453, 2455, 2456; Dec. Dig. \S 617(1).]

10. PLEADING \S 408—DEFECTS—WAIVER BY ANSWER OVER.

The objection that a complaint states no cause of action cannot be waived by answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1362, 1366; Dec. Dig. \S 408.]

11. PLEADING \S 406(8)—MISJOINDER—WAIVER BY ANSWER.

All question of misjoinder in a complaint is waived by answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1370, 1371; Dec. Dig. \S 406(8).]

Appeal from Circuit Court, Buchanan County; T. B. Allen, Judge.

"Not to be officially published."

Action by Andrew Wank and others

against William Peet and others. From a decree for plaintiffs, defendants appeal. Affirmed.

William G. Holt, of Kansas City, and L. C. Gabbert, of St. Joseph, for appellants. W. B. Norris and R. E. Culver, both of St. Joseph, for respondents.

ELLISON, P. J. Plaintiffs' action is in equity, brought by plaintiffs as creditors of a dissolved corporation; the defendants being charged with having in their possession the funds of such corporation. An injunction was asked as well as an accounting and the appointment of a receiver. The bill was sustained and a decree rendered against defendants for amounts found to be due the creditors.

[1] Plaintiffs insist that no alleged error save what may appear in the record proper can be urged in this court, for the reason that no motion for new trial is preserved in the bill of exceptions. What appears to be a motion for new trial is set out in the record proper, but that is no place for its preservation. That is a proper and necessary place for it to appear that a motion for new trial was filed and overruled, but the motion itself should appear in the bill of exceptions with the exception taken to its being overruled. By the terms of the statute (section 2083, R. S. 1909) it is necessary to copy the motion in the bill before it is signed by the judge, unless it contains directions to the clerk to copy, in which case it will be sufficient if the motion "is copied into the record sent up to the appellate court." In this case the motion for new trial is not copied into the bill of exceptions, nor does the bill contain directions to copy it. The only thing appearing in the bill is that a motion for new trial was filed and overruled and exception taken, and that "said motion for new trial is set forth in full on page 89 to 105 of this abstract; hence is here omitted." Those pages are pages of the record proper, and there is found at that place a copy of what purports to be a bill of exceptions. It has been many times decided that that mode of preserving a motion for new trial will not be allowed. *State v. Revelly*, 145 Mo. 660, 662, 47 S. W. 782; *Blanchard v. Dorman*, 236 Mo. 416, 439, 139 S. W. 395; *State ex rel. v. Board of Health*, 266 Mo. 242, 262, 264, 180 S. W. 538; *Pugsley v. Ozark Cooperage Co.*, 154 Mo. App. 387, 133 S. W. 859; *State ex rel. Waggoner v. Leichtman*, 146 Mo. App. 295, 130 S. W. 94. Our rule 28 (169 S. W. xv)—Supreme Court rule 32 (186 S. W. x)—does not affect this question. *Case v. Carland*, 264 Mo. 463, 175 S. W. 200.

The abstract of the bill of exceptions does not show that it was signed by the judge, but does show it to be signed by the attorneys for each party. It is recited in the rec-

ord proper that appellants "pray that said bill of exceptions be allowed by the court, signed by the judge thereof, sealed, filed, and made a part of the record in this cause, all of which is now here accordingly done, this 14th day of July, 1916." As all matters pertaining to exceptions are included in our disposition of the motion for new trial, it is not necessary to say whether the record shows this bill to be authenticated. We merely draw attention to the matter and cite *Cooper v. Maloney*, 162 Mo. 684, 63 S. W. 372; *Reno v. Fitz Jarrell*, 163 Mo. 411, 63 S. W. 808; *Roberts v. Jones*, 148 Mo. 368, 49 S. W. 985; *State v. Watts*, 248 Mo. 494, 496, 154 S. W. 721.

[2] When the case was called for argument and submission defendants' counsel stated that he would file a motion for leave to amend the abstract. This motion was filed on the next day. This was several days after plaintiffs had made the point against the abstract and briefed the case as it is made without a bill of exceptions. In such circumstances it has been expressly ruled that an amended abstract cannot be filed. *Harding v. Bedoll*, 202 Mo. 625, 634-637, 100 S. W. 638; *Everett v. Butler*, 192 Mo. 564, 569, 91 S. W. 890.

We are cited to *Pugsley v. Lumber Co.*, 162 Mo. App. 360, 141 S. W. 923, and *State ex rel. v. Lichtman*, 184 Mo. App. 225, 168 S. W. 367, where the St. Louis Court of Appeals permitted an abstract to be amended. Those cases had been improperly transferred to the Springfield Court of Appeals and submitted and decided by that court. Finding that it had no jurisdiction of the cases, that court transferred them back to the St. Louis Court of Appeals, where they were lodged as though they had not been sent away. It does not appear, and we do not know, in what circumstances the court allowed the amendment. It may be the cases were in such situation as to apply to them the remarks of the Supreme Court in *Everett v. Butler*, 192 Mo. loc. cit. 568, 569, 91 S. W. 890. But, if we were to allow the amendment asked in this case, it would be a clear violation of our duty to give effect to the decisions of the Supreme Court.

[3] We therefore have nothing to consider save the record proper. Arising on that record is the point that the case is not one in equity and should have been tried by a jury instead of by the court and referee. It appears from the petition that a corporation existed known as the British-American Cement Company, was organized under the laws of West Virginia, and that its principal office was in Kansas City, Missouri; that plaintiffs and defendants were stockholders and directors in the corporation; that it became involved in numerous contracts it could not perform; it could not meet its obligations; that thereafter it was duly dissolved; that the board of directors, consisting of

plaintiffs, defendants, and others, were directed as trustees to convert the property into cash and pay off all creditors, and then to divide what was left among the stockholders pro rata; that the board appointed defendants Peet, Courtney, and Dolman as agents in collecting and converting the assets of the dissolved corporation into cash; that they proceeded to do so, and appointed defendant Courtney as treasurer, and that he has his collections deposited with defendant the Bartlett Trust Company; that said trustees have wrongfully and unlawfully, in violation of their trust, paid to defendants Peet and Coughlin out of such assets \$2,000 as rebates on amounts paid by them on their stock in the corporation, for which they had no lawful claim, and that they have paid large sums (the exact amount unknown) to defendant Dolman as attorney's fees for such trustees, and that they have paid out other large sums, the amount and object unknown; that the plaintiffs loaned to the corporation \$500, and that other stockholders loaned sums unknown, and that they are entitled to these sums before distribution is made to stockholders who did not make such loans and are not creditors; that defendants Peet and Courtney will, unless restrained, appropriate wrongfully the remaining funds, and thereby not only deprive plaintiffs of their legal prior claims, but make them liable for debts as stockholders; that defendants have used their power for their own benefit and profit in violation of their duties as trustees; that such defendants have in their possession all the books and papers of the dissolved corporation; that it is necessary to have an accounting to avoid a large number of suits and expensive litigation, and to prevent the dissipation of the funds aforesaid. An injunction is asked, together with all proper relief.

Defendant Dolman came in by way of an answer and cross-petition. He admits having received fees and sets up the services performed and that such fees were reasonable and proper. He further set up services for which he had not been paid. He prayed the court to ascertain the value of his services, and in disposing of the case to make him an allowance therefor.

The trial court entered its decree in which it found that defendant William Peet had appropriated to his own use \$2,000 of the corporate funds, and had caused to be paid to one Tom Harrington \$2,000 of the corporate funds, and that defendant Coughlin had received \$1,250 of the corporate funds, all of which was a refund on stock which they had subscribed and paid for in full, and to which they were not entitled until all the debts were paid. The court further found that all debts had been paid except the claims of plaintiffs Wank and Geiger for \$500 each and of defendant Dolman for services rendered, the value of which the court found to

be \$5,000, from which should be deducted the amount he had received, amounting to \$3,129.92, leaving a balance due Dolman of \$1,870.08, and judgment was entered accordingly, and after adjusting the equities between the defendants, and they were ordered to pay the same to the extent of the money which came into their hands.

[4] It seems to us to be manifest that a cause of action is stated in equity in which it was altogether proper to appoint a referee to hear evidence, take an accounting, and thoroughly investigate the charges in the petition. The face of the petition shows it involves a long accounting and the record here bears that out. It contains more than 600 printed pages. It was also in the lawful power of the court to investigate the charges made by Attorney Dolman in the service of the trustees and to make him an allowance therefor.

[5] It was likewise within the lawful power of the court to appoint a receiver to take over the assets and distribute them as directed.

[6] As has been already explained, we have nothing but the record and the power which can be lawfully exercised under such a record. The record proper showing the jurisdiction and power, we must assume, in the absence of the only record which could disclose an error in its exercise, that it was properly exercised.

[7] "It is well settled that statutory trustees of a dissolved corporation are amenable to a court of equity, and stockholders are entitled to an injunction against an inequitable disposition of the assets by such trustees." 23 Encyc. Plead. & Pract. 1305.

[8] "The statutory trustees of a dissolved corporation are liable to a suit in equity by the stockholders for an account, and it would seem that an account against them is almost always a matter of course, and a court of equity has jurisdiction to remove statutory trustees for malfeasance in office or any betrayal of their trust." 2 Story on Equity Jur. (13th Ed.) § 1252; 2 Beach on Private Corp. § 788. To these may be added *Ashton v. Penfield*, 233 Mo. 391, 135 S. W. 938; *State ex rel. v. Shelton*, 238 Mo. 281, 142 S. W. 417; *Hageman v. Railroad*, 202 Mo. 249, 266, 100 S. W. 1081.

[9] After dissolution of a corporation, the assets are regarded as a trust fund, to be reached by a court of equity in a proper case and administered as a trust fund. *Foster v. Mullanphy Co.*, 92 Mo. 79, 90, 4 S. W. 260; *Mo. Lead Co. v. Reinhard*, 114 Mo. 218, 232, 21 S. W. 488, 35 Am. St. Rep. 746; *Horner v. Carter*, 11 Fed. 362.

[10, 11] In meeting plaintiff's point that defendants waived its demurrer to the pleading by answering, it is truly said that, if no cause of action is stated, there cannot be a waiver. But, as we have already seen, a

cause of action is stated. All question of misjoinder was waived by the answer.

After a careful consideration of the case presented, we find ourselves without right to disturb the judgment, and it is affirmed. All concur.

HOLTZCLAW v. CHICAGO, B. & Q. R. CO. (No. 12147.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916. Rehearing Denied
Dec. 18, 1916.)

1. PLEADING \S 248(12) — AMENDMENT — DEPARTURE.

It is not a departure, in an action for negligently causing a fall, for the amended petition to contain an additional specification of negligence as a cause of the fall.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 694; Dec. Dig. \S 248(12).]

2. PLEADING \S 420(3) — DEFECTS — DEPARTURE — WAIVER.

Any departure by amendment of petition is waived by defendant answering over, and going to trial on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1411; Dec. Dig. \S 420(3).]

3. MASTER AND SERVANT \S 287(5) — ACTION FOR INJURY — NEGLIGENCE — EVIDENCE.

Evidence, in a servant's action for injury, held insufficient to go to the jury on the issue of B., a fellow servant, negligently jumping against plaintiff while both were attempting to leap on a power car used by a section crew; it leaving in the realm of conjecture the question of any contact being negligent rather than accidental.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1061; Dec. Dig. \S 287(5).]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

"Not to be officially published."

Action by John M. Holtzclaw against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

O. M. Spencer, E. M. Spencer, and M. G. Roberts, all of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

TRIMBLE, J. This is a suit to recover damages for personal injuries under the Employers' Liability Act (Act April 22, 1908, c 149, 35 Stat. 65 [U. S. Comp. St. 1913 § 8657-8665]). There was a recovery of \$2,000, and defendant appealed.

Plaintiff was a member of a section gang or crew. In going to and from their work on the section, the men used a "motor hand car," which was very much like an ordinary hand car, except that in the middle of the back end of the car it had a motor engine by which it was propelled instead of by the ordinary hand power. The floor of the car was about 18 inches above the rail and along each side of the car was a board seat about 6 or 8 inches wide, extending the length of the car and about 44 inches above

the surface of the ties. The seats were supported at the ends by resting upon Z-shaped irons, the ends of the seats being fastened to the upper horizontal portions of the irons, while the lower horizontal portions thereof rested upon and were fastened to the floor. The car was 6 feet 8 inches in length, and at its corners were four handholds, the two in front extending to the front and the two behind extending to the rear. These handholds were 6 or 8 inches in length, and were about the size of the ordinary two by four. They were for use in lifting the car to place it on the rails. After it was put upon the rails, it was necessary that the car be pushed for a short distance to start the motor, the initial movement of the car, we assume, producing a similar result as the "cranking" of certain automobiles. In thus pushing the car the men would run along with it, and, after the engine began working, would leap from their various positions upon the ground to the seats.

At the time of plaintiff's injury the car had been placed upon the rails and the section men were shoving it along as was customary. The track lay east and west, and the car was being pushed in the latter direction. The foreman was on the car at the motor with his back to the front. Plaintiff was assisting the other men in pushing the car along to start the engine. He was on the north side and at the front of the car, running along at its side, holding the front end of the north seat with his right hand, and the inside of the seat with his left, which was at some point back east of the west end of the car. Loren Brown was at the front on the south side, just opposite to and across the car from plaintiff. Holt and Bottorff were behind the car, helping to push, the latter on the south or left and the former on the north or right. Lawrence Brown (or Bill Brown, as he was sometimes called) was on plaintiff's side of the car. These two, Brown and plaintiff, were the only men on the north side of the car. All were running along giving the car its initial start, and, the engine beginning to work, the men were leaping upon the car. Plaintiff, in testifying, claimed that, as he and Lawrence Brown were leaping upon the car, it gave a jerk, and Brown either jumped or fell against him; that the impact of Brown's body broke the hold of plaintiff's left hand, causing him to fall from and in front of the car and receive the injuries for which he sued. In his original petition plaintiff charged defendant with specific negligence in maintaining a defective motor which would start and stop, and alleged that:

"While in the act of getting upon the car the plaintiff was, on account of the defective motor and the same stopping, and on account of the negligence of the defendant and its servants, knocked from the car and under said motor car"

—but nothing was said in the petition about Brown having jumped against him. And in

answer to inquiries, after he was hurt, as to how it happened, he said nothing about any one having jumped against him. After depositions were taken, which failed to show a defect in the motor or to disclose the cause of plaintiff's fall, an amended petition was filed which, in addition to the charge contained in the original, alleged:

"That the agents and servants of defendant carelessly and negligently jumped against him (plaintiff) thereby causing him to be knocked from said car," etc.

[1, 2] The cause of action in the original petition was the negligent causing of plaintiff to fall. The amended petition presented the same cause of action, but contained an additional specification of negligence as a cause of the fall. This was not a departure as defendant claims, but if it was, defendant waived any right to complain by answering over, and going to trial on the merits.

[3] Defendant offered a demurrer, both at the close of the evidence in chief and at the conclusion of all the evidence. These were unavailing, and one of defendant's contentions is that plaintiff is not entitled to recover. The sole ground upon which plaintiff went to the jury was the alleged negligence of Brown in jumping against plaintiff while both were attempting to leap upon the car. It is clear, therefore, that unless the evidence discloses some negligence on the part of Brown, or presents facts from which the jury can rightfully draw an inference that he was negligent, the plaintiff is not entitled to recover.

Plaintiff was the only witness on his side of the case as to the happening of the accident. The other men were witnesses for the defendant. They all testified that they did not see plaintiff fall from the car, nor did they know what it was that caused him to fall. Plaintiff testified that he and the men were pushing the car along and Brown was behind him; that he, plaintiff, was holding the front edge of the seat with his right hand; that while he could not say just how far his left hand was back east of the west end of the car, yet his best judgment was that it was $2\frac{1}{2}$ or 3 feet back; that he had his right foot on the step or handle, and while in that position—

"there was a jerk in the car as I made to bring my left foot up, and Bill Brown made a leap, you know, to get on the car, and jumped against me, fell against me. Q. Jumped against what? A. My arm. Q. Which arm? A. The left one. Q. What happened to it? A. It put me down under the car. Q. What did he do to your left hand, if anything? A. Knocked it loose, of course, when the man fell against me."

Plaintiff did not see Brown jump. He was asked:

"Q. What part of his body did strike you? A. I think just about all of him; he fell against my hand, knocked it loose; fell against me, that's just the size of it, when he went to make his leap; he was bound to jump on. Q. Did you see him jump on? A. I never seen him jump."

Further on he testified:

"When I went to pick up the left foot there was a jerk in the car, Brown fell against me and threw me forward. * * * If it hadn't been for Brown falling against me, I wouldn't have went under; the jerk wasn't strong enough to put me under. * * * Q. Mr. Holtzclaw, this jerk that you refer to, the jerk of the car, that was not sufficient to throw you off the car? A. No, sir, it didn't do it. * * * Q. You knew the jerk wouldn't pull you loose? A. I knew that it didn't. Q. It was not sufficiently strong, was it? A. It was strong enough to put Brown against me; that is the size of it, exactly."

In a deposition taken prior to the trial plaintiff testified:

"Q. You said that Brown fell into your hand—do you mean that he fell into it or jumped into it when he jumped onto the car? A. I couldn't say which, whether he jumped or fell in, but I know he knocked my hand loose."

So far as plaintiff's testimony is concerned, it is clear that he did not see Brown when he jumped. He does not testify to anything Brown did or failed to do which would constitute negligence on the latter's part. Indeed, plaintiff's evidence tends to absolve Brown from negligence. He at first says Brown either jumped or fell against him, and then later says Brown "fell against me, that's just the size of it, when he went to make his leap"; that as Brown leaped there was a jerk in the car "strong enough to put Brown against me; that is the size of it exactly." If Brown fell against the plaintiff by reason of a jerk in the car occurring at the moment he leaped, certainly Brown was not negligent. Plaintiff's evidence not only failed to disclose any negligent act on Brown's part, but tended to show instead that the fall was not Brown's fault, but was caused by a jerk in the car, which plaintiff says was going six or eight miles an hour. This, however, was, as heretofore stated, not the negligence upon which plaintiff went to the jury. The plaintiff, therefore, failed to make out even a prima facie case of negligence, and, having so failed, the defendant is not in the position of having the burden of proving its freedom from negligence.

It is true that, although plaintiff failed to make out a prima facie case, yet, if defendant's evidence made out a case wherein the jury could reasonably find that Brown's act was negligent rather than accidental, then the last demurrer was properly overruled, even though the first one should have been sustained. For, in that situation where the burden is still with plaintiff to establish negligence, the defendant's evidence will not be sufficient to help out plaintiff's case, unless the evidence, or the inferences to be drawn therefrom, tend to show negligence rather than an accident. Nor will that evidence be sufficient if the question of negligence is left a matter of uncertainty or conjecture. Otherwise plaintiff could recover merely upon a showing that, while working in the ordinary close proximity of another servant, he came in contact with such servant and was injured.

Plaintiff contends, however, that defendant's evidence made out a case of negligence for plaintiff and relieved him of the burden of establishing that negligence.

As stated, all of the men except plaintiff testified that they did not see plaintiff fall and did not know what caused him to fall. Brown swore that he did not jump against plaintiff nor come in contact with him. Thus far, therefore, defendant's evidence did not supply plaintiff's lack of proof. But Brown and the foreman, on cross-examination, said that it was customary for the hind man to get back far enough to clear the front man. And Brown said that there was no jerk of the car and no fall by him in consequence thereof; that he landed where he intended to jump; that he jumped straight toward the car and not forward a little, and did not strike plaintiff. He further said that he was about the center of the car, and, on further cross-examination, admitted that there was nothing to prevent him from being back further, and there was plenty of room for him back there. Plaintiff, therefore, takes the position that these admissions present a state of facts from which the jury could find that Brown negligently jumped against him. This is based upon the following theory: That plaintiff's left hand was from 30 to 36 inches east of the west end of the seat; that if Brown was at the center of the side of the car, the center of his body was opposite the middle point of the seat and, as it was 80 inches long, this middle point was 40 inches back from the west end of the seat; that Brown's body was 10 inches in width from the center line thereof to his right shoulder, and hence, even if Brown jumped straight, one-half of his body would be west of the middle point of the seat, and 6 inches of his body would strike plaintiff's hand if it was 36 inches back; and by rejecting plaintiff's statement that the car jerked, but accepting his statement that Brown struck him, and accepting Brown's statement that the car did not jerk, but rejecting his statement that he did not touch plaintiff, the jury could say that Brown struck plaintiff's hand and was negligent in not getting further back.

Doubtless a jury can accept any part of a witness's testimony and reject any other part and can, under the proper circumstances, piece out a case by proper selections from the evidence of both sides. But do the facts in the case at bar justify the jury in finding anything more than that Brown's body struck plaintiff's hand? To entitle plaintiff to recover, the facts must be such as to reasonably enable the jury to find that the striking was negligent rather than accidental. For the jury cannot speculate as to whether it was one or the other, nor can they arbitrarily choose the one rather than the other. If the proof leaves it uncertain as to which it was, then plaintiff must fail. The question, therefore, is whether or not the alleged negligence

is left in the realm of speculation and conjecture under the circumstances conceded to exist in this case.

In the first place, the proof does not show definitely how far back plaintiff's left hand was from the west end of the seat. Plaintiff did not know. He testified:

"Q. How far back from the end of the car when you were pushing along here? A. About 2 feet or 2½, maybe; somewhere along about that; might have been further than that; might not be so far. Q. That don't give us any information. A. That is the best I can give you. You take a man, run up there and start that car, you don't know just how far you are from the end—might say so far, might not be that far. Q. Let us understand one another from the start. I think you are right about that; don't think you can be absolutely accurate. All I ask is, not for so many inches, but you are satisfied it is somewhere in the neighborhood of 2 feet or 2½—that is your best belief? A. It might be that, and it might be further; couldn't say and wouldn't say. Q. Might be less, but what is your best judgment of what it was? A. I give you my best judgment; I told you I didn't know. Q. Is that your best judgment about this whole case; that you are not sure—you don't know how far back your left hand was? A. No, sir."

Upon being urged to give his best judgment he said:

"I will say then 2½ or 3, if you must have it that way. Q. I must not have it at all, but I would like to get it for the benefit of the jury—your best information about the facts—2½ feet or 3? A. Yes, sir, I would say that. Q. Where was your right hand? A. On the front end of the seat."

Now, although plaintiff gives it as his opinion or best judgment that his hand was that far back, yet it is clear that it is only an opinion. And when the conceded facts as to plaintiff's position are examined, it will be seen that, while it is not impossible for plaintiff's left hand to be 36 inches back, it was at least an unnecessary, if not awkward, position for him to put his hand back that far. His statement, therefore, that his hand was so far back was no more than a guess, or, as his own testimony shows, a mere opinion.

In the next place, plaintiff's own testimony shows that Brown's position at the middle of the car's side was not negligence, as ordinarily there were three men on the side and the middle man had to let the hind man on. Plaintiff was asked:

"Q. What was the customary place for the rear man to stay with reference to the front man?"

This was not answered, and he was next asked:

"Q. At what part of the car would he ordinarily be, previous to this? A. He would be right behind me. Q. How far behind you? A. Maybe a couple of feet; maybe not that far; there was three on a side, you know, and one man had to get out of the other one's way; he had to let the hind man on."

Clearly, therefore, the middle man had to be at or about the middle when there were three on a side; for, granting that he had to keep away from the front man, he had also to keep out of the other man's way, and, as plaintiff says, "let the hind man on." If, now, the middle of the car was the customary and usual place for Brown to take, can it be said to be negligent for him to take that place merely because at this particular time the third man did not happen to be present? Plaintiff says the car was running 6 or 8 miles per hour; and at best Brown had only 40 inches to choose from in jumping upon the car going at that rate. Neither of the men could stand erect and jump with the precision one would jump at a fixed mark. Nor, with the car going at the rate it was, did the men have much time or space in which to choose or jump. Under these circumstances, it would be reasonably probable and likely that the men would brush against each other accidentally. Consequently the fact that Brown may have touched plaintiff's hand or arm is, under all these circumstances, as referable to accident, and more so, than to negligence. That being the case, since plaintiff did not make a prima facie showing of negligence, and the burden of showing same still remained upon him, he cannot claim that defendant's evidence has relieved him of that burden.

The foregoing is true without regard to the defendant's plea of assumption of risk, and without taking into consideration the question whether plaintiff's evidence does or does not disclose that if Brown did brush against him it was one of the ordinary hazards of the employment in which plaintiff and his coemployé were working in close proximity to one another and therefore liable to come in contact with one another. It would seem that in such a case as here, where both servants are working side by side, each exerting considerable muscular force in pushing the car and running along beside it, and both attempting to leap upon the car while going at the rate it was, the danger of their jostling one another would be one of the assumed risks if that doctrine is ever to be applied, and, in the absence of any specific act of negligence, would debar plaintiff from recovery. However this may be, we are of the opinion that there is nothing in defendant's evidence tending to show that the injury was the result of Brown's negligence any more than that it was accidental. It follows that plaintiff was not entitled to recover, and defendant's demurrer should have been sustained.

The judgment is therefore reversed. The other Judges concur.

BRYANT et al. v. WEST et al. (No. 1756.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

COURTS \Leftrightarrow 231(25)—APPELLATE COURTS—JURISDICTION—TITLE TO REAL ESTATE.

The title to the land being the issue in suit to enjoin its use, jurisdiction of the appeal is, under Const. art. 6, § 12, in the Supreme Court, as a case involving title to real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. \Leftrightarrow 231(25).]

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Action by John R. Bryant and others against Jack West and others. From an adverse judgment, plaintiffs appeal. Transferred to Supreme Court.

Boone & Lee and Russell & Joslyn, all of Charleston, for appellants. W. H. Grissom, of East Prairie, and Haw & Brown, of Charleston, for respondents.

ROBERTSON, P. J. In the petition it is alleged, so far as it is necessary for us to notice, that plaintiffs are the owners and in possession of a certain piece of land in Mississippi county, together with certain of the defendants so made parties because their consent cannot be obtained to join as plaintiffs; that defendant West is the agent of defendant Hinshaw, and that they are and have been operating a ferry from the Kentucky bank of the Mississippi to the west bank thereof, at which latter point they have established a landing upon the land of the plaintiffs. The prayer of the petition is that the said West and Hinshaw be enjoined from further using the land of the plaintiffs as a landing for their said ferry. Defendants West and Hinshaw answered, and specifically denied the plaintiffs' ownership of the land, and alleged that they leased the land from one Henry Lewis the owner thereof. Thomas E. Lewis, Ethar Lewis, and Henry Lewis appeared and filed an answer in the case denying plaintiffs' ownership in the land, and alleged that they were the sole owners of the land in controversy, and that they granted to the said defendants Hinshaw and West the right to use the land in the manner complained of by plaintiffs. A temporary injunction was granted. Upon motion to dissolve, the question of title to the land was tried, and resulted in a judgment in favor of defendants dissolving the temporary injunction and dismissing plaintiffs' petition. The plaintiffs have appealed.

This action involves title to real estate within the meaning of article 6, § 12, of the Constitution of this state (Baker v. Squire, 143 Mo. 92, 100, 44 S. W. 792; Peters v. Worth, 164 Mo. 431, 437, 64 S. W. 490; and State ex rel. Gavin v. Muench, 225 Mo. 210, 223, 124 S. W. 1124), and therefore the case

should be transferred to the Supreme Court, which is accordingly ordered.

FARRINGTON and STURGIS, JJ., concur.

YOUNG v. TILLEY. (No. 1841.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. DAMAGES \Leftrightarrow 6—SPECULATIVE OR INDEFINITE.

That damages are based on profits or other elements, making them more or less indefinite and speculative, is not ground for denying them when they can be estimated with a reasonable degree of certainty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 5; Dec. Dig. \Leftrightarrow 6.]

2. DAMAGES \Leftrightarrow 189—BREACH OF CONTRACT—EVIDENCE.

Defendant having contracted to furnish plaintiff work cutting timber for a certain period, at a certain price per thousand, and to furnish him a certain number of boarders, at a certain price per week, plaintiff's testimony as to what he made in cutting during the time he was allowed to work and on the one boarder furnished is sufficient for estimating the damages for defendant's breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 288, 512; Dec. Dig. \Leftrightarrow 189.]

3. TRIAL \Leftrightarrow 192—INSTRUCTIONS—ASSUMING.

An instruction may assume facts uncontroverted or on which the evidence of both parties agrees.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. \Leftrightarrow 192.]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by James H. Young against James H. Tilley. Judgment for plaintiff, and defendant appeals. Affirmed.

Mozley & Woody, of Bloomfield, for appellant.

STURGIS, J. The plaintiff's petition is in two counts, on both of which he recovered, and defendant appeals. Plaintiff's evidence, corroborated by that of Helen Poe, shows the following facts: That plaintiff and defendant both lived at Advance, in Stoddard county. That defendant was engaged in the timber business, having a contract to cut into logs and haul out same the timber on a tract of swamp land some seven or eight miles from this town. That defendant made a contract with plaintiff by which plaintiff was to move his family and necessary household effects to this land and engage in cutting the timber into logs at \$1 per thousand feet, lumber measure. Defendant also agreed to furnish plaintiff a suitable tent to live in and run as a boarding and lodging house and agreed to furnish him not less than five boarders at \$4 per week—this because defendant had to employ teamsters and other help and wanted a place for them to board and lodge. That defendant also agreed that he would furnish plaintiff work for six weeks

to two months, and of course the boarding house would run that long. That defendant would move plaintiff's household effects to the timber and move same back to town when the job was done, free of charge. That defendant did move plaintiff's effects to the timber, but refused to move same back, and plaintiff had to employ others to do so at an expense of \$12. That plaintiff was furnished work for less than 30 days when defendant made him quit. That he remained idle for the balance of the time, though prepared and willing to continue the work of cutting the timber. That defendant never furnished plaintiff with but one regular boarder and another or two for short intervals.

The first count of plaintiff's petition is for the recovery of \$12, the expense of plaintiff in having his household effects moved from the timber back to town, and a balance of \$38.10 due him on timber cut for defendant. The jury allowed plaintiff these items, and, while disputed by defendant, the question was one for the jury and no error is pointed out affecting the trial on this issue.

The second count is for loss of profits to plaintiff by reason of not being allowed to work in cutting timber for the full time contracted for and for failure of defendant to furnish him boarders as agreed. The plaintiff testified that he lost 30 days' time when the weather and other conditions were suitable and when he was ready and willing to go on with his work; that he could and would have made \$5 per day if allowed to work at the rate he was to be paid. He also testified that he could and would have made a profit of \$1.50 per week on each boarder paying him \$4 per week for board. This latter profit really means pay for the labor of his wife and stepdaughter living with him for doing the cooking and household work, which they had consented to do when agreeing to go with plaintiff to the timber and conduct the boarding house. The jury allowed plaintiff \$62.50 on these two items. There is an inference from the facts that plaintiff overestimated the time lost and the profits which he would have made, and the jury materially cut down the amount claimed.

[1, 2] The principal error claimed is that there is no sufficient evidence as to the amount, if any, of the profits plaintiff would have made, either in cutting timber or keeping boarders, and that same is too speculative to afford a basis for a judgment. A number of cases are cited as supporting this view, among them *Viernow v. Carthage*, 139 Mo. App. 276, 123 S. W. 67; *Morrow v. Railroad*, 140 Mo. App. 200, 123 S. W. 1034; *Reynolds v. Telegraph Co.*, 81 Mo. App. 223. We find no fault with the law as stated and applied in those cases, but the facts are quite different here. The mere fact that damages are based on profits or other elements, making same more or less indefinite and speculative, is not a ground for denying same, and

the tendency of the decisions is to allow such damage when same can be estimated with a reasonable degree of certainty. *Gildersleeve v. Overstolz*, 90 Mo. App. 518; *Wilt v. Hammond Bros.*, 179 Mo. App. 406, 418, 165 S. W. 362, and cases cited. In the present case the plaintiff had actually worked at and cut timber for a number of days and had kept some boarders under the exact conditions as existed for the time he was estimating his loss; and this was in addition to his more general knowledge and experience in these lines of work. He only estimated his loss for the days which were suitable for doing this work and the elements of uncertainty entering into the estimate here were comparatively small. It was a comparatively simple matter, easily understood, if not with the common experience of jurors, and we find no injustice in the verdict reached viewed in the light of plaintiff's evidence which the jury had a right to believe.

[3] Nor is there error in plaintiff's instruction in assuming that there was a price agreed upon for cutting the timber. Plaintiff so testified and defendant admitted that he agreed to pay plaintiff \$1 per thousand feet. An instruction may correctly assume as true uncontroverted facts, and certainly may assume as true those on which the evidence of both parties agree.

There is some evidence that defendant, because of his and plaintiff's differences, declared he was going to do everything he could to defeat plaintiff's claim, and that he would make it cost him all he could get out of it. The record here impresses us that this evidence is not without some foundation.

The judgment will be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

SENEKER v. LUSK et al. (No. 1907.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. CARRIERS — 121 — DAMAGE TO GOODS — CONTRIBUTORY NEGLIGENCE.

The mere knowledge of a shipper of strawberries of the defects in a refrigerator car which he had ordered, and the probable effect of shipping in such defective car, would not necessitate a verdict for the carrier in an action for damages to the berries.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 531-536; Dec. Dig. § 121.]

2. CARRIERS — 121 — DAMAGE TO GOODS — SHIPPER'S KNOWLEDGE—DUTY TO FURNISH ANOTHER CAR.

In such case, the carrier could not avoid liability on account of the shipper's knowledge of the defects in the refrigerator car, without showing that another car could have been so procured that loss would have thereby been avoided to a material extent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 531-536; Dec. Dig. § 121.]

3. CARRIERS \S 121 — DEFECTIVE CAR — DUTY OF SHIPPER.

A shipper is bound to protest against shipping in a defective car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 531-536; Dec. Dig. \S 121.]

4. TRIAL \S 251(3) — DAMAGE TO GOODS — INSTRUCTIONS—ISSUES—CONTRIBUTORY NEGLIGENCE.

In a shipper's action for damages to a shipment of strawberries from a defective refrigerator car, where the answer was a general denial and there was no plea of the shipper's negligence, in so shipping, an instruction on his negligence was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 590; Dec. Dig. \S 251(3).]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by L. E. Seneker against James W. Lusk and others, receivers of the St. Louis & San Francisco Railway Company. Judgment for defendants, and, from an order granting plaintiff a new trial, they appeal. Affirmed, and cause remanded.

W. F. Evans, of St. Louis, and McReynolds & Halliburton, of Carthage, and Mann, Todd & Mann, of Springfield, for appellants. H. A. Gardner, of Monett, for respondent.

ROBERTSON, P. J. This is an action to recover damages caused plaintiff in the shipment of a carload of strawberries from Mt. Vernon, Lawrence county, this state, to Topeka, Kan. Damages are claimed to have been caused by the presence of water due to a defective refrigerator car furnished by the defendants. Neither side controverts the fact that when the berries were being loaded water was running into the storage space of the car from the ice bunkers that are at each end. In the jury trial the verdict was returned for the defendants, and thereafter the court granted plaintiff a new trial, because of the error committed in giving the following instruction:

"The court instructs the jury that if you find and believe from the evidence that, at the time the plaintiff or his agents loaded car 459 at Mt. Vernon and this car was consigned to Topeka, Kan., said car was wet and in bad condition, and that plaintiff or his agents knew that fact, and further knew that the wet condition of said car would probably cause the berries which were packed in said car to spoil, and if you further find and believe that the condition of said berries when they arrived in Topeka was due to the wet and leaky condition of said car which was known to the plaintiff or his agent at Mt. Vernon, if you so find and believe, then the plaintiff in this case is guilty of contributory negligence and cannot recover, and your verdict will be for defendants."

The defendants have appealed, and one of the points involved is that of the correctness of said instruction, as there was testimony tending to prove the matters therein hypothetically submitted. There is, apparently, not much controversy as to said facts.

In order that plaintiff might procure a refrigerator car properly iced, it became neces-

sary that he make his order therefor some time before the car was needed, as such cars were not iced at Mt. Vernon. The car was accordingly ordered and received at Mt. Vernon late on the afternoon of June 1, 1914. When the car was set and was being loaded, its leaky and wet condition was noticed by plaintiff, and this was called to the attention of the agent of defendants at that place. This, so far as the evidence shows, was the only car there which could be used for this shipment and the only one that could be had on that day. The agent swept the water out of the car, and, when asked what he thought about it, he said he hardly knew; that it might be all right. He did not propose getting another car.

Upon these facts it is insisted in behalf of defendants that said instruction correctly declares the law, and in support of that contention there are cited the decisions in the cases of *Huston Bros. v. Wabash Railroad Co.*, 63 Mo. App. 671; *Ficklin & Son v. Wabash Railroad Co.*, 115 Mo. App. 633, 92 S. W. 347; *Nicholson v. St. Louis & S. F. R. Co.*, 141 Mo. App. 199, 124 S. W. 573; and *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 420, 134 S. W. 665. None of these opinions sustain the contention in support of which they are cited. It is sufficient to say of those cases that they reveal a state of facts where a shipper could and did, by reason of the character of the freight and the circumstances there involved, exercise his discretion about the shipment made and in effect selected the defective car. In the case at bar the plaintiff was the secretary of a fruit growers' association at Mt. Vernon through which the farmers in that vicinity marketed their berries. It was essential that in advance of delivering these berries at Mt. Vernon for shipment a refrigerator car therefor be ordered for the defendants. This, as we have already stated, was done, the car set late in the afternoon of June 1st loaded on that and the day following, when it was moved out. The plaintiff had the alternative of either loading the berries in this wet car, or holding them until another car could be procured, and there is no testimony as to when that could have been accomplished. Neither of the parties offered any evidence on that question.

[1] There being no testimony that another car was available for the plaintiff, it may be he had to accept the defective car in order to ship his berries. They were perishable, and, even if not, the mere knowledge of a shipper of the defects and the probable effect of shipping in a defective car would not defeat his right to recovery; but the instruction told the jury that said knowledge would necessitate a verdict for defendants. The position of plaintiff is sustained by virtually all of the authorities upon this point, among which are *Potts v. Wabash*, St. Louis

& Pac. Ry. Co., 17 Mo. App. 394, and numerous decisions referred to in the Nicholson Case, *supra*; also there are citations of many cases on the subject in 4 R. C. L. 685, § 158.

[2] Another defect in the instruction is that it ignores the question of plaintiff's ability to obtain another car in time to have avoided a greater loss than was suffered by shipping in this wet one. Since the car furnished was defective and defendants seek to avoid liability on account of plaintiff's knowledge thereof, it devolved on defendants to also show that another car could have been so procured that loss would thereby have been avoided to a material extent. The defendants were in a better position than plaintiff to make this proof as to their ability to get another car.

[3] We do not deem it expedient to suggest a course for another trial, as the material facts do not appear to have been fully proven, but we do observe that the case may turn on the conduct of plaintiff in shipping in this car without demanding and waiting for another one; his action being measured by what a reasonably prudent person would have done under the same or similar circumstances. It is also pointed out that the duty devolves on a shipper to protest against shipping in a defective car (Nicholson Case, *supra*, 141 Mo. App. 203, 124 S. W. 573); but as stated in that case, at the top of page 204 of 141 Mo. App., the plaintiff may not have had any choice in the matter. It may be that the defendants could not have procured another car in time to have avoided the loss suffered, or they may have failed in this regard even if they had the ability to get another car.

The point is urged in defendants' brief that it was the duty of plaintiff to make reasonable efforts to mitigate the damages caused by their failure to furnish a proper car. It is said that this would have been done without damages to the strawberries by waiting for the delivery of another car. We find no testimony that sustains this contention. There is nothing tending to prove how long the berries could have been kept outside of cold storage without damage equal to what was caused by the shipment in the wet car. Neither is there any testimony, as we have noticed above, as to when another car could have been procured. There was not a total loss of the berries as they were handled.

[4] Contributory negligence of the character relied upon in this case is not properly an issue. The answer is a general denial, and there is no plea of negligence on the part of plaintiff. Hence the court erred in giving the instruction for this reason. *White v. United Railways Co.*, 250 Mo. 476, 482-485, 157 S. W. 593.

Defendants contend that the trial court should have directed a verdict in their favor, because they say it should be held, as a matter of law, that plaintiff was guilty of contributory negligence in shipping the berries in the wet car; but what we have already held necessarily disposes of this contention adversely to defendants.

The court properly sustained the motion for a new trial. The judgment will be affirmed, and the cause remanded.

STURGIS and FARRINGTON, JJ., concur.

CRIGLER v. ALMA CASH STORE.
(No. 18.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. JUSTICES OF THE PEACE §36(2) — JURISDICTION—ACTIONS INVOLVING TITLE.

In an action in justice court for the conversion of crop of peaches, where the plaintiff asserts title under a mortgage which conveys only an interest in the personal property, the justice court has jurisdiction as against the objection that title to the realty was in controversy.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 84; Dec. Dig. § 36(2).]

2. TROVER AND CONVERSION §66—PROVINCE OF JURY.

In an action in a justice court for the conversion of a crop of peaches, conflicting evidence as to whether the plaintiff's assignor had lost his interest in crop by abandoning the premises in violation of his contract *held* for the jury.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.]

3. TROVER AND CONVERSION §40(3) — EVIDENCE—SUFFICIENCY.

In action for conversion of crop of peaches, conflicting evidence *held* to sustain finding of jury that plaintiff's grantor had not lost his interest in crop by abandoning premises in violation of his contract.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 234, 235; Dec. Dig. § 40(3).]

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Action by the Alma Cash Store against J. R. Crigler. Judgment for plaintiff and defendant appeals. Affirmed.

Wear & London, of Van Buren, for appellant. C. A. Starbird, of Alma, for appellee.

MCCULLOCH, O. J. This is an action instituted by appellee against appellant before a justice of the peace in Crawford county to recover the value of a certain interest in a crop of peaches produced on a farm in that county during the year 1915. Appellee claims title to the property under a mortgage executed by one Palmer. The farm on which the peaches were produced was owned by C. M. Brinkley, who entered into a written contract with Palmer for the sale of the farm to the latter. The contract recites that the sum of \$100 of the purchase price was paid in cash, and that four annual notes were executed for the balance of \$750. The contract further provided that Palmer should cultivate the peach trees on the land and assist in gathering the fruit when ripe, and that he should receive one-third of the net proceeds as compensation for his labor, and that the balance was to be applied by Brinkley as payments on the said purchase-money notes. It was also provided that in default of payment of the notes and interest when due the contract should be void, and that Palmer should vacate the premises within 30

days. Appellant purchased the farm from Brinkley in June, 1915, and took possession of the same and received the crop of peaches and appropriated the same to his own use.

[1] Appellant contends, in the first place, that the circuit court erred in refusing to sustain his motion to dismiss the cause on the ground that the justice of the peace had no jurisdiction of the subject-matter; that the title to the farm was in controversy. Appellee sues for the value of personal property alleged to have been wrongfully converted, and asserts title under a mortgage which conveys only an interest in the crop of peaches. The title to the land is not involved in this controversy, and the court was therefore correct in refusing to dismiss the cause.

[2, 3] The contention of the appellant is that Palmer abandoned the premises, and therefore had no interest in the crop of peaches, but there was a conflict in the testimony on that point. Witnesses introduced by appellant testified that Palmer abandoned the premises in December, 1914, but Palmer testified that he remained in possession and took care of the fruit trees in accordance with the terms of his contract, pruned and otherwise cared for them, and that he remained in possession until the land was sold to appellant, Crigler, in June, 1915. The court properly submitted to the jury for their determination the question at issue, whether or not there had been an abandonment of the premises by Palmer, and the verdict of the jury in appellee's favor is supported by legally sufficient evidence.

Judgment affirmed.

WILKINS v. EANES. (No. 16.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. SPECIFIC PERFORMANCE §66 — ENFORCEMENT—CONTRACTS.

Specific performance of a contract to sell land may be enforced by the vendor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 197; Dec. Dig. § 66.]

2. WILLS §687(5)—INTEREST DEVISED—CONSTRUCTION.

Testatrix devised land to plaintiff to be managed and controlled for him by a trustee until he should reach the age of 21 years, or be relieved of disabilities of minority, when title should vest in fee simple. Under preceding clauses of the will other property was devised to plaintiff's mother for life with remainder over at her death to plaintiff, while a subsequent clause declared that the property devised to plaintiff should in event of his death without issue of his body surviving vest in fee simple in his mother, and there was a residuary clause in favor of another. Plaintiff's mother died during the lifetime of testatrix, and after plaintiff reached majority he procured a quitclaim from the residuary devisee. *Held*, in view of the presumptions in favor of the early vesting of estates, the will must be construed as intending to vest in plaintiff an estate in fee simple in event that he should

reach his majority; the provisions for a gift over applying only in case of his death before majority.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1642; Dec. Dig. § 887(5).]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by D. F. S. Eanes against R. C. Wilkins. From a decree for plaintiff, defendant appeals. Affirmed.

Moore, Smith, Moore & Trieber, of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee in the chancery court of Pulaski county to compel specific performance of a written contract entered into between him and appellant whereby he agreed to sell, and appellant agreed to purchase, certain real estate situated in the city of Little Rock. The contract set forth in the complaint is unambiguous in its terms, and constitutes an undertaking on the part of appellee to sell, and on the part of appellant to purchase, the two lots for the stipulated price. Appellant paid the sum of \$100 on the purchase price, which is recited in the contract, and undertook to pay the balance "upon presentation of a good and valid warranty deed, after allowing ten days from delivery of abstracts of title and taxes for examination of title only." It is further stipulated in the contract that appellee was to furnish "a fee simple absolute title." Appellant refused to perform the contract on the alleged ground that appellee was unable to furnish a perfect title to the property which was the subject of the contract. The case was tried upon an agreed statement of the facts, and the chancellor decided in favor of appellee and rendered a decree for the specific performance of the contract. The only question therefore presented for our decision is whether or not appellee's title was such that appellant was bound to accept, or whether appellee failed to present a "fee simple absolute title" within the meaning of the contract.

[1] There is no question raised about the jurisdiction of the chancery court to decree specific performance of such a contract at the request of the vendor. That question has never been expressly passed on by this court, though it seems to be conceded in one of our decisions that the court may grant that relief to a vendor, the same as to the vendee, under a contract for the conveyance of real estate. *Hodges*, Ex parte, 24 Ark. 197. It seems to be settled, however, by the great weight of authority, that the relief of specific performance may be granted to a vendor of real estate, and we need not enter into any discussion of that question here or refer to the reasons upon which the relief is granted. 88 Cyc. 552-555.

[2] Appellee derived title to the property under the last will and testament of his great-aunt, Elizabeth S. Shall. The clause under which the property in question was devised to appellee reads as follows:

"Item 5. I will, devise and bequeath to my grandnephew, David F. Shall Eanes, lots 7, 8 and 9, in block 93, in the city of Little Rock, Pulaski county, Arkansas, the same to be controlled and managed for him by my grandnephew, David F. Shall Galloway, as trustee, until he is twenty-one years of age, or until he is relieved of his disabilities of minority when the same shall vest in fee simple in the said David F. Shall Eanes. But until that time, the same shall be controlled as above set out, and the income thereof shall be used for the support and education of the said David F. Shall Eanes."

Under the preceding clause of the will certain other property was devised to appellee's mother for and during her natural life, with remainder over at her death to appellee. A subsequent clause of the will, under which the present controversy arises, reads as follows:

"The property herein devised and bequeathed in items 4 and 5 to my grandnephew, David F. Shall Eanes, shall in the event of his death without issue of his body surviving, vest in fee simple in his mother, my niece, Mary A. Eanes, her heirs and assigns."

The residuary clause of the will devised to D. F. S. Galloway all the rest of the estate of the testatrix not specifically devised.

Mary A. Eanes died during the lifetime of the testatrix, and at the time this contract was entered into appellee was 25 years of age and was in full enjoyment of the use of the property devised to him. Appellee also had procured a quitclaim deed from D. F. S. Galloway, the residuary devisee under the will.

The contention of appellant is (stating it substantially in the language found in the brief) that under the terms of the will appellee took only a qualified fee in the lots in question, with a limitation over by way of executory devise to his mother upon the death of appellee without issue of his body surviving, that the devise over should be construed to be upon a definite failure of issue, and was therefore valid, and that it did not lapse upon the death of Mrs. Eanes during the lifetime of the testatrix or fall into the residuary clause of the will. The language of the devise undoubtedly refers to a definite failure of issue, and the only question is as to the point of time to which it refers. The contention of counsel for appellant is, of course, that it refers to the time of the death of appellee, and that the title he took was not absolute.

We are of the opinion that this case is ruled by the principles announced in the recent case of *Harrington v. Cooper*, 189 S. W. 667, where we said:

"This is an application of a rule that, where an estate is devised to one for life, with remainder to another, with the further provision that, 'if the remainderman shall die without having a child, then to a third person,' the

words 'die without having a child' are restricted to the death of the remainderman before the determination of the particular estate."

In that case there was a devise for life, and we held that the language used with reference to the devise over referred to the death of the first taker. The application of the principle announced in that case is slightly varied in the present one so as to construe the language to refer to the period at which the appellee was to come into full enjoyment of the property—in other words, when the trusteeship for his benefit ceased and the legal title vested in him. The principle announced, and its application to the facts of the present case, are sustained by the authorities there cited and others. It will be noted that the devise of this property was to appellee, that the same should be "controlled and managed for him" by D. F. S. Galloway, as trustee, until appellee should become 21 years of age or be relieved of his disabilities of minority, and that then the title "shall vest in fee simple in the said David F. Shall Eanes." This language is very emphatic, and it manifests unmistakably the intention of the testatrix to give to appellee at some time the title in fee.

One of the leading cases in this country on the question of construction of apparently conflicting devises is that of *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388, where Mr. Justice Peckham, in delivering the opinion of the court, said:

"We are confronted in the first place by the well-settled rule that courts refuse to cut down an estate already granted in fee or absolutely when the supposed terms of limitations are to be found in some subsequent portion of the will, and are not in themselves clear, unmistakable, and certain so that there can be no doubt of the meaning and intention of the testator. * * * There is another rule which is also well settled that, where the devise or bequest over to third persons is not dependent upon the event of death simply, but upon death without issue or without children, the death referred to is death in the lifetime of the testator. It is true that in some cases courts have stated that they would lay hold of slight circumstances to vary this construction and give effect to the language according to its natural import as referring to a death, under the circumstances mentioned, happening either before or after the death of the testator. But those circumstances must be such that a court can reasonably say there is good and fair ground upon which to base an alteration of the rule outside of and beyond the language which courts have heretofore held compelled them to enforce the rule as stated. When the language of a devise or bequest is such that the courts, without looking at any of the other provisions of a will, would say that such language meant, within the well-settled decisions, that the death spoken of was death before that of the testator, then the language in other portions of the will which is to alter that rule must be such as at least to give fair, clear, and reasonable ground for saying that its proper effect is to change the rule in question."

Applying this rule in the construction of the language of the will, it is entirely clear that, even without indulging the presumptions generally recognized in favor of the

early vesting of estates, the testatrix intended to vest the estate absolutely in appellee at some time during his life; and since she fixed a definite period for that to occur, namely when he became 21 years of age or was otherwise relieved of his disabilities of minority, we are driven to the conclusion that his death before that occurred was the period at which the devise over was to take effect, if at all. It being shown that appellee has attained the age of majority, and that the contingency upon which the devise over should take effect did not happen within the time specified, it follows that appellee's title under the will became absolute, and that he was in position to tender to appellant, and did so tender, a conveyance which conveyed the title in fee simple.

This conclusion is not affected by the peculiar result to which attention is called by counsel for appellant, which might have arisen with respect to the application of the devise over in the fourth clause of the will which leaves certain property to appellee's mother with remainder over to him in fee at her death. It is argued that the executory devise contained in item 8 of the will could have no application, as the period fixed for the failure of issue should be held to refer to the time of the death of the testatrix or to the period fixed for full enjoyment by appellee under the will. We need not concern ourselves now about the effect of this upon the property embraced in the other clause of the will; for we are clearly of the opinion that the conclusion we have reached gives a natural interpretation to the language used and reaches a result which the law always favored, namely, the early vesting of estates in land. It is not, however, very difficult to apply the same rule to the devise in item 4 and to hold that the contingency upon which the executory devise over is to vest related to the time when appellee was to begin the enjoyment of the estate. This conclusion brings that feature of the case squarely within the rule laid down in *Harrington v. Cooper*, supra.

We are of the opinion, therefore, that the chancellor reached the correct conclusion in the interpretation of the will, and that appellant should be compelled to specifically perform the contract.

The decree is therefore affirmed.

HOLT v. STATE. (No. 29.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. INTOXICATING LIQUORS \S 236(11) — UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE. Evidence, in a prosecution for unlawfully selling intoxicating liquors, held to show when and where the liquor was sold, and to sustain a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 318-319; Dec. Dig. \S 236(11).]

2. CRIMINAL LAW — 829(1)—REFUSAL OF INSTRUCTION COVERED.

Where the questions of sale and reasonable doubt were fully covered by the instructions given in a prosecution for selling whisky, the court did not err in refusing to instruct that defendant must be acquitted unless the jury found beyond a reasonable doubt that the sale was made to the alleged buyer and paid for as charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. — 829(1).]

3. INTOXICATING LIQUORS — 239(10) — UNLAWFUL SALE—INSTRUCTIONS.

In a prosecution for selling whisky, an instruction that it was not unlawful for a person to use another's name in ordering whisky was properly refused as tending to divert the minds of the jury from the issue whether defendant sold the whisky.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 342-345; Dec. Dig. — 239(10).]

4. INTOXICATING LIQUORS — 233(1)—UNLAWFUL SALE—EVIDENCE.

In a prosecution for selling whisky, the fact that defendant ordered whisky several times in another's name was a material circumstance tending to prove that defendant was in the liquor business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293, 294, 296, 297; Dec. Dig. — 233(1).]

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

Will Holt was convicted of selling intoxicating liquors, and appeals. Affirmed.

J. G. Sain, of Nashville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HUMPHREYS, J. Will Holt was indicted on the 22d day of August, 1916, by the grand jury of Howard county, Ark., for selling intoxicating liquors in Howard county and state of Arkansas, on the 1st day of June, 1916. On the trial of the cause, the jury returned a verdict of guilty against the defendant, and assessed his punishment in the penitentiary for one year.

[1] Appellant insists on a reversal of the judgment for the reason, he says, there is nothing in the record to show when or where he sold the whisky in question and because the court refused to give instructions 2 and 4 asked by him. The court told the jury that if they believed—

“from the evidence beyond a reasonable doubt that the defendant, in Howard county, Ark., since the 1st day of January, 1916, sold intoxicating liquors in any quantity, you will find him guilty and assess his punishment at imprisonment for one year in the state penitentiary. If you have a reasonable doubt of his guilt, you would find him not guilty.”

Will Gamble testified on the trial that he took some whisky from Memphis, Dallas & Gulf Depot, over to Will Holt's house, just before he was accused of making the sale. Being asked, “When?” he answered, “I believe it was Thursday evening. Q. Before the sale on Saturday night? A. Yes, sir.” Monroe Jones, the prosecuting witness, stat-

ed that he bought one pint of whisky from Will Holt at his house in Howard county and paid him \$1 for it. There was other evidence tending to show the time and place. We cannot say the verdict was unsupported by the evidence.

[2] Instruction No. 2, asked by defendant, is as follows:

“The defendant is charged with the sale of whisky to Monroe Jones, and you are instructed that you must find beyond a reasonable doubt that the sale was made; that Jones bought of the defendant the pint of whisky, and that he paid defendant \$1 for same, before you can convict him on the indictment in this case.”

The questions of sale and reasonable doubt were fully covered by the court's instructions. It was not error to refuse this instruction. *Larimore v. State*, 84 Ark. 606, 107 S. W. 165.

[3, 4] Instruction No. 4, asked by defendant, is as follows:

“You are further instructed that it is not against the laws of the state of Arkansas for a person in ordering whisky to use the name of another person in making the order, and the fact that the whisky out of which it is alleged that this pint of whisky was sold was ordered in the name of John Gamble is not a crime under the laws of the state of Arkansas.”

The fact that appellant was ordering whisky in Gamble's name as often as the record shows he did was a circumstance tending to prove he was in the liquor business. The issue here was, Did he sell it? Not in whose name he ordered it. The instruction in the form asked could only serve the purpose of diverting the minds of the jury from the real issue in the case.

The case was presented to the jury under proper instructions. There is evidence of a substantial character to support the verdict. The judgment is affirmed.

MISSISSIPPI COUNTY v. GRIDER et al. (No. 26.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. COUNTIES — 74(1) — COMPENSATION OF OFFICERS—COURTHOUSE COMMISSIONERS.

Under Laws 1913, p. 1498, appointing three courthouse commissioners for a certain county but making no provision for their compensation, the general statute contemplating compensation for one commissioner applies, and an allowance to the three commissioners collectively a sum which would have been reasonable compensation for one commissioner was authorized.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 104; Dec. Dig. — 74(1).]

2. COUNTIES — 74(1) — COMPENSATION OF OFFICERS—COURTHOUSE COMMISSIONERS.

That courthouse commissioners might have secured an architect to plan and supervise the work more cheaply than an architect and supervisor is not controlling on the commissioners' right to compensation, for the county court, under Kirby's Dig. § 1017, requiring plans to be submitted to it, has discretionary power regarding the employment of an architect.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 104; Dec. Dig. — 74(1).]

3. APPEAL AND ERROR — 1010(1)—REVIEW— FINDING OF COURT—SUFFICIENCY OF EVIDENCE.

The court below having found on sufficient evidence that courthouse commissioners performed their nondelegable duties and that such services were worth the sum allowed them, the finding must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. § 1010(1).]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Action by W. H. Grider and others against Mississippi County. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lamb & Rhodes, of Osceola, for appellant.
J. T. Coston, of Osceola, for appellees.

SMITH, J. This appeal is prosecuted to reverse a judgment in favor of appellees in which they were allowed the sum of \$1,000 for services as courthouse commissioners. Their appointment related originally to an order of the county court of Mississippi county, made in 1911, in which S. L. Gladish, as county judge, appointed himself and the other appellees as commissioners. They employed an architect to prepare plans for the building, and paid him \$1,500 for that service. In addition, they employed one Parlow as superintendent to supervise the construction of the building at a salary of \$200 per month, and paid him for his services in this connection \$3,400. The commissioners advertised for bids for the construction of the building, and let a contract for that purpose for \$87,820. The testimony shows that the county received full value for this money, but it is somewhat conflicting as to the nature, character, and extent of the services rendered by the commissioners themselves. There is testimony, however, to sustain the finding that they exercised that general supervision of the building in its construction and in making various contracts relating thereto which commissioners acting as such are required under the statute to perform, and that they continued in the performance of these duties from the time of their original appointment until the final completion and acceptance of the building.

[1] It is conceded that the appointment of Gladish by himself as a commissioner is void; but his term of office as judge expired on October 31, 1912, and he, with the other commissioners appointed by himself, were named as commissioners in Act No. 327, Acts 1913, p. 1498, and there charged with the duty of constructing the courthouse at Osceola. The statutes of this state in regard to the building courthouses contemplate the appointment of only one commissioner, and authority exists only for allowing compensation to one commissioner. The act of 1913 above mentioned amended this statute so far

as it related to Mississippi county, and provision was made for three commissioners in that county. It is true this special act made no provision for their compensation, but the general statute affords authority for that allowance. In the case of Izard County v. Williamson, 122 Ark. 596, 184 S. W. 420, it was said that, while more than one commissioner might have been appointed, the compensation allowed can be a reasonable one for only one person. And it was there also said that if the county court had allowed the two commissioners there appointed compensation in one order, and they had accepted it, the court could not be concerned about how they divided it, provided only a reasonable compensation for one person had been allowed. Here a single compensation was allowed in the sum of a thousand dollars to the three commissioners as such, and the order contains no direction as to the apportionment of the allowance among themselves. The court was not, therefore, without jurisdiction to make the order of allowance, and it remains only to consider whether that allowance was excessive.

[2] It is argued that a competent architect could have been secured to supervise the entire construction of the building, in addition to the preparation of the plans, for a less sum than that paid the architect for his plans and to Parlow for his supervision. This fact, if true, is not controlling here. The statute does not contain any express authority for the employment of an architect, but the commissioner is required under section 1017 of Kirby's Digest to prepare and submit to the county court a plan of the building to be erected, and there abides with that court a discretion in regard to the employment of an architect to assist in the preparation of these plans. The commissioner is not required to be an architect, yet the desirability, if not, indeed, the necessity, of the assistance of one, is apparent when we consider the character of work involved in the construction of a courthouse.

[3] Counsel, in effect, concedes this, and also concedes the right of the commissioners to employ Parlow; but it is said that the architect and Parlow did the work which the statute contemplates the commissioners should do, and that the present allowance results in double compensation for that service. This, however, is a question of fact which has been passed upon by the court below. There are certain duties which are nondelegable by the commissioners under the statute, and these, they say, they performed, and that such services were worth the allowance made.

The court below so found, and, as the evidence is legally sufficient to support that finding, we must affirm the judgment to that effect.

HOLLAND v. STATE. (No. 22.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. HOMICIDE —244(1)—TRIAL—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for murder against a plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 507; Dec. Dig. —244(1).]

2. HOMICIDE —214(2)—DYING DECLARATIONS —ADMISSIBILITY.

The declaration of a third person who was fatally wounded by accused's victim is inadmissible, on accused's behalf, as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 449; Dec. Dig. —214(2).]

3. CRIMINAL LAW —368(3) — ADMISSIBILITY OF EVIDENCE—RES GESTÆ.

Where a third party fatally wounded by accused's victim stated after the fight that he was dying, and then in response to a question said deceased shot him before accused fired, held his statement was inadmissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 821; Dec. Dig. —368(3).]

4. HOMICIDE —300(2)—INSTRUCTION—SELF-DEFENSE.

An instruction that accused was justified in shooting if he believed, "acting as a reasonable person," he was in danger, etc., is not reversible error because of the quoted words, where accused was not shown to have been of inferior mental capacity.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 616; Dec. Dig. —300(2).]

5. CRIMINAL LAW —829(18)—APPEAL AND ERROR—HARMLESS ERROR—REFUSAL OF REQUESTED INSTRUCTION.

Refusal of a requested instruction on reasonable doubt is not reversible error where other portions of the charge covered the ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. —829(18).]

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

J. J. Holland was convicted of murder, and appeals. Affirmed.

C. W. McKay, of Magnolia, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. The defendant J. J. Holland was indicted for the crime of murder in the first degree charged to have been committed by killing his brother, Bruce Holland. He was tried before a jury and convicted of murder in the second degree; his punishment being fixed at ten years in the state penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court. The material facts proved by the state are as follows:

[1] J. J. Holland, called Rome Holland, and Bruce Holland were brothers and lived near to each other in Columbia county, Ark. Rome Holland has a grown son called Dud Holland. An enmity existed between them and Bruce Holland. On one occasion Rome Holland came over in the field where his

brother, Bruce, was at work and threatened to kill him. On other occasions he would sit on top of the fence at the home of his brother Bruce with his rifle in his hand and at one time fired off his rifle while Bruce was out in the yard.

On the day of the killing Bruce Holland went to a commissary near his house to purchase some supplies. His nephew, Dud Holland, was there, and they with others remained there for some time. Finally Rome Holland came up with a raincoat in his hand. He gave it to his son Dud and asked him to take it home with him. About that time Bruce Holland started towards home and after he had gone 10 or 15 steps Rome Holland started after him. After Bruce Holland had walked about 113 steps he sat down on a stump and motioned to his brother Rome to go on. Rome Holland passed on about 25 steps, and then came back and put his hand on his breast and was talking to his brother Bruce. The witnesses at the commissary could not hear what the brothers were saying to each other. Dud Holland said to the other parties at the commissary:

"Come on, some of you, and let's go up there and keep them from killing each other."

One of the parties started to go with him, but his brother stopped him. Dud Holland, however, proceeded on to where his father and uncle were talking. As soon as he got there the shooting commenced. The witnesses for the state say they could not tell which one shot first, but one of them, a nephew of Rome and Bruce Holland, said that he thought that his uncle Bruce fell first.

Bose McMahon testified that he happened to look at the brothers just before the shooting began; that he could not tell who fired the first shot; that they were almost at the same time; that when the smoke cleared away one of them was on the ground; that when he got there Bruce Holland was down and Rome and Dud Holland were up, and that one or both of them were still shooting at him, and that Bruce was lying right where he saw some one fall; that after Bruce fell Rome and Dud Holland went towards him, and that he saw the smoke from their pistols; that he examined Bruce Holland's pistol just after the shooting, and that it was an old style Smith & Wesson single action pistol; that one cartridge had been fired from it and the other four were still in the pistol; that the shooting took place about 5 o'clock on a cloudy afternoon in November. The evidence shows that the killing occurred in Columbia county, Ark., in 1915; that Dud Holland was armed with a 38-caliber pistol; that Rome Holland was armed with a 32-caliber pistol; that Bruce Holland had a large bullet in his head over his right eye, and a small bullet also entered his head; that he was also shot in the body twice; that there were two sizes of bullet wounds caused by

pistols of different caliber, and that he died in a very short time as the result of these pistol wounds. At the time he was killed, Bruce Holland had sold his place and was preparing to move out of the neighborhood.

Another witness testified that some time after the killing the defendant told him that he heard that he was living where Nettie Holland (his brother's widow) was staying; that witness answered in the affirmative, and the defendant then said:

"If you help her out in any way, I will put your light out just like I did Bruce's."

The defendant further said:

"I wish God would raise Bruce from the dead so that I could kill him again and he could kill me and we could both kill each other."

According to the testimony adduced by the defendant, Bruce Holland had threatened him and his son and had purchased a rifle to kill them with and was in the habit of carrying his rifle around with him. On the day of the killing the defendant said that he walked off from the commissary behind his brother; that they walked about 100 steps close together, and that all at once Bruce sat down on a stump by the side of the road and told him to go on; that he did not make any reply to Bruce, but walked on a few steps, and that Bruce then said that Dud (referring to defendant's son) had been lying to him, and that he was going to kill him; that he turned around and thought that he would try to reason with Bruce and show him that he had no right to kill anybody; that he walked back a few steps and told Bruce that Dud did not mean him any harm, and that for him not to kill him, and that after talking a little bit he saw that Bruce was determined to kill Dud, and that he pulled his coat to one side, struck himself on the breast, and told Bruce that if he was bound to kill one of them to kill him and let the boy go home to his mother; that he told Bruce there was no use of having trouble; that about this time he heard a pistol hammer click and looked around and saw Dud; that he saw that Dud was hit with a bullet, and that he went up to Dud and put his left arm around him and held him up while he emptied his pistol; that he then jerked out his own pistol and emptied it; that he heard Bruce tell the boy he was going to kill him, and at the same time jerk out his pistol and shoot; that Dud then fell back against him and pulled his own pistol and shot at Bruce; that he held the boy up while he fired several shots and that he himself shot several times at Bruce.

Other witnesses for the defendant testified that Bruce fired the first shot. If the jury believed the witnesses for the state, it was warranted in finding the defendant guilty of murder in the second degree. It is true the witnesses for the state testified that the first two shots were fired nearly together, and that they could not tell which one fired first, but one of the witnesses testified that as

soon as the first shot was fired he saw a man fall, and that when he got up there he found that the man who had fallen was Bruce Holland. Bruce died in a very short time after the difficulty was over, and as there was only one shot fired from his pistol, the jury might have inferred that his nephew shot first. In any event Bruce Holland did not fire but one shot, and the evidence shows that the defendant and his son continued to shoot at him after he fell down on the ground. They both emptied their pistols at him, and several shots took effect in his head and body. When we consider this testimony together with the enmity which was shown to have existed between the parties and the previous threats made against the life of Bruce Holland, the jury was warranted in finding that it was a willful and malicious killing, and that the defendant was guilty of at least murder in the second degree.

[2] C. C. Hammock, the owner of the commissary and mill near which the shooting occurred, testified that he was at the mill the day of the killing, but did not see any of the shooting. He stated that he went to the scene of the shooting immediately after it occurred, and saw Bruce Holland lying up against a log dying, and Dud Holland was over by the side of the road a short distance away, and that Dud said he was dying; that they were both shot. He was then asked the following, "Did Dud Holland say anything further?" He answered, "I asked Dud who began the shooting, and he said his uncle Bruce shot him first. On cross-examination he was asked, "Did Dud Holland tell you he was dying?" He answered, "Yes, I believe he did, and I told him he wasn't dying." The prosecuting attorney objected to the evidence of Dud Holland's dying declaration and asked that it be excluded from the jury. The court held that the admission of dying declarations in evidence is confined to cases of homicide, where the death of deceased is the subject of the charge, and excluded the testimony from the jury.

The ruling of the court was excepted to, and it is now insisted that the judgment should be reversed because the court excluded the testimony from the jury. It will be remembered that the defendant was on trial charged with killing his brother Bruce, and although Dud Holland was shot in the same fight, his dying declarations were not, as such, admissible in evidence on the trial of Rome Holland for the murder of Bruce Holland. *Taylor v. State*, 120 Ga. 857, 48 S. E. 361; *State v. Westfall*, 49 Iowa, 328; *State v. Bohan*, 15 Kan. 407; *Johnson v. State*, 63 Fla. 16, 58 South. 540, 40 L. R. A. (N. S.) 1195; *State v. Nist*, 66 Wash. 55, 118 Pac. 920, Ann. Cas. 1913C, 409.

On this subject Mr. Underhill says:

"The declaration of a deceased person which is offered in evidence as dying declarations is only admissible, as such, in case his death is the subject of an inquiry because of an accusation

of homicide. * * * The mere circumstance that a person's death occurred in a disturbance, in which the person for whose homicide the prisoner is indicted was killed, is insufficient to admit the declaration." Underhill on Criminal Evidence, § 106; 2 Wigmore on Evidence, § 1440; *Montgomery v. State*, 80 Ind. 333, 41 Am. Rep. 815; *State v. Jefferson*, 77 Mo. 136; *State v. Dickinson*, 41 Wis. 299.

See, also, *Rhea v. State*, 104 Ark. 175, 147 S. W. 463.

[3] The contention is also made by the defendant that, if the dying declaration of Dud Holland cannot be admitted in evidence as such a declaration, yet it was proper as a part of the *res gestæ*. They cite in support of their contention *Childs v. State*, 98 Ark. 435, 136 S. W. 285, *Stevens v. State*, 117 Ark. 64, 174 S. W. 219, and *Carr v. State*, 43 Ark. 99. The witness stated that, when he went up to the place where the shooting occurred that Dud Holland said he was dying, that the witness asked Dud who began the shooting, and that Dud said his uncle Bruce shot him first. This was the narration of a past event in response to a question asked him, and was not a part of the transaction itself. Under the authorities above referred to, *res gestæ* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. As we have already seen the answer was made by Dud Holland in response to a question asked him, and it was made after he had said that he was dying, thus showing that his mind had been turned to other things, and the answer that his uncle Bruce shot him first was made in response to a question and was not a spontaneous emanation from the transaction itself.

[4] It is also contended by counsel for the defendant that the judgment should be reversed because the court erred in giving in its amended form instruction No. 9, which reads as follows:

"You are instructed that to justify a killing in self-defense, it is not essential that it should appear to the jury to have been necessary, it is sufficient if the defendant (acting as a reasonable person) honestly believed without fault or carelessness on his part that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent his receiving great bodily injury, or to save the life of his son; and the reasonableness of defendant's apprehension is to be judged from the standpoint of the defendant, situated as he was at the time and not from that of the jury."

The amendment consisted in adding the words included in parentheses, to wit, "acting as a reasonable person." In *Hoard v. State*, 80 Ark. 87, 95 S. W. 1002, the court held that:

"It was not error to instruct the jury that one who killed another was justified in defending himself, if it appeared to him, acting as a reasonable person, without fault on his part, that he was in danger of losing his life or receiving great bodily harm, as the law presumes, where nothing of the contrary is shown, that the accused is of ordinary reason and holds him accountable accordingly."

The court in that case while not approving the form of the instruction gives at length its reasons for holding that such an instruction does not constitute reversible error, and the reasoning of the court need not be repeated here. See, also, *Scoggin v. State*, 109 Ark. 510, 159 S. W. 211. There is nothing in the record in the present case that tends to show that the defendant is weak-minded or is a person of less than ordinary intelligence. Therefore the judgment will not be reversed for this alleged error.

[5] The defendant asked an instruction on reasonable doubt, which the court refused to give. We need not set out this instruction, however, for the court in its instructions given to the jury fully covered the question of reasonable doubt, and it is well settled that the court is not required to repeat instructions on the same point. We have carefully examined the record, and there is nothing in it which constitutes reversible error.

The judgment will be affirmed.

THURMAN et al. v. SYMONDS et al. (No. 25.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. WILLS §693(3) — CONSTRUCTION — POWER OF SALE.

Under a will devising to testator's surviving wife and to her children by testator all his property, both real and personal, and appointing her executrix, with power of sale, and also giving her the power to sell and convey any realty by warranty deed and to use the proceeds for her own benefit, she was authorized to convey realty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1655; Dec. Dig. §693(3).]

2. WILLS §693(5) — POWERS — CONVEYANCES — CAPACITY.

Under such will conveyance executed by such surviving wife in her individual capacity, and not as executrix of her deceased husband's estate, was a valid execution of the power to convey since it was given to her as wife, and not as executrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1656; Dec. Dig. §693(5).]

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Suit by Bethel Thurman and others against Edward T. Symonds and others. Judgment for defendants sustaining a demurrer and dismissing the complaint, and plaintiffs appeal. Affirmed.

Covington & Grant, of Ft. Smith, for appellants. Starbird & Starbird, of Alma, for appellees.

SMITH, J. Appellants brought suit to recover possession of certain lands described in their complaint. They claimed title to the lands through the will of one A. J. Meadors, which is set out and forms a part of the complaint. They alleged that at the death of the said Meadors he left a widow, Lucinda K. Meadors, who qualified as execu-

trix, and later conveyed certain lands which had belonged to the testator, but these conveyances were made in her individual capacity, and not as executrix, she claiming the authority so to convey under the will. The relevant portions of this will are as follows:

"II. I bequeath to my beloved wife, Lucinda K. Meadors, in the event she survives my death, and unto her children by my body begotten all my property by me owned at the time of my death, both real and personal, and I further will that my said beloved wife be my executrix and that she administer upon any and all my said property of both real and personal of any kind including the rights in action to use, sell or dispose of the same or any part thereof without bonds of any kind and without any process in any court or functionary.

"III. I also bequeath to my beloved wife the right and power to sell and make warranty deed to any real estate that I may be possessed of at the time of my death and to use the proceeds for her own personal use and benefit without bond or process of court or accountability to any person or persons. Now in the event that I survive my said beloved wife then in that event this will and testament shall be null, void and remain my property as heretofore."

The complaint questions the authority of the widow so to convey. The court sustained a demurrer and dismissed the complaint, and this appeal questions that action.

[1] Counsel for appellant argue that the case is similar to and is controlled by the case of *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; while counsel for appellee say the case of *Archer v. Palmer*, 112 Ark. 527, 167 S. W. 99, Ann. Cas. 1916B, 573, announces the doctrine which controls here; and we are of this latter opinion. A comparison of the will set out in the opinion in that case with the one now under consideration shows a striking similarity. A clause of the will in the *Archer Case* gave the widow a life estate with remainder over to a son and a niece. Another clause gave full power to sell and dispose of any and all the property. Here one clause contains a devise to the widow and to her children begotten by the testator; and another clause gave her the full authority to sell and convey the property. It was argued there, as here, that to so construe the will as to give the widow the authority to convey the fee in the land would operate to defeat the estate in remainder, and it was said there, as here, that the case of *Patty v. Goolsby* forbade that construction. It was pointed out, however, in the case of *Archer v. Palmer*, supra, that in the case of *Patty v. Goolsby* the power of disposition was given in the same clause as that which devised to the widow the property for her natural life and in immediate connection with the devise of the life estate, thereby indicating that the power of disposal was to be limited to the life estate, and that as by the terms of the will the widow took only a life estate, and that since the power of disposition was annexed to the devise of this life estate, its presence

did not give the widow an unlimited power of disposition, but was restricted to the life estate. In the case of *Archer v. Palmer* it was also said:

"The language is very broad and comprehensive. When the will is read and considered as a whole, we think it is manifest that the power of disposal was not limited to such disposition as a tenant for life can make. To so hold would give no effect whatever to the fourth clause of the will; for the tenant for life had the power of disposition without being granted that power under the will. The fourth clause of the will in express terms gives her the power of disposal of the whole of his property. It does not purport to give her any absolute right to the property, but only the bare authority to dispose of it. The existence of such a power does not imply ownership, but it does in express terms give to the life tenant authority to dispose of the property absolutely. By the exercise of the power by the life tenant, she could convey the fee to her grantee. According to the current of authority, the rule is that, where a testator gives an estate for life only, with the added power to the life tenant to convey the estate absolutely, the life tenant may defeat the estate of a remainderman under the will by the exercise of the power of disposal during his lifetime."

What was said there is applicable to the construction of this will, and in so far as this case differs from the instant case this is a stronger one for the application of this principle; for in the *Archer v. Palmer Case* the power was granted to one who had only a life estate, whereas here the will vests the fee in the widow and her heirs by the testator begotten.

[2] Nor do we think the conveyances executed by Mrs. Meadors are void because they were executed by her in her individual capacity, rather than as executrix of the estate of her husband. Under the second clause of the will she might have conveyed as executrix for purposes of administration upon this estate, but, however that may be, the grant of the power to convey contained in the third clause of the will was to her as wife, and not as executrix, and the conveyances in question were made pursuant to this power, and for the reasons stated will be upheld.

The judgment of the court below is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. COBB.
(No. 19.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. MASTER AND SERVANT—179—INJURIES TO SERVANT—NEGLIGENCE OF SUBORDINATE SERVANT—STATUTE.

Under the Employers' Liability Act (Acts 1911, p. 55), making a railroad liable for injuries to an employé resulting from the negligence of any employé of the railroad, a railroad is liable for injuries to a vice principal, resulting from the negligence of his subordinate employé, and the vice principal cannot be held to have assumed the risk of such negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. ¶ 179.]

2. MASTER AND SERVANT — 177—INJURIES TO SERVANT — NEGLIGENCE OF SUBORDINATE SERVANT—ORDERS FROM VICE PRINCIPAL.

If the injuries to a vice principal result from acts of the subordinate under the orders of the vice principal, without negligence on the subordinate servant's part, the employer is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. —177.]

3. APPEAL AND ERROR — 1064(2)—HARMLESS ERROR—INSTRUCTIONS—ASSUMPTION OF UNDISPUTED FACTS.

The giving of an instruction which assumes that plaintiff was injured is not prejudicial, where the undisputed evidence shows that he was injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221, 4222; Dec. Dig. —1064(2); Trial, Cent. Dig. § 525.]

4. TRIAL — 296(4, 5)—INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The giving of an instruction in an action for personal injuries, which erroneously ignored the issue of contributory comparative negligence, does not require a reversal, where the very next instruction fully and correctly submitted that issue to the jury, since the instructions, when considered as a whole and in the order in which they were given, could not have misled the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 707, 708, 709; Dec. Dig. —296(4, 5).]

5. MASTER AND SERVANT — 287(4)—NEGLECT — 136(26)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLECT OF SUBORDINATE SERVANT.

In an action for personal injuries to a section foreman, evidence held sufficient to warrant submitting to the jury the issues of negligence of the subordinate employé and plaintiff's contributory comparative negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1045, 1060; Dec. Dig. —287(4); Negligence, Cent. Dig. §§ 333, 338; Dec. Dig. —136(26).]

6. DAMAGES — 134(1)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A verdict of \$1,000 for severe injuries to the back and knee of a man 58 years old, who was earning \$55 per month, whereby his earning capacity was greatly diminished and he was caused intense pain, which continued to the time of the trial, is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 368, 388, 389-394; Dec. Dig. —134(1).]

7. APPEAL AND ERROR — 1064(4)—HARMLESS ERROR — INSTRUCTIONS — MEASURE OF DAMAGES.

The giving of an instruction as to the measure of damages for personal injuries, while not in the most approved form, held not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224; Dec. Dig. —1064(4); Trial, Cent. Dig. §§ 525, 553, 558.]

Appeal from Circuit Court, Monroe County; Thos. C. Trimble, Judge.

Action by J. B. Cobb against the St. Louis, Iron Mountain & Southern Railway Company to recover for personal injuries. Judgment for the plaintiff, and defendant appeals. Affirmed.

On or about the 2d of February, 1915, appellee, a section foreman of appellant, was instructed by the roadmaster to repair some

bad track on appellant's line between Marvell and Poplar Grove. On the 4th of February appellee was notified that a freight train would bring out a car of cinders from Helena, which was to be used by appellee in the repair work. Appellee resided at Marvell, in the section house of appellant. Appellee wanted to commence unloading cinders about half or three-quarters of a mile west of Poplar Grove. He went with his section crew on a hand car, and put four of the crew to draining the track, and went on with the cinder car to meet the local freight at Poplar Grove. He got upon the car of cinders and rode back to the place where the bad track was, in order that he might have the car of cinders stopped at the proper place for unloading. Upon reaching the place of bad track, the freight car was stopped and appellee directed his crew as follows.

"Ed Holland, you open the doors; and the balance of you get on top and go to cutting off cinders."

Holland opened the first door on the north side. Ed Richardson, when he got to the third door, was little long about opening it, and Cobb walked up along the side of the car to see what the trouble was, and just as he did so Holland knocked the door open and Cobb backed back to get out of the way of it, when Simon Derrick, who was on the south side, opened the door without Cobb's knowledge, causing him to fall against the side of the car, severely injuring him.

Cobb instituted this suit against appellant, alleging substantially the above facts, and charging that his injury was caused through the negligence of one of appellant's employés. The appellant answered, denying the allegations as to negligence, and setting up the defenses of assumed risk and contributory negligence. There was testimony on behalf of appellant tending to prove that the members of the crew were obeying his orders in the manner in which they were doing the work at the time that Cobb was injured. The verdict and judgment were in favor of the appellee for the sum of \$1,000. The appellant seeks to reverse this judgment. Other facts are stated in the opinion.

Troy Pace, of Little Rock, and W. R. Satterfield, of Helena, for appellant. Lee & Moore, of Clarendon, for appellee.

WOOD, J. (after stating the facts as above). Appellant contends that the court erred in giving appellee's prayer for instruction No. 1, as follows:

"(1) You are instructed that a common carrier by railroad in this state is liable for all damages to an employé suffering injury while such employé is employed by such carrier, which injury is the result in whole or in part from the negligence of any of the officers, agents, or employés

of such carrier. So, if you believe from the evidence in this case that the plaintiff was an employé of the St. Louis, Iron Mountain & Southern Railway Company at the time of the injury which the plaintiff received, and that the defendant is a common carrier by railroad in this state, and that the injury which the plaintiff received resulted in whole or in part from the negligence of the defendant, its officers, agents, or employés, the defendant would be liable."

[1] Appellant insists that, inasmuch as the allegations of the complaint and the undisputed evidence show that appellee was a vice principal at the time of his injury, and was injured by one of his subordinates, appellee assumed the risk, citing *McGrory v. Ultima Thule, A. & M. Railway Co.*, 90 Ark. 210, 118 S. W. 710, 23 L. R. A. (N. S.) 301, 134 Am. St. Rep. 24, where we held that the master was not responsible to a vice principal on account of the negligence of a servant, who was his subordinate, such negligence being one of the ordinary risks which the vice principal assumed when he took control over his subordinates. But that doctrine was announced before the passage of the Employers' Liability Act of March 8, 1911. Act 88, p. 55, Acts of 1911. The present suit was instituted under that act, the first section of which provides, in part, as follows:

"That every common carrier by railroad in this state shall be liable for all damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier."

In *Kansas City & M. Ry. Co. v. Huff*, 116 Ark. 461, 466, 173 S. W. 419, 421, we said:

"Where there is a right of action under section 1, that action cannot be defeated by the defense of assumption of risk, and is not necessarily defeated because the servant may have been guilty of contributory negligence."

Under the above statute, if an employé of a railroad company is injured by the negligence of another employé of such company, the injured employé may recover damages of the company for such negligence, provided he is engaged at the time of the injury in the running of trains, or in work that is incident thereto or immediately connected therewith. The statute was designed for the protection of those whose work exposed them to those "characteristic dangers peculiarly connected with the operation of railroads, known as railroad hazards"; i. e. "those peculiar dangers to which employés are exposed in work connected with and necessary to the operation and running of trains over a line of railroad." *St. L., I. M. & S. Ry. Co. v. Ingram*, 118 Ark. 377, 176 S. W. 692; *St. L., I. M. & S. R. Co. v. Wiseman*, 119 Ark. 477, 177 S. W. 1139.

[2] The language of the statute is very broad, and makes the railroad company liable "for the negligence of any of the officers, agents, or employés of such carrier," causing injury to another employé. Under

the statute it matters not whether the injured employé stands in the relation of vice principal to the employé injuring him, provided the injury is caused through the negligence of such employé. But if the relation of vice principal and subordinate exists between the two servants at the time of the injury, and the injury is caused while the subordinate is acting, without negligence, under the orders and directions of his superior, then there would be no negligence for which the company would be liable, because, in such case, the negligence would be that of the vice principal himself.

[3] It is urged that the instruction was erroneous because it assumes that appellee was injured. The undisputed evidence showed that appellee was injured; therefore there was no prejudicial error in assuming that such fact was established.

[4] It is also insisted that the instruction ignored the issue of contributory comparative negligence. The instruction was open to this objection, but the very next instruction fully and correctly submitted that issue to the jury, and, taking the instructions as a whole and the order thereof, the juxtaposition of the first and second, they were not contradictory. The jury could not have been misled, and the instruction was not prejudicial error under the rule announced in *St. L., I. M. & S. Ry. Co. v. Rogers*, 93 Ark. 564, 126 S. W. 375, 1199.

[5] The issues of negligence and contributory comparative negligence were issues of fact for the jury. The appellee testified that he directed Ed Holland to open the doors and the balance of the crew to get on top and go to cutting off cinders. Instead of obeying these directions, Simon Derrick opened the door on the south side without the knowledge of appellee, causing his injury. Appellee is corroborated by at least one member of the crew, Ed Holland. The others testify to the contrary, but this raised questions of fact as to negligence and contributory comparative negligence. There was evidence to warrant the verdict on these issues.

[6] The verdict was not excessive. According to appellee's testimony, and the testimony, of the physician who attended him, he was severely injured in his back and knee. He was 58 years of age, was getting \$55 per month, and his earning capacity in the work for which he was fitted had been greatly diminished by the injury. He had suffered intense pain for months, and was still suffering at the time of the trial. A verdict for \$1,000 under such circumstances is not excessive.

[7] There was no prejudicial error in the instruction on the measure of damages. While not in the most approved form, it conformed substantially to the instruction given in *Railway Co. v. Cantrell*, 37 Ark. 522, 40

Am. Rep. 105, and St. L., I. M. & S. Ry. Co. v. Hydrick, 109 Ark. 239, 160 S. W. 196, on the measure of damages. The giving of an instruction in this form had not been expressly condemned as prejudicial error by any previous decision of this court.

The record presents no reversible error, and the judgment is therefore affirmed.

MISSISSIPPI COUNTY v. MOORE.
(No. 23.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

APPEAL AND ERROR \Leftrightarrow 365(1)—**ORDER FOR APPEAL—APPEAL FROM COUNTY COURT.**

Under Kirby's Dig. § 1487, providing that appeals from county to circuit court shall be granted by either the county court or circuit clerk, the circuit court has no jurisdiction over a claim disallowed by the county court, where an affidavit for appeal was filed, but no order granting the appeal was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1784, 1977–1987; Dec. Dig. \Leftrightarrow 365(1).]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Action by W. H. Moore against Mississippi County. From a disallowance of his claim by the county court, plaintiff transferred the proceedings to the circuit court, which allowed his claim, and the county appeals. Reversed, and action dismissed.

Lamb & Rhodes, of Osceola, for appellant.

HART, J. In July, 1915, the sheriff of Mississippi county was killed in an effort to capture certain persons engaged in gambling and the illegal sale of intoxicating liquors on an island in the Mississippi river. Tony Hill, one of the persons captured, was badly wounded. W. H. Moore, a deputy sheriff who was in the raid, took Hill to his house and guarded him and filed a claim against the county for \$120 for boarding and guarding him. The county refused to allow his claim and Moore filed an affidavit for appeal to the circuit court, but the record does not contain any order of the county court or of the circuit clerk granting the appeal. The circuit court allowed the claim and Mississippi county has appealed.

Section 1487 of Kirby's Digest provides that appeals shall be granted as a matter of right from all final orders of the county court by the court rendering a judgment, as in Drainage District No. 1 v. Rolfe, 110 Ark. 374, 161 S. W. 1034, and Chicago Mill & Lumber Co. v. Drainage District, 117 Ark. 292, 174 S. W. 566, or by the circuit clerk, as in Jones v. Coffin, 96 Ark. 332, 131 S. W. 873.

Section 1348 of Kirby's Digest provides that appeals to the circuit court from the probate court shall be granted by the probate court. In construing this statute in the case of Speed v. Fry, 95 Ark. 148, 128 S. W. 854, the court held that the order of the pro-

bate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason cannot be waived. This rule was reaffirmed in the case of Williams v. Bowen, Executor, 116 Ark. 266, 170 S. W. 221. In that case no motion was made in the circuit court to dismiss the appeal on account of there being no order of the probate court granting it, and the court held that it was the duty of the circuit court to dismiss the appeal for want of jurisdiction. We quote from the opinion as follows:

"In the later case of Drainage District No. 1 v. Rolfe, 110 Ark. 374 [161 S. W. 1034], we held, under a statute prescribing methods for appeals from county courts in the matter of formation of drainage districts, that where there was no order of the county court granting the appeal, appearance in the circuit court without objection to the jurisdiction would not operate as a waiver, and that a judgment of the circuit court under those circumstances would be reversed, even though the question of jurisdiction was raised here for the first time."

For like reason, the circuit court should have dismissed the appeal in the present case for want of jurisdiction, and for the error in not doing so the judgment must be reversed, and the cause of action will be dismissed.

It is so ordered.

PINKERTON v. STATE. (No. 14.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. CRIMINAL LAW \Leftrightarrow 393(1)—**EVIDENCE—ADMISSIBILITY.**

The provision of Const. art. 2, § 8, that a person shall not be compelled in a criminal case to be a witness against himself is not violated by calling the foreman of the grand jury and permitting him to impeach the defendant by stating the latter's incriminating testimony before the grand jury, which testimony was contradictory of that given on the trial by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 871; Dec. Dig. \Leftrightarrow 393(1).]

2. WITNESSES \Leftrightarrow 380(2)—**IMPEACHMENT OF ACCUSED—CONFLICTING STATEMENTS.**

One accused of crime, who voluntarily goes upon the witness stand, subjects himself to the ordinary tests of credibility, and evidence of conflicting statements made by him before the grand jury are admissible, not as substantive proof of guilt, but as impeaching testimony merely, and that the jury may consider such testimony as substantive proof of guilt, in disregard of court's instructions, is no ground for its exclusion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1211, 1219; Dec. Dig. \Leftrightarrow 380(2).]

3. CRIMINAL LAW \Leftrightarrow 673(3)—**INSTRUCTIONS—PURPOSE OF IMPEACHING EVIDENCE.**

When evidence of testimony of accused before grand jury is admitted to impeach his testimony on trial, it is duty of court to instruct jury not to consider statements before grand jury as substantive proof of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1875; Dec. Dig. \Leftrightarrow 673(3).]

4. CRIMINAL LAW \S 829(1)—APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.

The refusal of the court to give requested instructions, is not error, where the substance of the instructions are covered by others given by the court of its own motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829(1).]

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

J. J. Pinkerton was convicted of being engaged in manufacturing whisky, and he appeals. Affirmed.

W. P. Feazel, of Nashville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Howard county on the charge of being engaged in manufacturing whisky in that county, and on the trial before a jury he was convicted and sentenced to the state penitentiary. It is undisputed that whisky was being manufactured at a small distillery in the woods near appellant's premises, and that appellant was aware of its presence there, and, in fact, visited the place on more than one occasion and drank whisky there. The only issue in the case is whether or not he participated in the operation of the still.

The state introduced a witness, who testified that he saw appellant at the place on several occasions, and that he was engaged in working there, performing various services required to manufacture the whisky. Appellant admitted that he visited the place several times, but stated that his visits there were purely accidental, and that he had nothing to do with the operation of the still. Appellant was asked on cross-examination if he had not stated before the grand jury that he worked at the still. He denied that he made any such statement, and later the foreman of the grand jury was called and permitted, over appellant's objection, to testify that appellant stated to the grand jury that he did some work at the still. An exception was duly saved, and this ruling of the court is about the only thing that is seriously urged here as grounds for reversal.

[1] It is argued that the effect of the court's ruling in the admission of this testimony was to do violence to the constitutional guaranty that a person shall not "be compelled, in any criminal case, to be a witness against himself." Article 2, \S 8, Const. 1874. The purpose of this guaranty is the protection against an accused as such, and not as a witness. When an accused person takes advantage of the right conferred upon him by statute to testify in his own behalf, he goes upon the witness stand subject to the same rules of evidence as any other witness, and may be impeached in the same way that any other witness may be impeached. He can be impeached by contradictory statements

wherever made, and there is no exception concerning a statement made before the grand jury when he has testified there as a witness.

[2, 3] The fact that the testimony might be considered by the jury as an admission of guilt, notwithstanding the admonition of the court to the contrary, is no reason for excluding the testimony. An accused person takes that chance when he voluntarily goes upon the witness stand and subjects himself to the ordinary tests of credibility as a witness. It is the duty of the court, of course, to admonish the jury that the alleged conflicting statements are not to be considered as substantive proof of guilt of the offense charged, and this the trial court did in very appropriate and forceful terms. We are of the opinion, therefore, that no error was committed.

[4] There is another assignment of error with respect to the refusal of the court to give an instruction concerning the inference to be drawn from the presence of the accused at the still, but we find that the substance of this instruction was covered by one which the court gave of its own motion.

There is no error, and the judgment is affirmed.

WHITE SEWING MACH. CO. v. ATKINSON & SON. (No. 15.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. EVIDENCE \S 441(9). — CONSTRUCTION OF CONTRACT—EVIDENCE TO AID CONSTRUCTION.

Where a contract for the purchase of sewing machines was entered into by signing a written order, containing the provision that no other understanding or agreement than as contained in such order should be any part of the contract, and also containing the provision that the order was subject to the approval of the vendor, evidence that in mailing the order the purchaser attached a typewritten stipulation, reserving the right to return certain unsold machines, was admissible as tending to prove what the written contract was, and not objectionable as tending to vary the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S\S$ 1187, 2035; Dec. Dig. \S 441(9).]

2. PRINCIPAL AND AGENT \S 103(12) — CONTRACTS—CONSTRUCTION—SALES.

Where purchaser, in giving order for merchandise, attached stipulation to order and gave it to seller's agent, who had no authority to approve orders, but only to solicit and forward them, the seller was bound by conditions, whether they were attached when order was received from agent, or whether latter had detached them before forwarding order.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 290; Dec. Dig. \S 103(12).]

3. SALES \S 859(1)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In an action by the vendor to recover the price of sewing machines, where the defendant alleged the return of a portion of the sewing machines, evidence held sufficient to sustain a verdict in the amount rendered for plaintiff as

against his objection that defendant had previously offered to pay a larger amount.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056, 1057; Dec. Dig. § 359(1).]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

Action by the White Sewing Machine Company against Atkinson & Son. From the judgment, plaintiff appeals. Affirmed.

Andrew J. Russell, of Berryville, and Chas. D. James, of Eureka Springs, for appellant. Festus O. Butt, of Eureka Springs, for appellee.

McCULLOCH, C. J. This is an action instituted by appellant against appellees before a justice of the peace, to recover the price of ten sewing machines sold to appellees pursuant to the terms of a written contract. Appellant introduced in evidence the contract, signed by appellees, constituting an unconditional agreement to purchase ten sewing machines at the price of \$26 each, payable on the terms specified in the contract.

Appellant is doing business at Cleveland, Ohio, and the order received from appellees was solicited by one McNutt, a traveling solicitor of appellant, with authority to solicit, receive, and forward orders for machines. The written order contained a stipulation that it was "given subject to approval of the White Sewing Machine Company and, if accepted or filled in full or in part, to be settled for at the price and terms above set forth"; also that:

"There is no understanding or agreement of any nature whatsoever between this company and the undersigned as to these machines, except such as is embraced in this written order, which contains all the terms and conditions which the same is given upon."

The order also specified that there was to be one machine of the same kind sent free as a premium. The order was signed by appellees at their place of business at Berryville, Ark., and delivered to McNutt, who forwarded the same to appellant at Cleveland, Ohio, and the machines were shipped from the last-named place. Appellees sold five of the machines, and shipped the other five back to appellant at Cleveland. Appellees offered to pay for the five machines sold, but appellant refused to accept the amount offered because it claimed that the price of all the machines was due.

[1, 2] Appellees introduced proof to the effect that in giving the order to McNutt there was attached to it a typewritten slip, expressly stipulating that appellees should have the right to return all unsold machines at any time they saw fit to quit the business before the machines were sold. One of the appellees testified to that effect, and also testified that he kept a copy of the typewritten stipu-

lation, and that he saw McNutt inclose the order, with the stipulation attached to it, in an envelope addressed to appellant at its place of business at Cleveland, and that he (witness) mailed the letter. This testimony was objected to on the ground that it was an attempt to vary the terms of the written contract. We do not think that such was the effect of the testimony, but it was introduced for the purpose of proving what the written contract was. Barion-Parker Mfg. Co. v. Taylor, 78 Ark. 586, 94 S. W. 713. The jury could have found from this testimony, and doubtless did find, that appellant received the order with the additional stipulation attached, and accepted it in that form, and shipped the machines accordingly. If so, it constituted a ratification of the act of the soliciting agent in attaching the additional stipulation. In addition to that, the evidence is that McNutt, while only a soliciting agent, had authority to solicit orders in writing and forward the same to appellant for approval; and if McNutt in fact received the written order with the slip attached, and failed to send it in that form, appellant is responsible for it, for that was within the scope of his authority. The proof is undisputed that McNutt had no authority to approve a sale, but he did have authority to receive and forward orders, and in doing that he was acting as the agent of appellant, who would be responsible for any act of his in failing to properly send in the order in the form in which it was received from the appellees. We are of the opinion, therefore, that the evidence did not offend against the rule which forbids the introduction of oral testimony varying or contradicting the terms of a written contract, and that the court was not in error in admitting it. The case was submitted to the jury upon instructions as favorable to appellant as it was entitled to, and the jury have settled the issues of fact against appellant's contention. There was sufficient evidence to support the verdict.

[3] The verdict was in appellant's favor for the recovery of \$130, and it is urged that this is erroneous for the reason that appellees, it is said, admitted liability in the sum of \$150. It is true that appellees offered at one time to pay \$150, but their testimony is that that was really more than they owed. They proved at the trial that they had only sold five of the machines, and that they had shipped back the other five, and that the additional \$20 was to go on the price of a new "free" machine. The explanation of this may not appear altogether satisfactory, but the jury accepted it and credited the testimony of appellees, to the effect that they only owed \$130, and we cannot, therefore, say that the verdict is unsupported by the evidence.

Affirmed.

WILLIAMS v. THWEATT. (No. 20.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. PLEADING \S 237(7)—AMENDMENT TO CONFORM TO PROOF.

Where a complaint did not seek an accounting regarding certain transactions occurring after the action was commenced, evidence concerning them was objected to, and the master did not consider them in his report, *held*, that plaintiff was not entitled to have the pleadings amended to conform to the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 610, 617; Dec. Dig. \S 237(7).]

2. ACCOUNT \S 20(2)—PROCEEDINGS ON REPORT—CONFIRMATION.

There was no error in confirming the report without finding for plaintiff regarding such transactions.

[Ed. Note.—For other cases, see Account, Cent. Dig. \S 119-126; Dec. Dig. \S 20(2).]

3. ACCOUNT \S 18—EVIDENCE—SUFFICIENCY.

In an accounting action based on a contract between plaintiff's assignor and defendant for acquiring and selling certain lands with a division of profits between them, evidence *held* to sustain a master's finding for defendant regarding various transactions.

[Ed. Note.—For other cases, see Account, Cent. Dig. \S 89-93; Dec. Dig. \S 18.]

4. CONTRACTS \S 233—CONSTRUCTION—SCOPE OF OBLIGATION.

Where a contract provided plaintiff should pay for clearing certain lands of tax titles together with back taxes, the defendant to conduct all litigation, etc., *held*, plaintiff was not entitled, in an accounting, to credit for expenditures in examining the record title or in negotiating with parties claiming an interest in the property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1098; Dec. Dig. \S 233.]

5. CONTRACTS \S 322(1)—PRESUMPTION—PERFORMANCE.

In the absence of proof to the contrary, a party to a contract is presumed to have performed his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1306, 1465, 1754, 1772; Dec. Dig. \S 322(1).]

6. CONTRACTS \S 322(3)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to sustain a master's finding that defendant was negligent in not redeeming land forfeited for taxes, where such matters were intrusted to his judgment and his testimony indicated that he considered the land not worth the cost of clearing the title.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1534; Dec. Dig. \S 322(3).]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Accounting action by Jno. S. Williams, as administrator, against J. G. Thweatt. Judgment for defendant, and plaintiff appeals. **Affirmed.**

In 1884, J. G. Thweatt and one Chas. Paxson entered into a contract concerning certain lands designated as the Corby and Platt lands. These lands had been forfeited and sold for taxes. The original owners of the lands agreed to accept \$1,000 for their interest in same. By a contract between Paxson

and Thweatt, Paxson was to furnish all money necessary to clear the lands of tax titles, and the title of same was to be taken in his name. Thweatt was to attend to all the litigation and to make sale of the lands, and out of the proceeds arising from the first sales of any part of the lands Paxson was to be refunded all the money he had expended, and the remainder, if any, thereafter was to be equally divided between them. W. Henry Williams acquired by purchase all the interest of Paxson in the contract.

This suit was instituted by W. Henry Williams against Thweatt, and in his complaint, after setting up the contract, he alleged that Paxson had performed his part of the contract, and that Thweatt had neglected to carry out his contract; that he had sold all the lands except certain tracts, describing them, and that the proceeds from these sales had passed into his hands, and that he had only accounted for a portion of these proceeds; that he allowed the lands remaining unsold to be sold for taxes, and that other parties were claiming title to same under these tax sales; that the lands so sold for taxes were worth at least \$1,200, and that the negligence of Thweatt in allowing the lands to be sold for taxes had deprived the plaintiff of one-half their value, the sum of \$600; that plaintiff was unable to say just what Thweatt owed, but believed that, upon a fair settlement of the business between them growing out of the contract, he would owe at least the sum of \$1,500. The complaint prayed that Thweatt be required to answer, giving an itemized statement of the lands sold, the amount received for each tract, the moneys paid by him and for what purpose, and all other facts necessary for a settlement of the business between and for the appointment of a master, if necessary, to state an account, and that upon final hearing the plaintiff have judgment for the amount shown to be due him. Thweatt, the appellee, answered admitting the contract as set up in Williams' complaint, but denied all the other allegations. Williams having died during the progress of the litigation, the suit was filed in the name of his administrator, John S. Williams. A master was appointed to take proof and state an account between the parties, which he did, showing that Williams was indebted to Thweatt in the sum of \$78.33. Exceptions were filed to the master's report. These were overruled, and a decree was entered in favor of the appellee for the sum shown to be due him by such report, and appellant duly prosecuted this appeal. Other facts as may be necessary will be stated in the opinion.

Manning, Emerson & Morris, of Little Rock, for appellant. Sam Frauenthal, of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). [1, 2] 1. The appellant contends, first, that appellee was due him the sum of \$30 with 6 per cent. interest from May 8, 1908, up to the time of judgment. The testimony of one McClintock on behalf of appellant tends to show that a certain tract of the lands in controversy had been sold for taxes, purchased by one J. C. England, and by agreement between England and Thweatt and Williams was afterwards sold for \$1,600, with the understanding that Thweatt and Williams were to get \$800 of the purchase money, that this transaction took place May 8, 1908, and that Thweatt had only paid to Williams the sum of \$370, leaving a balance due of \$30. But the master reported that "this sale was consummated after the institution of the suit," and for that reason was not taken into consideration by him in stating the account. Moreover, Thweatt testified concerning this item that "the one-half of the proceeds due Williams was paid."

2. The appellant contends, and shows by witness McClintock, that a certain other tract was sold by Thweatt for the sum of \$320 on November 10, 1913, and the appellant therefore claims that the principle and interest due him on this tract amounted up to the time of the rendition of the judgment to \$275, but this tract, like the one above mentioned, was not sold until after the institution of the suit. The complaint expressly alleged that these tracts had not been sold, and no accounting was asked in regard to them. They were therefore not referred to or considered by the master and were not mentioned in his report, and there was an exception in the way of a general objection to the deposition of the witness McClintock, who testified to this sale. It therefore appears that the court did not consider these sales in approving the master's report.

Under such circumstances, it cannot be said that the pleadings should be amended to conform to the proof. The court therefore could not and should not have found in favor of the appellant as to the amounts claimed on the above sales.

[3, 4] 3. In 1892, a judgment was obtained against Chas. Paxson in the sum of \$48.80, which sum was declared a lien on a certain tract of the land in which Paxson had a three-sevenths interest. The land was sold to satisfy the judgment and bought in by Thweatt. Thweatt afterwards sold the land on a basis that would make the three-sevenths interest worth \$273. Appellant contends that it was the duty of appellee to pay off this judgment with money that he had in his hand belonging to Paxson, and that he was due appellant at least the sum of \$136.50, one-half of the amount for which Thweatt sold the three-sevenths interest. But it appears from the testimony of Thweatt that, in order to perfect a title to the above tract of land for himself and Paxson, he permitted the land

to be sold to satisfy the judgment against it which amounted, with interest and cost, to the sum of \$80. He purchased the land, satisfied the judgment, and afterwards sold the interest which he bought for the sum of \$365. In his statement of account with the appellant he credited himself with the \$80 he paid on the judgment and charged himself with the amount (\$365) for which he afterwards sold the land. The master in his report approved and adopted the account as thus stated by Thweatt concerning this transaction. Appellant certainly had no cause to complain of this. He got the benefit of more than he was entitled to under the contract.

4. There was evidence on behalf of appellant tending to prove that in 1888 Williams wrote Thweatt that he had an opportunity to handle a certain tract of the lands in a trade, provided it would not cost him (Williams) more than \$400, and that Thweatt wrote Williams in response to this letter that it would be satisfactory for him to make a deed to the land placing the consideration at \$400; that the deed was made to Williams naming \$400 as the consideration; and that Williams used the land in the trade and did not realize as much as \$400 for same. Thweatt testifies concerning this that he agreed that Williams might make a sale of the land. It was represented to witness that Williams had a buyer at the price of \$400. Williams was interested in the land the same as witness, and, when witness afterwards found out that Williams had received \$1,000 for the land instead of \$400, witness claimed that in the settlement between him and Williams the latter should be charged with the \$1,000 that he had received for this land. The deed which Williams gave in the trade for the lands named a consideration of \$1,000. When witness was trying to settle with Williams, witness insisted that Williams should pay him one-half of the amount which he (Williams) said he received for the land. In this state of the record, it cannot be said that a clear preponderance of the evidence shows that the master erred in charging the \$1,000 to Williams.

5. There is testimony tending to prove that Williams made one or more trips to St. Louis to see the Corby people, and spent some time in Little Rock in examining the records as to the status of the lands, and that he expended in looking after the joint interest of all of the parties the sum of \$167.60 which appellant claims should have been credited to Williams in settlement with Thweatt. The contract only bound Paxson (and Williams as his successor in interest) to furnish money to clear the titles to the lands, pay back taxes, etc. Williams, under the contract, was under no duty to make trips to St. Louis to see the Corby people, or to spend any time in examining records as to the status of the title of the lands. Those

were matters which, under the contract, devolved upon Thweatt, and, if Williams expended any money in the particulars mentioned, it was but a voluntary contribution on his part, and he could not legally charge Thweatt for the same. There is no testimony to prove that these expenditures which Williams claimed to have made were necessary in order to clear the title, nor that Thweatt authorized such expenditures. That was his part of the contract, and, in the absence of evidence to the contrary, it will be presumed that he performed his part of the contract.

6. It is next contended, that the master erred in charging Williams with the proceeds from the sale of the certain tract of land made April 30, 1802, in the sum of \$160. The appellant denied that this sum was received by Paxson, and therefore denied that Williams should be charged with same. The burden of proof was upon the appellee to show that Paxson did receive this sum. Appellee testifies that the money for which this tract of land was sold was sent to Paxson. He could not remember whether the remittance was by check or money order, his best recollection being that it was by check. The testimony of the appellee was positive that the money was sent. There is nothing in the record to show that the money was not received by Paxson. True, both Paxson and Williams were dead at the time of the trial, but Williams' deposition had been taken before he died, and, although this deposition had been destroyed by fire, witness McClintock's testimony was taken to substitute or supply the same, and the witness McClintock nowhere testifies that Williams in his deposition denied that the \$160 was received by Paxson. The master did not err, therefore, in charging appellant with this \$160.

[5, 6] 7. The appellant contends that a certain tract of land included in the contract was bought by Paxson at a curator's sale in 1886 for \$40; that appellee failed to perform his trust to pay the taxes on this land as he was required to do under the contract, but allowed the same to forfeit for taxes; that the value of the land at the time of the trial was \$1,000; and that appellee should be charged with one-half of that sum. The master found in favor of the appellant for \$40, the amount alleged to have been paid by Paxson for the land at the curator's sale, but refused to allow the appellant for the then value of the land, which the evidence tends to show was worth \$1,000. The testimony as abstracted by appellant does not show that the tract of land now under consideration, to wit, the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29, was sold at curator's sale and bought by Paxson for the sum of \$40. The master in his report found that this tract was lost through the negligence of Thweatt.

Thweatt testifies in regard to this as abstracted as follows:

"I did not pay the taxes on the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ because it was owned at the time under a donation deed, and his improvements on the land I considered worth more than the land."

Turning to the page of the abstract referred to, we find that Thweatt testified as follows:

"The N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29, as I now remember it, was owned at the time either by William Hurst, or one 40 by William and the other by his son. It was a donation with improvements on each 40 at that time worth more than the land. We tried to get the old man to buy this in at the curator's sale. He would not do it, was willing, though, to take his improvements and taxes, which we were not willing to pay, and, as I now remember, there was never anything done about it."

He further testified: "I cannot say whether I ever paid taxes on the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ or not." The testimony of the appellee further shows that under the contract appellee was to use his own judgment as to redeeming lands that had been forfeited for taxes.

Now, it is not shown from the testimony as abstracted that these lands were purchased by Paxson at the curator's sale. We cannot explore the record to ascertain whether or not Paxson really purchased these lands at the curator's sale, paying therefor the sum of \$40; but, assuming that he did, and that they were afterwards lost on account of the failure of the appellee to pay the taxes as found by the master, there is no proof in the record to show that the lands at that time were worth any more than the amount which it is claimed Paxson paid for the same. The appellant does not correctly abstract the testimony of the appellee concerning this tract, as is shown by the quotation from the page of the record to which reference is made, and, when the appellee's testimony is considered as actually given, it does not show that there was any negligence on his part concerning the above tract of land. The final report of the master in that respect is not correct, and his finding is more favorable to the appellant than is justified by the testimony contained in the record. Under the contract it was entirely with the appellee to exercise his judgment in the matter of clearing the lands that had been forfeited for taxes, and the appellee's testimony tends to show that in his judgment the particular tract of land now under consideration was not worth the amount that he would have been required to pay in order to clear the title.

8. It is contended in the last place that the master erred in various items of interest charges. It could serve no useful purpose to set out and discuss these in detail. We have carefully considered appellant's contention concerning these, and find that no error—at least no error prejudicial to appellant—has been made by the master in the interest items of his report.

The decree is therefore affirmed.

IMPERIAL VALLEY SAVINGS BANK et al.
v. HUFF et al. (No. 264.)

(Supreme Court of Arkansas. Nov. 20, 1916.)

1. CHATTEL MORTGAGES ⇨219—CONSENT OF MORTGAGEE TO SALE—EVIDENCE.

That the mortgagee of cattle had permitted the mortgagor in one or two previous similar mortgage transactions to sell the cattle and apply the proceeds to the mortgage did not show that the mortgagee gave him the same right under a later mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 473-475; Dec. Dig. ⇨219.]

2. CHATTEL MORTGAGES ⇨227 — SALE BY MORTGAGOR—RIGHT TO PROCEEDS.

Where, without consent of mortgagee, the mortgagor sells the mortgaged property, the mortgagee may elect either to sue the purchaser for conversion of the property or to ratify the sale and sue the mortgagor for the proceeds.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 476; Dec. Dig. ⇨227.]

3. CHATTEL MORTGAGES ⇨227 — SALE OF MORTGAGED PROPERTY—RIGHT TO PROCEEDS—ASSIGNMENT.

Where a mortgagor sold the mortgaged property without permission of the mortgagees and deposited the proceeds of the sale in habeas corpus proceedings in lieu of bail bond, and the mortgagees filed in the court having custody of the fund their petition asking that it be turned over to them, this petition being filed before the mortgagor assigned his right in such money to attorneys for their legal services in such habeas corpus proceedings, the mortgagees were entitled to it as against the attorneys.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 476; Dec. Dig. ⇨227.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Habeas corpus proceedings by E. J. Phillips in which he was permitted to deposit a sum in lieu of bail. The Imperial Valley Savings Bank and another filed an intervention, claiming the deposit as the proceeds of mortgaged property, and C. Floyd Huff and another filed a petition, claiming the fund under an assignment. From judgment against interveners, they appeal. Reversed and remanded.

Frank Birkhauser, of Calxico, Cal., and Rector & Sawyer, of Hot Springs, for appellants. C. Floyd Huff and B. H. Randolph, both of Hot Springs, for appellees.

HART, J. E. J. Phillips was arrested in Hot Springs, Garland county, Ark., as a fugitive from justice, charged with having unlawfully disposed of mortgaged property in the state of California. He sued out a writ of habeas corpus in the circuit court, and was permitted to deposit with the clerk of the court \$1,100 in lieu of bail. Appellants filed an intervention, in which they set up that the money deposited as bail with the clerk of the court was derived from the pro-

ceeds of personal property which Phillips had mortgaged to appellants, and which he had sold without their consent. The prayer was that the money should be delivered to appellants. Subsequently appellees filed a petition, in which they stated that Phillips had assigned the money to them for professional services rendered by them in the habeas corpus proceeding and other proceedings concerning the disposition of the mortgaged property. Phillips was discharged from custody, and issue was joined between appellants and appellees as to which of them were entitled to the money deposited with the clerk as above stated. The case was tried before the court sitting without a jury. The material facts are as follows: Appellants were banking corporations doing business in the state of California, and had a mortgage executed by E. J. Phillips, a resident of the state of California, on 50 head of cattle, which belonged to him and which were in his possession, to secure a debt owed by Phillips to the banks. The mortgage was duly recorded as required by the laws of the state. Phillips removed the cattle from the county where the mortgage was given and recorded, to another county in the state of California and sold them, together with other cattle owned by him, to a packing house without the consent of the mortgagees. He collected the proceeds of the sale, and soon afterwards went to Hot Springs in the state of Arkansas. After he arrived there, he was arrested as a fugitive from justice, charged with selling mortgaged property in the state of California in violation of the statutes of that state. After he was arrested, he filed a petition in the circuit court for a writ of habeas corpus, and the court allowed him to deposit \$1,100 in cash in lieu of a bond for his appearance, as required by law. The money was immediately deposited in court, and it was a part of the money which Phillips had received from the sale of the mortgaged cattle and other cattle owned by him which he had mingled with them. Appellants then filed an intervention in the circuit court, claiming the money as the proceeds of the sale of the cattle mortgaged to them as above set forth. After the petition was filed by appellants, appellees filed an answer, claiming the money under a written assignment made to them by Phillips for legal services rendered by them in the habeas corpus proceeding as above set forth. Other facts tend to show that appellees had notice that the money was derived from the sale of the mortgaged property before they received the assignment of the money from Phillips. The court found that appellees' right to the money deposited with the clerk was superior to that of appellants, and rendered judgment accordingly. To reverse that judgment appellants prosecute this appeal.

[1, 2] The circuit court was of the opinion

that under the facts the laws of the state of California must govern, and that in that state the title does not pass to the mortgagee to personal property under a chattel mortgage, but that the mortgagee merely has a lien on the property. He was further of the opinion that, even though appellees had notice that the money in the hands of the court was a part of the proceeds of the cattle upon which appellants had a mortgage, this would not deprive them of the right to an assignment of the money, and that their rights are superior to those of appellants. We think the circuit court erred in its conclusions of law. We deem it immaterial to decide whether or not under the laws of the state of California a mortgage of chattels conveys the title in the mortgaged property to the mortgagee, or that he has merely a lien on the property. The mortgage in question contained a clause providing that the mortgagor should not sell the property without the written consent of the mortgagee or remove it from the county. It is insisted by appellees that appellants waived this provision of the mortgage. They relied on the testimony of the cashier of the bank to sustain their contention. The cashier denied that appellants had given Phillips the right to remove the property from the county in which it was situated or to sell or dispose of it. On cross-examination the cashier admitted that there had been one or two mortgages executed by Phillips in favor of appellants before this time, and that they had permitted him to sell the cattle and apply the proceeds to the mortgage. The fact that they had done this on two previous occasions does not show that they gave Phillips the right to sell the cattle embraced in the mortgage under consideration and apply the proceeds to the payment of the mortgage debt. The testimony of the cashier of the bank shows that the mortgage debt was more than the amount deposited with the clerk of the circuit court, and it was shown that Phillips admitted that this money was the proceeds of the sale of cattle mortgaged to appellants. As we have already seen, the testimony shows that the property was sold without the consent of the mortgagee. Under these circumstances it is immaterial whether the legal title to the mortgaged property passed to the mortgagee by execution of the mortgage, or whether it merely had a lien on the cattle. Phillips having sold the property upon which appellants had a lien, appellants might sue the purchaser for conversion of the property, or that they might elect to ratify the sale and sue Phillips for the proceeds. *Burke v. First National Bank*, 61 Neb. 20, 84 N. W. 408, 87 Am. St. Rep. 447; *Jones v. Hoar*, 5 Pick. (Mass.) 285. See, also, *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344, and cases cited.

[3] We do not think what we have said in

any wise conflicts with the rule laid down in *Reavis v. Barnes*, 36 Ark. 575, and *Judge v. Curtis*, 72 Ark. 132, 78 S. W. 746. In each of these cases a landlord was proceeding against the purchaser from his tenant of property upon which he had a landlord's lien. Here the mortgagees are not proceeding against the purchaser from the mortgagor to fix their lien on the property sold by the mortgagor or the proceeds thereof, but they are proceeding directly against the mortgagor. The mortgagor had sold the mortgaged property without permission of the mortgagees, and had deposited the proceeds of sale with the clerk of the circuit court in lieu of a bail bond. The mortgagees filed their petition in the court which had custody of the fund. They asked the court that had the custody of the money to turn it over to them, and their petition was filed before the mortgagor assigned his right to the money to appellees. The mortgagees properly filed their petition in the court which had the custody of the money, and they were entitled to it. The circuit court erred in not directing that it be turned over to them. For this error the judgment will be reversed, and the cause remanded for a new trial.

HOLLIS v. HOGAN. (No. 21.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

JUSTICES OF THE PEACE ⇐202(2)—CERTIORARI—GROUNDS—DEFENSE.

Certiorari will not lie to quash a judgment obtained against petitioner before a justice of the peace on the ground that petitioner "had a just and meritorious defense to said unjust, trumped-up, and fraudulent claim" of the judgment creditor in that he was not indebted as set out in the account for goods sold, as the petition did not controvert the sale or the value of the goods, or allege any valid defense to the action.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 781-788; Dec. Dig. ⇐202(2).]

Appeal from Circuit Court, Baxter County; J. B. Baker, Judge.

Petition by Ben Hollis, for writ of certiorari to quash a judgment obtained against him by W. M. Hogan before a justice of the peace. Petition dismissed, and petitioner appeals. Affirmed.

Allyn Smith, of Cotter, for appellant. Z. M. Horton, of Mountain Home, for appellee.

HART, J. Ben Hollis filed a petition in the circuit court for a writ of certiorari to quash a judgment obtained against him by W. M. Hogan before a justice of the peace in Union township in Baxter county, Ark. The circuit court dismissed his petition, and Hollis has appealed.

The case as stated in his petition is substantially as follows: On the 15th day of May, 1915, W. M. Hogan filed an account against B. W. Hollis before a justice of the

peace in Union township in Baxter county, Ark. The account was for merchandise sold by Hogan to Hollis, and was duly verified. The account contained a list of the goods and the prices thereof and the days, on which they were sold, together with the credits allowed and the balance due. The affidavit stated that the account was correct, and that after all just credits had been placed thereon the sum of \$32.49 was due Hogan. A warning order was thereupon issued by the justice of the peace and published in a newspaper of the county, warning the defendant to appear on the 22d day of June, 1915. On that day the justice of the peace rendered a personal judgment against Hollis in favor of Hogan for the sum of \$32.39. No writ of attachment was asked or issued by the justice. On the 31st day of July, 1915, an execution was issued and certain personal property belonging to Hollis was seized under it and sold in satisfaction of the debt. The execution was then returned satisfied. Hollis filed his petition for writ of certiorari on August 23, 1915. In his petition he says that he is now, and has been for more than five years past, a resident and citizen of Baxter county, Ark; that the judgment above recited was obtained against him while he was temporarily absent from home; that he had been absent from home about 60 days, and that while he was absent the judgment in question was rendered against him, and that he did not know of that fact until the 1st day of August, 1915, when it was too late to appeal. His petition also contains the following:

"And this plaintiff has a just and meritorious defense to said unjust, trumped-up, and fraudulent claim of said W. M. Hogan, on which said judgment was rendered, in that he was not indebted to said W. M. Hogan as set forth in the account filed by said W. M. Hogan in said case."

The circuit court was right in quashing the writ of certiorari and dismissing the petition of Hollis.

This case is ruled by *Gates v. Hayes*, 69 Ark. 518, 64 S. W. 271, where the court said that the aid of the writ should never be granted except to do substantial justice, and that a petition for a writ of certiorari to review a judgment rendered on a note and account should be denied when it alleged no valid defense thereto. It will be noted that the defense of Hollis to the action against him before the justice of the peace is stated in language as follows:

"And this plaintiff has a just and meritorious defense to said unjust, trumped-up, and fraudulent claim of said W. M. Hogan on which said judgment was rendered, in that he was not indebted to said W. M. Hogan as set forth in the account filed by said W. M. Hogan in said case."

This general statement does not state any defense to the action. The object of the Code is that the pleadings shall state facts and not mere conclusions of law. The petition of Hollis neither denies any allegation of

fact contained in the account filed before the justice of the peace, nor does it state any new matter constituting a defense. The account sued on by Hogan was for goods sold to Hollis, and the items are set out in it and the account is sworn to. The account imports that Hogan sold to Hollis certain articles of merchandise set out in it at the times and for the prices therein stated.

The petition does not controvert the sale or the value of the goods, but simply alleges that Hollis was not indebted to Hogan as set forth in the account filed before the justice of the peace. Every item in the account might be correct except a single one of inconsiderable value, and yet the petition in its present form would be literally true. If this practice was tolerated, the plaintiff might, in all similar cases, be put to the trouble and expense of proving that which the defendant would not and could not upon oath deny. Such generalities and vagueness of pleading is opposed to the requirements of our Code. *Gates v. Hayes*, supra; *Lawrence v. Meyer*, 85 Ark. 104; *Francis v. Francis*, 18 B. Mon. (Ky.) 57.

It follows that the judgment must be affirmed.

FLUHART et al. v. W. T. RAWLEIGH CO., Inc. (No. 259.)

(Supreme Court of Arkansas. Nov. 20, 1916.)

1. GUARANTY — 27 — CONSTRUCTION.

Where a contract to sell goods and a guaranty of payment therefor by the buyer, although on separate papers, were made as one transaction on the same day, and the guaranty referred to the selling contract as if part thereof, the two were to be regarded as evidenced by one and the same instrument.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 28; Dec. Dig. — 27.]

2. GUARANTY — 82(3) — ACTION BY CREDITOR — JOINDER — "SURETY."

Under Kirby's Dig. § 6009, providing that persons severally liable upon the same contract, including "sureties on the same or separate instruments," may be included in the same action, at plaintiff's option, and section 6010, providing that, where two or more persons are jointly bound by a contract, the action may be brought against all or any of them, etc., where an instrument bound the guarantors and the principal jointly and severally to pay the principal's debt on maturity, the guarantors could be sued jointly with the principal, for the word "surety" in the statute must be understood as including any one who is bound on the same instrument, for its payment with another, who, as between themselves, is the principal debtor, whatever may be the particular form of the undertaking.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 97; Dec. Dig. — 82(3); *Parties*, Cent. Dig. § 34.

For other definitions, see *Words and Phrases*, First and Second Series, *Surety*.]

3. GUARANTY — 94 — ACTION BY CREDITOR — JUDGMENT.

In such suit, when, on overruling of defendants' demurrer for misjoinder, the guarantors declined to plead further and the principal answer-

ed denying indebtedness, it was error to render judgment against the guarantors for the amount claimed, before determination of the issue raised by the principal's answer.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 108; Dec. Dig. § 94.]

Appeal from Circuit Court, Lonoke County; Thos. C. Trimble, Judge.

Action by the W. T. Rawleigh Company, Incorporated, against I. T. Fluhart and others. From judgment for plaintiff, defendants appeal. Reversed and remanded.

The appellee instituted this suit against C. C. Whedbee, principal, and I. T. Fluhart, G. W. Persefull, and J. V. Crutcher, as guarantors of a certain contract which was made an exhibit to the complaint. The complaint alleged that on or about October 24, 1913, an agreement was made between the appellee (plaintiff) and the defendant C. C. Whedbee, as principal, and the said parties, guarantors (naming them), for the said C. C. Whedbee, which contract was accepted June 4, 1914; that by the terms of the contract appellee agreed to sell to Whedbee certain goods, wares, and merchandise; that the guarantors jointly and severally guaranteed that Whedbee would pay the balance due from him to the appellee at the time the contract was entered into, and would pay all indebtedness incurred under the contract; that Whedbee purchased goods under the contract amounting to the sum of \$1,567.07, and he owed the appellee \$350.73 at the time the contract was entered into, making a total indebtedness of \$1,915.80; that the sum of \$1,191.10 had been paid thereon, leaving a balance of \$724.70; that such balance had not been paid, "although reasonable time therefor had elapsed, and although lawful demand therefor had been made"; that the guarantors, under the terms of their contract, had agreed that a written acknowledgment of the account by C. C. Whedbee or any judgment against Whedbee in favor of the appellee should in every respect bind and be conclusive against them, and that any extension of time granted by the appellee to Whedbee should not release them from liability under their guaranty. Plaintiff prayed judgment against C. C. Whedbee and the other appellants in the sum of \$724.70, with interest.

The contract set up as an exhibit to the complaint was one by which the appellee agreed to sell, and Whedbee agreed to buy, certain medical supplies and other equipments. The contract contained mutual agreements for things to be done by the respective parties, and provided that, unless previously terminated by either party upon written notice, it should expire December 31, 1914; that at the expiration of the contract the company agreed to make a new contract, if signed by acceptable guarantors, without requiring Whedbee to pay any balance of account. The contract was duly signed by the parties and was accepted by

the appellee June 4, 1914. The contract of guaranty provided, in part, as follows:

"For and in consideration of the extension of further time in which to pay his account for goods previously sold to the above party (Whedbee) of the second part, and in further consideration of the W. T. Rawleigh Medical Company extending further credit to him, we, the undersigned, do hereby jointly and severally guarantee unto the said W. T. Rawleigh Medical Company, unconditionally, first, the payment in full of the balance due said company on account as shown by its books, at the date of the acceptance of this contract; and, second, the full and complete payment to said company of any indebtedness incurred under the terms of the within instrument by the party of the second part, named as such therein, to which terms we fully assent, waiving acceptance of this guaranty and all notice, and agreed that the written acknowledgment of his account or any judgment against said party of the second part shall, in every respect, bind and be conclusive against the undersigned, and that any extension of time shall not release us from liability under this guaranty."

Also exhibited with the complaint was a statement of account, showing balance due the appellee of \$724.70.

The appellant Whedbee answered the complaint, denying that he owed appellee anything, and by way of cross-complaint alleged that appellee was indebted to him in the sum of \$1,230, for which he asked judgment. The appellant Whedbee, and the other appellants, the guarantors, demurred to the complaint, and also moved to dismiss the same as to the guarantors. The court, upon consideration of the motion, overruled the same, to which the appellants duly excepted. The appellants the guarantors declined to plead further. The appellee, plaintiff, thereupon asked that judgment be entered against the guarantors for the amount sued for, which the court granted, and entered judgment in favor of the appellee against the guarantors for the amount sued for in the complaint.

Oscar E. Williams, of Lonoke, for appellants. Trimble & Williams, of Lonoke, for appellee.

WOOD, J. (after stating the facts as above). Two questions are presented.

[1] I. Did the court err in holding that the guarantors could be sued jointly with the principal? The contract between the appellee and Whedbee, the principal debtor, it appears from the recitals therein, was executed on the 24th day of October, 1913. The contract of guaranty bears no date, but the allegations of the complaint, in effect, show that the instruments were executed on the same day, and that they were parts of but one and the same transaction. Indeed, the recitals of the contract of guaranty referred to the contract between appellee and Whedbee as if it were but a part of the same contract. For instance, the recital "for and in consideration of the extension of further time in which to pay his accounts for goods previously sold to the above party of the second part." Whedbee is not mentioned co

nominee in the contract of guaranty, but is only referred to as "the above party of the second part," clearly referring to the contract in which Whedbee is mentioned as "party of the second part." It occurs to us therefore that the two contracts appear on their face to be parts of the same instrument. There is no way to identify Whedbee as being the "above party of the second part," except by reading this in connection with the original contract, and the two contracts therefore should be regarded as evidenced by one and the same instrument.

The contract of guaranty under review was an unconditional undertaking on the part of the guarantors to pay appellee the balance shown to be due it by their principal, Whedbee. There was no condition that they would pay in the event that appellee could not collect its debt with reasonable diligence from Whedbee. In other words, the liability of the guarantors was fixed by the failure of Whedbee, the principal debtor, to pay the indebtedness incurred by him at maturity. See 2 R. C. L. § 13, p. 1064; *Yager v. Kentucky Title Co.*, 112 Ky. 932, 66 S. W. 1027; *White Sewing Machine Co. v. Powell (Ky.)* 74 S. W. 746; *Memphis v. Brown*, 87 U. S. (20 Wall.) 289, 22 L. Ed. 264. There is no limitation in the contract upon the obligation to pay. The guarantors, however, did not bind themselves to pay any amount claimed by the appellee to be due it from Whedbee unless he gave appellee a written acknowledgment of his account or unless there was a judgment in appellee's favor against him.

[2] As we construe the contracts, the guarantors and Whedbee bound themselves jointly and severally for the payment of the latter's debt to the appellee when the same matured. Section 6009 of Kirby's Digest provides:

"Persons severally liable upon the same contract, including parties to bills of exchange, promissory notes, common orders and checks, and sureties on the same or separate instruments, may all, or any of them, * * * be included in the same action, at * * * plaintiff's option."

And section 6010 provides:

"Where two or more persons are jointly bound by contract, the action * * * may be brought against all or any of them, at the plaintiff's option."

The Supreme Court of Minnesota, in passing upon a statute precisely similar to section 6009 of Kirby's Digest, supra, said:

"There is no principle of reason which requires two separate suits against the parties when one would effect the same object, and every reason which can be given for uniting a maker and indorser in one action will apply with equal force to maker and guarantor. If an indorser is liable on the same instrument with the maker, so is an absolute guarantor of payment, for his undertaking is in the nature of a surety, * * * which is primary, and that of a guarantor properly so called, which is collateral and secondary." And when he "guarantees the payment of the debt is in every respect essentially a surety. Moreover, in view of the manifest policy and purpose of this statute, the word 'surety' must be understood as including any one who is bound on the same instrument for its payment with another, who, as between themselves, is the principal debtor, whatever may be the particular form of the undertaking. If not, the italicized clause (and sureties on the same or separate instruments) in the statute would be without meaning and effect." *Henry Hammel v. Beardsley*, 31 Minn. 314, 17 N. W. 858.

We approve the above doctrine as applicable to the facts of this record. See, also, *Marvin v. Adamson*, 11 Iowa, 373, and other cases cited on this point in appellee's brief.

The ruling of the court therefore was correct in overruling appellants' motion to dismiss the complaint against them.

[3] II. The court erred, however, in rendering judgment in favor of the appellee for the amount claimed. No judgment had been rendered against the principal debtor. He denied that he was indebted to the appellee, and there had been no judicial determination and final judgment as to the issue thus raised.

The judgment therefore in favor of the appellee was premature, and for the error in rendering judgment against the appellants the same is reversed, and the cause will be remanded for further proceedings according to law.

HARRIS v. LAM COAL CO.

(Court of Appeals of Kentucky. Dec. 15, 1916.)

1. MASTER AND SERVANT ⇨88(4)—VOLUNTEER SERVANT.

The machine foreman of a coal mine, injured when he heard a shot fired out of time and went to see if there had been an accident, could not recover damages for his injuries, sustained at a time and place where his duties did not require him to be, and while acting purely as a volunteer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 147; Dec. Dig. ⇨88(4).]

2. MASTER AND SERVANT ⇨264(10)—INJURIES TO SERVANT—VARIANCE IN PROOF—STATUTE.

Under Civ. Code Prac. § 181, providing that if the allegation of the claim or defense to which the proof is directed be unproved in its general scope and meaning, it is to be deemed a failure of proof, where the machine foreman of a coal mine, suing for injuries, alleged that he was injured while working as machine foreman, but the proof showed that he was injured while going to see if there had been an accident upon hearing a shot out of time, there was a fatal variance between the cause of action pleaded and that attempted to be proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 870; Dec. Dig. ⇨264(10).]

3. MASTER AND SERVANT ⇨108(2)—INJURIES TO SUPERIOR EMPLOYÉ.

Where a coal mine's machine foreman was injured when a miner, in good faith, without meaning to violate any rule, believing the time had arrived when shots could be fired, discharged a shot, the machine foreman having hastened to see if there was an accident on hearing a first shot, in performance of his duties as assistant mine foreman in the absence of the foreman, the machine foreman could not recover, since he was acting as the superior officer of the miner, and the company was not responsible for the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. ⇨108(2).]

4. MASTER AND SERVANT ⇨189(5)—ASSISTANT MINE FOREMAN—STATUTE.

Despite Ky. St. § 2726, providing that the mine foreman shall have charge of all the inside workings, and that assistants to the mine foreman may be employed by the operator or superintendent, if the mine foreman himself employs an assistant, who acts as such with the knowledge and acquiescence of the superintendent or operator, and some person is injured by the assistant's negligence, or while acting under his direction, the coal company is responsible for his acts as if he had been appointed assistant by the operator or superintendent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 446; Dec. Dig. ⇨189(5).]

Appeal from Circuit Court, Muhlenberg County.

Suit by George Harris against the Lam Coal Company. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Ernest Woodward, of Hartford, and Milton Clark, of Greenville, for appellant. Belcher & Belcher and Taylor, Eaves & Sparks, all of Greenville, for appellee.

CARROLL, J. The appellant Harris, while working as an employé of the appellee coal company, sustained severe personal injuries as the result of a shot fired by one of the miners in a room of the mine. To recover damages for the injuries so sustained, he brought this suit, and on the trial, after the evidence in his behalf had been heard, the court directed a verdict in favor of the coal company, and he appeals. In his petition he averred:

"That on and prior to the 12th day of December, 1914, he was employed by and working for the defendant, Lam Coal Company, at and in its said coal mine near Bevier, Ky., in the capacity of a machine foreman and while working as aforesaid in the line of his duty, and while using due care for his own safety on or about the said 12th day of December, 1914, through the gross negligence and carelessness of the defendant, its agents, servants, and employes in charge of and operating said mine superior in authority to plaintiff, and also through the gross negligence and carelessness of defendant's servants and employes engaged in a different line of employment to that of plaintiff, his head, nose, teeth, and jaw, eyes, and shoulder, were seriously injured, bruised, lacerated, and broken, because of a premature and untimely blast or shot, which was exploded and discharged by John Henry Bolden, an employé of defendant, working in a different line of employment from that of the plaintiff. * * *

"Plaintiff says that defendant, its agent, servants, and employes in charge of and operating said mine, superior in authority to the plaintiff, negligently and carelessly failed to furnish plaintiff a reasonably safe place in which to perform his work, and that said defendant's servants and employes who were engaged in a different line of employment from that of plaintiff were grossly negligent and careless in the management and operation of said mine, and by discharging and exploding dangerous, deadly, and powerful explosives therein without warning or notice to the plaintiff, at unusual, unexpected, and unaccustomed times and in violation of the rules, regulations, and custom governing the work in said mine."

The answer was a traverse and plea of contributory negligence.

It appears from the evidence that under a rule in force in the mine shots were not to be fired until 3:30 p. m., or afterwards, and that Bolden, the man who fired the shot, was fully acquainted with this rule, but, not having his watch on this day, and being of the opinion that the time for firing shots had about arrived, he asked a fellow miner by the name of Springer what time it was, and Springer, after looking at his watch, thought it was 3:30, when in fact it was only 2:30, and told Bolden it was 3:30. Upon receiving this information Bolden made arrangements to fire some shots in his room. When Harris, who was in the mine in another room, heard the first shot fired before the time for firing had arrived, he apprehended that some accident had happened, and went immediately and as quickly as he could to the room where the shot was fired. About the time he entered the room another blast that had been prepared by Bolden exploded and threw with

great force a lot of coal against the head and body of Harris, inflicting painful and serious injuries.

It will be observed that Harris in his petition averred that when the accident occurred he was employed by and working for the coal company "in the capacity of a machine foreman, and while working as aforesaid in the line of his duty, and while using due care for his own safety" received the injuries of which he complains. But in his testimony he said that in addition to being employed as foreman of the machine men and bradders—the latter having duties in connection with the machine men and loaders not necessary to detail—he was also given orders by the mine foreman, Mr. Arnold, to "look after things for him. He told me to look after things for him, and if I found anything going wrong around me to look after it and report it to him."

In relating what happened at the time of the accident, he said:

"Well, I was setting on the second west lie-way; been there 5 or 10 minutes, and I heard a shot go off, and I pulled my watch out and it was 25 minutes after 2. I says, 'I expect somebody is hurt tamping a shot, or set a keg of powder off,' and I was expecting to find somebody badly hurt or killed. Q. You did not know where the shot was fired? A. No, sir. Q. And you were seeking to find out where it was fired? A. Yes, sir. Q. Why were you seeking to find out? A. I thought there was somebody hurt, and I also had orders from the mine foreman to see after anything going wrong. Q. Now, what was it that was going wrong? A. Well, there was a shot fired out of time. Q. Was there an established time at which shots should be fired? A. Yes, sir; 3:30. Q. Had the foreman given you any specific instructions about the second west entry where you said you were hurt? A. Well, that was the entry he had me looking after, but I had looked after other entries for him too. He just told me to look after the second west run for him, and if I seen anything going wrong at any time to look after it and report to him."

On his cross-examination he was asked and answered these questions:

"Q. What were your duties as machine boss? A. To look after the machine men and bradders, and keep the bradders' time. Q. Those were your duties as machine boss? A. Yes, sir. Q. For what period of time before the accident had you been looking after the mine for Mr. Arnold when he was not present for the purpose of reporting to him? A. Well, I had been looking after it off and on all the time that I had been there. Q. And you went down there to find out the purpose of firing out of time? A. Well, I thought there was somebody hurt by it going off that time of day. Q. You didn't go then for the purpose of finding out what the men were doing and seeing whether anything was wrong or not to report to Mr. Arnold, as you say? A. Why, certainly I would have reported it to Mr. Arnold; I was going according to his orders, because I thought there was something wrong. Q. And you went to see what was wrong? A. Yes. Q. And when you went you were going instead of Mr. Arnold, in his place, acting for him, for the purpose of reporting to him? A. Well, I was going to report to him; yes, sir. Q. Your duty as machine boss, the purpose for which you were employed, you say, did not require that you go down to this place where you received this injury? A. My special orders did. Q. I am talk-

ing about as machine boss? A. My duties as machine boss didn't. Q. Did anybody direct you specially on that day to go down there? A. I don't know that they did specially that day; but I had orders, as I told you."

It will thus be seen that, according to the evidence for the plaintiff, he was employed as machine boss to look after the machine men and bradders, and that the mine foreman, Arnold, had also instructed him to look after things in the mine when he (Arnold) was absent, and report to him anything that he found going wrong. It also appears from his evidence that in going to the place where he received the injury he was not acting in his capacity as machine foreman or looking after the machine men or bradders, because they had nothing to do with shooting or blasting coal. He went to the place of his injury, acting under his general instructions from the mine foreman, because he believed something had gone wrong when he heard the shot fired out of time. So that, although he alleged in his petition that he received the injuries complained of while working in his capacity as machine foreman, it develops from his evidence that he did not receive his injuries while working in his capacity as machine foreman, or while doing anything at all in connection with his duties as machine foreman. His duties as machine foreman did not require him to give any attention to shots fired out of time, or to go to the place where noise from an explosion came from, or to investigate the cause of it.

[1] Putting aside for the moment the directions given to him by the mine foreman, it is clear that Harris did not receive his injuries in the line of his employment as machine foreman, or while he was engaged in any service that his employment as machine foreman required him to perform; and it follows that he could not recover damages for injuries sustained, at a time when and a place where his duties did not require him to be, and while acting purely as a volunteer.

[2] Upon this condition of the pleadings and the evidence, it is insisted that there is a fatal variance between the cause of action set out in the petition and the cause of action attempted to be made in the evidence, and it would seem that there is not room for two opinions about the correctness of this contention on the part of the coal company. Civil Code of Practice, section 131.

[3] Counsel for Harris, appreciating the force of this contention, seek to avoid the obstacle presented by the fatal variance between the pleading and proof, by shifting the issue and putting the case upon the ground, as stated in the brief:

"That appellant at the time he received his injuries was acting in the line of his duty under his employment in obeying the orders of the mine foreman. In going in search of the cause of the premature shot, appellant was obeying the orders of the mine foreman and had a right to believe that the mine foreman would not send him into a dangerous place to perform his work. He had a right to believe that the

shooting in the mines was so regulated by the mine foreman, mine management, and under the rules and customs prevailing in the mine relating to the time of firing shots as to prevent irregular and untimely shots being purposely discharged at unaccustomed times, and therefore did not expect to find in the room he entered another loaded hole ready to explode."

But in assuming this position they are confronted by the further obstacle that if Harris was performing duties as assistant mine foreman, or acting for the mine foreman, Arnold, in his absence, there can be no recovery in his behalf, because he was the superior officer of the miner who, without meaning to violate any rule of the mine, but in good faith believing the time had arrived when shots should be fired, proceeded to do so, and therefore as Arnold, the mine foreman, could not have recovered if he had been injured under the same circumstances, neither can Harris. To avoid this dilemma counsel say that Harris cannot be regarded as a vice principal or as representing the master in safeguarding the mine. "He acted merely in obedience to the positive terms of the statute in obeying the commands of the mine foreman, and as a dutiful servant, in trying to ascertain and report to that mine foreman, who was either willfully or necessarily absent from that portion of the mine practically all of the time, the nature and cause of the unusual occurrence of a shot being fired an hour before time. This occurrence indicated an accident, with probably fatal results, or a negligent violation of the rules. * * * It was therefore clearly the duty of the plaintiff under his instructions to ascertain the facts and to report to the mine foreman."

[4] We are inclined to the opinion that Harris must be treated as acting in the capacity of assistant foreman, although under the statute regulating mines and mining he was not, strictly speaking, an assistant to the mine foreman. The mine foreman is the chief officer in charge of the mine, the statute in section 2726 providing that:

"The mine foreman shall have charge of all the inside workings and of the persons employed therein, in order that all the provisions of this act so far as they relate to his duties shall be complied with."

It is further provided in this same section that assistants to the mine foreman may be employed by the operator or superintendent. It thus appears that under the statute a mine foreman has not the authority to employ an assistant mine foreman, as this power is delegated by the statute to the operator or superintendent. But, notwithstanding the terms of the statute, if the mine foreman should employ an assistant, and this assistant, with the knowledge and acquiescence of the superintendent or operator, should act in that capacity, their knowledge of and acquiescence in what the mine foreman did and what his assistant was doing

would constitute an approval of the appointment of an assistant by the mine foreman, and have the effect of putting the assistant in the same attitude as if he had been employed by the operator or mine superintendent. Under such circumstances, if some person were injured by the negligence of the assistant, or while acting under his direction, we have no doubt that the coal company would be responsible for his acts to the same extent as if he had been, in fact, appointed assistant by the operator or superintendent. *Gould Const. Co. v. Childers' Adm'r*, 129 Ky. 536, 112 S. W. 622, 130 Am. St. Rep. 473; *Broadway Coal Mining Co. v. Davis*, 122 S. W. 223. But if it should be said that the evidence was not sufficient to show that Harris was acting as assistant with the knowledge and acquiescence of the operator or superintendent—although there is a good deal of evidence in the record that for quite a while he performed a number of duties devolving on the mine foreman—we are nevertheless of the opinion that there can be no recovery in his behalf, because it is plain that if he was not acting as assistant mine foreman, he was purely a volunteer and had no business at all to go to the place where he went at the time and under the circumstances. He either went to the place where he received the injury as assistant mine foreman or he went as a volunteer. If he went as assistant mine foreman, then he occupied the same position in respect to this matter as the mine foreman would have occupied if he had been present and had gone to the place where Harris went to ascertain what the trouble was. And clearly the mine foreman could not have recovered, because there is no contention that the coal company was in any manner responsible for the accident. The explosion was not due to its negligence or its fault. It was, as we have said, caused by pure mistake made in good faith by the shooter. If he went as a volunteer, neither can there be any recovery in his behalf because as a volunteer he had no business at the place where he went and no duties to perform there. So that whether he went as assistant foreman or as a volunteer the result is the same.

The judgment is affirmed.

CAVANAUGH v. COMMONWEALTH. *

(Court of Appeals of Kentucky. Dec. 15, 1916.)

1. HOMICIDE §250 — WILLFUL MURDER — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of willful murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 515-517; Dec. Dig. §250.]

2. CRIMINAL LAW §1159(2)—APPEAL—SUFFICIENCY OF EVIDENCE—REVERSAL.

In a criminal case, where the question of the defendant's guilt depends upon whether the witnesses for the commonwealth or those for de-

fendant are to be believed, and the Court of Appeals is unable to say that the verdict is flagrantly against the evidence, it is its invariable rule not to interfere with the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. § 1159(2).]

3. HOMICIDE §307(1) — INSTRUCTION — DEGREE.

The practice of giving the law to the jury on the subject of murder and manslaughter in one instruction is proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 638; Dec. Dig. § 307(1).]

4. HOMICIDE §33 — DEGREE — VOLUNTARY MANSLAUGHTER—"SUDDEN AFFRAY."

To constitute voluntary manslaughter, the killing must be done either in a sudden affray or in sudden heat of passion, and upon provocation ordinarily calculated to excite the passion beyond control; a "sudden affray" being a difficulty or fight suddenly resulting from the mutual agreement of two or more parties.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 54; Dec. Dig. § 33.]

For other definitions, see Words and Phrases, First and Second Series, Sudden Affray.]

5. WITNESSES §240(4) — EXAMINATION — LEADING QUESTION.

In a prosecution for willful murder, the question to defendant as to whether he shot deceased in his own necessary self-defense to protect himself from great bodily harm or death as he believed, was leading, and properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 839; Dec. Dig. § 240(4).]

6. HOMICIDE §338(1) — APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a prosecution for willful murder, a question to defendant as to whether he shot deceased in his own necessary self-defense to protect himself from great bodily harm, or death as he believed, was properly excluded, where the answer it would have elicited from defendant was previously given by defendant in his statement, in answer to a question, as to what made him shoot, that he shot to protect himself and believed that deceased was coming on him with a knife and was going to do him some injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 709; Dec. Dig. § 338(1).]

7. CRIMINAL LAW §390—EVIDENCE — INTENT—SELF-DEFENSE.

In a criminal prosecution, it is permissible for the defendant to state, if such be his defense, that the killing of the deceased was in the defense of his person, or to protect his person or life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.]

8. WITNESSES §338—IMPEACHMENT—MORAL CHARACTER—STATUTE.

Under Civ. Code Prac. § 597, defendant, in a prosecution for willful murder, had the right to impeach the moral character of an adverse witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. § 338.]

9. WITNESSES §362—IMPEACHMENT—EFFECT.

The jury may determine from an attack on either a witness' reputation for untruthfulness or upon his moral character, as permitted by Civ. Code Prac. § 597, if it be successfully made, whether the witness is worthy or unworthy of belief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1176; Dec. Dig. § 362.]

10. CRIMINAL LAW §1186(4)—HARMLESS ERROR—IMPEACHMENT OF WITNESS.

Under Cr. Code Prac. § 340, providing that an error to authorize a reversal must be such as to have prejudiced a substantial right of the defendant, as determined from a consideration of the whole case, error in refusing to allow defendant to impeach the moral character of a witness for the commonwealth was not prejudicial, where several other witnesses for the commonwealth furnished abundant testimony not only as to the matters testified to by that witness, but also as to other facts, which with all the other evidence in the case authorized a conviction, without the first witness' testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215, 3219; Dec. Dig. § 1186(4).]

11. CRIMINAL LAW §1064(6)—APPEAL—MOTION FOR NEW TRIAL — MISCONDUCT OF PROSECUTING ATTORNEY.

In a trial for willful murder, where the alleged misconduct of the commonwealth's attorney in his argument to the jury was not embraced in the motion and grounds for a new trial, the Court of Appeals was without authority to consider or to pass upon the objection made to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2681; Dec. Dig. § 1064(6).]

12. CRIMINAL LAW §717—APPEAL—CONDUCT OF PROSECUTING ATTORNEY.

In a trial for willful murder, the refusal to exclude the commonwealth's attorney's substantially correct statement of the law as to voluntary manslaughter, and advising the jury that on the stated facts they might find defendant guilty of that crime, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1682-1687; Dec. Dig. § 717.]

13. HOMICIDE §215(4) — DYING DECLARATIONS—ADMISSIBILITY—CONCLUSION.

In a trial for willful murder the part of the deceased's statement to another to whom he said that he was going to die, that he was shot without cause, and his statement to other parties that "he shot me just because he could," was inadmissible, as being a mere expression of opinion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 454-456; Dec. Dig. § 215(4).]

14. HOMICIDE §214(1) — DYING DECLARATIONS—ADMISSIBILITY.

The declaration of the deceased that he was shot by defendant, that he was not doing anything when shot, that he did not know that defendant had anything against him and that he had had no previous trouble with him, were admissible, in connection with his declarations conducing to show that he believed his death inevitable and near at hand.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 448; Dec. Dig. § 214(1).]

15. HOMICIDE §203(2) — DYING DECLARATIONS—ADMISSIBILITY—SENSE OF IMPENDING DEATH.

The law does not require as a condition to the competency of a statement as a dying declaration that the injured party shall in express words declare that he knows he is about to die, or that he shall use equivalent language, and, while his recognition of impending dissolution may be shown in that way, the law does not limit it to that way alone.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 431; Dec. Dig. § 203(2).]

16. HOMICIDE §338(1)—APPEAL—HARMLESS ERROR—DYING DECLARATIONS.

In a trial for willful murder, the court's failure to exclude the single expression of opin-

ion contained in the deceased's statements to his wife and brother was not prejudicial to defendant, in view of the competency of the statements in other respects, and of those made by deceased in the presence of another witness in which there was no such expression of opinion.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 709; Dec. Dig. ¶ 338(1).]

17. CRIMINAL LAW ¶ 1186(4)—APPEAL—REVERSAL—STATUTE.

The Court of Appeals will not reverse a judgment or remand the case for a new trial except as authorized by Cr. Code Prac. § 340, prohibiting the reversal of a judgment of conviction unless, upon consideration of the whole case, the court is satisfied that the defendant has been so prejudiced in some substantial right as to have been deprived of a fair trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215, 3219; Dec. Dig. ¶ 1186(4).]

Appeal from Circuit Court, Hopkins County.

B. Frank Cavanaugh was convicted of willful murder, and he appeals. Affirmed.

Cox & Grayot, of Madisonville, for appellant. M. M. Logan, Atty. Gen., and O. S. Hogan, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, B. Frank Cavanaugh, was tried and convicted in the court below under an indictment charging him with the crime of willful murder, committed by shooting and killing Leonard Griffin March 30, 1916; his punishment being fixed by the verdict of the jury and judgment of the court at confinement in the penitentiary for life. He was refused a new trial by the circuit court and has appealed. Six grounds are urged in the brief of his counsel for the reversal of the judgment: (1) The evidence of the commonwealth was not sufficient to sustain the verdict; (2) error in the instructions given by the court; (3) error of the court in refusing to allow appellant to testify that he shot deceased to protect himself from great bodily harm or death; (4) error of the court in refusing to allow the general moral character of Humphrey Hawkins, witness for the commonwealth, to be impeached; (5) misconduct of the commonwealth's attorney in argument to the jury; (6) error of the court in admitting in evidence the dying declaration of the deceased.

[1] Response to the first complaint requires consideration of the evidence, which was, in brief, as follows: The appellant, Joe Collins, Charlie Wallace, and the deceased all met at a house conducted by one Boyd Cates in the outskirts of Slaughtersville, Hopkins county, at which a drink known as "nutra malt" was sold. The parties remained there about two hours, and during that time took several drinks, treats being given by appellant, Collins, and the deceased. The witnesses, other than appellant and one Will Reynolds, introduced in his behalf, testified that they saw nothing unusual in the conduct of the parties while in Cates' house,

except that they were hilarious from drink and all more or less intoxicated. It is true several of the witnesses testified that at one time while they were in Cates' house the deceased attempted to step in the rear of appellant and was ordered by him not to get behind him, to which deceased replied, "All right," and walked away. The good humor of the assembly is shown by the fact that just before they left the house appellant indulged in a song. It was, however, testified by appellant that while in the Cates house Joe Collins had a pistol in his hip pocket, upon which he placed his hand and advanced toward appellant when the latter refused to promise him that he would attend his (Collins') trial in the police court the next day to answer a charge of drunkenness for which he had been arrested the previous afternoon, and at the same time Wallace had a knife in his hand and deceased a knife in his pocket which appellant claimed to have seen him open and place there; that the three persons named were attempting to close in on him, but stepped back when he ordered them to do so. None of these belligerent manifestations mentioned by appellant were seen by the other witnesses except Will Reynolds, who testified that he saw the knife in the hands of Wallace, and that Collins had one hand in his pocket, but that as they were advancing toward appellant he said, "I am not going to stand anything like that; you fellows will have to stand back;" that they did stand back and appellant thereupon commenced to sing. According to all the witnesses the parties all went out of the house and returned once or twice before they finally took their departure; that at the end of two hours Cates announced he would have to close the house and go home, by which time Collins, Wallace, and deceased were so drunk that they were barely able to keep their feet. When Cates announced his purpose to close, all the persons present left the house. According to appellant's testimony, when he, Wallace, Collins, and deceased got out of the house they attempted to get around him as in the house, and he told them good night and walked away, and was followed by deceased and Wallace, whereupon he asked them what they wanted, to which they made no answer, but kept coming toward him; that he told them to stop, and Wallace did stop, but deceased kept advancing with a knife in his hand, and that when deceased failed to stop after being told by him to do so, he shot twice, one of which shots struck deceased in the stomach and perforated his bowels, causing his death the following day in, or on his way to, an Evansville hospital to submit to a surgical operation for relief from his wound.

The foregoing testimony of appellant was,

however, contradicted by that of Collins, Wallace, Hawkins, Crowley, Pleasant, and Whit Ashby, whose testimony, particularly that of Pleasant and Hawkins, was most damaging to appellant. Pleasant, among other things, testified that he heard some cursing just before the shooting began; that appellant was cursing deceased and he heard him say to deceased, "God damn you, tell me good night"; that deceased did tell him good night, and appellant then said to him, "I'll tell you in a way, God damn you, you'll never forget," immediately after which the shots were fired, seven altogether, after five of which were fired Pleasant heard some one that he took to be Wallace say, "Now you have killed him. Now, God damn you, kill me," to which the voice that he took to be appellant's replied, "Just as you say, not as I give a damn," and two more shots were fired. Shortly after the shooting appellant came back by the hotel where the witness saw him as he passed. Wallace, who was at the place of the shooting, corroborated the testimony of Pleasant. According to the testimony of Roy Brown, appellant, shortly after the shooting, made of him the inquiry: "Is he [meaning the deceased] dead yet? All I hate about it is I got him and didn't get the other [or others]." Luther Whistler testified that after deceased was carried to the railroad station the night of the shooting, appellant entered the station about 20 minutes later and inquired of him what he knew about the shooting, and upon being told that he knew nothing appellant said: "I shot Griffin. I don't know whether I killed him or not; I hope I did; and all I hate about it, I didn't get the other son of a b——." Whistler said to him, "I wouldn't talk that way;" to which appellant replied, "I want to tell you that two sons of b—— tried to poison me with whisky and carbolic acid, and that was the cause of this here." Appellant denied making these statements to Brown and Whistler, and also testified that about a month before the shooting of deceased the latter called him to one side and asked him if he would like to have a drink of whisky, and upon receiving an affirmative answer pulled from his pocket a bottle which appellant, upon putting to his mouth for the purpose of taking a drink, but before drinking therefrom, discovered contained carbolic acid, whereupon he threw the bottle down and left deceased.

Jesse Brooks, a witness introduced in appellant's behalf, testified that in the afternoon and shortly before the killing of deceased, he tried to borrow from him a gun, saying he wanted to get that fellow, and upon being asked by Brooks what fellow he was talking about replied, "Cavanaugh." It does not appear, however, from the testimony of appellant and Brooks or that of any other witness, that the deceased, Wallace, or Collins had ever had a difficulty with appellant

or manifested any ill will toward him, and no explanation was given by appellant as to why the deceased should have tried to kill him with carbolic acid or have borrowed a pistol with which to take his life, nor was there anything in the testimony of Brooks conducing to show any cause for deceased's desire to obtain the pistol with which to kill him. In view of the absence of a showing of a motive on the part of the deceased for injuring or taking the life of appellant, and the proof of the friendly terms upon which they met in the house of Cates previous to the killing, to say nothing of the other evidence conducing to show the agreeable relations of the parties, at all times, the above testimony of appellant and Brooks is hardly consonant with reason. Our reading of the evidence furnishes us no reason for sustaining the contention of appellant's counsel that it does not support the verdict of the jury. On the contrary, we think it amply sufficient to that end, even without the testimony admitted as the dying declaration of the deceased.

[2] Where, in a criminal case, the question of the guilt of the defendant depends upon whether the witnesses for the commonwealth or those for the defendant are to be believed, and this court is unable to say that the verdict is flagrantly against the evidence, it is its invariable rule not to interfere with the verdict of the jury. *Chaney v. Commonwealth*, 149 Ky. 464, 149 S. W. 923; *Black v. Commonwealth*, 154 Ky. 144, 156 S. W. 1043; *Slaughter v. Commonwealth*, 152 Ky. 128, 153 S. W. 46; *Hendrickson v. Commonwealth*, 165 Ky. 665, 177 S. W. 438.

[3] No reason is apparent for sustaining appellant's second complaint, which questions the correctness of the instruction of the court as to murder and voluntary manslaughter. It is the contention of his counsel, first, that it was prejudicial to appellant for the trial court to define murder and voluntary manslaughter in the one instruction, and, second, that the instruction did not correctly state the law with respect to voluntary manslaughter. As to the first objection it is only necessary to say that the practice of giving the law to the jury on the subject of murder and manslaughter in one instruction is proper and has received our approval. *Ball v. Commonwealth*, 125 Ky. 601, 101 S. W. 956, 31 Ky. Law Rep. 188.

[4] The second objection is that it was error for the court to instruct the jury that in order to constitute the crime of voluntary manslaughter it was necessary that the killing should have been done in sudden affray or in sudden heat of passion and upon provocation ordinarily calculated to excite the passion beyond control; it being the contention of his counsel that this part of the instruction should have been worded as follows: "In sudden affray or in sudden heat of passion or upon provocation ordinarily calculated to excite the passion beyond con-

trol"—the argument being that if the killing was done, not with malice aforethought nor in the appellant's necessary or apparently necessary self-defense, but upon provocation ordinarily calculated to excite the passion beyond control, it would constitute voluntary manslaughter, though not done in sudden affray or in sudden heat of passion; and therefore the fallure of the court to use in the instruction "or" in place of the word "and" before the words "upon provocation ordinarily calculated to excite the passion beyond control," deprived the appellant of the benefit of one of three grounds upon which the jury might have found him guilty of voluntary manslaughter. The fallacy of this contention is, we think, patent. It is possible for a sudden affray—which is a difficulty or fight suddenly resulting from the mutual agreement of two or more parties—to occur without provocation, but this is not true of a killing in sudden heat and passion. Therefore, in defining voluntary manslaughter, it is necessary to say that the killing must have occurred without previous malice, in a sudden affray, or in the sudden heat of passion; and as the killing could not be done in the sudden heat of passion without provocation, there must be added to the instruction following the word "passion" the words "and upon provocation ordinarily calculated to excite the passion beyond control." On the other hand, a killing upon provocation ordinarily calculated to excite the passion beyond control would not make the killing voluntary manslaughter if the provocation did not, in fact, produce the sudden heat of passion, which is an essential ingredient of the offense. If there is, therefore, nothing said or done by the party killed that would constitute provocation ordinarily calculated to excite the passion of the party doing the killing beyond control, the latter would be without cause to claim that he acted in sudden heat of passion. So to constitute voluntary manslaughter the killing must be done either in a sudden affray or in sudden heat of passion and upon provocation ordinarily calculated to excite the passion beyond control. In *Hobson, etc.*, on Instructions, § 742, a form of instruction is given which not only contains in the one instruction the law with respect to both murder and voluntary manslaughter, but in stating the law as to the latter offense uses language identical with that of the instruction given in the instant case.

[6-7] Appellant's third complaint is as to the trial court's ruling in refusing to permit the appellant to answer the following question: "Did you shoot Leonard Griffin in your own necessary self-defense, to protect yourself from great bodily harm or death at his hands, as you believed?" to which, according to the avowal in the record, he would have replied, "Yes." It would be impossible to frame a question more leading in form or suggestive of the answer desired than the

one quoted, and because of its leading character its exclusion by the court was proper. Its exclusion was also proper because the answer it would have elicited from appellant was previously given by him in better and more elaborate form in response to a question which was neither leading nor suggestive. That question was, "What made you shoot?" and his answer to it, "I shot to protect myself; I believed that the man was coming onto me with a knife and was going to do me some injury." In a criminal prosecution it is permissible for the defendant to state, if such be his defense, that the killing of the deceased was in defense of his person or to protect his person or life, but such testimony, like all other testimony, must be brought out by the asking of a competent question. It is manifest from what has been said that appellant's third complaint is wholly lacking in merit.

[8, 9] Appellant's fourth complaint, relating to the trial court's refusal to permit the moral character of the witness Humphrey Hawkins to be impeached, must be sustained. Section 597, Civil Code, which applies to criminal prosecutions as well as civil actions, allows a witness to be impeached by the party against whom he testifies, "by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony." It will be observed that one of the methods provided by this section for impeaching a witness is to show that his reputation for morality is bad. This makes the general moral character of the witness a fair subject of inquiry. The inquiry may be confined to an attack upon his reputation for untruthfulness, or it may be directed alone to a showing that his moral character is bad. So the jury may determine from the attack on either, if it be successfully made, whether the witness is worthy or unworthy of belief. *Thurman v. Virgin*, 18 B. Mon. 785; *Turner v. King*, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405, 17 Ky. Law Rep. 871; *Davis v. Commonwealth*, 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201, 15 Ky. Law Rep. 396.

[10] It is patent, therefore, that the exclusion of the evidence offered to impeach the character of the witness Hawkins was error, but as an error, to authorize a reversal of the judgment, must be such as to have prejudiced a substantial right of the defendant, it remains to be determined whether this error is of that character, and this determination must be arrived at from a consideration of the whole case. Section 840, Criminal Code of Practice.

To authorize the reversal of a judgment of conviction for felony upon the ground of the

rejection of evidence offered on the part of the defendant, it is not sufficient that the rejected evidence be shown to have been merely pertinent or relevant or technically admissible. It must also be important for the defendant in view of the whole case as presented. *Champ v. Commonwealth*, 2 Metc. 17, 74 Am. Dec. 388. In view of the fact that several witnesses, other than Hawkins, introduced for the commonwealth, furnished abundant evidence, not only as to the matters testified to by Hawkins, but also as to other facts which, with all other evidence in the case, authorized the verdict of the jury, without Hawkins' testimony, we are constrained to hold that the error committed by the court in excluding the evidence offered to impeach the character of the latter could not have prejudiced any substantial right of the appellant.

[11, 12] The alleged misconduct of the commonwealth's attorney in argument to the jury, presented by appellant's fifth complaint, consisted of the following statements made by that officer:

"That he was the commonwealth's attorney and had the sole right to argue, construe, and interpret the instructions of the court, the law of the case to the jury; and that the attorneys for the defendant had no right nor business arguing the instructions, construing the instructions or interpreting the instructions."

And again:

"That even if the killing was done in sudden heat and passion and in sudden affray, still there would have to be circumstances ordinarily calculated to arouse passion beyond control, before the killing could be voluntary manslaughter."

As to the first of these statements it is sufficient to say that though it was highly improper, as the complaint thereof was not embraced in the motion and grounds for a new trial, we are without authority to consider or pass upon the objection now made to it. As the second statement of the commonwealth's attorney, though complained of in the motion and grounds for a new trial, constitutes a substantially correct statement of the law and conforms to what we have already said in approval of the instruction defining voluntary manslaughter and advising the jury in that state of case they would be authorized to find appellant guilty of that crime, it is hardly necessary to add that the refusal of the court to exclude the statement from the jury and admonish them not to consider it, was not error.

[13, 14] The appellant's sixth and final complaint involves a more serious question, viz.: Were the statements of the deceased, made after he was shot, admitted by the trial court as dying declarations, competent as such? Dr. Tanner, his attending physician, upon examining his wound, told him that there was but one chance for him to live, which chance could only be afforded by an immediate surgical operation, which might or might not save his life. To his wife,

when asked with reference to his going to Evansville for the surgical operation, if he wanted a cot, he said, "No, he wanted to ride the cushions [meaning the car seat] because he would have to ride back in the baggage car." He then said to her that "he would never get well; that he would not or could not live." When asked by her who shot him, he said, "Frank Cavanaugh." She then asked him what he was doing and why appellant shot him, to which he replied "He wasn't doing anything; he shot me just because he could." To Tom Drake he said, "He didn't know that Cavanaugh had anything against him." To John Griffin, his brother, he said, when asked why Cavanaugh shot him and whether he had had any previous trouble with him, "I did not know Cavanaugh had anything in the world against me last night or any other time; he shot me just because he could." To Frank McEwen he said he was going to die, and when asked by the latter if he had better not have a cot for the trip to Evansville he said, "No, I will ride in a baggage car coming back;" also that "he was shot without cause and was not doing anything to Cavanaugh." That part of the deceased's statement to McEwen to the effect that he was shot without cause, testified to by McEwen, was excluded from the consideration of the jury by the court, presumably upon the ground that it was a mere expression of the deceased's opinion and therefore incompetent. Dr. Tanner, after testifying for the commonwealth, was recalled by appellant, and in response to the interrogation of his counsel said:

"Mr. Combs asked him [deceased] if he had any trouble with Cavanaugh previous to that night, and he said he had not. 'Well,' he said, 'why did Frank shoot you?' and he said, 'I do not know; I do not reckon he aimed to; yes, I guess he did, too.' Remarked, 'Why did he shoot you?' and he said, 'I do not know.'"

Nearly all the witnesses were asked whether in any of the statements made to them by deceased there was any expression of belief or opinion from him that he would recover from his wound, and from each came the same answer, that no expression of opinion or intimation to that effect was given by the deceased, and that to practically all of them he expressed his belief that he would die.

[15] We think so much of the deceased's statements as amounted to a mere expression of opinion that he was shot without cause, made to McEwen, was properly excluded by the court, and for the same reason that part of the statements made by him to his wife, Annie Griffin, and to his brother, John Griffin, to the effect that "he shot me just because he could," should also have been excluded as a mere expression of opinion and tantamount to the statement, "He shot me for nothing," which, in *Allen v. Commonwealth*, 168 Ky. 325, 182 S. W. 176, was held

incompetent because a mere expression of opinion. But the numerous other declarations of deceased, to the effect that he was shot by appellant, that he was not doing anything when shot, that he did not know the appellant had anything against him, that he had had no previous trouble with him, and the like, were all competent and properly admitted, as were his further declarations conducing to show that he believed his death inevitable and near at hand. As said in *Allen v. Commonwealth*, supra, quoting with approval from *Peoples v. Commonwealth*, 87 Ky. 487, 9 S. W. 509, 810:

"The law does not require as a condition to the competency of the statement as a dying declaration, that the injured party shall, in express words, declare that he knows he is about to die, or that he shall make use of equivalent language. His recognition of impending dissolution may be shown in this way, but the law does not limit it to this mode alone." *Eversole v. Commonwealth*, 157 Ky. 478, 163 S. W. 496; *McHargess v. Commonwealth*, 23 S. W. 849, 16 Ky. Law Rep. 323; *Pennington v. Commonwealth*, 68 S. W. 451, 24 Ky. Law Rep. 321; *Jones v. Commonwealth*, 46 S. W. 217, 20 Ky. Law Rep. 355; *Terrell v. Commonwealth*, 13 Bush, 246; 1 Greenleaf, § 158.

[16] In our opinion the failure of the court to exclude from the jury the single expression of opinion contained in the statements to his wife and his brother, John Griffin, was not prejudicial to appellant, in view of the competency of the statements in other respects and of those made by the deceased in the presence of Dr. Tanner, in which there was no such expression of opinion. Our conclusion that the admission of the evidence proving the expressions of opinion made by deceased was not prejudicial to appellant is fortified by the further conclusion at which we have arrived, that the evidence, other than that of the declarations of deceased, appearing in the record, authorized the verdict.

[17] Under section 840, Criminal Code, the reversal of a judgment of conviction is not permissible unless upon consideration of the whole case the Court of Appeals is satisfied that the defendant has been so prejudiced in some substantial right as to have been deprived of a fair trial. So it is a well-settled rule of this court, repeatedly announced in its opinions, that it will not reverse a judgment or remand the case for a new trial except in the manner and on the grounds authorized by the section of the Code, supra. *Overstreet v. Commonwealth*, 147 Ky. 471, 144 S. W. 751; *Parrish v. Commonwealth*, 136 Ky. 77, 123 S. W. 339; *Henson v. Commonwealth*, 139 Ky. 173, 129 S. W. 566; *Middleton v. Commonwealth*, 136 Ky. 354, 124 S. W. 355; *Oldham v. Commonwealth*, 136 Ky. 789, 125 S. W. 242; *Renaker v. Commonwealth*, 172 Ky. 714, 189 S. W. 928.

Applying that rule to the case here presented, it is our opinion that the record

shows no error committed by the trial court as will compel a reversal of the judgment; hence it is affirmed.

KENTUCKY TRACTION & TERMINAL CO. v. GRIMES.

(Court of Appeals of Kentucky. Dec. 15, 1916.)

APPEAL AND ERROR \S 861(5), 516—FILING "RECORD"—NECESSITY OF COMPLETE RECORD—HEARING OF MOTION.

Under Court of Appeals rule 20 (169 S. W. vii), requiring appellant to file his record in the clerk's office accompanied by a motion for appeal, it is not necessary to file the entire record, but only the part appellant considers necessary for the purpose of the appeal, and therefore objections to granting an appeal because only the judgment was filed will be overruled, and appellant allowed to proceed on only so much of the record, if he elects to do so. For the purpose of such motion, the judgment will be treated as the "record," and the motion for appeal may be determined on the merits.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1955–1958, 2332–3340; Dec. Dig. \S 861(5), 516.

For other definitions, see *Words and Phrases*, First and Second Series, Record.]

Action by Mary Grimes against the Kentucky Traction & Terminal Company. Judgment for the plaintiff, and defendant moves for an appeal. Objections of plaintiff to granting the appeal overruled.

Guy H. Briggs, of Frankfort, and Wallace Muir, of Lexington, for appellant. J. P. Hobson & Son and J. H. Polsgrove, all of Frankfort, for appellee.

MILLER, C. J. Appellee recovered a judgment for \$450, against appellant on September, 15, 1916.

On December 12, 1916, appellant filed a certified copy of the judgment in the office of the clerk of this court, accompanied by a written motion asking this court to grant it appeal, as is required by rule 20 of the court (169 S. W. vii).

Appellee objects to the motion for an appeal upon the ground that appellant has not complied with rule 20 by filing the record for the appeal, but has only filed a copy of the judgment.

While it is true the rule requires appellant to "file his record in the clerk's office of this court in the time and manner now provided by law," and there must accompany the record a written motion of the appellant asking the court to grant an appeal, this does not mean that appellant must file the entire record. He may, as in other appeals, proceed upon such portions of record as he may think necessary for the purposes of the appeal, taking the risk of trying his appeal upon an incomplete record.

Good practice would require the appellant to ask this court, upon grounds shown, to extend his time for completing the record, as in other appeals; but if appellant is willing

to proceed differently, he may do so, taking the chances which ordinarily attend appeals upon an incomplete record. But, for the purpose of complying with rule 20, the judgment will be treated as the "record," which is necessary as a basis for the motion for an appeal.

The motion for the appeal will be passed upon when the case is considered upon its merits. *Oman-Bowling Green Stone Co. v. L. & N. R. Co.*, 169 Ky. 832, 185 S. W. 118. Objections overruled.

TENNIS COAL CO. v. SACKWYTT.

(Court of Appeals of Kentucky. Dec. 15, 1916.)

1. TRIAL §168 — DIRECTED VERDICT — GROUNDS.

The giving of a peremptory instruction where an issue is made upon the pleadings is always predicated upon the fact that all the evidence tends to support the contention of the party in whose favor the verdict is directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. §168.]

2. PUBLIC LANDS §151(7) — KENTUCKY — PATENT—PRIORITY.

The senior grant vests the legal title in the holder and is always the paramount title, unless it has been lost by the adverse possession of another or he has renounced his title; and the law vests the possession of land in the paramount title holder, and a senior grantee is by operation of law in the constructive possession of the land, where it is not in the actual possession of another.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. §151(7).]

3. ADVERSE POSSESSION §14—REQUISITES—ACTUAL POSSESSION.

A possession, which if continued for the statutory period of 15 years will ripen into title, must in the first instance be an actual possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. §14.]

4. ADVERSE POSSESSION §15—ACTUAL POSSESSION—INTENT—BOUNDARIES.

Before one can acquire an actual possession to land to which he has no title and to which he has only a color of title, he must enter upon the land with the intention of holding it, and, if without color of title, must claim it to well marked and defined boundaries.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. §15.]

5. ADVERSE POSSESSION §96 — COLOR OF TITLE—POSSESSION—BOUNDARY.

One entering under a deed, patent, or other written instrument evidencing title, with the intention of possessing the land to the extent of the boundaries described in his deed, etc., is in the actual possession to the extent of his boundaries, or to the extent his boundary is not in the actual possession of another, or unless the boundary described in his color of title embraces a lap upon a senior grant, in which instance he will not be in the actual possession of the part embraced in the conflict unless he actually enters thereon.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533-536; Dec. Dig. §96.]

6. ADVERSE POSSESSION §16(1)—REQUISITES—IMPROVEMENT.

The adverse possession necessary to create title does not consist of mental intentions, but must be based on the existence of physical facts, such as making an improvement upon the land or the doing of other acts upon it which openly evince a purpose to hold dominion over it in hostility to the title of the real owner, and such as will give notice of such hostile intent, which adverse holding must continue for the statutory period of 15 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82, 83, 88; Dec. Dig. §16(1).]

7. ADVERSE POSSESSION §114(1)—PATENTED LAND—SUFFICIENCY OF EVIDENCE.

In a suit to establish ownership of various tracts of land conveyed to plaintiff by the devisees under the will of the original patentee, and to the coal and minerals thereunder, evidence held insufficient to show adverse possession in the vendors of defendant coal company.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. §114(1).]

8. PUBLIC LANDS §151(7) — PATENT — EXCLUDED LANDS—SUFFICIENCY OF EVIDENCE.

In such suit, evidence held to show that such tracts were not embraced in any of the exceptions in the patent to the original patentee or in plaintiff's deed from the devisees under his will.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. §151(7).]

9. PUBLIC LANDS §151(7)—PATENT—ACTION—BURDEN OF PROOF.

Where plaintiff, in a suit to establish ownership of various tracts of land and to the coal and minerals thereunder, had substantially shown that the lands sued for were within his grant and not included in any prior grants or exclusions, the burden shifted to the defendant to show that the lands were included in an exclusion or prior grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. §151(7).]

10. EVIDENCE §572—OPINION OF SURVEYOR—WEIGHT.

On the issue whether a part of a tract was embraced in a patent prior to that under which the plaintiff claimed, the statement of one of the surveyors that it was his opinion that it was so embraced, but that he had not made any survey of the other patent and knew nothing of its lines, except that some one had informed him of the location of one of the corners, did not constitute any evidence as to where the lines of the patent, made 60 years previously, would be marked when surveyed, and hence was insufficient to require a submission to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. §572.]

11. PUBLIC LANDS §151(7) — PATENT — EXTENT—SUFFICIENCY OF EVIDENCE.

In a suit to establish ownership to a tract of land claimed to be embraced in a patent and to have been conveyed to plaintiff by the devisees under the patentee's will, evidence held to sustain the jury's finding in favor of the plaintiff as to certain tracts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. §151(7).]

12. PROPERTY §10 — CONSTRUCTIVE POSSESSION.

One having no actual possession of the land embraced within his deed, by a fiction of law, is in the constructive possession of all the land

embraced therein which is not in the actual possession of another.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 10.]

13. ADVERSE POSSESSION § 14 — CONSTRUCTIVE POSSESSION—DIVESTITURE.

Parties having constructive possession of lands embraced within certain patents could not be divested of such possession, except by an actual possession in fact, or by such acts as vested in another an actual possession by construction.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.]

14. ADVERSE POSSESSION § 66(1) — TITLE — CONTIGUOUS TRACTS—INTENT.

One having the title to land and the actual possession thereof, and who acquires the title to contiguous tracts with the intention of holding possession to the extent of the boundaries of all the tracts, is in the actual possession of all, as, having already the constructive possession by reason of his title, the law waives the necessity of an entry upon each of the newly acquired tracts, and the actual possession of the tract contiguous to them is extended over all of them by operation of law.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-377; Dec. Dig. § 66(1).]

15. ADVERSE POSSESSION § 68 — COLOR OF TITLE—EXTENT.

One without color of title may create an actual possession in himself, by construction, to parts of a tract of land, by entering thereon and using and occupying a part and claiming it to a well marked and defined boundary, which either already exists or which he places there, and he is then in actual possession of the part which he incloses and uses, and in actual possession by construction to the extent of his boundary, unless the land is in the actual or constructive possession of another, in which case his actual possession only extends to his inclosures.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. § 68.]

16. ADVERSE POSSESSION § 100(1) — COLOR OF TITLE—EXTENT—INTENT.

One having color of title may have an actual possession, by construction, to parts of a tract by entering thereon with the intention to take and hold possession to the extent of the boundaries of his deed, etc., and is then in actual possession of the part which he occupies and in actual possession, by construction, of the remainder, when not in the possession of another.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547, 553; Dec. Dig. § 100(1).]

17. ADVERSE POSSESSION § 14 — CONSTRUCTIVE POSSESSION—COLOR OF TITLE.

Without actual possession of some part of a tract of land, there can be no constructive possession of any part by one without title or one having a mere color of title under a deed, patent, etc., which makes an inferior title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.]

18. ADVERSE POSSESSION § 103—PATENTS—PRIORITIES—CONSTRUCTIVE POSSESSION.

Where a junior grant laps upon a senior grant, and although the senior patentee has never entered upon any part of his patent, and has only the constructive possession of it, which the law vests in him, and the junior patentee enters upon his grant, but without the lap, with the intention of holding to the extent of his boundaries, he is not in the possession of

the lap either actually or constructively, because his possession of it would only be constructive and would not displace the senior patentee's constructive possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. § 103.]

19. ADVERSE POSSESSION § 103 — COLOR OF TITLE — ACTUAL POSSESSION. — CONTIGUOUS TRACTS.

One owning and residing upon a tract who acquires an inferior title to an adjoining tract, in which another has a constructive possession, does not acquire an actual possession of the tract to which he holds a color of title, and before he obtains adverse possession of it he must enter and take physical possession of it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. § 103.]

20. ADVERSE POSSESSION § 101—TITLE—ACTUAL POSSESSION.

Where a grantee enters land to a part of which the vendor's title was valid and to a part of which it was invalid and covered by another's valid title and occupies the part to which he has a good title, he does not have adverse possession of the part to which he has not a good title, unless he actually enters and subjects it to such use as will be notice to the true owner; though a different rule applies where his title to all the land embraced in the deed is invalid.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 578-589; Dec. Dig. § 101.]

21. ADVERSE POSSESSION § 16(1) — CHARACTER OF POSSESSION.

Adverse possession must be based upon some physical acts done upon the land which will give the true owner notice that another is in possession of his land, and the acts necessarily must be such as to enable the owner to maintain an action of ejectment or trespass against the intruder.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82, 83, 87, 88; Dec. Dig. § 16(1).]

22. PUBLIC LANDS § 151(7)—PATENT—OWNERSHIP.

Plaintiff claiming title under a patent should have recovered a tract not embraced by any other patent, unless defendant had title by adverse possession, or it was in the adverse possession of defendant's vendors when the deed to plaintiff from the patentee's devisees was executed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. § 151(7).]

23. ADVERSE POSSESSION § 115(1) — CHAMPERTY AND MAINTENANCE § 7(7)—SALE OF LAND HELD ADVERSELY—ACTS OF POSSESSION—QUESTION FOR JURY.

In a suit to establish the ownership of a tract of land embraced in a patent under which plaintiff claimed, held, that the questions of the adverse possession of the defendant's vendors, and of champerty, were for the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 691, 701; Dec. Dig. § 115(1); Champerty and Maintenance, Dec. Dig. § 7(7).]

24. LIS PENDENS § 13—STATUTES—APPLICATION—FEDERAL COURTS.

Ky. St. § 2358a, providing that no action in which the title or possession of realty is involved, nor any order or judgment therein, or sale thereunder, shall affect the right or title of any subsequent purchaser for value and without notice thereof, except from the time

there shall be filed in the office of the clerk of the county court in which the realty lies a memorandum stating the style and number of the action, the court in which it is pending, the name of the person whose interest is involved, and a description of the realty, must be followed in order that the action, sale, or judgment may affect the title or interest of a subsequent purchaser, etc., of realty situated in the state involved in a suit in the federal court.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 23; Dec. Dig. ¶13.]

25. LIS PENDENS ¶4 — CONSTRUCTION OF STATUTE—OWNERSHIP.

Such statute does not apply to a case where a person sells, leases, or incumbers realty not his own and which he never had owned.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 9-11; Dec. Dig. ¶4.]

26. MINES AND MINERALS ¶49 — ADVERSE POSSESSION—CONTINUITY—MINERAL INTERESTS—STATUTE.

Under Ky. St. § 2366a, providing that, whenever the mineral rights appurtenant to land shall pass from a claimant in possession of the surface, the continuity of the possession of such mineral rights shall not be broken, a vendor in possession of surface when he sold the minerals, by thereafter remaining in possession for the statutory period, gave the purchaser of the minerals a valid title; but if, before the statutory period expired, the vendor abandoned the possession or was evicted by paramount title, the title of the purchaser failed.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 135; Dec. Dig. ¶49.]

27. MINES AND MINERALS ¶49 — ADVERSE POSSESSION — BREAK IN CONTINUITY — EFFECT—STATUTE.

Under such statute, a judgment, in a suit to quiet title in the federal court putting the title to and ownership of land in issue between plaintiff's vendors and the claimants of the surface under whom defendants herein claim mineral rights by a purchase pending that suit, conclusive between the parties, and determining that the claimants of the surface were not the owners, and forbidding them to claim ownership, and enjoining them from using or trespassing upon the land, concluded their right to hold adversely, and was a break in the continuity, conclusive against the purchaser.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 135; Dec. Dig. ¶49.]

28. CHAMPERTY AND MAINTENANCE ¶7(2) — ADVERSE POSSESSION—CONVEYANCE.

During the 15 years necessary to hold land in order to create a title by adverse possession, after an adverse judgment, although possession might be sufficient under the statute of limitations, one estopped by the judgment to deny the title of the owner had no such adverse possession as would make a sale and conveyance by the owner void as against the champerty statute.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 66-83; Dec. Dig. ¶7(2).]

Appeal from Circuit Court, Harlan County.

Suit by F. M. Sackett against the Tennis Coal Company, with counterclaim by defendant. Judgment for plaintiff in part, and for defendant in part, motions for new trial denied, and defendant appeals, and plaintiff takes a cross-appeal. Affirmed upon the original appeal, and reversed in part upon the cross-appeal, and otherwise affirmed, and cause remanded with directions.

Bailey P. Wootton and Jesse Morgan, both of Hazard, Jas. H. Jeffries, of Pineville, Hager & Stewart, of Ashland, and Neal & Strickling, of Huntington, W. Va., for appellant. Cleon K. Calvert, of Hyden, for appellee.

HURT, J. Based upon surveys made on the 24th, 25th, 26th, 27th, 28th, and 30th days of June, and 1st, 2d, 3d, and 4th days of July, 1873, a patent was granted to C. O. Lockard, on the 4th day of November, 1873, for 78,262 acres of land, in what was then Harlan county, but now in Harlan and Leslie counties. That patent, by its terms, excluded from the grant 32,147 acres of land, which had been previously patented, the names of the patentees of which were not given, and in addition thereto 5,675 acres of land, which was embraced by prior entries. The prior entries had been made by 26 different persons, whose names and the number of acres included in their entries, respectively, were specifically set out. This left included within the grant 40,400 acres of land, which until then had not been appropriated. The boundary of the lands, embraced within the patent, was described, generally, as lying upon the waters of Beech fork, — fork, Bad creek, Coon creek, and Wolfe creek, tributaries of the Middle fork of the Kentucky river, and bounded on the south and southeast by Pine Mountain, north and northeast by the lines of Perry and Letcher counties, on the west and northwest by the line of Clay county, and on the southwest by Boyd Dickerson's 100,000-acre survey; and, in addition to this general description, the metes and bounds of the granted land were set out specifically by courses and distances.

C. O. Lockard died, testate, about the year 1887, a citizen of the state of Ohio, but on November 20th, 1905, his last will and testament was duly probated, as a will of real estate, in the Leslie county court. Thereafter, on the 11th day of May, 1907, the devisees under the will of C. O. Lockard, deceased, conveyed a very large portion of the lands, embraced in the grant to C. O. Lockard, to the appellee, F. M. Sackett. In the deed to Sackett, there was excluded from the operation of that deed 24,000 acres of land, which were held under patents anterior to the Lockard patent, and about 800 acres of land, which had been previously conveyed to the Burt & Brabb Lumber Company.

During the year 1903, the appellant, Tennis Coal Company, which is a corporation and organized under the laws of the state of West Virginia, purchased from various persons, who were claimants of different portions of the lands embraced in the deed of conveyance from the devisees of C. O. Lockard to appellee, F. M. Sackett, the coals, minerals, gases, oils, stone, salt waters, salt minerals, iron ore, fire and potter's clay and other mineral products, and many privileges

and easements, usually incident to the sale of minerals, as separated from the ownership of the surface of the land, which were in and under the lands claimed by such parties, from whom the purchases were made, and obtained deeds of conveyance therefor.

On September 24, 1912, the appellee, F. M. Sackett, instituted this suit in the Harlan circuit court against the appellant, Tennis Coal Company. In the petition he alleged his ownership of the various tracts of land and all of the coals, minerals, etc., above mentioned, which were in and under the surface of the lands; and that in and under eleven distinct portions of the lands, which were described by metes and bounds, the Tennis Coal Company was claiming to be the owner of the minerals and products above mentioned, and had without right and against his consent entered upon such portions as were described in the petition, and was detaining the possession of such portions from him without right and against his consent, and prayed the court to adjudge that he was the owner of the lands and the various substances underneath the surface of them, and to give him the possession of same.

The appellant, by answer, set out and described thirteen portions of the lands, which were described in the petition, and in such thirteen portions it claimed to be the owner and in the possession of the various coals, minerals, etc., mentioned in the petition, and as to these portions it denied the ownership and right of possession of appellee of the lands or any of the substances under the surface of the lands, or any of the easements or privileges claimed and sued for, and further claimed that it, and those under whom it claimed ownership, had been in the adverse possession of the lands and the substances therein for more than 15 years before the filing of the petition; that the lands were covered by an older and superior title to that of the appellee; and that, at the time the lands were conveyed to appellee by the devisees of Lockard, the lands were then in the adverse possession of it and those under whom it claimed, and for that reason the deed of conveyance, under which the appellee claims ownership, was champertous and void. The answer was made a counterclaim, with a prayer that the petition be dismissed, and that its title to the coals, minerals, etc., in the thirteen portions of the land claimed by it, be quieted. An amended answer was also filed. The affirmative averments of the answers were denied by replies.

At the close of the testimony offered by the appellee, who, as said, was the plaintiff below, the appellant moved the court to peremptorily instruct the jury to find a verdict in its behalf as to the coals, minerals, etc., in all the tracts of land in controversy, and, at the close of all the evidence, renewed the motion, but it was overruled in both instances.

At the close of all the evidence, the appel-

lee moved the court to direct a verdict for him as to all the coals, minerals, etc., sued for, in and under all the tracts of land in controversy. The court sustained the motion in part and overruled it in part. It directed the jury to find for appellee all the coals, minerals, etc., mentioned in the petition, in and under the tracts of land described as the Lewis Turner, James Miniard, and Wm. Miniard, second tract, respectively; and in and under all that portion of the tract known as the John Huff tract, which lies outside of the exterior lines of the David Turner 50-acre patent, No. 64,345; and in and under that portion of the tract described as the Wm. Miniard, first tract, which is not embraced by the patents to Wm. Miniard, which are No. 58985, No. 58984, and No. 64344, respectively; and in and under that portion of the tract described as the John L. Turner tract, which is not embraced by the patent granted to Ballard Begley, No. 62702, and the patent to Israel Napier, No. 67056.

The ownership of the coals, minerals, and privileges described in the petition, in and under all the other portions of the lands in controversy, not included by the portions of the lands referred to and designated in the peremptory instruction, were submitted to the jury under instructions, which, in substance, directed it that if it believed from the evidence that the lands in controversy were not embraced within the excluded portions in the patent to C. O. Lockard, nor in the excluded portions in the deed from Lockard's devisees to appellee, to find for appellee all the coals, minerals, privileges, etc., mentioned in the petition, in and under so much of the lands as are not embraced in the lands excluded from the operation of the patent and deed, unless it should believe from the evidence that all, or some portions, of the lands had been in the adverse possession of the appellants, or those under whom it claims title, for 15 years, at one time, before the institution of the action, or that all or some portions of the lands in controversy were in the adverse possession of the appellant and those under whom it claimed title at the time of the purchase by and conveyance to the appellee, and that all or such portions of the lands as it should find had been held adversely by appellant and those under whom it claimed for as much as 15 years, at one time, before the institution of the action, or was in the adverse possession of the appellant and those under whom it claimed at the time of the purchase by and conveyance to appellee, it should find for appellant. The jury was in substance further instructed that where minerals in lands are sold and conveyed, and the person, selling the same, or any one claiming under him, remains in possession of the surface of the land, the person so holding the possession, also, holds the actual possession of the

minerals for the benefit of the person to whom they had been conveyed. Another instruction directed the jury that if the patents No. 58984, No. 58985, and No. 64344, which had been granted to Wm. Miniard, and containing 50, 100, and 75 acres, respectively, lie adjoining each other and form one connected boundary of land, the entry of Wm. Miniard upon the lands embraced in one of these patents and clearing and fencing a field thereon was, in contemplation of law, an entry and taking possession of all the lands, which are embraced in all three of the grants.

The appellant and appellees, each, objected to the instructions given by the court, and, their objections being overruled, saved exceptions, and each of them offered other instruction, which were denied by the court and to which reference will hereafter be made.

In accordance with the directions of the peremptory instruction, the jury found for appellee, as therein directed, and, under the other instructions, found for appellee, the coals, minerals, etc., in the lands embraced in a 200-acre patent, which had been granted to Benjamin Miniard; and those in and under the lands embraced in the 75-acre patent and the 50-acre patent, which had been granted to Wm. Miniard; and those in the land embraced in a 200-acre patent, which had been granted to John A. Metcalfe; and the coals, minerals, etc., in all the other lands, in controversy, it found for the appellant, and the court rendered judgment in favor of appellee for the recovery of the coals, minerals, privileges, etc., sued for the lands, which the jury found for him, and adjudged in accordance with the prayer of the answer and counterclaim in favor of appellant as to the coals, minerals, etc., in the other lands in controversy.

Both appellant and appellee filed grounds and moved the court to grant a new trial, as to that portion of the verdict and judgment which was unfavorable to them, respectively. The court overruled the motions, and the appellant has appealed from all that portion of the judgment which adjudged a recovery of anything against it, and the appellee, by a cross-appeal, seeks a reversal of the judgment to the extent that it is adjudged that appellant was the owner of the coals, minerals, etc., in the tracts of the land described as the Taylor Huff and Walter Miniard tracts, respectively, and as to that portion of the Wm. Miniard tract which is covered by the patent granted to Wm. Miniard, No. 58985.

[1] 1. The first question which naturally arises is as to the propriety of the giving of the peremptory instruction to find for appellee the coals, minerals, etc., in and under the lands designated in that instruction. The giving of a peremptory instruction, in a trial, where an issue is made upon the plead-

ings, is always predicated upon the fact that all of the evidence tends to support the contention of the party in whose favor the verdict is directed, and hence there is nothing left to be submitted to the jury. In the instant case, to justify the giving of the peremptory instruction in favor of the appellee, it should appear that all the evidence goes to support the averment that appellee is the owner of the coals, minerals, etc., in and under the lands designated in the instruction; and that all the evidence tends to show that these lands were not included in the lands excluded from the patent to Lockard and the deed to appellee; and that there is an absence of any evidence which tends to support the claim of appellant to title by adverse possession of the coals, minerals, etc., in the lands designated in the peremptory instruction, or that these lands were in the adverse possession of the appellant or its vendors at the time of the making of the deed, under which appellee claims. It is conceded that the patent granted to C. O. Lockard on November 4, 1873, and the deed under which appellee claims, dated May 11, 1907, embrace all the lands mentioned in the peremptory instruction. It is also conceded that such of the lands as are covered by the peremptory instruction and which had been granted by patent to others than C. O. Lockard, that the appellant had derived title to the coals, minerals, etc., in them from the persons to whom some were patented. It only remains, then, to be determined whether it was shown that these lands are not within the lands excluded in the Lockard patent and by the deed to appellee, and that the title of appellee is paramount, and whether the appellant or those under whom it claims had acquired title by adverse possession to such lands, and whether the deed of appellee for the lands is champertous and void.

[2] As applying to all of the lands recovered by appellee under the peremptory instruction, as well as all the other lands in controversy, it is elementary to say that the senior grant vests the legal title in the holder of such grant, and that the senior grant is always the paramount title, unless it has been lost to the holder by the adverse possession of another, or he has renounced his title. It is, likewise, elementary to say that the law vests the possession of land in the paramount title holder, and that a senior grantee is by construction and operation of law in the constructive possession of the lands, where it is not in the actual possession of another. The appellant claims title to the coals, minerals, etc., in the Lewis Turner tract of land under Lewis Turner, and his title is based upon a patent to him of the land, which was granted upon a survey made on February 26, 1887. The appellant's title to the coals, minerals, etc., in the James Miniard tract of land is deduced from a patent granted to James Miniard on No-

rember 17, 1890. The appellant's title to the coals, minerals, etc., in the Wm. Miniard tract No. 2, is deduced from a patent which was granted to Wm. Miniard, based upon a survey made on November 18, 1890. The title of appellant to the coals, minerals, etc., in the portion of the John Huff tract, which lies outside of the boundary lines of a patent granted to David Turner, and which was based upon a survey made November 18, 1890, is not deducible from any grant made by the commonwealth of Kentucky, and a large portion of that tract does not seem to be covered by any patent, except that granted to Lockard, under which appellee claims title. The title of appellant to the coals, minerals, etc., in that portion of the Wm. Miniard tract, No. 1, which is not embraced by the patents, No. 58985, No. 58984, and No. 64344, is not deducible from any patent granted to appellant or its vendors, and is covered, alone, by the Lockard patent. The appellant's title to the coals, minerals, etc., in the portion of the John L. Turner tract, which lies outside of the Ballard Begley patent and the patent to Israel Napier, No. 67056, is not deducible from any patentee, under which appellant claims; the Lockard patent, alone, embracing it. Hence it will be observed that appellant's claim of title to the coals, minerals, etc., in the foregoing six tracts of land, which were designated in the peremptory instruction, in the first four instances, is founded upon patents and surveys in point of age, long subsequent to the Lockard patent, and in the other two instances upon the deeds of vendors, who had no title to the lands, and the deeds were not made until the year 1903. The title of appellant, then, to the ownership of the coals, minerals, etc., in these tracts of land designated in the peremptory instruction, if any title it has, must arise from an adverse possession of the lands by appellant's vendors through whom it claims title, as the appellant, itself, has never had any actual possession of any of these tracts of land at any time.

[3-6] A possession, which, if continued the statutory period of 15 years, will ripen into a title, must, in the first instance, be an actual possession. Before one can acquire an actual possession to lands to which he has no title, or only has such grounds to claim of ownership, which merely gives him a color of title, he must enter upon the land with the intention of holding it. If he is without color of title, he must claim it to a well marked and defined boundary. If he enters under a deed, patent, or other written instrument evidencing title, with the intention of possessing the land to the extent of the boundaries described in his deed, patent, or writing, he will be in the actual possession to the extent of his boundaries, or to the extent his boundary is not in the actual possession of another, or unless the boundary described in his color of title embraces a lap

upon a senior grant, in which instance he will not be in the actual possession of the portion embraced in the conflict, unless he actually enters upon the part in conflict. The adverse possession necessary to create title does not consist of mental conclusions or intentions, but it must have for its basis the existence of physical facts, such as making an improvement upon the land, or doing other acts upon it, as will openly evince a purpose to hold a dominion over it in hostility to the title of the real owner, and such as will give notice to the real owner that the purpose is to hold it in hostility to his title. This adverse holding must continue for the statutory period of 15 years. *Frazier v. Ison et al.*, 161 Ky. 379, 170 S. W. 977; *Wilson v. Stivers*, 4 Dana, 634; *Lillard v. McGee*, 3 J. J. Marsh. 549; *Caskey v. Lewis*, 15 B. Mon. 27; *Smith v. Morrow*, 7 J. J. Marsh. 442; *Trotter v. Cassidy et al.*, 3 A. K. Marsh. 365, 13 Am. Dec. 183; *Trimble v. Smith*, 4 Bibb, 257; *Whitley County Land Co. v. Powers*, 146 Ky. 801, 144 S. W. 2; and many other decisions of this court.

[7] Keeping in view the principles above announced, it will be necessary to make an examination of the evidence with reference to the adverse holding, which appellant claims its vendors had to the lands designated in the peremptory instruction. The difficulty of such a consideration will be appreciated, when it is considered that the testimony, in a case of this kind, is scarcely intelligible, unless it is accompanied by a map, from which the witnesses testify, and upon which is laid down the various streams, patents, and other deed boundaries, and the evidences of possession, in the way of a clearing and fencing of lands, and houses, which are referred to by the witnesses. One of the maps which accompanies the record contains but very little which will illustrate the evidence, as it contains representations of but few of the tracts of land which are in controversy or referred to in the evidence, and the other map contains only a portion of such lands. As an instance, much testimony is given as to the H. M. McDaniel tract of land and the John A. Metcalf patent, and the location of it, and the Jesse Lewis patent, referred to in the evidence, and there is nothing upon either map with reference to those patents. While the witnesses in their testimony appear to be pointing out the location of the patents and lines and streams and other objects which are said to be upon the maps, a careful examination of them develops the fact that the objects about which they speak are not shown upon the maps in many instances at all. A review of the evidence under these difficulties fails to disclose that the vendors of appellant have ever, at any time, made an entry upon the lands designated in the peremptory instruction, or made any improvements thereon, or done any act, which evinced upon their part

a purpose to hold or claim the lands or to exercise dominion over them, except in one or two instances, and the acts done by them were admittedly at too recent a date to create a title by adverse possession. Where such of the portions of the lands as were a part, only, of junior patents, which were granted to the vendors of appellant, no entry upon or actual possession of such patents is shown, as might be construed into an actual possession by construction of the entire patent and thus actual possession of the part found for appellee under the peremptory instruction.

[8, 9] It is insisted, however, that the evidence does not show that the lands to which the peremptory instruction related are without the lands which were excluded in the patent to Lockard and the deed under which appellee holds, and that hence it was error for the court to adjudge, as a fact, that they were without the exclusions, and to take away from the jury the power to pass upon that issue by the peremptory instruction. The appellee relied for title to the lands in controversy upon a patent and deed from which a large number of acres were excluded on account of prior grants or entries and prior sales of portions of the lands embraced within the exterior lines of the patent and deed. It was incumbent upon him to show, by proof, that the lands in which the coals, minerals, etc., which were sought to be recovered were located, were within the exterior boundaries of the deed and patent, and not embraced by any of the exclusions. The exclusions, of course, are not embraced in the patent or deed, and the appellant cannot have any title to the lands embraced by the exclusions. The evidence offered to prove the affirmative upon that issue was not contradicted. It was shown, without any question, that the lands in controversy were within the exterior lines of the deed and patent. Upon the issue as to whether or not they were included in any of the excluded lands, it was shown by the agent of appellee, and who was a surveyor of experience, that he was well acquainted with the territory embraced by the patent and deed, with the water courses and other natural objects upon it; that, with the assistance of an attorney, he visited the land office of the state, at Frankfort, and there sought diligently for ten days to find all the prior grants included in the exterior lines of the patent; that he examined the records in that office, which show all the grants; that after an exhausted search, and having obtained copies of all the prior grants which he could find, he had them surveyed and located; that none of them interfered with the lands in controversy; that he knew the location of the 39 tracts, which were excluded from appellee's deed as having been sold to the Burt & Brabb Lumber Company, and none of them included the lands in controversy; that he knew

where all of the specific exclusions in the patent were located, except four, and he knew that these did not interfere with the lands in controversy. Other evidence heard in addition to that of the agent shows it to be reasonably certain that the lands in controversy are not embraced within any of the exclusions. The tracts described in the petition are the only ones in issue, and no proof was heard or offered, which tended to prove that any of the lands in controversy were embraced by any of the exclusions. When the appellee had shown substantially that the lands sued for were within his grant and not included in any prior grants or exclusions, the burden then shifted to the appellant to show, if he could, that the lands in controversy are included in an exclusion or prior grant. *Bowling v. Breathitt Coal, Iron & Lumber Co.*, 134 Ky. 249, 120 S. W. 317; *Caddell v. Eagle Coal Co.*, 144 Ky. 396, 138 S. W. 304; *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755; *Miller v. Breathitt Coal, Land & Lumber Co.*, 152 Ky. 390, 153 S. W. 468. In *Steele v. Bryant*, *supra*, which involved the same question now under consideration, the court said:

"In cases of this sort the plaintiff ought not to be required to do a thing that is impossible. He ought only to be required to furnish such proof as is practicable; and, if his proof reasonably establishes that the land is within his patent, and not within any prior grant, burden shifts. The defendant may show that the prior grant includes the land, although he does not connect himself with it."

The other cases cited sustain the doctrine announced in *Steele v. Bryant*, *supra*. There being an entire absence of any proof that the disputed areas were covered by any exclusions in the patent or deed or by any prior grants, and no contradictions of the testimony upon that subject, the court did not err in giving the peremptory instruction.

[10] It is insisted, with reference to that portion of the John Huff tract which is outside of the exterior lines of the David Turner patent, that there was evidence to the effect that a portion of it was embraced in a patent prior to that of Lockard, and which was granted to James Turner, on a survey made on the 26th day of May, 1852, and for that reason it was error to peremptorily instruct the jury to find for appellee all that portion of the John Huff tract which was without the David Turner patent. The proof of a portion of it being with the James Turner patent consisted of the statement of one of the surveyors that it was his opinion that it was so embraced, but that he had not made any survey of the James Turner patent and knew nothing of its lines or to where they would extend, except that some person had informed him of the location of one of the corners. It is a matter of common knowledge that such information as that does not constitute any evidence of where the lines of a patent made 60-odd years ago will be located, when surveyed, and hence it was

not sufficient to require the submission of the question to the jury.

[11] 2. As before stated, the jury found in favor of the appellee as to the H. M. McDaniel tract, the Benjamin Miniard tract, and the Wm. Miniard tract covered by the 75-acre and the 50-acre patents, and of these findings the appellant complains and insists that the court should have directed a verdict in its favor as to all of these tracts and should have granted it a new trial as to them, when the jury found against it. In neither of these contentions can we concur. The H. M. McDaniel tract lies wholly within a junior patent granted to John A. Metcalfe for 200 acres of land and which is based upon a survey made on October 24, 1882. Benjamin McDaniel acquired it from Metcalfe, and conveyed the portion of it in controversy to H. M. McDaniel. The evidence for appellant tended to prove that the Metcalfe patent had been occupied by the McDaniels since the year 1894, while the evidence for appellee was to the effect that it had never been occupied, for any time, by any one, and that the only evidence of adverse possession, which any one had ever held of it, that was visible upon it, was upon one edge, where a clearing had been extended from adjoining lands upon it to the extent of about 2 acres, and the portion upon the Metcalfe patent which had been cleared appeared to have been done for only about four years. As to the Benjamin Miniard tract, it is embraced entirely by a patent which was granted to Benjamin Miniard on a survey made on the 25th day of February, 1887. The evidence for appellant tended to prove that Benjamin Miniard had entered upon this tract before the year 1907 and cleared a small field upon it, that the field has been cleared and fenced for about eight or nine years; while the evidence for appellee tended to prove that the only evidence of actual possession upon it is a small clearing extending into this tract from adjoining lands, the ownership of which is not disclosed, and that it had been made in recent years. The 75-acre patent to Wm. Miniard was granted upon a survey made on November 17, 1890, and the 50-acre patent was granted upon a survey made on April 15, 1883. No improvements of any kind were ever made upon the lands embraced in either of these patents, and no evidence of any physical possession of the lands embraced in either of them was offered. They adjoin a 100-acre patent granted to Wm. Miniard on a survey made on April 5, 1883, upon which there is a small field, which was cleared and fenced from 16 to 18 years previous to the trial, which occurred in February, 1914. Although the jury was instructed that if the three patents mentioned, to Miniard, adjoined and made one connected boundary of land and he entered and held one of them in adverse possession, his actual possession extended to the lands embraced in all of them, the jury

found that he had not had the 50-acre and the 75-acre patents in adverse possession for the time necessary to create title. As regards the McDaniel tract, the Benjamin Miniard, and the Wm. Miniard 50-acre and 75-acre tracts, the evidence is sufficient to sustain the finding of the jury, and, there being no error in the instructions which is prejudicial to appellant and of which it can complain, there seems to be no reason to disturb the verdict of the jury.

3. The appellant complains seriously of the finding of the jury as to the 50-acre tract and the 75-acre tract, above referred to and known as the grants made to Wm. Miniard, and insists that the law which applies to the facts proven in regard to these two tracts entitled the appellant's vendors to hold them under the doctrine of adverse possession and should have been adjudged to it upon a peremptory instruction, and offered an instruction as applying to these tracts, as well as others, which the court denied, and which was in fact a direction by the court to the jury that, if one resided upon a tract of land to which he had title and takes a deed or grant to an unoccupied tract of land adjacent to that upon which he lives and to which he claims title, his possession at once, by operation of law, extends to the outside boundary of the newly acquired lands, unless the newly acquired land was at the time in the actual possession of some one else. It is the doctrine enunciated by the rejected instruction which is now contended for by appellant. As applying to the Wm. Miniard 75-acre and 50-acre and 100-acre tracts of land, in controversy, the court substantially instructed the jury in accordance with the principles of that proposed instruction, and under the particular facts of this case it seems to have been more favorable to appellant than it was entitled to. Wm. Miniard has resided for over 50 years upon the land embraced in a patent, which was granted to his father in the year 1853, for 300 acres of land, and which is not involved in this action, as it was granted prior to the Lockard patent, and probably is not embraced in the exterior lines of that patent. The lands embraced in the 100-acre, the 75-acre, and the 50-acre patent to Wm. Miniard, and which were in controversy, were granted at the following dates, respectively, April 5, 1883, November 17, 1890, and May 4, 1883. They are all subsequent grants to the title of appellee, within the Lockard patent and contiguous to each other, and one or more of them are contiguous to the old 300-acre patent upon which Miniard lived. As before stated, upon the 75-acre patent nor the 50-acre patent there had never been any actual possession taken by Wm. Miniard, or any evidence of any dominion over them by him, although he stated in his testimony that he had claimed to be the owner of them. Upon the 100-acre patent, the mineral rights in which the jury found to be in the appellant, Wm. Miniard had opened a

small field and put it under fence and cultivation for 16 or 18 years before the trial. If the jury believed that this improvement was made 15 years prior to the institution of the suit, which was filed on September 24, 1912, that fact, or else that it was in the adverse possession of Miniard in 1907, when appellee obtained his title, was probably the basis of its verdict in finding for appellant as to that tract. It is now necessary to determine what principles of law should be applied to the state of facts presented.

[12] There was no actual possession shown by appellee of the lands embraced within his deed, but by the fiction of the law he was in the constructive possession of all of the lands embraced within his deed which were not in the actual possession of another. Neither the appellant nor Wm. Miniard, under whom it claims title, as stated before, was or had ever been in the possession of either the 50-acre or 75-acre tracts, unless the contention of appellant that the fact that its vendor lived upon and owned an adjoining tract of land, when he acquired junior patents to the 50-acre and 75-acre tracts and the 100-acre tract, or from the fact that he entered upon the 100-acre tract and reduced it to possession, he thereby and without any entry or other act indicating a purpose to possess the 50-acre or 75-acre tract, he became in the adverse possession of them, and, so continuing for the statutory period, became their true owner.

[13, 14] The vendors of appellee having the constructive possession of the 75, 50, and 100 acre tracts at the time the patents were granted to Miniard, it is a well-settled maxim of the law that their constructive possession of the lands embraced within these patents could not be divested except by an actual possession. To acquire an actual possession, an actual possession, in fact, must be taken, or such acts must be done by the claimant to vest in him an actual possession by construction. It is not contended that Miniard ever took actual possession, in fact, of either the 75-acre or the 50-acre grants, and, if he ever had any actual possession of either of these two grants, it was necessarily an actual possession by construction. One having the title to the lands, of which he is at the time in the actual possession, and acquires the title to contiguous tracts, and has the intention of holding the possession to the extent of the boundaries of all, is in the actual possession of all. Having already the constructive possession, by reason of being the owner of the titles, the law waives the necessity of an entry upon each of the newly acquired tracts, and the actual possession which he has of the tract contiguous to them is extended over all of them by operation of law. *Harrison v. McDaniel*, 2 Dana, 354; *Everidge v. Martin*, 164 Ky. 497, 175 S. W. 1004; 2 C. J. 243; *Mounts v. Mounts*, 155 Ky. 363, 159 S. W. 818; *Miniard v. Napier*, 167 Ky. 208, 180 S. W. 863.

[15-17] One without a color of title may create an actual possession in himself, by construction, to parts of a tract of land, by entering thereon and using and occupying a part and claiming it to a well marked and defined boundary, which either already exists or which he places there. He is then in the actual possession of the portion which he incloses and uses, and is in the actual possession, by construction, to the extent of his well marked and defined boundary, unless the land is in the actual or constructive actual possession of another, and then his actual possession only extends to his inclosures. *Le Moyne v. Meadors*, 156 Ky. 832, 162 S. W. 526; *Burt & Brabb Lumber Co. v. Sackett*, 147 Ky. 232, 144 S. W. 34; *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021; *New Domain Oil Co. v. Gaffney*, 134 Ky. 792, 121 S. W. 699; *Campbell v. Thomas*, 9 B. Mon. 82; *Le Moyne v. Litton*, 159 Ky. 652, 167 S. W. 912. One having a color of title may have an actual possession, by construction, to parts of a tract of land by entering thereon with the intention to take and hold possession to the extent of the boundaries of the deed, patent, or other instrument which gives color of title. He is then in the actual possession of the portion of the premises which he occupies and in the actual possession, by construction, of the remainder of the tract, where same is not in the possession of another. *Thomas v. Harrow*, 4 Bibb, 563; *Fox v. Hinton*, 4 Bibb, 559; *Daniel v. Ellis*, 1 A. K. Marsh, 60, 10 Am. Dec. 707; *Harrison v. McDaniel*, 2 Dana, 348; *Kendal v. Slaughter*, 1 A. K. Marsh. 375; *Taylor v. Buckner*, 2 A. K. Marsh. 18, 12 Am. Dec. 354; *Chiles v. Conley*, 9 Dana, 385; *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563; *Franklin Academy v. Hall*, 16 B. Mon. 472; *Taylor & Crate v. Burt & Brabb Lumber Co.*, 109 S. W. 348; *Slaven v. Dority*, 142 Ky. 640, 134 S. W. 1166. Without actual possession of some part of a tract of land, there can be no constructive possession of any part by one without title or one having a mere color of title, under a deed, patent, or other instrument which makes an inferior title. It will be observed that a constructive possession created by an actual possession of a part of a tract, and a claim of possession to the boundaries of an instrument which gives a mere color of title, extends only to the boundaries described in the instrument. If the occupation of a tract of land under an instrument, which makes only a color of title, creates a constructive actual possession of the unoccupied lands embraced by the instrument only to the extent of the boundaries described in it, it is difficult to see how the holding of one tract of land under such an instrument would create an actual possession, by construction, to other separate and independent tracts of land, although contiguous to the tract held under the instrument.

[18, 19] It has been held in this jurisdiction, by a uniform line of decisions, that

where there is a lap of a junior upon a senior grant, and although the senior patentee has never entered upon any part of his grant, and has only the constructive possession of it, which the law vests in him, and the junior patentee enters upon his grant, but without the lap, and although he does so with the intention of holding to the extent of his boundaries, he is not in the possession of the lap, either actually or constructively, because his possession of it would be only constructive, and such possession would not displace the constructive possession which the senior patentee already has. *Trimble v. Smith*, supra. In the instant case, the appellee and his predecessors in title have had the constructive possession of the lands included in the 75-acre and the 50-acre patents, then how could the constructive possession, which it is claimed that Wm. Minlard obtained over the unoccupied portion of the 100-acre patent, by entering upon it under a mere color of title, displace the appellee of his constructive possession of the 75-acre and 50-acre grants? While there has been some divergence of opinion and expression in the many decisions of this court with reference to land titles, arising largely from the different statements of fact in the different cases, it has been practically settled as a rule of property in this state that one who owns and resides upon a tract of land and acquires an inferior title by deed or otherwise to an adjoining tract, to which some one else has a constructive possession by reason of his legal title, does not acquire an actual possession of the tract to which he holds a color of title by reason of the deed to him, and before he obtains the adverse possession of it he must enter upon it and take physical possession of it. *Whitley County Land Co. v. Powers*, 146 Ky. 801, 144 S. W. 2; *Bowling v. Breathitt Coal & Iron & Lumber Co.*, supra; *Quisenberry v. Chenault*, 143 Ky. 312, 138 S. W. 625.

[20, 21] It is also held that where one enters under a deed, upon land, to a part of which the vendor's title was valid and to a part of which the vendor's title was invalid, and was covered by a valid title of another, and he occupies the portion to which he has a good title, he thereby does not become in the adverse possession of the portion to which he has not a valid title, unless he actually enters upon it and subjects it to his use and dominion, and in such a manner that it will be notice to the true owner, although a different rule applies where his title to all the land embraced in the deed is invalid. An adverse possession must be based upon some physical acts performed upon the land as will give the true owner notice that another is in the possession of his land, and the acts necessarily must be such that it would enable the owner to maintain an action of ejectment or trespass against the intruder. Where an intruder has a deed or

patent which gives him a color of title, and it is of record, the owner may, by investigation, learn the extent of the intruder's possession, when he has received notice of the adverse holding by seeking his acts upon the property; but an instrument creating a color of title does not necessarily have to be of record, and even a recorded instrument would not give warning, as the owner could not know that the person to whom the instrument gives color of title would ever undertake to assert his claim to ownership, by taking possession of the land, until he has done so. There is no step necessary for the owner to take to care for his interests, until the claimant, under color of title, undertakes to subject the property to his use and dominion. In the instant case, the patents, each, embraced an independent survey, and were granted at different times, and a deed executed by his brother the patentee for their interest in the 300-acre patent, and which was made to include the lands in controversy, would not change the right of the appellee, since that deed was made only ten years ago. Following the decisions of this court and the analogies of the law, it does not seem that Wm. Minlard's actual possession of the 300-acre tract of land, which he owned, nor of the 100-acre tract, to which he had a color of title, if he was in the actual possession, did not put him in the actual possession of either the 75-acre nor the 50-acre patent boundaries, and hence the claim of title to them by adverse possession, or that the conveyance to appellee was champertous and void, must both fail, and the court did not err in rejecting the instruction offered.

4. The cross-appeal is as to the judgment of the court adjudging the ownership of the coals, minerals, etc., in three of the tracts of land, which were adjudged to appellant. They are the Taylor Huff tract, the Wm. Minlard 100-acre patent boundary, and the Walter Minlard 100-acre patent boundary.

[22, 23] The Taylor Huff tract is not embraced by any patent, except the Lockard, under which appellee claims title. The appellee should have recovered it, unless the appellant had title by adverse possession or it was in the adverse possession of appellant or its vendors when the deed to appellee for the lands was executed. At the time of the trial, Taylor Huff, the vendor of appellant, had died. It seems that Taylor Huff claimed to be the owner of this tract of land under a deed which was executed to him by John Huff on July 2, 1891, and it embraced the land in controversy. It is insisted by the appellee that the court should have directed a verdict in its favor for this tract of land, and insists that the only evidence of any adverse possession of it by Taylor Huff was a small clearing, which commenced upon the boundary within a patent that was granted to Jas. Minlard on November 17,

1855, anterior to Lockard's patent, and that this clearing and improvement extended for some short distance within the boundary of the deed from John Huff to Taylor Huff, and that Taylor Huff did not reside within this boundary, and did not make the improvement referred to, but that he resided at a place upon an adjoining patent, which was granted to William Turner and Wm. Miniard and was older in point of age than the Lockard patent. The land covered by the patent to James Miniard of November 17, 1855, was conveyed to Taylor Huff by Miniard on June 21, 1897. There was other evidence, however, to the effect that Taylor Huff had lands cleared and fenced upon the tract in controversy for 25 years before the trial, and, under these circumstances, the question of adverse possession and champerty were ones for the jury, and it determined under the instructions that Taylor Huff had maintained an adverse possession to the land for the statutory period necessary to create title, and its verdict cannot be now disturbed.

[24, 25] 5. The appellee insists that the court was in error in not directing a verdict in his favor for the coals, minerals, etc., in the Walter Miniard 100-acre patent boundary, and the Wm. Miniard 100-acre patent. While the evidence for appellee was being heard upon the trial, he offered in evidence a copy of the pleadings, process, and of the judgment, in the action of Cordelia Lockard et al. v. Asher Lumber Company et al., 131 Fed. 689, 95 C. C. A. 517, in the United States Circuit Court for the Eastern District of Kentucky. An objection was sustained to the introduction of this record as evidence, to which appellee excepted and now complains of the ruling of the court as prejudicial error. The complainants in that action were the devisees under the will of C. O. Lockard and the vendors of appellee. Among the defendants were Wm. Miniard and Walter Miniard, through whose possession of the surface of the lands the appellant is, in this action, claiming the ownership of the coals, minerals, etc., in the two tracts of land now being considered. They were served with process and appeared in that action and made a defense to it. The action was to quiet the title of the complainants, together with various other tracts within the Lockard patent, to the two tracts of land now under consideration, and to enjoin Walter and Wm. Miniard from trespassing or committing waste upon the lands which are here in controversy, and from ever claiming any right, title, or interest in the lands, and to adjudge the complainants to be the owners of the lands, free from any claim or interest of the defendants. The action was filed in the year 1900, but the final judgment was not rendered until March 5, 1906, and resulted in a judgment in favor of the complainants.

The court, after adjudging that the devisees of C. O. Lockard were the true and beneficial owners of the land, adjudged that the defendants in that action, which included Walter and Wm. Miniard and all persons who should claim under them, to be forever enjoined from trespassing upon the lands, and from setting up, pretending or in any wise asserting any estate, title, right, interest, claim, or demand in or to the lands, adverse or contrary to the interest or title of the complainants, or of any person who thereafter might claim under them. The court had jurisdiction of both the parties and the subject-matter, but it is insisted that the record and judgment was not competent evidence, in the instant case, against the appellant, because it was a purchaser for value of the interests claimed by it in the lands, during the pendency of the suit, in the year 1903, and without notice of the claim of appellee's vendors to the ownership of the land, and that the *lis pendens* notice provided for by section 2358a, Ky. Statutes, was never filed in the office of the clerk of the Harlan county court, and that under the express provisions of that statute the judgment could not affect their interests in the land. It appears that no such notice was ever filed. The statute provides as follows.

"That no action, cross-action, counterclaim or other proceeding whatever * * * hereafter commenced or filed in which the title to or the possession or use of or any lien, tax, assessment, or charge on real estate, or any interest therein, is in any manner affected or involved nor any order or judgment therein, nor any sale or other proceeding thereunder, shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, or encumbrancer of such real estate or interest for value and without notice thereof, except from the time there shall be filed in the office of the clerk of the county court in which the real estate or greater part thereof lies, a memorandum, etc. * * *"

It is provided that the memorandum shall state the style and number of the action, and the court in which it is commenced or pending, and the name of the person whose interest in the real estate is involved, and a description of the real estate affected by the proceeding. We do not concur in the view urged by counsel for the appellee that a *lis pendens* notice, as provided by that statute, is unnecessary in order that the proceeding, sale, or judgment may affect the title or interest of a subsequent purchaser, lessee, or encumbrancer, for value, without notice, of real estate involved in a suit in a federal court, where the real estate is situated in this state. It is a rule pertaining to property situated in this state, and it is to be assumed that the federal courts will give force and effect to it, as the courts of the state will do. The notice must be filed by some party who has an interest, and, if the clerk of the county court should refuse to do his duty in regard to it, he could be

compelled by proper proceedings to do so. All the cases in this jurisdiction in which this statute has been construed have related to instances in which the owner of the property affected had made sales, leases, or placed incumbrances upon it, and in no instance has the statute been invoked to protect a purchaser or lessee or incumbrancer who has purchased or leased property from an individual who did not own it, or has accepted an incumbrance upon property which was executed or placed upon it by some one who did not have any title to it or interest in it. The statute does not seem to have application to the case where a person sells, leases, or incumbers real estate not his own and which he never had owned. In the instant case, the lands in controversy were the property of appellee's vendors, and had never been owned by the vendors of appellant. The vendors of appellant had procured patents subsequent to that of appellee which gave them only a color of title, and there is no pretense that they had been in possession of the lands for such a time as to make them owners by adverse possession, at the time of their sales, of the coals, minerals, etc., to appellant.

[28, 27] As before stated, the appellant must necessarily rely for its title to the coals, minerals, etc., in the lands to the ownership of the lands by its vendors acquired by adverse possession. The statute, section 2366a, Ky. Statutes, is invoked, which provides as follows:

"Wherever the mineral or other interests in or rights appurtenant to land in this commonwealth have heretofore passed, or shall hereafter pass, in any way, from a claimant in possession of the surface of said land, the continuity of the possession of such mineral interests and rights shall not be deemed thereby to have been, or to be, broken; but the possession of the surface by the original claimant thereof, from whom such mineral interests or rights passed, or by those claiming through or under him, or by virtue of a judgment against him in an action to which the holder of said mineral interests or rights is not a party, shall be deemed to have been, and hereafter to be, the possession of such mineral interests and rights in said land for the benefit of said person, his heirs and assigns, to whom said mineral interests or rights have or shall have passed as aforesaid."

[28] Under the provisions of this statute, it seems that if the vendors of appellant were in possession of the lands when they sold the coals, minerals, etc., to appellant, and thereafter remained in possession until they had been in the adverse possession of the lands for the statutory period, counting from their first acquiring actual possession of the lands, the title of appellant was made valid; but if, before the statutory period had expired, they had abandoned the possession or been evicted by the owners of the paramount title, then the title of appellant failed. The possession of its vendors, or those claiming under or through them, inured to the benefit of the appellant; but, if its vendors did not keep

the adverse possession, then, in the absence of such adverse possession, there was nothing to ripen the appellant's claim into a title. If the one holding the possession, and upon whose possession the appellant depends for the ripening of its title, is estopped to deny the title of appellee, and is prohibited from claiming to own the land, or any interest in it, and from holding it adversely to the appellee, it seems that appellant would be in no better condition than he would be if the possession was entirely vacant. The suit in the federal District Court put the title to and ownership of the lands in issue between appellee's vendors and the minerals just as fully and completely as if it had been a suit in ejectment, instead of *quia timet*. The judgment of the court therein was conclusive between the parties. The statute of limitation gives title only to those who hold adverse possession of land claiming it as their own, undisturbed, continuously, and peaceably, for as many as 15 years. An action is the only way provided for disturbing one who is in possession of a tract of land and claiming to own it. A judgment, which determines that he is not the owner and forbids him to claim to be such and enjoins him from using or trespassing upon the land, concludes his right to hold it adversely. Any adverse possession, which he might have had or claimed before the institution of the action in which the judgment was rendered or pending, is extinguished by the judgment, and if he would create a title to the lands, either in himself or that would inure to the benefit of the holder of the minerals under the surface, he must remain in adverse possession of the land for 15 years after the judgment. When the judgment was rendered, it then became his duty to give up the possession and to refrain from any further possession of the land, or claim to its ownership. Such a judgment is a termination of any claims or rights he had in the land. It breaks the continuity of his possession, if any he had theretofore. During the 15 years necessary for him to hold the land in order to create a title by adverse possession, after the judgment, although his possession might be sufficient under the statute of limitations, he having been estopped to deny the title of the owner, it is not such adverse possession as will make a sale and conveyance by the owner void, as being against the champerty statute. *Perry v. Eagle Coal Co.*, 170 Ky. 824, 186 S. W. 876; *Jones v. Chiles*, 2 Dana, 25; *Barret v. Coburn*, 3 Metc. 510; *Baley v. Deakins*, 5 B. Mon. 161; *Castleman v. Combs*, 7 T. B. Mon. 273; *Griffith v. Dicken*, 4 Dana, 561.

Since the judgment in the federal court, the expiration of the time has not been sufficient to permit the creation of a title to the lands by adverse possession, if appellant's vendors have, in fact, maintained such a possession since the rendition of that judgment.

The possession of the vendors of appellant having terminated by the judgment, and the appellee not having taken actual possession of the land by virtue of the judgment, there has been no actual possession of it by virtue of the judgment since its rendition. Hence it seems the court was in error in refusing to admit the record and judgment of the federal court in evidence, and the giving to it such effect as it was entitled to have. Upon the facts presented in evidence, after the admission of the record and judgment of the federal court, the appellee was entitled to have included in the peremptory instruction

in his favor the coals, minerals, etc., in the Walter Miniard tract, embraced in patent No. 51935, and the Wm. Miniard tract, embraced in patent No. 58985.

It is therefore ordered that the judgment be affirmed upon the original appeal, and reversed upon the cross-appeal as to the Wm. Miniard tract and the Walter Miniard tract, which were embraced by the junior patents, Nos. 58985 and 51935, respectively, and otherwise the judgment upon the cross-appeal is affirmed, and the cause is remanded, with directions for further proceedings in conformity to this opinion.

SCOTT et al. v. SCOTT et al.

(Court of Appeals of Kentucky. Dec. 8. 1916.)

1. DEEDS §127(2) — ESTATES CONVEYED — WORDS OF PURCHASE OR LIMITATION — "BODILY HEIRS."

The rule that a conveyance to one and "her bodily heirs," or the "heirs of her body," creates an estate tail, which by the statute is converted into a fee, does not apply, where there is something else in the deed from which a reasonable inference can be drawn that the words were used in a sense different from their technical signification, so that, in a husband's deed to his wife and "her bodily heirs by Crit Scott," with grant to "the party of the second part, their heirs and assigns," and with a habendum clause "unto the party of the second part, their heirs and assigns forever," made in consideration of the grantor's love and affection for her and their children, the words "her bodily heirs by Crit Scott" were words of purchase, and not of limitation, as if the word "children" was used in their place.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 358; Dec. Dig. §127(2).]

For other definitions, see Words and Phrases, First and Second Series, Bodily Heirs.]

2. DEEDS §129(4) — ESTATES CONVEYED — LIFE ESTATE—VESTED REMAINDER.

Whether the wife takes a joint estate with her children, or a life estate, with remainder to her children, depends upon the relationship of the parties and the language of the deed, and, absent a contrary intention, such conveyance will be held to vest in the wife a life estate only.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 431; Dec. Dig. §129(4).]

3. FRAUDULENT CONVEYANCES §71, 75 — BONA FIDE PURCHASER—RIGHTS.

Under Ky. St. §§ 1906, 1907, relating to the rights of bona fide purchasers, a conveyance actually fraudulent as to the grantor's creditors is void as to subsequent purchasers for value, who are not affected by either actual or constructive notice of the conveyance; and a conveyance merely voluntary, and hence only constructively fraudulent, is void as to such purchasers, unless they have actual notice of the conveyance, constructive notice being insufficient.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 184, 191; Dec. Dig. §71, 75.]

4. FRAUDULENT CONVEYANCES §248—BONA FIDE PURCHASERS—NOTICE—TIME.

The protection afforded to subsequent purchasers for value from a fraudulent grantor is only for a limited period, and, whether the former conveyance is actually or constructively fraudulent, as to grantor's creditors, the grantee's title is perfect after the lapse of 10 years, and a purchaser from the grantor after that time is then as much bound to take notice of the prior voluntary or fraudulent conveyance as if the grantee had been an innocent purchaser for value.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 730-734; Dec. Dig. §248.]

Appeal from Circuit Court, Pike County.

Suit to quiet title by Daisy Scott and others against John W. Scott and others. Judgment for defendants, and plaintiffs appeal. Reversed, and cause remanded.

Staton & Pinson and O. A. Stump, all of Pikeville, for appellants. Childers & Childers, of Pikeville, for appellees.

CLAY, C. Evin Scott owned a large boundary of land in Pike county, which he divided among his children. Among those who received conveyances were Crit Scott and John W. Scott. On November 30, 1891, Crit Scott conveyed his land to his wife, Pricy Scott, "and her bodily heirs by Crit Scott"; the deed reciting "that the said party of the first part, for and in consideration of the sum of the love and affection that I have for my wife and children," etc. The deed was recorded on December 3, 1891. When the deed was made, Crit Scott believed that he was about to be sued for slander, and he executed the conveyance to prevent the property from being subjected to any judgment that might be rendered against him. After the deed was put to record, the words "and her bodily heirs by Crit Scott" were erased, not only from the original deed itself, but from the deed as recorded. The word "their," before the words "heirs and assigns," in both the granting and habendum clauses, was changed to "her." Exactly when and by whom these erasures and changes were made does not satisfactorily appear. On January 20, 1902, Pricy Scott and her husband, Crit Scott, conveyed the same land to John W. Scott and Elizabeth Scott, his wife, by deed containing covenants of general warranty, and purporting to convey the fee-simple title. The consideration paid was \$1,000.

Claiming to own the land as remaindermen, subject to their mother's life estate, plaintiffs, Daisy Scott, Alice Scott, Mirtle Scott, and Minerva Scott, children of Pricy Scott and Crit Scott, brought this suit against John W. Scott and his wife to quiet their title, to correct the deed under which they held, to enjoin future waste, and recover damages for prior waste. The petition was dismissed, on the ground that the conveyance from Crit Scott to his wife and children was voluntary and fraudulent, and that John W. Scott and his wife were bona fide purchasers for value, without actual notice of the conveyance to Pricy Scott's children. The children appeal.

[1] The first question to be determined is: What estate, if any, did plaintiffs acquire in the land by virtue of the deed of November 30, 1891? The rule that a conveyance to one and "her bodily heirs," or the "heirs of her body," creates an estate tail, which, by our statute, is converted into a fee, does not apply where there is something else in the deed from which a reasonable inference can be drawn that the words were used in a sense different from their legal or technical signification. In the conveyance under consideration, the party of the second part is Pricy Scott "and her bodily heirs by Crit Scott." The grant is to "the party of the second part, their heirs and as-

signs." The habendum clause is "unto the party of the second part, their heirs and assigns forever." Not only so, but the deed shows that it was made in consideration of the love and affection which the grantor had for his wife and children. It is apparent, therefore, from the other provisions of the deed, that the words "her bodily heirs by Crit Scott" were not used in their technical sense, but were intended to be synonymous with "children." In such a case, the words "her bodily heirs by Crit Scott" will be regarded as words of purchase, and not of limitation, and the deed will be construed as if the word "children" was used in place of the words "her bodily heirs by Crit Scott." *Brann v. Elzey, etc.*, 83 Ky. 440; *Tucker, etc., v. Tucker, etc.*, 78 Ky. 503; *Righter, etc., v. Forrester, etc.*, 1 Bush, 278; *Mitchell v. Simpson*, 88 Ky. 125, 10 S. W. 872, 10 Ky. Law Rep. 708.

[2] Under such circumstances the grantee will not take the entire fee; but whether she will take a joint estate with her children, or a life estate with remainder to her children, depends upon the relationship of the parties and the language of the deed. And where there is nothing in the deed to show a contrary intention, a conveyance from the husband to his wife and her children will vest the wife with a life estate and the children with the remainder. *McFarland v. Hatchett*, 118 Ky. 423, 80 S. W. 1185, 26 Ky. Law Rep. 276; *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129, 27 Ky. Law Rep. 1185; *Ewing v. Milliken*, 148 Ky. 841, 147 S. W. 770; *Virginia Iron, Coal & Coke Co. v. Dye*, 146 Ky. 524, 142 S. W. 1057; *American National Bank v. Madison*, 144 Ky. 156, 137 S. W. 1076, 38 L. R. A. (N. S.) 597. It follows that the chancellor properly held that under the deed in question Pricy Scott took a mere life estate and her children the remainder. That being true, it likewise follows that the deed from Pricy Scott and her husband to John W. Scott and his wife, though purporting to convey a fee simple, conveyed merely the life estate of Pricy Scott.

[3] But it is insisted that, as the deed from Crit Scott to his wife and children was not only voluntary, but fraudulent, the rights of John W. Scott and his wife are not affected thereby, because they paid a valuable and adequate consideration for the land without actual notice of the fact of the prior conveyance to Pricy Scott's children. Under our statutes, a conveyance which is actually

fraudulent as to the grantor's creditors is void as to subsequent purchasers for value from the grantor, such purchasers not being affected by either actual or constructive notice of the conveyance, and a conveyance which is merely voluntary, and therefore only constructively fraudulent, is void as to such purchasers, unless they have actual notice of the conveyance, constructive notice not being sufficient to affect them. *Kentucky Statutes*, §§ 1906 and 1907; *Jones' Adm'r v. Jenkins*, 83 Ky. 391; *Ward v. Thomas*, 81 Ky. 452; *Sewell v. Nelson*, 113 Ky. 171, 67 S. W. 985, 23 Ky. Law Rep. 2438.

[4] But the protection thus afforded to purchasers for value is only for a limited period, and, whether the conveyance be actually or constructively fraudulent, the title of the grantee is perfect after the lapse of 10 years, as any action to set aside such a conveyance is barred after that time; and a purchaser is then as much bound to take notice of the prior voluntary or fraudulent conveyance as if the grantee had been an innocent purchaser for value. *Brown v. Connell*, 85 Ky. 403, 3 S. W. 794, 9 Ky. Law Rep. 27. Here the defendants, John W. Scott and wife, purchased from Pricy Scott and her husband more than 10 years after the alleged fraudulent conveyance was made by Crit Scott to his wife and children. Under the circumstances, it is unnecessary to determine whether the conveyance was actually fraudulent, or only constructively fraudulent, or whether the defendants purchased with or without actual notice. Having bought the land more than 10 years after the alleged fraudulent conveyance was made, they acquired no title by their purchase. It follows that plaintiffs are entitled to have the deed corrected, and their title to the remainder interest in the land quieted.

In view of the state of the record and of the fact that such questions have not been passed on by the chancellor, we refrain at present from expressing any opinion on the liability of Pricy Scott and Crit Scott to the defendants, John W. Scott and wife, under their covenant of general warranty, or on the question of waste and improvements between plaintiffs and defendants, but think it best to remand the case, with directions to the chancellor to consider and pass on these questions after the parties have been given an opportunity to take further proof, if they so desire.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CARSON v. STATE. (No. 4221.)

(Court of Criminal Appeals of Texas. Nov. 8, 1916. Rehearing Denied Dec. 20, 1916.)

1. CRIMINAL LAW \Leftrightarrow 1090(7)—**APPEAL—NECESSITY OF BILL OF EXCEPTIONS—REFUSAL OF CONTINUANCE.**

Where no bill of exceptions is reserved to refusal of continuance, it is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. \Leftrightarrow 1090(7).]

2. HOMICIDE \Leftrightarrow 174(7)—**EVIDENCE—PREPARATIONS FOR FLIGHT.**

In murder trial, testimony that the witness, searching for evidence of cause of the death at accused's home, found a trunk packed with clothes of deceased and another, accused of part in the crime, was admissible as evidence of readiness for flight.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 365; Dec. Dig. \Leftrightarrow 174(7).]

3. CRIMINAL LAW \Leftrightarrow 721½(2)—**TRIAL—COMMENT OF PROSECUTOR.**

In murder trial, where accused contended that another who had also been indicted for the crime, and was a witness against him, was insane, and therefore an incompetent witness, comment by the state on the fact that accused had called several doctors and yet had questioned none of them on such issue, was legitimate, it appearing accused had secured two doctors to visit such witness and called both of them as witnesses, but had questioned neither as to the witness' mental condition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. \Leftrightarrow 721½(2).]

4. HOMICIDE \Leftrightarrow 173—**EVIDENCE—ADMINISTERING POISON.**

In murder trial, evidence that accused had given the victim "rough on rats," pretending it was medicine, was admissible; it appearing that "rough on rats" contains arsenic, and arsenic in quantities was found in the victim's stomach, after death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 374; Dec. Dig. \Leftrightarrow 173.]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Jim Carson was convicted of murder, and appeals. Affirmed.

J. W. Gross and A. P. Bolding, both of Bonham, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 99 years confinement in the state penitentiary.

Appellant and Henrietta Sutton were indicted separately, charged with causing the death of Era Sutton (a daughter of Henrietta) by administering poison. Appellant filed a plea asking that his codefendant be first tried, as he believed the state had not sufficient evidence to secure her conviction, and that her testimony would be material to his defense.

The state filed a contest of this plea, alleging that Henrietta Sutton would testify in behalf of the state by agreement, and that the testimony she would give would be material to the state's cause, and her testimony

would not be material to the defense. Henrietta Sutton filed an affidavit stating she desired that appellant be first tried, and that she would testify in the case on behalf of the state.

When two defendants cannot agree on the order of trial, and each expresses a desire that the other be first tried, it then becomes the duty of the court to direct which shall first be tried, and as Henrietta Sutton and appellant both filed pleas asking that the other be tried first, there was no error in the court directing that appellant be first tried. Article 727, O. C. P. 1911; *Chumley v. State*, 32 Tex. Cr. R. 255, 26 S. W. 406; *Parker v. State*, 33 Tex. Cr. R. 111, 21 S. W. 604, 25 S. W. 967.

[1] Appellant then filed a motion asking that the case be continued on account of the absence of Dr. O. A. Gray, and says he expected to prove by said doctor that his codefendant, Henrietta Sutton, is in an insane condition of mind, and therefore an incompetent witness. No sufficient diligence is shown, and no bill of exceptions was reserved to the action of the court in overruling his motion for a continuance; consequently the matter is not presented in a way to authorize a review of that question. *Cocker v. State*, 31 Tex. 498, and cases cited in note 5, p. 529, *Vernon's Criminal Procedure*. However, the state, out of the abundance of precaution, when the motion for a new trial was presented, called Dr. Gray as a witness, and he testified that he had never seen Henrietta Sutton prior to the trial, and since the trial, at the instance of the state, he had called on her, and said he would not testify as desired by appellant.

[2] In bills of exception Nos. 1 and 2, it is contended by appellant that the court erred in permitting W. L. Norton and J. L. Campbell to testify, among other things, that they opened a trunk and found the trunk packed with appellant's clothing, and the clothing of Henrietta Sutton. These two witnesses were called to the Sutton home on account of the sudden and mysterious death of Era Sutton and her sister Tishie. They were searching for some evidence as to the cause of death, and it was permissible to prove that such search was made, and if in making the search it was discovered that appellant and Henrietta had packed their clothing, ready for flight, there was no error in permitting that fact to be shown.

[3] Appellant was contending on the trial that Henrietta Sutton was of unsound mind, and under such state of facts there was no error in the state commenting on the fact that appellant had called several doctors as witnesses, and yet asked neither of them any question on that issue. In fact the record before us discloses that appellant's counsel had secured two doctors to visit Henrietta Sutton; that he called both of them as

witnesses, but asked neither of them any question about the condition of her mentally. The argument complained of was proper and legitimate.

[4] The question propounded by the state to Henrietta Sutton was legitimate, and the answer admissible, when she testified that appellant had given the girl Era a dose of "rough on rats," pretending it was medicine. The record discloses that "rough on rats" contains arsenic, and arsenic in quantities was found in the girl's stomach after her death.

The judgment is affirmed.

LANG v. STATE. (No. 4193.)

(Court of Criminal Appeals of Texas. Nov. 1, 1916. Rehearing Denied Dec. 20, 1916.)

CRIMINAL LAW \S 1181(4)—APPEAL—BOND OR RECOGNIZANCE—DISMISSAL.

Under Code Cr. Proc. arts. 902, 904, providing for a prisoner's release pending appeal upon the giving of a recognizance in term time, or an appeal bond during vacation, the Court of Criminal Appeals acquires no jurisdiction of an appeal where appellant gives an appeal bond during term time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2974, 2976, 2977; Dec. Dig. \S 1181(4).]

Appeal from District Court, Montgomery County; J. Llewellyn, Judge.

Alec Lang was convicted of a felony, and appeals. Appeal dismissed.

J. T. Rucks, of Conroe, and Dean, Humphrey & Powell, of Huntsville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. This is a felony conviction. Appellant gave notice of appeal, and while court was in session entered into an appeal bond, approved by the sheriff and the trial judge. Motion is made by the Assistant Attorney General to dismiss the appeal because the jurisdiction of this court cannot be thus attached; that, in order to attach the jurisdiction of this court under such circumstances, a recognizance must be entered into during term time, or, if this be not done during the term, he can obtain his release, though the appeal is pending before the Court of Criminal Appeals, by entering into an appeal bond as prescribed by the statute.

Article 902 of the Code of Criminal Procedure provides that where a party desires to appeal and takes the necessary steps to accomplish that, and desires not to remain in jail pending the appeal, he may enter into a recognizance pending such appeal, provided it is in term time and he was in custody at the time. Article 904 provides that, if this be not done in term time, he may secure his release from custody by entering into an appeal bond, approved by the sheriff and the

trial judge, in vacation. These statutes have been construed by this court. See the recent case of Bloss v. State, 187 S. W. 487. It seems to be the purpose and the wording in fact of our statutes that recognizances can only be entered into during term time, and that, in order to consummate an appeal to this court, the trial court being in session, the party cannot give an appeal bond; he must enter into a recognizance. Whether this be a hardship or not, it seems to be the plain statutory enactment. Under no decision that we have been able to find can a party, in a felony, after term time, enter into a recognizance. In that character of case the Legislature provides that he may give an appeal bond. But in cases of this character the jurisdiction of this court cannot attach without statutory obligation was entered into as required by law. It may be well enough for the Legislature to change this rule; but, not having done so, this court cannot do so.

Under the record as made, the jurisdiction of this court does not attach, and the appeal must therefore be dismissed, and it is, accordingly, so ordered.

GILLESPIE v. STATE. (No. 4217.)

(Court of Criminal Appeals of Texas. Nov. 22, 1916. On Motion for Rehearing, Dec. 20, 1916.)

1. CRIMINAL LAW \S 404(4) — EVIDENCE — BLOODY CLOTHING OF DECEASED.

In a murder trial, unless there is an issue as to the position of the parties, or character of the wound, on which examination of the bloody clothing of the victim might be enlightening, such clothing is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 891, 893, 1457; Dec. Dig. \S 404(4).]

2. CRIMINAL LAW \S 364(6)—EVIDENCE—RES GESTÆ.

In murder trial accused's version of the killing given in conversation not over 12 or 20 minutes thereafter, after going 700 or 800 yards from the scene, was admissible as part of the res gestæ, although self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 808, 817; Dec. Dig. \S 364(6).]

Appeal from District Court, Clay County; Wm. N. Bonner, Judge.

Cauley Gillespie was convicted of murder, and appeals. Reversed and remanded.

R. E. Taylor, and Wantland & Parrish, all of Henrietta, for appellant. O. W. Gillespie, of Ft. Worth, and C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, his punishment being assessed at nine years' confinement in the penitentiary.

Briefly, the evidence discloses that appellant was engaged to the sister-in-law of deceased, Murphy. Her name was Cynthia Sims. She subsequently married appellant.

She, her mother, and a younger sister were at the time of the homicide either visiting or living at deceased Murphy's. Shortly after the killing appellant married Cynthia Sims, and had been married to her about two years at the time of this trial. There was some objection by deceased and some members of his family to the attention appellant was paying to Miss Sims. On the night before the homicide the following day appellant called for Miss Sims and took her to a nearby neighbor's. After they left the parlor some "rubber goods," as the witnesses called it, were found in the parlor folded in tissue paper. This enraged Murphy, and he stated that appellant could never enter his house again except over his dead body, and that he intended to talk with him or hold him to account for the matter. The next day Miss Sims was at church, as was appellant, and she informed him of the fact that Murphy would not permit him again to come to his house. She suggested to him that he had better not come; that Murphy had stated he could not enter his house any more except over his (Murphy's) dead body. In the evening after this conversation between Miss Sims and appellant appellant drove up in front of Murphy's residence and holloed "Hello." Murphy went out to where he was sitting in a buggy. What occurred there is detailed by the witnesses, except a conversation. None of them seemed to have heard the conversation, but appellant took the witness stand and testified as to that part of the transaction. When Murphy went from the residence to the gate, after a brief conversation, the witnesses practically agree that he either got in the buggy or partially in the buggy where appellant was. There is some divergence as to the relative position of the parties, one or two perhaps of the witnesses testifying that one of Murphy's feet was on the ground and the other on the step of the buggy. The great preponderance of the evidence shows that Murphy reached for appellant's throat, or caught him about the neck. The first attempt was a failure, but the second time he caught him somewhere about the neck or throat. The preponderance of the evidence shows deceased was in the buggy and had hold of appellant about the throat somewhere; some of them saying he had him pushed back with his head over the back of the buggy. The testimony indicates that after he got in the buggy he left it by jumping over the left hind wheel, and ran in the house, where he died shortly afterward. As appellant started away he said to some of those who were present on the gallery or about the front of the house, "Tell Jess to get a gun and come and kill him;" that he did not care. Appellant says that when Murphy came to the buggy he reminded him of the fact that "rubber goods" were found in the house and was angry about it. He replied

there was nothing wrong about it; that he had never mentioned anything of that sort to the girl in his life; that she was a pure girl; that he had not bought the rubber goods for that purpose or for the purpose of contaminating the girl; and that she was a lady in every sense of the word. Deceased called him a liar, and jumped in the buggy and caught him by the throat and pushed his head back, threatening to kill him. He jerked his knife out and cut him. One of the wounds was in the hip and the other in the breast, which seems to have penetrated the heart. It seems appellant did not know he had inflicted such serious wounds on deceased until he heard later during the evening that Murphy had died. Appellant testified to a lot of matters, among other things, with reference to deceased getting him by the throat and collar and threatening to kill him, and that he acted in self-defense on a sudden impulse of the moment, and that he had no idea when he went there of having any difficulty with deceased; that his purpose was to go and have an explanation and conversation with him in order to adjust the matters, but the conduct of deceased prevented this; he would not hear him, and brought on the difficulty, which resulted fatally; that he had no purpose or intent of killing him, and did not know he had done so for some hours afterward. The state's theory was that appellant went to the home of deceased for the purpose of doing what he did, and that his story was fabricated and false, and induced the jury evidently to agree with that theory. This is a sufficient statement of the case, in a general way, to bring in review the questions suggested for revision.

[1] During the trial, over protest of appellant, as shown by two bills of exception, the bloody clothing of deceased was permitted to go before and to be examined by the jury. Among other objections, it was stated there was no purpose for which the bloody clothing could be used, there was no question as to the location and character of the wounds, and that the defendant stated that there would be no issue on the question as to the location and character of the wounds. If there was any issue on this question at all, it was on the theory that the wound in the breast was a direct stab, and not a "raking" cut. The testimony of the attending physician shows that the wound was, in a general way, a stab with a little cut on the flesh before the knife entered. We are of opinion that under this state of the record the court was in error in permitting the clothing of deceased to go to the jury. This matter has been the subject of a great many decisions. There seems to be a general rule to the effect that, unless the bloody clothing would serve to illustrate some purpose with reference to the position of the parties and character of the wound, which was an issue in the case affirmed on

one side and denied on the other, the admission of the bloody clothing would be error. The cases are collated in Mr. Branch's Annotated Penal Code on page 1032. See, also, *Cole v. State*, 45 Tex. Cr. R. 225, 75 S. W. 527; *Melton v. State*, 47 Tex. Cr. R. 451, 83 S. W. 823; *Williams v. State*, 61 Tex. Cr. R. 353, 136 S. W. 775; *Christian v. State*, 46 Tex. Cr. R. 47, 79 S. W. 563; *Lucas v. State*, 50 Tex. Cr. R. 219, 95 S. W. 1055; *Lacoume v. State*, 65 Tex. Cr. R. 146, 143 S. W. 626; *Corley v. State*, 69 Tex. Cr. R. 626, 155 S. W. 227. There was no issue as to the condition or situation of the wounds and their effect. All this was conceded by appellant, proved by the state, and no issue was formed. The theory evidently of the state must have been that defendant's story as to the difficulty testified by himself was a fabrication and invention, and therefore this assisted the state in showing that he was prepared for it, and that it was not the striking of a man in self-defense, but the deliberate purpose of a man stabbing. None of the witnesses question the fact as to the relation of the parties in any material way; that appellant was in the buggy and deceased attacked him in the buggy, and that appellant was never out of the buggy at any time; that he sat in the buggy during the whole difficulty. The court was in error.

[2] Another bill shows that appellant offered to prove by the witness Williams that he had a conversation with appellant shortly after the difficulty at the house of witness; that the distance between the place of the difficulty and the conversation was something like 700 or 800 yards; that appellant in leaving Murphy's passed directly by Williams' residence, and there the conversation occurred. The court permitted the witness to testify, as he states in his qualification, that defendant was crying and also as to the appearance and demeanor, but not the declaration, of the defendant. The conversation offered was admitted by the prosecution, as shown by the bill, to have been somewhere not beyond 12 to 20 minutes after the trouble. The appellant's contention was that it was not so long. Williams would have testified, had he been permitted to do so, as follows:

"Yes; I saw the defendant and talked to him when he arrived at my house on his way from Jess Murphy's. He seemed to me to be very sad, and was crying when he was talking to me, and he said, 'Jim, I went up there to talk to Jess and reason with him and get my girl,' and he said, 'I called him out and he came out and began to talk,' and he said, 'Cauley, I have some property of yours here,' and he took out his pocketbook, and I said, 'Yes, Jess; that is mine, I don't deny it,' and then Murphy accused me and the girl of doing something we ought not to have done. And Cauley said that he told Jess that that was something of which they were not guilty, and that that was as straight a girl as ever lived so far as he knew, and Cauley said that Jess then called him a liar and got into the buggy and got him by the throat and said, 'I will kill you,' and

then Cauley said, 'I would not have done it for nothing in the world, if I had not had to.' And when he made this statement the tears were rolling down his cheeks. I asked Cauley how he struck him, and he said, 'We just had a little trouble,' and he kept repeating it over, 'We just had a little trouble.' He seemed to be very sad and disturbed at the time he told me this."

This was evidently in a very few minutes after it occurred. Appellant drove in his buggy from the place where it occurred to Williams' house, and this conversation occurred between them. The state's objection seems to be based upon the idea that it was a self-serving declaration. On the witness stand appellant testified, in substance, if not exactly, to the same account of the trouble that he told Williams; more in detail, however. Another theory of the state evidently was, or must have been, it was not *res gestæ*, and for the two reasons was not *res gestæ* but self-serving, and therefore inadmissible. We cannot agree with the state in either contention. We are of opinion it was *res gestæ*. The authorities are numerous and so well known it would hardly seem necessary at this late day to collate them. However, a few of them may be collated. *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297. The Craig Case has been followed in *Clark v. State*, 56 Tex. Cr. R. 297, 120 S. W. 179; *Wakefield v. State*, 50 Tex. Cr. R. 127, 94 S. W. 1046; *Craven v. State*, 49 Tex. Cr. R. 82, 90 S. W. 311, 122 Am. St. Rep. 799; *Thomas v. State*, 47 Tex. Cr. R. 535, 84 S. W. 823, 122 Am. St. Rep. 712; *Gray v. State*, 47 Tex. Cr. R. 378, 83 S. W. 705; *Freeman v. State*, 40 Tex. Cr. R. 554, 46 S. W. 641; 51 S. W. 230; *Castillo v. State*, 31 Tex. Cr. R. 152, 19 S. W. 892, 37 Am. St. Rep. 794; *McKinney v. State*, 40 Tex. Cr. R. 374, 50 S. W. 708; *Ingram v. State*, 43 S. W. 519. These are cases where the declaration of the accused was in evidence, but rejected. The rule of *res gestæ* is not limited to the state's side of a case. That rule applies wherever there is a call for it, and one side of the case is as much entitled to the benefit of the rule as the other. The criterion is that it is *res gestæ*. *Res gestæ* statements may some time operate as self-serving, but if they are *res gestæ* they are still admissible. There is another reason in this particular case why this testimony should have been admitted. The state attacked the defendant's testimony vigorously on the ground that it was fabricated and false, and that he went for the purpose of doing what he did do, to kill Murphy. His testimony was a case of self-defense. Wherever the defendant's testimony is attacked as being fabricated, he may prove in rebuttal prior statements by him corroborating his testimony. Williams' testimony was admissible from that standpoint. See *Messer v. State*, 48 Tex. Cr. R. 109, 63 S. W. 643. It would be useless to follow this line of discussion further. Williams'

testimony, under the circumstances of this case, was admissible.

There is another serious question. The court charged the jury on the law of self-defense generally, and then gave this charge:

"You are charged that the fact that one with a grievance seeks an interview with a man who he believes has wronged him, and in such interview kills or inflicts serious bodily injury upon such person, the act of seeking such interview is not necessarily a provocation nor does it place such party in the wrong. You are therefore charged that the defendant had the right to peaceably go to the house of the deceased for the purpose of having an interview with the deceased, and for the purpose of explaining any differences which may have existed between them at the time. And the fact of his seeking such interview for the purpose of making explanations does not place the defendant in the wrong, and in this connection you are charged that the defendant had the right to make preparation to arm himself for the purposes of defending himself if the deceased assaulted him at such time."

This is the entire charge of the court with reference to this phase of the case. To meet this appellant asked this charge:

"In this case you are instructed that the defendant, Cauley Gillespie, had the right to go to the home of the deceased, either for the purpose of interviewing the deceased concerning the feeling of the deceased toward him or to fulfill the engagement he had with Miss Cynthia Sims, and in this connection you are instructed that if, after the defendant arrived at the home of the deceased, and while he was engaged in conversation with the deceased, the deceased went out to the buggy where the defendant was, and climbed into the buggy of the defendant and assaulted him, or assaulted him immediately before climbing into the buggy, and that such assault was an unlawful one, and that at the time of such assault the defendant believed that he was in danger of death or serious bodily harm at the hands of the deceased, and that at said time had a reasonable apprehension for so believing, and that at said time the defendant cut or stabbed the deceased and killed him, then you will acquit the defendant, and say by your verdict not guilty, but in this connection you are instructed that you must view the entire transaction surrounding this homicide and the defendant's presence at the home of the deceased from the standpoint of the defendant."

This charge was refused; it should have been given. This phase of the law was gone over thoroughly in *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17, in a very strong and well-considered opinion by this court written by Judge Simkins. So far as the writer is aware, that opinion has never been attacked or criticized. That appellant had the right to go to Murphy's and talk with him about the matter and explain to him ought not to be questioned, whether the *Shannon* Case had ever been written. That he had the right to do so would be but a simple rule of justice and fairness. A man has the right to talk to his adversary, or another party who has charged him with wrongdoing, and explain to him that there was no wrong perpetrated. This ought not to be modified nor minimized when it brings in review a charge of illicit intercourse or fornication with a girl and want

of chastity on her part. The deceased had coupled the two together as being guilty of acts of unchastity. The boy was engaged to the girl. His reputation and character and that of the girl both were at issue. He had a right to talk with deceased, and, in the judgment of the writer, would have been derelict had he not done so. She was soon to become his wife, and in fact within a short time after the homicide did become his wife. He went to deceased to protest against the accusation brought against the woman soon to be his wife, and she deceased's sister-in-law, and the fact that he had accused him of taking advantage of the freedom of deceased's home and company of his sister-in-law to debauch and ruin her. This would at least be calculated to disturb the equanimity of the mind of any man who felt he had been wronged in such a matter, and especially under a charge of debauching the girl. His theory of it was, as testified by him, he went to explain to Murphy that there was nothing wrong with the girl, that he had never said anything out of the way to her in his life, and that the "rubber goods" he spoke of were not bought for any such purpose, and that he had had them for some time, and had them in the band of his hat, from where they had fallen without his knowledge; that he bought them in Henrietta, Clay county, when en route to Wichita Falls some time prior to the happening of this matter in the house of deceased.

There is another phase that has not been mentioned that comes into this part of the case. This girl in telling appellant of the condition of things at Murphy's residence and the church about appellant going back to the house, it seems, reached an agreement with him that she was to go to another sister's that evening and he was to call and take her, at least, if not that evening, shortly, and the evidence is further that she did go later. The court's charge, in a general way, covered a part of this phase of the case, but the court nowhere in the charge informed the jury as to what would be the defendant's attitude in the case if the killing occurred under those circumstances when deceased made the assault. He did tell the jury defendant had the right to arm himself and go peaceably, which was rather a stretch of the law with reference to the word "peaceably," but that, if he went under those circumstances, it would not be a provocation on the part of appellant to bring on the difficulty. Provocation is a limitation of the right of self-defense. If the jury believed he went there, as he contended, under such circumstances, he would be entitled to an acquittal. Appellant's special charge applied more nearly the law of the case to the facts shown, at least to defendant's side of it.

There is also a bill of exceptions presented by defendant to the argument of one of state's counsel. The language used is thus recited in the bill:

"Gentlemen of the jury, the rivers of blood in Texas running through Texas like the Brazos river and had started in its origin or fountain head like the Brazos river, being red streams of blood coming from the homes where murder had been committed, which had developed into great rivers of blood. And these are the clothes that were worn by the deceased, Jess Murphy, at the time of the fatal stabbing, and shows at the time of the fatal stabbing that the life blood of Jess Murphy was taken while he was in the defense of his home and the girl under his protection, and that the clothing worn by the deceased at the time he was stabbed by defendant showed that the stabbing by the defendant was deliberate, was calculated, and was made directly at the heart of the deceased, and that Jess Murphy's blood was part of the blood that helped to make the rivers of blood in Texas."

This was objected to, and appellant requested a special charge, which was refused by the court. This charge requested that the jury be instructed they should not consider this argument. Objection was also made to the argument at the time it occurred. Such sanguinary speeches and statements like those contained in the bill of exceptions should not be indulged. This defendant was not being tried for originating rivers of blood similar to the flow of the waters of the Brazos river through Texas, but he was tried, or supposed to be tried, or ought to have been tried upon the facts developed before the jury. There was no evidence in the case that there were rivers of blood running through Texas like the Brazos river. Upon another trial the prosecuting officers will refrain from comments of this character and argue the case on the facts and the law as given in charge by the court. One of the evils or supposed evils to be cured by the late statute requiring the charges to be read to the jury before argument began was to avoid such speeches and arguments. That statute was intended to confine the arguments upon both sides to the facts in evidence and the law of the case as given by the charge of the court. If the court is wrong in his charge, that matter can be corrected by special charges, and, if not given, proper exceptions can be reserved, and the case can come before this court for review, if the trial court refuses the motion for a new trial.

There is another question not pointedly raised perhaps, but indirectly, at least it is in the case, with reference to the meeting of the parties at the time of the difficulty at the buggy. The evidence discloses in part that appellant was only armed with a pocketknife, and that he got the pocketknife out after the difficulty began. There is no conflict in the testimony that appellant only had a pocketknife, and there is little conflict as to when he got the knife out of his pocket, yet no witness swears to the deadly character of the knife, and the only evidence that it could be of a deadly nature was the fact of the infliction of the wound which caused death. The owner of the knife, who loaned it to appellant to fix his "tugs" some time prior

to this difficulty, testified the blade was about two inches or such matter in length, and that he loaned this knife to defendant, as before stated, to fix a "tug" which had gotten loose some way in driving the buggy. Upon another trial the court should instruct the jury with reference to article 1147 of Branch's Ann. Penal Code and following articles, which are article 717 and subsequent articles in the old Code. Where the instrument is not itself deadly per se, or calculated to inflict death, a party may be guilty of a less phase of assault. The facts of this case called for a charge under that statute, and should be given upon another trial.

The judgment is reversed, and the cause remanded.

HARPER, J., absent.

PRENDERGAST, P. J. I concur in the reversal because of the admission of the bloody clothes, under the circumstances stated by Judge DAVIDSON.

On Motion for Rehearing.

PER CURIAM. Rehearing denied.

HARPER, J. I was not present when the original opinion was handed down, and, as my Brethren are unable to agree in the disposition of the motion for a rehearing, I have taken the record and studied it carefully and thoughtfully.

I agree that the clothing was inadmissible. When the physician described the location, nature, and character of the wound, no question was raised by appellant that he correctly presented the matter. Appellant introduced no testimony to vary the state's testimony on this issue, and the testimony of the state was clear and unequivocal. Therefore the clothing was not necessary to show the nature or character of the wound, nor the relative position of the parties at the time the fatal wound was inflicted. I therefore agree with Judge DAVIDSON in holding that the bloody clothing was inadmissible.

I also agree with Judge DAVIDSON in holding that the conversation had with the witness Williams was admissible under the res gestae rule that has long been in force in this state.

On the other questions discussed by Judge DAVIDSON, I do not agree with him. The court refused the bills in regard to argument of counsel; therefore these matters are not properly verified and would present no error.

As the charge on self-defense was full and fair, and no limitation placed thereon in any respect, there was no error in refusing the special charge requested. *Williford v. State*, 38 Tex. Cr. R. 396, 42 S. W. 972; *Harris v. State*, 69 Tex. Cr. R. 588, 155 S. W. 205; *Fox v. State*, 71 Tex. Cr. R. 322, 158 S. W. 1141.

On account of the matters first herein referred to, I join in the order overruling the motion for rehearing.

PRENDERGAST, P. J. (dissenting). I have studied this record, and am now convinced the clothing was admissible, and that appellant's statement to Williams was self-serving, and not *res gestæ*, and not admissible on any ground.

The judgment should be affirmed, not reversed.

LUSPORT v. STATE. (No. 4252.)

(Court of Criminal Appeals of Texas. Nov. 22, 1916. Rehearing Denied Dec. 20, 1916.)

1. LARCENY \Leftrightarrow 49—EVIDENCE—ADMISSIBILITY.

In a trial for horse theft, where a number of witnesses identified accused as one of the men in a wagon described, the fact that four other witnesses were unable to identify accused as one of the men in the wagon would not render their testimony inadmissible when they identify the wagon as the same in which the other witnesses say accused and others were traveling at the same times, places, and under the same circumstances.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 140; Dec. Dig. \Leftrightarrow 49.]

2. CRIMINAL LAW \Leftrightarrow 372(5)—EVIDENCE—ADMISSIBILITY—SIMILAR TRANSACTIONS.

In a trial for horse theft, where the defense was purchase of the animals stolen, evidence of a similar transaction a short time prior would be admissible on that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. \Leftrightarrow 372 (5).]

3. CRIMINAL LAW \Leftrightarrow 792(1)—TRIAL—INSTRUCTIONS—LAW OF PRINCIPALS.

In a trial for horse theft, where the state's evidence was that defendant and others went to a point near where the stock were pastured on the night they were stolen, that they returned that night leading four head of stock of the character and kind lost, and that defendant and two others were in possession of two mares when recovered, but no one saw who took the stock out of the pasture, or could say who was leading the stock on the return trip, and defendant offered no explanation relying on an alibi, and purchase of the stock on the morning of his arrest, it was proper to charge the law of principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. \Leftrightarrow 792(1).]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Frank Lusport, alias Frank Strong, alias Frank Laporte, was convicted of theft of a horse, and he appeals. Affirmed.

W. W. Nelms and M. H. Hughes, both of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft of a horse, and his punishment assessed at two years' confinement in the state penitentiary.

On the night of March 16, 1916, J. L. Dwight, living northwest of Grapevine, plac-

ed two horses and two mules in his bermuda pasture; the next morning all four head of stock were missing. He discovered where the staples had been pulled, the wire pressed down, and the animals taken from the pasture. Two days after the animals were missed they were recovered, the two mules being in the city pound at Dallas, the mares being found in possession of some Italians in Dallas—appellant's connection therewith being hereafter recited.

Jim Autry, who lives on the road from Dallas to Grapevine, says that on Thursday evening, March 16th, he saw appellant and some three other Italians driving along the road in a little yellow-wheeled vehicle, going in the direction of Grapevine; that when he saw them going out they had no other stock than the mule hitched to the wagon; that about 2 o'clock that night he saw them again pass his house, going in the direction of Dallas, and at this time they were leading four head of stock, two horses and two mules. He identifies appellant as being one of the men in the wagon both going and coming back. He says the stock were of the same color and description as that lost by Mr. Dwight.

Many other witnesses were called, a number of whom identified appellant as one of the party, and all identified the wagon, tracing it to a point near Mr. Dwight's residence and back to Dallas.

[1] In four bills of exception it is shown appellant objected to the testimony of B. W. Scruggs, J. E. Deering, Mrs. Mary Autry, and A. Kenner, because in their testimony they say they did not know appellant and were unable to identify him as one of the men in the wagon with yellow wheels to which a mule was hitched. As Mr. Autry, Elbert Kelly, Jake Page, Melton Oates, John W. Hodges, E. T. Jones, and others do identify appellant as one of the men in the little yellow wagon or hack with green bed, the fact the four witnesses, to whose testimony the objection was urged, were unable to identify appellant as one of the men in the wagon would not render their testimony inadmissible, when they do identify the wagon as the same wagon that Mr. Autry and the others named say appellant and others were traveling, both in going to near Mr. Dwight's, with no stock except the animal hitched to the wagon, and coming back that night leading four head of stock—two mules and two horses.

F. F. Tillery and Ed Slaven went in search of Mr. Dwight's stock, and on the morning of the 18th found the two mares. Mr. Slaven saw appellant place a bridle on one of the mares, and he and two others brought out the mare and hitched her to the little yellow wagon, and drove her down to a store where the other mare was found. They telephoned for an officer, and Officer Horn

responded. He says when Tillery said, "Yonder they are," all three men in the wagon jumped out and attempted to escape, two of them going through the back gate, and the other one through the store. That appellant was one of the men found in possession of the mares, and one of the men who attempted to escape at the time of the discovery of the stock and the arrest.

Appellant testified in the case, and admitted that he was in possession of the stock, or just about to take possession, when arrested. He says he had purchased the wagon and two horses from Marrello, paying \$16 for the wagon, \$40 for one horse, and \$75 for the other. He denies going out on the Grapevine road on March 16th, and introduces evidence tending to prove an alibi. He said he had been engaged in the mercantile business, and also buying and selling a few head of stock. The jury evidently did not believe the testimony as to the alibi in the face of the numerous witnesses who testified to seeing appellant on the Grapevine road on the evening of March 16th, and did not believe his testimony as to the purchase of the stock, for these issues were both fairly submitted in the court's charge.

[2] After appellant had testified as to his business, the state on cross-examination asked appellant where he got that mule he sold to Mr. Britton, and appellant was, over his objection, interrogated in regard to this transaction. He said he purchased the mule from a white man, paying \$85 for it, and sold it for \$70, making \$5 on the transaction. The state in no way contested this testimony as to the Britton mule, accepting his testimony as final on that issue. While there is nothing in the questions and answers to suggest the state was charging that he had stolen the mule sold to Mr. Britton, appellant's objections were:

"That it was testimony that the defendant had sold a mule supposed to have been stolen property to one Joe Britton a short time prior to the transaction in issue on this trial."

If such be the correct construction to place on the Britton transaction, there was no error in admitting the testimony. His defense in this case was a purchase of the animals stolen from Mr. Dwight, and as this was his defense, evidence of a similar transaction a short time prior would be admissible on that issue.

[3] The only other complaint relates to the court's charge on who are principals; appellant contending that it was error to charge the law of principals. The state's testimony would have appellant and others go up the road March 16th to a point near Mr. Dwight's residence; that his horses were stolen that night, and would have appellant and others returning that night leading four head of stock of the character and kind lost by Mr. Dwight; would have appellant and

two others in possession of the two mares when they were recovered. No one saw who took the stock out of Mr. Dwight's pasture, and no one could say who of the five men in the wagon were leading this stock on the return trip to Dallas. Appellant's testimony offers no explanation; he relying on testimony tending to prove an alibi, and testimony of purchase of the stock on the morning of his arrest. Under such circumstances it was proper to charge the law of principals, and the charge as given was very favorable to appellant. It reads:

"All persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders, and may be prosecuted as such.

"You are therefore charged that if you find and believe from the evidence beyond a reasonable doubt that the offense, if any, charged in the indictment was actually committed as therein charged, and you further find and believe from the evidence that such offense, if any, was committed by four men, or either or all of said four men other than the defendant, and you further find and believe from the evidence beyond a reasonable doubt that the defendant was present and knowing the unlawful intent, if any, aided by acts or encouraged by words or gestures, if he did so aid or encourage either or all of said four men, if any, actually engaged in the commission of the offense, charged in the indictment, if any, then if you so find you are instructed that the defendant would be a principal offender and would be guilty as charged in the indictment.

"If, on the other hand, you find and believe from the evidence beyond a reasonable doubt that the offense, if any, charged in the indictment, was actually committed as therein charged, and you further find and believe from the evidence, or if you have a reasonable doubt thereof, that such offense, if any, was committed by either one or all of said four men other than the defendant, and you further find and believe from the evidence, or if you have a reasonable doubt thereof that the defendant was not present at the time and place of the commission of such offense, if any, or if you further find and believe from the evidence or have a reasonable doubt thereof that the defendant did not encourage by words or aid by acts or gestures the said four men, if any, other than the defendant or either or all of them in the commission of such offense, if any, then if you so find or if you have a reasonable doubt thereof, you will acquit the defendant, and say by your verdict not guilty."

The judgment is affirmed.

CALDWELL v. STATE. (No. 4248.)

(Court of Criminal Appeals of Texas. Nov. 22, 1916. Rehearing Denied Dec. 20, 1916.)

CRIMINAL LAW 6-1144(18)-APPEAL-REVIEW-DENIAL OF MOTION FOR NEW TRIAL-PRESUMPTION.

Where defendant, convicted of crime, moved for new trial on the ground of newly discovered testimony, the affidavits being in the record, but the trial court states that he heard evidence in regard to the matter and found against defendant, the Court of Criminal Appeals cannot review the question, in the absence

of the testimony on which the trial judge based his finding; the presumption obtaining that the court ruled correctly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3036; Dec. Dig. ☞ 1144(18).]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Emerson Caldwell was convicted of arson, and he appeals. Judgment affirmed.

Travis T. Thompson, of Clarksville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of arson, his punishment being assessed at five years' confinement in the penitentiary.

The evidence is conflicting. The state relied upon accomplice's testimony and such corroboration as was obtainable. We are of opinion that the corroboration is sufficient under the statute, and tends to connect the defendant with the burning. The accomplice makes out a clear case, not only against appellant but himself.

Newly discovered testimony was set up in the motion for a new trial, supported by a couple of affidavits. The court signs the bill of exceptions by stating that he heard testimony with reference to these affidavits and this matter on the motion for new trial, and ruled against the defendant. This evidence is not before this court in any way, either by bill of exceptions or in statement of facts. The affidavits are in the record, but the court practically eliminates their consideration by stating that he heard evidence in regard to the matter set up, and found against appellant. We think this disposes of the matter adversely to appellant. We cannot review it in the absence of the testimony upon which the judge based his finding. If the defendant believed there was error in this ruling, the testimony should have been before this court as a predicate for its action. In the absence of the testimony the presumption will obtain that the court ruled correctly. This is the only matter relied upon, it seems, by appellant, and it is not well taken.

The judgment will be affirmed.

HARPER, J., absent.

WYATT v. STATE. (No. 4264.)

(Court of Criminal Appeals of Texas. Nov. 1, 1916. Rehearing Denied Dec. 20, 1916.)

1. INDICTMENT AND INFORMATION ☞128 — SUFFICIENCY — DISORDERLY HOUSE — STATUTES.

In an indictment for keeping and aiding and abetting the keeping of a house where prostitutes were permitted to reside to ply their vocation, two counts based on the same transaction, one charging accused with committing the offense as agent for another, and the other charging him directly with keeping, were prop-

er; it being permissible to charge the offense to have been committed, in different counts, in any of the ways denounced by the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 403-413; Dec. Dig. ☞128.]

2. INDICTMENT AND INFORMATION ☞132(4)—ELECTION BETWEEN COUNTS.

Where an indictment for keeping and aiding and abetting the keeping of a house where prostitutes were permitted to reside to ply their vocation contains two counts based on the same transaction, one charging accused with committing the offense as agent for another, and the other charging him directly with keeping, the state is not required to elect upon which count it will prosecute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 439-443, 445; Dec. Dig. ☞132(4).]

3. CRIMINAL LAW ☞598(6)—CONTINUANCE—WITNESS—DILIGENCE.

Where a motion for continuance showed that accused waited until the day before trial to have process issued to an absent witness, when no one knew the whereabouts of the witness, and did not show effort by accused to ascertain the location of the witness, it failed to show diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1337; Dec. Dig. ☞598(6).]

4. DISORDERLY HOUSE ☞16—KNOWLEDGE—EVIDENCE—ADMISSIBILITY.

In a prosecution for keeping a house for prostitutes, where accused testified that he did not know the character of the women, or that they were plying the vocation of prostitutes, testimony of a witness that she, her sister, and another woman stayed at the house for a month, that all three were prostitutes plying their vocation, and that accused had intercourse with her the first night she was there, and came to her room several times and stayed a while, was admissible, on question of conveying knowledge to accused of the character of the women residing at the house, and that they were plying their vocation.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 21-25; Dec. Dig. ☞16.]

Appeal from Wichita County Court; Harvey Harris, Judge.

J. H. (Heuse) Wyatt was convicted of crime, and he appeals. Affirmed.

Ralph P. Mathis, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted under an indictment charging him with keeping and aiding, assisting and abetting the keeping of a house where prostitutes were permitted to resort and reside for the purpose of plying their vocation.

[1,2] The court did not err in overruling the motion to quash the indictment. Both counts were based on the same transaction, one charging him with committing the offense as the agent of T. J. Leachem, and the other charging him directly with keeping. Both counts specifically charge an offense, and it is permissible to charge the offense to have been committed, in different counts, in any of the ways denounced by the statute. Neither is the state required to elect upon

which count it will prosecute under such circumstances.

[3] Appellant's motion for a continuance falls to show he exercised diligence to secure the attendance of the absent witness. He waited to have process issued until the day immediately preceding the day the case was called for trial, and it is shown that no one at that time knew the whereabouts of the witness, and appellant does not show that he made any effort to ascertain the location of the witness.

[4] The testimony of Ethel Ward was properly admitted in evidence as conveying knowledge to appellant of the character of the women resorting to and residing at the house, and the further fact they were at that house plying their vocation. Appellant testified he did not know the character of the women and did not know they were plying the vocation of prostitutes while they stayed at the house; that as soon as he ascertained that fact he put the women out of the house. Ethel Ward testified she stayed at the house for a month; that her sister and another woman also stayed at this house during all the time she stayed there; that all three were prostitutes plying their vocation, and, as carrying knowledge to appellant, she testified:

"This man Wyatt came to my room several times while I was there and stayed with me a while each time. He had intercourse with me the first night I was up there and told me to be quiet up there. Certainly Wyatt knew what I was doing up there at the house."

The judgment is affirmed.

BULLINGTON v. STATE. (No. 4219.)

(Court of Criminal Appeals of Texas. Nov. 8, 1916. Rehearing Denied Dec. 20, 1916.)

1. CRIMINAL LAW §1036(2)—APPEAL—PRESERVATION OF EXCEPTIONS.

Error, if any, in receiving an answer of a witness in impeaching accused that he made a statement to her "just after he was tried for killing a man," when the question only legitimately called for the time of the statement, cannot be complained of by accused when it was promptly excluded and the jury directed not to consider it, in the absence of request for further instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2640; Dec. Dig. §1036(2).]

2. CRIMINAL LAW §1037(2)—APPEAL—PRESERVATION OF EXCEPTIONS.

Accused cannot complain of alleged improper argument of the prosecutor, in the absence of requested instructions to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. §1037(2).]

3. CRIMINAL LAW §939(3)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where the application disclosed that the witness, whose newly discovered testimony was its basis, had been present at the trial and that no inquiry to secure her testimony was made, there was lack of diligence, and new trial should not be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2319; Dec. Dig. §939(3).]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Frank M. Bullington was convicted of assault to murder, and he appeals. Affirmed.

L. C. Fuller and Cunningham & McMahon, all of Bonham, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. From a conviction of assault to murder appellant prosecutes this appeal. This is the second appeal, the opinion on the former appeal being reported in 180 S. W. 679.

[1] There are but four bills of exception in the record, the first relating to a question propounded to the witness Mrs. Press Johnson, and her answer thereto, the answer being:

"It was about the last of May or first of June—the next day after he was tried for killing that man in Dallas."

Appellant at once objected to the answer of the witness, and asked that it be expunged from the record, and the jury instructed not to consider the answer of the witness. The district attorney joined in the request, and the court at once instructed the jury not to consider it. The district attorney had asked appellant if he did not make a certain statement in the presence of Mrs. Johnson upon his return from Dallas, and he denied doing so. The state was examining Mrs. Johnson as to this matter, and merely asked her, "Do you remember the defendant being at your house last spring on the day he came back from Dallas?" The question was not improper, the state had the right and it was its duty to direct her mind to the time and place when it is claimed certain statements were made by appellant, offered to impeach him. The latter part of the answer of the witness was not responsive to the question, was a volunteer statement of the witness, and when the court promptly excluded and directed the jury not to consider it, if appellant desired any further instructions given, he should have requested that it be done.

[2] The other three bills all relate to different portions of the argument of the private prosecutor, Mr. J. M. Baldwin. The bills prepared by appellant were rejected by the court, and the court in each instance prepares other bills, giving the remarks as reduced to writing at the time by the court stenographer. The bills prepared by the court, with the setting set forth, and the full particulars connected with each objection made, would evidence very slight, if any, improper argument. No request was made that the court charge the jury not to consider such remarks, and the remarks, if any portion thereof should be held to be slightly erroneous, present no ground for reversal, in the absence of requested instructions.

[3] The only other matter presented is alleged newly discovered testimony. It is set

forth that Mrs. Lena Cobb was present the morning after Mrs. Bullington was shot by her husband (appellant), and that when they were undressing her and took some money off of her, she said: "Doctor, give that money to Frank (appellant), and he will take care of it for me." As Mrs. Bullington testified that appellant intentionally shot her, it is contended that this remark would have a tendency to show that she did not so consider the shooting, immediately after it occurred, and would lend strength to appellant's contention that the shooting was accidental. The most that can be said is that such testimony would have a slight tendency to so show. The record discloses that Mrs. Cobb was present as a witness at the former trial and at this trial, and the law requires that diligence be used to ascertain what the witness knew in regard to the matter under investigation. Appellant was at home when Mrs. Cobb came to see his wife on the morning she was shot, and this naturally put him upon inquiry as to what her testimony would be, but he swears he made no inquiry of her. It is the rule that where a witness is subpoenaed in a case, attends court, and no inquiry as to her testimony is made of her, such application is lacking in diligence, unless some good reason is shown why she was not interviewed, and a new trial should not be granted. *Powell v. State*, 36 Tex. Cr. R. 377, 37 S. W. 322; *Halliburton v. State*, 34 Tex. Cr. R. 410, 31 S. W. 297.

The judgment is affirmed.

WILSON v. STATE. (No. 4135.)

(Court of Criminal Appeals of Texas. Oct 25, 1916. On motion for Rehearing, Dec. 20, 1916.)

1. CRIMINAL LAW § 917(2)—CONTINUANCE—DENTAL AS GROUNDS FOR NEW TRIAL.

Continuance for absence of witnesses is no longer a matter of right, but, when overruled, on motion for new trial, the allegations should be considered in the light of the evidence heard on the trial, and if the absent testimony would have been material to some issue in the case, and proper diligence was used to secure the attendance of the witness, a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2162; Dec. Dig. § 917(2).]

2. CRIMINAL LAW § 595(1)—CONTINUANCE—ABSENCE OF WITNESS.

Where a witness for defendant charged with murder, who would testify that he knew a person was dead to whom deceased had stated that he was going to beat defendant up, was absent from home when the sheriff sought to serve process on him issued by defendant, and such absence was procured by defendant's uncle, with whom defendant was not shown to have had any connection from the time the subpoena was issued until the time of the trial, the court erroneously denied continuance for absence of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1323; Dec. Dig. § 595(1).]

3. CRIMINAL LAW § 594(1)—CONTINUANCE—WILLFUL ABSENCE OF WITNESS.

Though the conduct of a witness in willfully absenting himself is censurable, defendant cannot be held responsible to justify denial of his motion for continuance on the ground of absence of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1321; Dec. Dig. § 594(1).]

4. CRIMINAL LAW § 941(1)—NEW TRIAL—GROUNDS—ABSENCE OF WITNESSES.

In a prosecution for murder, the trial court erred in not granting new trial for the absence of three witnesses, the materiality of whose testimony was made manifest, although the testimony of one of them, defendant's mother, would be cumulative of that of his father, and the testimony of another would be cumulative to some extent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330; Dec. Dig. § 941(1).]

5. SCHOOLS AND SCHOOL DISTRICTS § 176—RIGHT OF TEACHER TO PUNISH—USE OF FISTS.

A teacher is not authorized to use his fists in administering corporal punishment, even though the pupil conducts himself so as to demand discipline.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 345, 347; Dec. Dig. § 176.]

6. HOMICIDE § 309(4)—INSTRUCTIONS—MAN-SLAUGHTER.

Where a schoolboy shot his teacher after the teacher started toward him, as if to punish for an insulting remark, without a switch or other usual instrument in his hand, the teacher having stated previously that he would beat the pupil up so that his parents would not know him, the issue of manslaughter should have been submitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 653; Dec. Dig. § 309(4).]

7. HOMICIDE § 304—INSTRUCTIONS—ACCIDENT.

In a prosecution of a schoolboy for shooting his teacher, where the issue of accidental discharge of the pistol was not in the case, the court properly refused a special charge presenting it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. § 304.]

8. CRIMINAL LAW § 364(5)—EVIDENCE—RES GESTÆ—HOMICIDE.

In prosecution of a schoolboy for shooting his teacher, testimony of a witness as to what defendant told him almost immediately after the shooting, when defendant was still laboring under the excitement of the moment, there having been no break or let down in his state of mind, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808, 816; Dec. Dig. § 364(5).]

Appeal from District Court, Clay County; Wm. N. Bonner, Judge.

Jay Wilson was convicted of murder, and he appeals. Judgment reversed, and cause remanded.

H. F. Weldon, of Bowie, and Arnold & Taylor, of Henrietta, for appellant. Leslie Humphrey, of Wichita Falls, Wantland & Parrish, of Henrietta, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 25 years' confinement in the state penitentiary.

Appellant was a boy 17 years of age, attending the Newport public school. Deceased, J. G. Wright, was the teacher in charge of the school. Appellant handed in a composition, written in part in his handwriting and in part in the handwriting of a young lady. On the day of the homicide deceased was criticizing this paper; said he was going to give no grade on it, and that he was going to report the matter to the pupil's parents. Appellant spoke up and said, "That he could report; he did not guess anybody cared." The teacher remarked, "Don't you get too smart or sassy back there," and, after making this remark, started to the seat occupied by appellant. As to whether the teacher spoke in an angry tone of voice, or in his usual tone, is a disputed fact in the testimony, as also his looks and actions on that occasion. The state's evidence is that when deceased got in about 10 or 12 steps of appellant, appellant got up out of his seat, drew a pistol, and threw it on deceased and told him to come no nearer, and when deceased did not stop, appellant shot deceased; that the teacher then got hold of appellant, when a second shot was fired. Appellant contends that the deceased spoke in an angry and threatening tone of voice; that when he started towards him he did so in an angry and threatening manner; that he had been informed the Saturday before that the teacher had said to Will Simpson that "he intended to beat him (appellant) up so his parents would not know him," and, thinking he was going to carry this threat into execution, when the teacher got near him he drew his pistol and asked Mr. Wright to stop three times; that Mr. Wright kept coming, and caught him by the right shoulder, and a scuffle began, when he fired the pistol. This is a short synopsis of the testimony.

[1, 2] When called on to announce ready for trial the defendant moved to continue the case on account of the absence of his mother, Wells Teague, and R. E. Morrow, stating what he expected to prove by each of them. This was the first application for a continuance. We will state that a continuance is no longer a matter of right but, when overruled, on motion for a new trial the allegations should be considered in the light of the evidence heard on the trial, and if the absent testimony would have been material to some issue in the case and proper diligence had been used to secure the attendance of the witness, a new trial should be granted. Appellant, in the application for a continuance, stated that Will Simpson, on Monday before the homicide on Friday, told him he had a conversation with Prof. Wright, and in the conversation Prof. Wright had said he intended "to beat him (appellant) up and send him home in such shape that his people

would not know him"; that Will Simpson had since died, and he could prove this fact by no other person than the witness Morrow. When the motion for a new trial was presented the affidavit of Morrow was introduced, showing that if he had been present at the trial he would have testified that he heard the teacher make this statement to Simpson. Appellant on the trial testified that Simpson had told him about this conversation, and that on the day of the homicide, when Prof. Wright started toward appellant, he thought he was going to do what he had told Simpson he was going to do; that he came toward him with his right hand in his pocket, looking angry, and caught hold of him as if to execute the threat. No other person testified to this threat other than appellant, who testified Simpson had so told him. He could not even testify that the threat had been made, and this makes it the more apparent it was material to his case to have some one present who would testify that the threat had been made and the language used by deceased. The appellant had process issued for this witness as soon as he learned he was present when the conversation took place between Mr. Wright and Simpson; it was returned not served, but the witness in his testimony shows he was only temporarily absent from home when the sheriff returned the subpoena, and was absent not exceeding 48 hours. So it may be said that appellant is shown to have used diligence, unless he can be charged with the conduct of an uncle, Charlie Morris. This uncle denies getting the witness Morrow to leave, but the state introduced facts and circumstances where the court perhaps would be authorized to find, as he did, that this uncle was instrumental in keeping the witness from attending court. The question, therefore, is, Can this appellant be charged with the acts of the uncle? for if so, there was no error in overruling the motion for a new trial in so far as the witness Morrow is concerned. Appellant did not live with his uncle, but lived with his father. He is not shown to have had any connection with the uncle from the time the subpoena was issued until the time of the trial. Not being shown to have had any knowledge of the acts of the uncle, and the testimony being so material, we are of the opinion the court was in error in his ruling.

[3] Again, as to the witness Wells Teague, there is no question this witness willfully absented himself. His testimony, however, is material, and while to some extent cumulative, yet if he would testify as appellant states, he would support appellant in his contention that he fired no shot until after Mr. Wright had caught hold of him and the scuffle began. This is a disputed issue in the case. The conduct of Teague in willfully absenting himself is censurable, but appellant cannot be held responsible for such conduct, as he in no sense is shown to have been re-

sponsible for such conduct on the part of Teague.

[4] It is true the testimony of his mother, if it would be as alleged, would be cumulative of that of his father, but this is the first application for a continuance. Taking the testimony of the three witnesses, the court is of the opinion that the trial court erred in not granting a new trial when the materiality of the testimony of the absent witnesses was made so manifest.

[5, 6] Another bill strongly insisted on by the appellant that the court erred in not charging on manslaughter is not agreed to by all the court, however, in view of another trial we will say that the trial court should charge on manslaughter. A special charge was requested and exception reserved to the failure of the court to give it, and to the court failing to submit the issue of manslaughter in his main charge. It is contended that when there is evidence of a threat made by deceased that "he was going to beat appellant up so that his parents would not know him and send him home," and evidence that deceased started towards appellant in an angry and threatening manner (carrying no switch or other instrument with him to administer such punishment as a teacher would ordinarily administer), and evidence that he caught appellant by the shoulder with one hand and threw the other around him as if to execute the threat, this raises the issue that appellant's mind might have been in such a state of anger, fear, resentment, or rage as to render his mind incapable of cool reflection, and in the light of the threat, if believed, the other facts and circumstances would be deemed adequate cause if in fact his mind was so affected. If deceased had gone towards appellant with a switch or other instrument usually used by teachers to administer corporal punishment, perhaps the issue might not be in the case, but a teacher is not authorized to use his fist in administering corporal punishment, even though the pupil so conducts himself as to be in need of and require discipline. In this case there is no evidence that the teacher intended to administer the punishment in any other way than with his fists, and it may be that the court should in a proper charge, submit manslaughter on the evidence offered in behalf of appellant, and on another trial, if the evidence is the same, and especially if supplemented by the testimony of Morrow, the court should properly submit that issue.

[7] We hardly think the issue of an accidental discharge of the pistol is in the case, but rather that it was intentionally fired by appellant during the scuffle, as he puts it, and, under such circumstances, there was no error in refusing the special charge presenting that issue. This matter may be made clearer on another trial, and the court can

so frame the charge on that issue as the evidence then adduced may authorize.

[8] The testimony of the witness Morris in regard to what appellant told him almost immediately after the shooting, under the record we have before us, should have been admitted. It is evident that appellant was still laboring under the excitement attendant upon the shooting, and it does not appear there had been a "break or let down," as some authorities put it, in his state of mind. There had not been time nor opportunity to frame a defensive explanation, and under the broad rule in force in this state such statement would be *res gestæ* of the transaction.

We do not think the other matters complained of present error; but, on account of the matters hereinbefore discussed, this case will be reversed.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

PER CURIAM. Rehearing denied.

PRENDERGAST, P. J. (dissenting). I have read and studied the record and every question raised in it thoroughly. I deem it useless to discuss the questions, but I cannot get my consent to even impliedly consent to a reversal of this case.

I think it could be demonstrated from the record and authorities that there was no error in overruling appellant's motion for a continuance. I think he could have procured, with any reasonable diligence, the attendance of the witnesses, if he had wanted them. I think that, instead of wanting them, he wanted a continuance.

Without discussing it, the testimony, in my opinion, did not raise manslaughter, and the court correctly refused to charge thereon.

To my mind, it is clear that the statement by appellant to the witness Morris was not *res gestæ*, and the court properly excluded it, as hearsay and self-serving.

I, therefore, respectfully dissent.

LUNSFORD v. STATE. (No. 4302.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916.)

1. NAMES \hookrightarrow 16(2) — INDICTMENT — SUFFICIENCY — IDEM SONANS.

In an indictment for larceny, the name "McKeg" is *idem sonans* with "McCaig," which was the true name of the victim of the larceny, so that the indictment was sufficient.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 13; Dec. Dig. \hookrightarrow 16(2).]

2. LARCENY \hookrightarrow 32(1) — INDICTMENT — SUFFICIENCY.

In an indictment for larceny, if the injured party was generally known by the name alleged, his true name was immaterial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 81; Dec. Dig. \hookrightarrow 32(1); Indictment and Information, Cent. Dig. § 282.]

3. LARCENY —50—EVIDENCE—ADMISSIBILITY.

In a prosecution for stealing seed cotton, a witness could testify as to letters on the shoulder strap of a sack containing the stolen cotton, and that he tried to find out by inquiry where the cotton came from, and that he made observation on the ground of the tracks of two persons around the cotton and found where an automobile had stopped and leaked oil on the ground near the place where the cotton was found.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 142; Dec. Dig. —50.]

4. CRIMINAL LAW —393(3)—EVIDENCE—ADMISSIBILITY.

In a prosecution for larceny of cotton, evidence that the county attorney took defendant's shoes and fitted them in tracks about where the cotton was found is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 873; Dec. Dig. —393(3).]

5. CRIMINAL LAW —517(6), 518(4)—EVIDENCE—CONFESSION—ADMISSIBILITY.

A confession or admission of guilt is admissible if the accused was properly warned by the officer taking it, or if it was a personal statement to the county attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1152-1156, 1161, 1162; Dec. Dig. —517(6), 518(4).]

6. CRIMINAL LAW —417(2), 696(3) — EVIDENCE—ADMISSIBILITY.

It was error to permit the county attorney to testify, or to refuse to strike his testimony that he heard the testimony on an inquiring investigation of another witness, and to state what such witness then testified, where it subsequently was made to appear that accused was not then present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 968; Dec. Dig. —417(2), 696(3).]

7. CRIMINAL LAW —419, 420(10)—EVIDENCE—HEARSAY—ADMISSIBILITY—OTHER OFFENSES.

While evidence of other extraneous crimes, if a part of the *res gestae*, or tending to connect defendant with the offense for which he is on trial, is admissible, yet testimony that another person identified certain cotton stolen as his is hearsay and not admissible in a prosecution for stealing other cotton.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983; Dec. Dig. —419, 420(10).]

8. CRIMINAL LAW —829(1)—INSTRUCTIONS—SUBSTANCE.

The accused cannot complain of refusal of a requested instruction, when the court gave a similar instruction which omitted only one word, but did not change the effect of that requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. —829(1).]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Jess Lunsford was convicted of larceny, and he appeals. Reversed and remanded.

W. B. Featherston and W. E. Myres, both of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for stealing some seed cotton.

The evidence was wholly circumstantial and was ample to sustain the conviction. Hence appellant's charge to peremptorily acquit was correctly refused.

[1, 2] The pleadings alleged that the cotton was stolen from "Dad" McKeg, and that he was the owner, etc. He testified that his initials were "J. D." and that his name was spelled "McCaig," but that he was known and called as alleged in the pleadings and that his name was often spelled "McKeg" instead of "McCaig." The names were idem sonans. 2 Vernon's C. C. P. p. 203. Again, the universal rule in this state is that, if the injured party was generally known by the name alleged, it is immaterial what the true name was; and, if the injured party is known by one name as well as another, it is immaterial which is his true name; and, in either event, there is no variance. White's An. C. C. P., § 340; 1 Branch's An. P. C. p. 238.

[3] That Dud Sanders testified, in describing the locations, what road or route he would travel in going to Ft. Worth, presents no error. This witness could also properly testify as to the letters he found on the shoulder strap of the sack in which the cotton was contained, and he could also testify that he tried to find out by inquiry where the cotton came from, and that he made observations on the ground, which consisted of his telling about the cotton, the tracks of two persons around about it, and that he found where an automobile had stopped and leaked oil, or oil was there found, upon the ground, and such like testimony. He was not permitted to testify what he learned by making inquiry. Perhaps his testimony that he learned later whose sack it was by making inquiry since then might not be admissible, but that alone would not present reversible error.

[4, 5] The county attorney testified that he took a pair of Clifford Morgan's shoes and a pair of appellant's out with him where this cotton was found, and that appellant's shoes were tennis shoes. He further testified about finding tracks of persons there and fitting these shoes in them. This testimony was all properly admissible. He then further testified that appellant told him that his shoes which he had thus taken out were the shoes he had on on the Sunday night in question, which was the night of the theft. What he testified appellant thus told him was objected to by appellant. The bill does not disclose enough for us to determine whether this testimony was admissible or not. The county attorney had further stated that appellant was not in jail nor under arrest at the time he made the statement, but that he was in the county attorney's office before a court of inquiry at the time. Whether he gave this testimony before the court of inquiry or made the statement personally to the county attorney at the time is not disclosed; nor is it disclosed whether, if before the court of inquiry, he had been duly warned. We therefore cannot tell

whether this testimony was admissible or not. If it was made in appellant's testimony before the court of inquiry, it would be inadmissible if it was done under such circumstances as is covered by the decision in *Simmons v. State*, 184 S. W. 226, and cases there cited. If he was properly warned, then it would be admissible. If it was a personal statement to the county attorney, it would be admissible. We state these matters in order that the testimony may properly be admitted or excluded, as the facts may develop on another trial.

[6] The county attorney was further permitted to testify, over appellant's objections, that he heard the testimony of Clifford Morgan, it seems at the same inquiring investigation, and then proceeded to tell, as shown by Bill No. 5, what Morgan had testified on that occasion. At the time appellant objected it was not made certain whether appellant was present and heard Morgan's testimony or not, but later, by the testimony of Mr. Featherston, it was made certain that appellant was not present at that time, and, after this developed, appellant sought to have the testimony excluded from the jury; but the court refused to exclude it. This testimony of Morgan's, as testified to by the county attorney, under the circumstances, was clearly hearsay. It was injurious to appellant, and presents error, for which the judgment must be reversed.

[7] Ferd Hamilton testified, among other things, that he remembered about some cotton being found in his pasture about September 4th or 5th; that he himself found the cotton. He then was permitted to testify, over appellant's objection, that Lon Farris identified two sacks of the cotton as his. Appellant objected to this testimony in substance on the ground that it was an effort on the part of the state to show another and different theft from that alleged in the pleadings. The evidence showed that other cotton in sacks was found at the same time and place with that alleged to have been stolen from McKeg and was stolen at the same, or about the same, time. This testimony was admissible as against that objection by appellant; or, rather, Farris himself could have so testified. The rule is that when an extraneous crime is a part of the *res gestæ*, or tends to connect defendant with the offense for which he is on trial, proof of same is admissible. 1 Branch's An. P. C. § 166, p. 98, where a large number of authorities are collated. But that particular testimony by Hamilton that Farris did identify two sacks of the cotton as his was hearsay and inadmissible. 2 Branch's An. P. C. p. 1343. On another trial, as stated, Farris could testify that he saw and identified two sacks of the cotton as his, but Hamilton should not be permitted to state that Farris did so. Testimony showing that other cotton was stolen

about the same time McKeg's was, and found at the time and place his was, is admissible if appellant is shown to be illegally connected therewith.

[8] The charge of the court on circumstantial evidence is word for word the same as that requested by appellant, with the single exception that that requested by appellant added the one word "charged" to the end of the court's charge. We think appellant's complaint on this score is hypercritical. Either charge, so far as appellant's objections are concerned, would have been proper. The addition of said word would have made no difference.

For the errors pointed out, the judgment is reversed, and the cause remanded.

HARPER, J., absent.

PORTER v. STATE. (No. 4238.)

(Court of Criminal Appeals of Texas. Nov. 1, 1916. Rehearing Denied Dec. 20, 1916.)

1. DEPOSITIONS ~~49~~—OFFICERS AUTHORIZED TO TAKE—NOTARIES.

Code Cr. Proc. 1911, art. 820, as to taking depositions of witnesses residing in another state, does not authorize a notary public in such other state to take depositions in criminal cases.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 72-80; Dec. Dig. ~~49~~.]

2. CRIMINAL LAW ~~598~~(3), 913(3)—CONTINUANCE—NEW TRIAL—DILIGENCE.

Where accused, instead of sending interrogatories to an officer authorized to take depositions, sent them to a notary public in another state, and it did not appear he provided for payment of the officer's fees for taking depositions, and he did not explain why the depositions were not taken and returned in time for the trial, it was not error to refuse continuance nor to refuse new trial, because of his lack of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1336, 2144; Dec. Dig. ~~598~~(3), 913(3).]

3. CRIMINAL LAW ~~598~~(2), 913(3)—CONTINUANCE—NEW TRIAL—DILIGENCE.

Where accused made only one attempt to subpoena a witness residing in an adjoining county, although it appeared that the witness was home part of the time during the trial, it was not error to refuse accused continuance and to refuse him new trial because of his lack of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1336, 1341, 2144; Dec. Dig. ~~598~~(2), 913(3).]

4. CRIMINAL LAW ~~1091~~(14)—APPEAL—NECESSITY OF SPECIFIC OBJECTIONS.

To properly present several exceptions to the court's charge, accused should take a separate bill to the court's action in each instance where he does not correct or change his charge to meet accused's objection, and should not embrace all his objections to the charge in one bill.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2823, 2824; Dec. Dig. ~~1091~~(14).]

5. CRIMINAL LAW \S 1172(8)—HARMLESS ERROR—REFUSAL TO GIVE INSTRUCTION—EFFECT OF VERDICT.

The question of correctness of court's refusal to instruct as to matters pertaining to a charge of assault to murder passes out on accused's acquittal of such offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3161; Dec. Dig. \S 1172(8).]

6. CRIMINAL LAW \S 1093—APPEAL—NECESSITY OF SPECIFIC EXCEPTIONS.

Accused's bill to refusal to give instruction requested, stating merely that at the proper time he presented his said charge, and asked that it be given, quoting the charge, and that the court refused to give it, did not authorize or require review of such refusal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2828-2833, 2919, 2920; Dec. Dig. \S 1093.]

7. CRIMINAL LAW \S 364(2)—EVIDENCE—RES GESTÆ.

In trial for aggravated assault upon a constable endeavoring to arrest accused, who was "joy riding" in an automobile, evidence as to acts of accused along the road leading up to the alleged assault, such as that his party was drunk, drinking, and shooting along the road at a high rate of speed, and also what accused's companions shouted to him when he took his Winchester rifle and ran back towards the constable, making him throw up his hands and marching him back, and the condition of accused's gun at the time, and that he was attempting to work it so as to shoot the constable, was admissible as part of the whole transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 808, 813, 816; Dec. Dig. \S 364(2).]

8. CRIMINAL LAW \S 1166½(12)—APPEAL—HARMLESS ERROR—COMMENT OF COURT.

It appearing that the constable was summoned to arrest accused by a third party who thought accused had committed a robbery, where on objection to such third party's testimony that when he was hunting for the constable, he met his brother and asked him if he was the constable, the court, passing on the question, said, "I don't think that the constable at that time would have had to determine whether they were guilty of a felony or a misdemeanor, or which had been committed," such comment would not authorize reversal, even if improper, since, while made in the hearing of the jury, it was not addressed to the jury, but to counsel debating a question of law.

[Ed. Note.—For other case, see Criminal Law, Cent. Dig. \S 3125; Dec. Dig. \S 1166½(12).]

9. ASSAULT AND BATTERY \S 83—EVIDENCE.

It was not error to permit the constable to tell what the third party said when he came to get him to make the arrest.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. \S 128, 134; Dec. Dig. \S 83.]

10. CRIMINAL LAW \S 351(3)—EVIDENCE—FLIGHT.

Flight, or attempted flight, may be shown as a criminating circumstance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 779, 930, 931; Dec. Dig. \S 351(3).]

11. CRIMINAL LAW \S 351(4)—EVIDENCE—RESISTING ARREST.

It is always proper to show that when accused is arrested, or sought to be arrested, for an offense, he resists it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 780; Dec. Dig. \S 351(4).]

12. ASSAULT AND BATTERY \S 83—EVIDENCE.

In trial for aggravated assault on a constable who endeavored to arrest accused, it was proper to permit officers in another city to tell that they were communicated with by those directed to communicate with them over the telephone by the constable, when accused had escaped from the constable, and that such officers acted on the communication and immediately prepared to arrest accused, the evidence showing that they had neither time nor opportunity to procure a warrant, and if they had not acted promptly accused would have escaped.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. \S 128, 134; Dec. Dig. \S 83.]

13. ASSAULT AND BATTERY \S 83—AGGRAVATED ASSAULT—EXCLUSION OF EVIDENCE.

It was not error to refuse to permit the county attorney to testify at accused's instance that accused had been charged with drunkenness, disturbing the peace, resisting an officer sent to arrest him after he escaped from the constable, etc.; these matters being irrelevant.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. \S 128, 134; Dec. Dig. \S 83.]

14. WITNESSES \S 392(1)—IMPEACHMENT.

It was not error to permit the state to introduce for impeaching purposes a written statement of a witness which contradicted some of his testimony on the trial; the proper predicate having been laid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1249-1251; Dec. Dig. \S 392(1).]

15. CRIMINAL LAW \S 448(3)—EVIDENCE—OPINION EVIDENCE.

It was not error to permit the state to elicit from accused's witness on cross-examination that it looked to him as if when accused was running back with the gun toward the assaulted party he was getting ready to shoot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1036, 1037; Dec. Dig. \S 448(3).]

16. CRIMINAL LAW \S 1169(5)—APPEAL—HARMLESS ERROR.

Where inadmissible testimony has been admitted, but is thereafter clearly excluded by the court's charge given at accused's instance, it is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3141; Dec. Dig. \S 1169(5).]

Appeal from District Court, Clay County; Wm. N. Bonner, Judge.

D. Porter was convicted of aggravated assault, and appeals. Affirmed.

Wantland & Parrish, of Henrietta, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted for an assault with intent to murder John Firestone, a constable of said county. Upon a trial he was convicted of an aggravated assault. The indictment, by inclusion, embraced aggravated assault on several phases.

[1, 2] The offense was alleged to have been committed May 26, 1916. He was arrested and placed in jail on that date. The indictment was filed June 1st, and he was the next day served with a copy. He did not make bond from the time of the arrest until after

his conviction. He was confined in the jail all this time. His trial was set for June 5th, and began that day, and consumed that and the following two days. With proper diligence appellant propounded interrogatories to John Reed, a witness who was a resident of Oklahoma. The district attorney promptly crossed, waived time, and appellant procured a commission on June 3d to the proper officers in Oklahoma to take the depositions. It may be conceded from his allegations that the testimony of Reed was material to him on some points. Our statute (article 820, C. C. P.) prescribes that:

The "depositions of a witness residing out of the state may be taken before the judge or chancellor of a Supreme Court of law or equity, or before a commissioner of deeds and depositions for this state, who resides within the state where the deposition is to be taken."

It does not authorize a notary public in such other state to take depositions, as has been repeatedly held by this court. *Ilenpo v. State*, 28 Tex. Cr. R. 179, 12 S. W. 588; *Murrell v. State*, 184 S. W. 831, and cases therein cited. His application alleges that they sent the commission and interrogatories to a certain notary public in Oklahoma with instructions to him to have the witness to come before him and give his depositions. It nowhere alleges that he provided for the payment to any officer of his fees for taking the depositions. Nor does he allege or any way show why said depositions were not taken and returned within the time so that they could have been introduced. We know, judicially, that Clay county adjoins Oklahoma, only a short distance from Henrietta, the county seat of Clay county, and all of the testimony shows that this witness lived but a short distance in Oklahoma from Clay county.

[3] His other witness was Ivan Boyd, who lived in Montague county, in about a mile of Ringgold, just a short distance across the Clay county line. Within proper time he had a subpoena issued for him, as well as for some other witnesses, among them, his father, with whom he lived. His father and other witnesses were subpoenaed, and they appeared and were present on the morning when the case was called for trial, his father having come from his home to Henrietta that morning. His son Ivan, the witness, had left home and was absent therefrom at the time his father was subpoenaed, and he was not served. However, the testimony shows that Ivan Boyd returned to his home after a short absence and was there pending this trial, his father at appellant's instance testifying during the trial that Ivan had returned to his home the night before he was testifying and was there when he got up that morning. It is evident that his father, appellant's witness, went back and forth to his home from Henrietta and stayed at home at night, returning to the court each morning. Appellant did not procure any other subpoena after

the one was returned showing that Ivan Boyd had not been served and used no other diligence or means whatever to have Ivan to attend the trial. If appellant had used any reasonable diligence to have said Ivan attend as a witness, he could unquestionably, as this record shows, have secured his attendance.

Under the circumstances of this case and as shown by the record, appellant used no such diligence to get the testimony of either of his absent witnesses as to entitle him to a continuance. In other words, it shows such a lack of diligence as would entitle him neither to a continuance nor to a new trial because he did not get said witnesses. We have had occasion to fully discuss this question and cite and quote from the authorities in *Giles v. State*, 66 Tex. Cr. R. 642-644, 148 S. W. 817, and *Murrell v. State*, supra. So that the court committed no reversible error in refusing his original application for a continuance, nor the renewal thereof, nor in refusing him a new trial on that ground.

Appellant has a large number of bills of exceptions. It is unnecessary to state or discuss them separately. Several present the same character of question.

[4] He filed a large number of exceptions to the court's charge. He took one bill, embracing all these matters therein. It is perfectly evident from the record that the court changed his charge in at least several respects and gave some of his special charges to meet some of his objections. The only way to properly present such questions for review by this court under such circumstances is to take a separate bill to the court's action in the particular instance wherein he does not correct or change his charge to meet the objection and not to embrace the whole thing in one bill.

[5, 6] He requested eight special charges. The court gave two of them just as asked. Three others were to matters pertaining solely to the charge of an assault to murder. As appellant was acquitted of this offense, all such questions pass out, as has uniformly been held. Neither of his others should have been given. However, neither of them is presented in such a way as to authorize or require this court to review them. His bill to each in substance and effect states that in the proper time he presented his said charge and asked that it be given, quoting the charge, and that the court refused to give it, to which he excepted. It has been the uniform holding of this court that in such instances, even in felony cases, and much more so in misdemeanor cases or convictions, such a bill does not present the questions so as to authorize or require this court to review it. *Byrd v. State*, 69 Tex. Cr. R. 35, 151 S. W. 1068, *Ryan v. State*, 64 Tex. Cr. R. 628, 142 S. W. 878, and a great number of earlier cases cited in these decisions and other cases subsequently decided.

Briefly stated, the evidence shows: That

appellant and three companions, he and two of whom at least, lived in Oklahoma, went therefrom to Wichita Falls in an automobile, and stayed there one night and about half the next day, when they started to return in the same way. Their route was from Wichita Falls through Henrietta, and thence easterly to Oklahoma. That they all were drinking. Appellant and at least one of the others were drunk. They had a Winchester rifle and a pistol with them. Soon after leaving Wichita Falls they ran the automobile at an excessive speed, several witnesses testifying that they ran it part of the way as fast as that make of machine, the Ford, could possibly run—25 to 35 miles an hour; appellant himself testifying that part of the time they ran it "awful" fast. That along the road they shot the gun while they were running. That on one or two occasions they stopped and shot it while they were traveling along the road, and that in the town of Jolley, through which they had to pass, they shot the gun at least twice while they were in this town. That after leaving Jolley, one of the state's witnesses, who was traveling behind them in his automobile, testified in substance that, as he approached appellant and his companions, he saw appellant and one of the others out on the ground coming back the road, their automobile having stopped, and the other two remaining in it. The witness stopped his automobile also, and while thus stopped, an utter stranger to him, and it seems to the appellant and his companions too, jumped up on his running board and demanded that the witness should take him on, which he refused. That while this was going on, appellant and his companion came up on him, demanded that he give them their pistol, and upon his failure or refusal to do so they took it away from him. It seems it appeared to this witness that they were forcibly taking a pistol away from this stranger, and he, the witness, did not know to whom it belonged; it appearing to him that they were forcibly taking it away from this party. It developed on this trial that appellant or some one of his companions in running their automobile had dropped a pistol, and that they stopped their machine and went back to hunt for it, with the result stated. The state's witness, as stated, did not know this at the time. John Firestone was the constable and lived near the road where these parties were traveling and these transactions occurring. This witness, who had seen as appeared to him the robbery of this stranger by appellant and his companion of the pistol, went ahead of them, reached Firestone's residence where he was and told him that appellant and his crowd were a bunch of drunks, that they had taken a six-shooter from a party and had a Winchester, and in effect called upon the constable to act in the premises. The constable immediately took his pistol, got in an automobile,

and rode down to the road where these parties would soon pass, with the intention of stopping and arresting them. The testimony, without dispute, shows that he had no time or opportunity to procure any warrant for their arrest, and that he had to act immediately. He was several miles from Henrietta. There was no justice of the peace nearer than Henrietta, nor any other means whereby he could have procured a warrant. It is certain that if he had not acted immediately, the parties would have entirely escaped and gone into Oklahoma before he could have possibly overtaken them or procured a warrant. He reached the road these parties were running on before they got there, when he got out in the road, waved his pistol back and forth in his hand, and notified them that he was an officer, and demanded that they should stop; instead they speeded the faster, but after running 200 or 300 yards further they did stop, and he started up towards them afoot, and appellant jumped out of his automobile, took the Winchester, ran back towards Firestone, and when not far distant from him, the state's evidence shows, that he threw his Winchester down on Firestone, pointing it directly at him, and demanded that he throw down his pistol and throw up his hands. That Firestone at the time again reiterated to appellant that he was an officer, as he had stated to them when he had attempted to stop them in the road just before this. That appellant did force the constable to lay his pistol down on the ground, move away from it, hold up his hands, and he had to remain in this condition until appellant reached the pistol, picked it up, and with his gun marched the constable down to where his car was. The assault in this instance is charged to have been committed at the time he leveled his gun upon the constable, forced him to lay his pistol down, move away from it, and hold up his hands. Whether the constable, when he first attempted to stop these parties in the road, told them that he was an officer or not, was a disputed point by the testimony. Also whether or not the constable so told appellant when he leveled his gun upon him, made him lay aside his pistol and hold up his hands, was disputed by the testimony; the state's side showing that in both instances at the specified times the constable did notify them of his official position. When appellant marched the constable back to his car, the constable again told the crowd who he was, and the other companions of appellant then made him deliver the constable's pistol back to him, but before he would do so he unloaded it, kept all the cartridges and passed it back to him through one of the other parties. They thereupon jumped in their automobile, left, running very fast, and attempted to escape. The constable, it seems, went back up to his residence, near where these things took place, told his wife, or some others, to communicate with the off-

cers at Henrietta what had occurred, and that the defendant and his companions were attempting to escape and to stop and arrest them, telling them substantially what had occurred, from which the parties making the communication and the officers at Henrietta receiving the communication believed, and acted upon such belief, that these parties had committed these crimes and were attempting to escape. Appellant and his companions stated, as shown, that when they left Firestone they ran their machine "awful" fast, trying to escape. That their route would take them through Henrietta, but fearing they would be arrested if they attempted to go through Henrietta, they took another road so as to avoid going through Henrietta and attempted to escape into Oklahoma without being arrested at all. Firestone, it seems, as soon as he could, procured an automobile and took after appellant and his crowd, but he lost so much time and was so far behind that he did not catch up with them. The officers at Henrietta, as soon as communicated with, armed themselves, procured an automobile, and went on the road towards Wichita Falls, expecting to meet and arrest appellant and his crowd. They did not know them, however, and after running out a few miles did meet them; the appellant and his crowd running with great speed, as stated. Immediately after they met, the sheriff's automobile was stopped, and another big, powerful machine belonging to Mr. Boyd came along, and Mr. Boyd, who had been following these parties, told the officers that the persons they had just met were the persons they were after. The officers then got in this big, powerful machine and took after appellant and his crowd. In attempting to avoid going through Henrietta on the road that they took, which appellant said he knew and by going it they would avoid Henrietta, they had to go through a gate, and to do this they had to stop the car, run it in, stop it again, and close the gate. That appellant himself got out with his Winchester in his hand, opened the gate, and had just closed it as these officers ran up. They immediately demanded that appellant and his crowd should halt, hold up their hands and surrender. Two of appellant's companions promptly got out of the machine, did hold up their hands and surrender. Appellant, however, retreated to the machine, and as the officers testified, attempted to shoot them with his Winchester, but his gun hung fire and would not shoot, and that they again fled some several miles before they could be overtaken again by the officers, and that just before the officers overtook them, they concluded that they had better go back and surrender. They stopped the car, and as the officers again caught up with them, they got out, held up their hands, and surrendered. We have merely given a general outline of what the evidence was sufficient to show,

deeming it unnecessary to detail it. There were conflicts in the testimony on some material points.

[7] Appellant has some bills objecting to the testimony of the witnesses following him in their automobiles as to the acts of appellant along the road leading up to the very alleged assault herein, such as that they were drunk, drinking, shooting along the road, and in the town of Jolley, the rate of speed, and the way they were running their machine, also what appellant's companions shouted to him when he took his Winchester and ran back towards Firestone, making him hold up his hands and marching him back, wherein they shouted to him to shoot him, kill him, and such matters, and also the condition of appellant's gun at the time, and that he was attempting to work it so as to shoot Firestone. We think all this testimony was admissible. It was a part of the whole transaction. The jury could not have understood the situation and properly passed upon the questions without it.

[8] Appellant has another bill, wherein it is shown that he objected to the state's witness Rountree telling that when he was hunting for the constable, he met Pat Firestone, a brother of John the constable, and that he asked him if he was a constable. That his attorney thereupon objected and was arguing that this one expression of the witness was inadmissible, and that the court, in passing on the question said to him:

"I don't think that the constable at that time would have had to determine whether they were guilty of a felony or a misdemeanor, or which had been committed."

This, as explained by the court, was a remark made to appellant's counsel in his debating that question of law. The remark, while in the hearing of the jury, was not to the jury at all, as shown. We think it no such comment as would authorize or justify a reversal of this case, even if it should be held to have been improper.

[9] There was no error in the court permitting the witness John Firestone to tell that when Rountree came up to get him that he told him there was a bunch on the road with a gun and an automatic pistol, and for him to go down and stop them, telling him which one had the gun, and that he had seen him take the pistol away from another man on the road, and that the constable replied he would go down, and did go down; the court stating that he would permit him to say why he went down there.

[10, 11] Appellant by other bills shows that he objected to the testimony by the officers from Henrietta who responded to the call to arrest him and his bunch, which shows their flight and resistance of arrest when these officers came upon them at the gate and demanded their surrender, announcing that they were officers. The court at the time admitted this evidence, as stated by him, to show flight and resistance of arrest if it did

and restricted the jury to its consideration for that purpose only. This testimony undoubtedly tends to show both flight to avoid and prevent arrest, and resistance of arrest, at the time. Flight, or attempted flight, may always be shown as a criminating circumstance. Section 135, 1 Branch's P. C. page 78, and authorities there collated. Also it may always be shown that when an accused is arrested, or sought to be arrested, for an offense, he resists it. *Mitchell v. State*, 52 Tex. Or. R. 39, 106 S. W. 124; *Moreno v. State*, 71 Tex. Or. R. 461, 160 S. W. 361; 2 Jones on Ev. § 287. So that we think all this testimony was admissible on these points. However, the court later gave appellant's specially requested charge, instructing the jury peremptorily that they could not consider any of said evidence for any purpose except to show flight, if it did, and that they could consider it for no other purpose whatever.

[12] Neither did the court err in permitting the officers at Henrietta to tell that they were communicated with, and by whom, telling them in substance of the said acts of appellant and his crowd, and that they acted thereon and immediately proceeded to undertake to arrest them. The evidence unquestionably shows that they had neither time nor opportunity to procure any warrant for any of them; and, as stated, if they had not acted as promptly as they did, the appellant and his crowd would have entirely escaped, which they were undertaking to do, running their machine in the most reckless and rapid manner, and avoided going through Henrietta for the very purpose, as they stated, to prevent and avoid being arrested.

[13] Neither did the court err in refusing to permit the county attorney to testify at appellant's instance that appellant had been charged with drunkenness, disturbing the peace, resisting the officer Cunningham, aggravated assault on Firestone, and aggravated assault on Cunningham, all these persons being the officers who attempted to arrest him, and that said charges grew out of the facts and circumstances testified to by the various witnesses on this trial, though we cannot see where the state should have objected to this testimony. It occurs to us that it would clearly have been against appellant and not in his favor, but at any rate it had no legitimate bearing upon the trial of appellant in this cause.

[14] Neither did the court err in permitting the state to introduce the written statement of the witness Eckman, which contradicted some of his testimony on this trial. The court admitted it, as he stated, for impeachment purposes of this witness, the proper predicate having been laid.

[15, 16] Neither did the court err in permitting the state to have Brown, appellant's witness, on cross-examination, to tell in substance that it looked to him like when ap-

pellant was running back with the gun that he was getting ready to shoot. Even if this testimony had not been admissible, it was clearly excluded by the court's charge given at appellant's instance, which we have just mentioned above.

We think no reversible error has been pointed out in the trial of this case. The judgment will therefore be affirmed.

SPEERS v. STATE. (No. 4306.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916.)

1. CRIMINAL LAW § 663—EVIDENCE—RECORD OF DEED.

In a prosecution for violating Pen. Code 1911, art. 500, relating to the keeping of disorderly houses, it was error to permit the introduction in evidence of the record of a deed on the contested issue of the ownership of the premises, where a certified copy of the deed had not been filed and notice thereof given as required by Rev. St. art. 3700.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. § 663.]

2. CRIMINAL LAW § 419, 420(11)—EVIDENCE—HEARSAY.

In a prosecution for violating Pen. Code 1911, art. 500, relative to keeping of disorderly houses, the testimony of a witness as to what others told him and as to what he had learned from people around the house should have been excluded as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980, 981-983; Dec. Dig. § 419, 420(11).]

3. CRIMINAL LAW § 772(6)—INSTRUCTIONS.

Where defendant in such case merely pleaded not guilty and made no special defense, and the court gave the usual charge on reasonable doubt, and instructed that the jury should not convict unless they believed all the facts necessary to establish defendant's guilt beyond a reasonable doubt, requested special charges enumerating various facts alleged to constitute special defenses were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1817; Dec. Dig. § 772(6).]

4. CRIMINAL LAW § 763, 764(6)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a prosecution for violating Pen. Code 1911, art. 500, relating to keeping of disorderly houses, an instruction that the jury should not consider the location of the house was properly refused as on the weight of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1732, 1733; Dec. Dig. § 763, 764(6).]

5. DISORDERLY HOUSE § 16—PROSECUTION—EVIDENCE.

In such case evidence that the house in question was in the "reservation district" was admissible.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 21-25; Dec. Dig. § 16.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Pauline Speers was convicted of violating Pen. Code 1911, art. 500, relating to the keeping of disorderly houses, and appeals. Reversed and remanded.

T. R. Boone, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was prosecuted under article 500, P. O., the indictment alleging that she was the owner of a certain house situated in said county, and that she did then and there unlawfully keep, and was concerned in keeping, and knowingly permitted to be kept said house as a house of prostitution, where prostitutes were permitted to resort and reside for the purpose of plying their vocation. She was convicted, and her punishment assessed as fixed by the statute.

[1] The question of ownership of the premises was a contested issue. At least it was necessary for the state to prove this. A deed to her of comparatively recent date would tend strongly to prove her ownership. The state introduced various facts tending, and perhaps amply sufficient to show this, without reference to the claimed deed to her of the premises. However, over her objections, properly and timely made, the court permitted the state to introduce in evidence the record of a deed to her for said premises without having notified her the proper time in advance to produce the deed and without procuring any certified copy thereof and filing it and giving three days' notice to her before the trial. Our civil statute (R. S. art. 3700) provides that a certified copy of an executed and recorded deed cannot be introduced in evidence unless the party who gives such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it at least three days before the commencement of the trial of such suit and give notice of such filing to the opposite party, or his attorney of record. This statute is applicable to criminal as well as civil causes. This action of the court was clearly material error against appellant. *Allison v. State*, 14 Tex. App. 426; *Gould v. State*, 61 Tex. Cr. R. 195, 134 S. W. 695. Of course, if the original deed be produced, and its execution proven, then it could be introduced without being filed and notice given three days before the trial. What we have said is likewise applicable to any other deed or deeds to be introduced in evidence.

[2] Appellant has another bill which we think presents error, and that is to the effect that the witness Hinkley was permitted to testify as to what others told him, and he learned from the people around said house who occupied it stating who this was. This was hearsay and should have been excluded. Under all the other testimony the admission of this would not have presented reversible error.

[3-5] The court did not err in refusing to give a charge on circumstantial evidence as to appellant's ownership of said house, nor in permitting the same to be kept, etc. Such a

charge would have been inapplicable and not required. Neither did the court err in failing and refusing to give appellant's said several special charges in effect enumerating the various facts tending to establish her guilt, because, as claimed by appellant, these or any of them were her special defense. She had no special defense. Her plea was simply not guilty. The charge of the court affirmatively required the jury to believe all facts necessary to establish her guilt beyond a reasonable doubt before they could convict her, and gave the usual charge of reasonable doubt, etc. This covered all that was necessary on this point. Neither did the court err in refusing to give his charges to the jury not to take into consideration the location or situation of the house in question. This would have been a charge on the weight of the testimony. The fact, if so, that the testimony established that the house in question was in the "reservation district," was admissible in evidence. The fact that others than prostitutes might reside, or even own a home, in such district, would be a matter of argument only.

For the errors above pointed out, the judgment is reversed, and the cause remanded.

HARPER, J., absent.

KIERNAN v. STATE. (No. 4256.)

(Court of Criminal Appeals of Texas. Nov. 8, 1916. Rehearing Denied Dec. 20, 1916.)

1. CRIMINAL LAW — 1171(1) — APPEAL — HARMLESS ERROR — ARGUMENT OF PROSECUTOR.

In a prosecution for murder, where the main defense was insanity, and where there was medical testimony on both sides of the issue, and where a doctor who had testified that defendant was sane, in answer to a juror, stated that he did not think that defendant should be turned loose, even if the jury, in the alternative, were to return a verdict resulting in his confinement in jail, the prosecuting attorney's argument that the state had no place for the confinement of insane persons except the penitentiary, implying that, if the jury acquitted and defendant was found insane, he would be released on habeas corpus, which probability was emphasized by the trial judge, was improper, and reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. 1171(1).]

2. INSANE PERSONS — 83, 86 — RESPONSIBILITY FOR CRIME — CONFINEMENT.

An insane person cannot legally be held responsible for his acts, and the fact that the state provides no adequate means to confine an insane person in an asylum would not authorize his confinement in the penitentiary as a criminal.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 144, 145, 149; Dec. Dig. 83, 86.]

Prendergast, P. J., dissenting.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

O. J. Kiernan was convicted of murder,

and he appeals. Reversed, and cause remanded.

Butler L. Knight, Wm. C. Church, and S. D. Hopkins, all of San Antonio, for appellant. Joe H. H. Graham, of San Antonio, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 99 years' confinement in the state penitentiary.

The facts would show that appellant and his son John (the young man whom he killed) had an altercation at the breakfast table; that during the day appellant purchased a pistol, and went to the home of his daughter, and told her to warn John not to come home; that, if John did come home, he would kill him, showing her the pistol he had purchased, remarking, "If he came in he would come over his dead body; he also told me that morning, if he came back, he would kill him."

Appellant's wife testified that when he came home that evening he had a pistol in his hand, and told her, if she did not want a tragedy there, not to let John come home that evening. Both the mother and sister testified they gave John the warning and requested him not to come home that evening. Capt. Brown, of the police force, testified to John coming to see him late in the afternoon, and reporting to him what his mother and sister had informed him of, and desired an officer to go with him. He did not send an officer, and advised him to wait until his father had time to "cool off"; that John made the remark, if he could get hold of him, he could take the pistol away from his father.

No one saw the tragedy but appellant. He testified that he did not say he would kill John, but said instead he told his wife and daughter to tell John not to come home; that he was armed and would defend himself—he testifying to a state of facts which would lead one to believe that he thought his son was trying to put him out of the house. He then testifies that his son rushed into the room where he was, and details the fatal affray as follows:

"I suppose he walked in two or three feet, and I just turned and told him, 'Hold up! hold up!' that way; 'don't advance, John.' He turned in an instant, and like he was going to go back, and I felt very much relieved—in fact, happy. It was passed that way without any trouble, but I kept my eye on him all the time, and he turned southwest and stopped for a minute as he went to open the door, and just in an instant that he stopped I was afraid then he was going to advance, or change his mind, and I pointed the revolver right at him. I said, 'Don't advance this way, John.' Before he did, I saw for an instant he drew himself together and says, 'Well, papa;' and he dashed at me with his right arm around my neck, and we grappled into that room, and into the next, and into the dining room, and he sank in my arms."

[1, 2] In the record before us there is but one error pointed out, and as to whether or not it should cause a reversal of the case is

a question regarding which our decisions are not entirely harmonious, but in the writer's opinion the best-considered cases hold that under the peculiar facts of this case, the error is of that nature as to necessitate a reversal of the case.

Appellant's main defense was insanity. The testimony of Drs. Largen and Kenney would render him mentally incapable to commit a crime in his then condition. They both had seen and examined appellant, and heard the testimony on the trial. The testimony of Dr. Berrey would render him wholly sane, knowing right from wrong, and legally responsible for his acts. Other testimony was introduced bearing on this issue, and it might be said the principal contested issue was whether or not appellant was sane or insane, and that bearing on this issue it appears by the record that during the examination of Dr. Kenney one juror propounded some questions:

"Q. Dr. Kenney, in view of this evidence, going back for a period of 17 years—that time the defendant would be at the age of about 38 or 39 years old; he was about 38 or 39 when he ordered his crippled son away from home—the evidence in this case shows he has exercised uncontrollable temper with his family from time to time until the 15th of September, 1915, when he took his son's life. Now, if he has this record according to the evidence, being placed in this capacity off and on for a period of 17 or 18 years, I just want to ask you now, of course I don't want the jury or anybody else to let this weigh on them at all, but I just want to ask your opinion: Now, in case a man is liberated, turned loose, what would be your opinion, don't you think he ought to be kept under cover, kept in jail, or kept in the asylum? Do you think he ought to be turned loose? A. No, sir; I do not; I don't think he ought to be turned loose. Q. Suppose he should, doctor, be sent for a period of two years; do you think you ought to turn him loose? A. No, sir."

We have copied this in the record because of the remarks of counsel complained of. In bill No. 2 it is shown that—

"during the argument of Mr. Joe Graham, counsel for the state, in the closing argument to the jury, he stated, over objection of defendant's counsel, that the state of Texas had no place for the criminally insane except the penitentiary, and that if the jury in this case should acquit defendant because of his insanity he would have to be tried before another jury of six doctors, and if they found him insane he would be placed in an insane asylum, and that further the law creating such board of such doctors had been declared unconstitutional, and that this court had been releasing parties adjudged insane by said board; and further because the court stated, then in the presence and hearing of the jury, that 'Yes, he had just turned one loose that noon upon a writ of habeas corpus.' And because said state's counsel argued the example of Hopkins' case in this county to the jury, and stated it was a case he would never forget, and that she was running at large now, and she plead insanity."

We can hardly understand the court's qualification to the bill. He verifies that the language was used by the district attorney, but says:

"No request in writing at the time was made that the jury be instructed not to consider it, and that in fact no exception was so reserved."

And then he adds that counsel did object to the remarks and request the court to instruct the jury not to consider the remarks, and it was at the time counsel personally made such objection and request that the court made the remark in the presence and hearing of the jury:

"Yes, he [the court] had just turned one loose [a person adjudged insane by a commission] that noon upon a writ of habeas corpus."

When request was made to instruct the jury not to consider the improper remarks of the prosecuting officer, the court not only declined to do so, but in the presence and hearing of the jury emphasized the argument made by counsel that Texas had no place for the criminally insane other than the penitentiary, because the law providing the mode and means of incarcerating them in the asylum had been declared unconstitutional, and further emphasizing the only legitimate deduction from such argument, that if the jury acquitted appellant on the ground of insanity, and a jury commission then found him insane, and he was ordered confined in the asylum, the court would release him on habeas corpus and leave him at large, as Mrs. Hopkins was then at large.

Take such argument in the light of the question propounded by the juror to the doctor testifying to appellant's insanity, it necessarily followed that there would be conveyed to the minds of the jury that, whether appellant was sane or insane, the only way he could be confined was by this jury finding him guilty and refusing to release him on the ground of insanity. Without passing on the question of whether or not Texas has a law whereby the insane can be confined in the asylums provided for their safe-keeping and treatment, we will say that, if appellant was in fact insane at the time he shot his son, the fact laws of this state provided no adequate means to confine him in an asylum would not authorize his confinement in the penitentiary as a criminal. The rule of law that an insane person cannot legally be held responsible for his acts is as old as the law itself—it is part and parcel of the law.

We do not know the facts surrounding the Hopkins case. We do know that such remarks were entirely outside the record in this case. It may be that counsel for the state knew that certain members of the jury were familiar with the Hopkins case, and, if so, this was an improper appeal to them.

We do know from this record that, when Dr. Kenney was swearing to a state of facts that would render appellant irresponsible for his acts and had just answered the hypothet-

ical question of the state, "Will you say under such state of facts he was necessarily crazy?" "I think he was, yes, sir," one of the jurors propounded questions to the doctor, and asked if the doctor thought appellant ought to be turned loose, to which question the doctor answered, "No," and that two years' confinement would be insufficient, and after such testimony had gone before the jury the prosecuting officer in his argument insisted that there was no confinement for the criminally insane but the penitentiary.

It may be that after hearing all the evidence the jury was convinced that appellant was sane, and if so this judgment should stand. But who can say what weight such argument would have with the jury, when the doctor who was testifying to appellant's insanity testified also that he should be kept confined. The assistant district attorney's argument, that if the jury found appellant insane, and acquitted him on that ground, he could not be confined in the asylum, and the court "backed him up" in such statement, by stating that he had that day turned a person loose who had been adjudged insane by a commission appointed under the law, on the ground the law was unconstitutional, would make the impression on the jury that the only way to confine appellant was for them to do so by their verdict.

The jury had but little option left. The witnesses for the defendant were swearing that he was insane, and it was dangerous to the public for him to be at large; the district attorney was insisting, "If you do not convict him of this murder, he will be allowed to go at large," citing the Hopkins case, and this argument was reinforced by the district judge remarking, "Yes, I turned one loose today"—as much as to say, if you acquit this man on the ground of insanity, and an effort is made to send him to the asylum under a finding of a commission that he is insane, I will turn him loose on habeas corpus. Thus it was up to the jury to find him guilty and confine him in the penitentiary, or they were then and there informed he would not be sent to an asylum, but be turned loose upon the public.

We cannot sanction such improper proceeding. Appellant was entitled to have the issue of his sanity tried under the rules of law, and no improper influence brought to bear on the jury to sway their judgment on that issue.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J., dissents.

PERKINS v. STATE. (No. 4149.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 18—EIGHT HOUR LAW—VIOLATION—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for violating the eight hour labor law, held insufficient to show that defendant had any control over the laborer permitted to work in violation of law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \Leftrightarrow 18.]

2. MASTER AND SERVANT \Leftrightarrow 18—EIGHT HOUR LABOR LAW—ELEMENTS OF OFFENSE—"PERMIT."

It is essential to a conviction of unlawfully permitting an employé to labor in violation of the eight hour labor law that defendant shall have had some control over the laborer; the word "permit" as used in the statute necessarily carrying the idea of such control.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \Leftrightarrow 18.]

For other definitions, see Words and Phrases, First and Second Series, Permit.]

Appeal from Collin County Court; H. L. Davis, Judge.

F. D. Perkins was convicted of violating the eight hour labor law and appeals. Reversed and remanded.

Wallace Hughston and W. R. Abernathy, both of McKinney, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for violation of the eight hour labor law.

[1] The record discloses that there was being constructed a public road from the edge of the city of McKinney about $7\frac{1}{4}$ miles into the country, under contract with the commissioners' court by J. Fred Smith. This was in road district No. 4 of Collin county. After Smith made the contract with the commissioners' court, he made a contract with appellant. By the terms of this contract appellant was to furnish the necessary funds to finance and carry out the contract to construct the road. In consideration of this defendant was to establish an office in the city of McKinney to handle funds and to pay out money, as well as to receive and collect from the company payments under the contract, and at the completion of the contract appellant was to receive one-half of the profits after payment of expenses. The actual construction was in charge of Mr. Keller as foreman. Keller was employed by J. Fred Smith and placed in charge of the work, clothed with full authority to employ and discharge all hands and laborers, with complete authority to issue all orders in the construction of the road and superintend all laborers as well. It is further shown appellant had no authority to issue any orders or to manage or control the construction work, or employ or discharge any hand or laborer, or to issue any orders to them, or require or permit these laborers to work or not to work

on the road at any time. It is also shown that he had nothing to do with constructing the road, or with the laborers engaged in such construction. He had no management of the prosecuting witnesses Carter and Luten. He neither employed nor discharged them, nor managed or controlled them, nor did he require or permit them to work or not to work. Appellant signed some of the pay checks, and the others were signed by the bookkeeper, Mr. Sears. The time was kept by Mr. Sears. Sears was an employé of J. Fred Smith. Luten testified he was controlled by the foremen, who told him when to work and when to quit; that these foremen were in charge of the witness. He further states that:

"While I was out on the road Mr. Perkins never told me what to do, when to begin or quit work. Sometimes Mr. Perkins came out there. He did not give me any orders to do anything. * * * I was in charge of McGill, Moore, and Griffith during the time I worked. Mr. Lonnie Sears kept my time while I was out there at work."

The testimony is fully borne out by Sears, the bookkeeper, as to keeping the books and signing the checks. This statement might be amplified in details, but we think this sufficient.

[2] The statute under which appellant was convicted punishes the employer in charge of the hands, and this must be in some manner or way by which he may control or have authority over them. The statute punishes if the employer or contractor shall require or permit the laborers to work beyond eight hours. In this case it may be conceded that the witness Luten testified that he worked ten hours, but he testifies appellant had nothing to do with him, and had no control over him; that he never gave him any orders in regard to the work, neither to begin or quit; that he was not controlled by appellant, but by other parties, and the whole testimony shows this to be true. There can be no contention that appellant required the laborers to work. All the testimony excludes that idea. If appellant is liable, it must be under the other clause of the statute with reference to his permitting the laborers to work more than eight hours. The word "permit" here necessarily carries with it the idea of control or authority over the laborer. If the party having charge of the laborer requires him to work and he does work, he would be guilty. If he had him under his control or authority, and permitted him to work beyond eight hours, he might still be guilty under that phase of the statute. But the word "permit" in the sense in which it is used in this statute pertains to the authority or control of the employer or contractor over the employé or laborer. There must be a corresponding relation by which the laborer works with the permission of his contractor or employer, or the man who has him under

authority. The word "permit" here does not apply generally to the citizenship. If so, then any man who happens to know of the fact that the laborer is working beyond eight hours and does not object to it might be held for permitting that laborer to work. So the statute necessarily carries with it the relation of employer and employé, or the party having charge of the work has also charge of the laborer, with corresponding authority over him. We do not believe the testimony so shows in this case; in fact, it excludes the idea.

The evidence not being sufficient, the judgment is reversed, and the cause remanded.

HARPER, J., absent.

KELLEY v. STATE. (No. 4162.)

(Court of Criminal Appeals of Texas. Nov. 1, 1916. Dissenting Opinion Nov. 22, 1916.)

1. CRIMINAL LAW \S 829(5)—HOMICIDE \S 96(1)—ASSAULT TO MURDER—RESISTANCE TO ARREST—INSTRUCTIONS.

One is not justified in resisting officers attempting to arrest him if he knew that they were officers and what their purpose was, even though they did not inform him of those facts, and therefore, in a prosecution for assault to murder an officer, it was not error to refuse requested charges that if the officers did not inform defendant who they were, and that they had come to arrest him, he was justified in resisting them, even to the extent of killing them; the court's charge and other charges given at defendant's request having fully informed the jury as to defendant's right to resist an illegal arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829(5); Homicide, Cent. Dig. \S 124; Dec. Dig. \S 96(1).]

2. HOMICIDE \S 276—ASSAULT TO MURDER—SUFFICIENCY OF EVIDENCE—RESISTANCE TO ARREST.

In a prosecution for assault to murder an officer, evidence held sufficient to take to the jury the issue whether defendant knew that the other was an officer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 569; Dec. Dig. \S 276.]

3. HOMICIDE \S 300(3)—ASSAULT TO MURDER—INSTRUCTIONS—RESISTANCE TO ARREST.

In a prosecution for assault to murder an officer, instructions as to appellant's right to defend his person and an intrusion into his room held sufficient.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 617; Dec. Dig. \S 300(3).]

Davidson, J., dissenting.

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Frank Kelley was convicted of assault to murder, and he appeals. Affirmed.

See, also, 185 S. W. 874.

W. F. Bane and El. J. Gibson, both of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment as-

essed at seven years' confinement in the state penitentiary.

There are four bills of exception; three to the refusal of the court to give special charges requested, and the fourth embodying appellant's exceptions to the charge as given. We do not deem it necessary to discuss each of them separately, but rather all four at one time, because they each present the same question, in substance, and that is, the failure of the court to give in charge articles 289 and 290 of the Code of Criminal Procedure, which relate to an officer forcibly entering a house to make an arrest, and in making an arrest, both articles providing that the officer shall make it known that he is an officer, and that he is there for the purpose of making an arrest. Three officers, in citizens' clothes, went to appellant's room at night for the purpose of arresting him. They knocked on his door, and he asked, "Is that you, Dave?" The officer replied, "Yes." Dave was a friend of appellant, whom he was expecting to come to his room, and when appellant opened the door he saw the three officers, one of them having a pistol drawn. He undertook to close the door, and the shooting began, appellant shooting two of the officers, and this conviction is for the act of shooting one of these officers.

Appellant's contention is that, as these officers testified they did not inform appellant they were officers and there to effect his arrest, he was justified in shooting, and the court should have instructed the jury that it was the duty of the officers to notify appellant that they were officers and had come to arrest him, and, as they admit they did not do so, the court should have in effect instructed the jury appellant was justifiable in resisting and in shooting the men at his door. This is the contention made by appellant in the special charges requested, and in the exception to the charge.

[1] The court tried the case upon the theory that, although these officers did not notify appellant of their purpose, yet, if the jury found (notwithstanding these officers failed to so tell appellant) that appellant was aware they were officers and had come to effect his arrest, appellant would not be justified in shooting the officer, and we think this a correct exposition of the law.

It is true appellant testified he did not know the men, and he thought they had come to his room to effect a burglary, or for some other unlawful purpose; that they did not notify him they were officers, nor the purpose of their mission, and when they undertook to force an entrance to his room he shot to protect himself and his domicile. If the jury found that state of facts to be true, he should have been acquitted, and this we do not think any one would question.

[2] But the state contends that, although the three men who went to the door and

knocked did not explain their purpose to appellant, yet the facts and circumstances in the case are such as to authorize the jury to find that he did know they were officers and they were there to arrest him. And as raising this issue, the state proved, and appellant admitted, that he that night had committed two acts of highway robbery; that the officers went to the door and knocked, and men on an unlawful mission do not generally give notice of their presence on occasions of this character; that appellant, while testifying that he did not know they were officers there to effect his arrest, yet stated after he closed the door he went to the window for the purpose of escaping through the window, and that one defending his residence would not be hunting places to escape; that, when he got his head out of the window, an officer stationed there fired at him and grazed the back of his head; that he then exclaimed, "I will surrender," or, "I will give up." And we think these facts and circumstances are such as to authorize the court to submit to the jury the issue of whether or not appellant knew they were officers, intending to arrest him, when he shot Officer Smith. It is true, appellant in his testimony would explain these circumstances, yet the court and jury were not compelled to accept his explanation.

[3] Appellant is on trial, and not Officer Smith. Mr. Smith and those with him may not have done their whole duty under the law. Under the law, it may be contended that when they knocked on the door and appellant asked, "Is that you, Dave?" they should have answered, "No, we are officers here to arrest you for the robbery of the Caywoods and the robbery at the drug store," but the desperate methods used in the perpetration of these two robberies made the officers aware they would be taking their lives into their hands to have so answered. But their failure to do so would not authorize appellant to shoot them, or either of them, if he was in any way made aware of the fact they were officers and were there to arrest him. It is appellant who is on trial, and it is the information he had and the motive moving him to fire the shots by which he is to be judged, and not the motives of the officers. That the officers did not specifically notify him of their mission would be a circumstance tending to show he had no notice they were officers, and the court admitted the testimony on that theory; yet this is not conclusive proof that he was not aware of their purpose and mission. If he was aware of their purpose in coming to his room—that is, to effect his arrest—he would not be authorized to slay them, no matter how negligent in the performance of their duty they might have been.

The court instructed the jury, after defining properly what would be an illegal arrest:

"In this connection, you are charged that, though you find and believe from the evidence

that the defendant was guilty of a felony, yet if he was not at the time about to escape, and there was time for the officers to procure a warrant for his arrest, then you are instructed that said arrest of defendant without a warrant (if they did so arrest him) was illegal, and that defendant had a right to resist same, using such force as was necessary, going even to the extent of killing said Smith and Eimicke or either of them, if such killing was necessary to prevent said illegal arrest; and if you find and believe under this charge that said arrest was illegal as herein defined, and that the injury inflicted upon the said Frank Smith, if any, was made while resisting arrest, or if you have a reasonable doubt thereof, then you will acquit the defendant and say by your verdict not guilty."

Again, on the question of using more force than was necessary in effecting the arrest, the court instructed the jury:

"You are hereby instructed at the request of the defendant that though you may find and believe from the evidence that the officers, Smith, Eimicke, and Lane, had information from a credible person that the defendant herein had committed a felony, and though you believe said officers had a lawful right at said time to arrest the defendant, yet if you find and believe from the evidence that the power to arrest was, by them, or either of them, exercised in such a wanton and menacing manner as to threaten the defendant with loss of life or some serious bodily harm, then you are instructed said defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense against the power to arrest exercised in a wanton and menacing manner, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of the said Lane, Smith, and Eimicke or either of them, or if you have a reasonable doubt thereof, then you will acquit the defendant and say by your verdict not guilty."

In his main charge, the court instructed the jury:

"You are therefore instructed that if you believe from the evidence, or have a reasonable doubt thereof, that the said Frank Smith, or one George Eimicke, or one E. B. Lane, or either or all of them, just previous to the time of the assault, if any, alleged in the indictment, attempted to force an entrance into the room occupied by the defendant; and if you further believe from the evidence, or have a reasonable doubt thereof, that at the time of attempting to force such entrance, if they did attempt to force an entrance, the said Frank Smith or said George Eimicke or said E. B. Lane, or either or all of them, had a pistol or pistols in their hands; and you further believe from the evidence, or have a reasonable doubt thereof, that the defendant saw said pistol or pistols, and that viewed from the defendant's standpoint and viewed in the light of all the surroundings, facts, and circumstances, the defendant reasonably believed that he was about to be unlawfully attacked and was about to receive death or serious bodily injury at the hands of the said Frank Smith or said George Eimicke or the said E. B. Lane, or either or all of said men, or that the defendant reasonably believed that said Smith, Lane, and Eimicke, or either or all of them, were attempting to enter said room for the purpose of burglary or the commission of a felony, or were attempting to force an unlawful intrusion into the room of defendant, or were attempting to make an unlawful or illegal arrest of the defendant, and that he (the defendant), acting under a reason-

able apprehension of such danger, unlawful intrusion, or unlawful arrest, if any, at the time he did shoot said Frank Smith, if the defendant so shot him—then, if you so find, or have a reasonable doubt thereof, you are charged that such assault, if any, committed by the defendant upon the said Frank Smith, if he did so commit it, would be justifiable upon the grounds of his own necessary self-defense or in defense of his personal property or in defense of his domicile, and if you so believe, or have a reasonable doubt concerning such fact, you will acquit the defendant and say by your verdict not guilty.

"You are further charged that if you find and believe from the evidence, or have a reasonable doubt thereof, that at the time the officers Smith, Lane, and Eimicke effected the arrest of the defendant at the rooming house on the corner of Elm and Hawkins streets in the city of Dallas, Tex., the defendant did not know and did not have reasonable ground to believe that said Smith, Lane, and Eimicke were officers attempting to effect the arrest of the defendant at said time and place; and you further find and believe from the evidence, or have a reasonable doubt thereof, that the acts and conduct of said Smith, Lane, and Eimicke, or their acts coupled with their words, at said time and place reasonably created in the mind of the defendant a belief that the said Smith, Lane, or Eimicke were burglars or robbers attempting to force an entrance to his room for the purpose of committing the offense of theft or any other felony, or that such acts or words, or acts coupled with the words of the said Smith, Lane, and Eimicke, or either or all of them, if any, created in the mind of the defendant a reasonable belief that he was about to receive an unlawful attack from the said Smith, Lane, or Eimicke, which placed the defendant in danger of death or serious bodily injury—then, if you so find, you are instructed that the defendant had the right to use all necessary force to repel such intrusion into his room by said Smith, Lane, and Eimicke, or either or all of them, even going to the extent of taking the life of either or all of said men, and it matters not whether such danger be real or apparent, if it reasonably appeared to the defendant that such danger did in fact exist.

"If you believe that the defendant committed an assault as charged, if any, as a means of defense, believing at the time he did so (if he did so) that he was in danger of being robbed or of losing his life or of serious bodily injury at the hands of said Smith, Lane and Eimicke, or either of them, or if you have a reasonable doubt thereof, then you will acquit the defendant, and say by your verdict not guilty. * * *

"You are further charged that it matters not whether such danger, if any, did in fact exist; but it is only necessary that the defendant reasonably believed that such danger did in fact exist, and, if acting upon such reasonable belief, the defendant would be justifiable in using all necessary force to protect himself against such danger—whether the danger was either real or apparent.

"You are further charged that if you find and believe from the evidence, or have a reasonable doubt thereof, that the arrest of the defendant by said officers Smith, Lane, and Eimicke was an illegal arrest, or if you further find and believe from the evidence that, viewed from the standpoint of the defendant in the light of all the surroundings and circumstances of the case, the defendant reasonably believed such arrest was an unlawful or an illegal arrest, or if you find that the defendant reasonably believed that said Lane, Eimicke, and Smith were about to make an unlawful intrusion into defendant's room, then, if you so believe or have a reasonable doubt thereof, you are instructed that the defendant had the right to use all necessary force in overcoming such, either real or apparent, illegal arrest or unlawful intrusion, if any, or such ar-

rest as the defendant reasonably believed to be unlawful or illegal.

"You are further charged that, in passing upon the defendant's case, the jury should view all of the facts from the defendant's standpoint. Each juror should place himself as nearly as may be in the position of the defendant at the time of the assault, if any, and determine from all of the facts and circumstances and surroundings as they appeared to defendant at the time of the assault, if any, whether an apprehension or a fear of death or serious bodily harm was reasonable; and, if you so find, you should acquit the defendant and say by your verdict not guilty."

Having thus instructed the jury, we do not think they could possibly have been misled as to appellant's right to defend his person and an intrusion into his room, if he did not know they were officers and their mission was to arrest him for the robberies committed by him that night.

The judgment is affirmed.

DAVIDSON, J. I cannot concur in this affirmance.

DAVIDSON, J. (dissenting). I disagreed with my Brethren on the affirmance. They held the charge was sufficient, and the case correctly tried. The evidence demonstrates that appellant after midnight, in the "wee small hours of the morning," was at his hotel in his room retired for the night; that he was aroused by some one at his door. He asked if that was his friend and companion, calling his name. He was informed that the caller was the friend mentioned. He opened the door to admit him, and was confronted by three strangers in citizens or "plain clothes," who testified on the trial they were officers in "plain clothes." They were entire strangers to him. They had no warrant for the arrest of appellant. They went to his room at that late hour of the night on information they had received of his whereabouts. It seems that sometime early the same night appellant and his friend had committed robbery in Oak Cliff, and officers were seeking his arrest. One of the "plain clothes" officers undertook to enter. They were armed, and the shooting began. One of the officers was wounded. I cannot agree with my Brethren that appellant knew that these parties were officers and he was trying to make his escape. They had no warrant for his arrest and misled him by making the statement that the speaker was his friend. This was not true, and admitted by the witnesses in testifying to be untrue. They were all strangers to appellant. They knocked at his door long after midnight, with nothing to indicate to him their official rank or why they were there. They did not notify him at any time of their official rank or their purpose, but misled him by the speaker telling him that he was his looked-for friend. The majority seem to place this upon the theory that the officers were authorized to pursue and ar-

rest appellant without a warrant or to notify him of the fact that they were officers at his room at that time of the night. This is not the law in Texas. There is nothing to indicate that he was escaping, or trying to escape. He was in bed locked in his room for the night, with no purpose indicated in this record of getting out of that room or bed. He had left the place of the alleged robbery in Oak Cliff, and had come to Dallas and retired for the night. This was not indicative of flight or seeking to escape. If appellant knew they were officers, we might have a different proposition; but there is nothing to indicate that he so knew. In fact, the evidence demonstrates the contrary. Not only so, but until he opened the door he believed otherwise. There was nothing to indicate to him the purpose of the visit of three men, and they did not disclose their purpose. So far as he is concerned, they may have come to him as robbers or people intending to do him violence, and he could readily have so believed. The last and most remote conjecture that would come to his mind was that they were officers. They had ample opportunity to so inform him, but not only did not, but misled him by stating what was not true.

It is but a natural conclusion: First, that the spokesman was his friend. Second, that he was intentionally misled. Third, that he was not halted by officers as such. Fourth, that strangers coming to his room at an unseemly late hour were bent on purposes unknown but suspicious to appellant. Fifth, those strangers had as much time to inform appellant why they were there and their mission and who they were as they did to mislead and falsify as to who they were and why they were there. Sixth, it is evident he was misled and did not know who they were, but believed the speaker to be his friend. Seventh, these officers could have as readily and easily told him the truth as to who they were and their mission as they did to mislead him; it would have taken no more time and brought less trouble. Eighth, the statute requires officers to notify appellant of their presence and official character and purpose. Ninth, the law did not and does not authorize officers to misinform and mislead, but it does require them to give notice of their reasons for calling at night under such circumstances as indicated in this record. That there may be no mistake about it, I quote article 289, Vernon's Criminal Procedure, p. 143:

"In case of felony, the officer may break down the door of any house for the purpose of effecting an arrest, if he be refused admittance, after giving notice of his authority and purpose."

Apropos of this, they did not notify appellant of their mission for arrest; he did not refuse them admittance, thinking they were

his friends; nor did the officers give notice of their authority or purpose, but, on the contrary, told him they were somebody else. Article 290 may also be cited here:

"In executing a warrant of arrest, it shall always be made known to the person accused under what authority the arrest is made; and, if requested, the warrant shall be exhibited to him."

There was no warrant in the hands of the officers in this instance, and, of course, none exhibited, and not only that, but appellant was not aware of the fact they were officers, because they misled him as to their identity and purpose. While the court charged in a general way that, if appellant knew they were officers, he had no right to resist. The state's contention was, after the shooting was over he ran to a window to get out and get away, and that he discovered some officers on the outside dressed in official clothes, and dating back from that discovery they charged him with notice of the fact he knew who the three men at the door were. This is rather a violent presumption against the facts and against the law and against the innocence of the accused. The accused is to be tried from his standpoint of view. There was nothing to indicate the officers could not obtain a warrant before his escape, because the man was in bed, and was not trying to escape; but the court charged that if the defendant was not aware, or if there was a reasonable doubt of the fact that he was not aware, they were officers, he would not be guilty of resisting arrest. This was a direct thrust at his right of defending himself from his bedroom at night against unknown trespassers or men he believed to be trespassers, and in charging the law it must be favorably given to defendant as he viewed it. If appellant was not aware that these officers came to arrest him, or there was a doubt about it, he had the right to resist. These officers could have informed him of their mission, but did not. They had ample time to do so, and this is demonstrated by the fact that they called twice to appellant before he answered, and when he did answer they misled him as to who they were, and obtained entrance to his door under the theory that he was admitting his friend and associate. It would hardly justify discussion to arrive at the conclusion that the officers had as much time to notify him they were officers and wanted to arrest him, and therefore ask admittance, as they did to mislead him as to who they were. I do not care to pursue this matter further.

There are other matters in the record, but I do not understand how this defendant has had a fair trial under this record and under the statutory laws of this state. I cannot therefore agree to the affirmance. I do not believe the decision correct. I respectfully enter my dissent.

KELLEY v. STATE. (No. 4251.)

(Court of Criminal Appeals of Texas. Nov. 1, 1916. Dissenting Opinion, Nov. 22, 1916.)

1. CRIMINAL LAW §980(2)—PLEA OF GUILTY—EVIDENCE.

Under Code Cr. Proc. 1911, art. 566, providing that when an accused pleads guilty to an offense, if the punishment is not absolutely fixed by law and beyond the discretion of the jury, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereon, and a charge requested by defendant and given by the court that, notwithstanding the plea of guilty, the jury must be satisfied of his guilt beyond a reasonable doubt, the state could introduce all the testimony it had to establish his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2494, 2495; Dec. Dig. § 980(2).]

2. CRIMINAL LAW §351(3, 4)—ADMISSIBILITY OF EVIDENCE—FLIGHT—RESISTANCE TO ARREST.

In a prosecution for crime, the state may prove the flight or attempted flight and resistance to arrest by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 779, 780, 930, 931; Dec. Dig. § 351(3, 4).]

3. CRIMINAL LAW §1093—APPEAL—BILLS OF EXCEPTION—ADMISSIBILITY OF EVIDENCE—EVIDENCE IN PART COMPETENT.

Bills of exceptions to the admission of the entire evidence as to resistance to arrest are not sufficient to show error in admitting evidence of the details and circumstances of the resistance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.]

4. CRIMINAL LAW §814(3)—REQUESTED INSTRUCTIONS—RESISTANCE TO ARREST—APPLICABILITY TO EVIDENCE.

Where the evidence shows that the officers unquestionably had a right to arrest defendant without an assault on a charge of robbery, and that they attempted to do so in a proper manner, requested charges, that resistance to unlawful arrest as therein defined should not be considered a circumstance in determining his guilt of robbery, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. § 814(3).]

5. CRIMINAL LAW §351(4)—RESISTANCE TO ARREST—LEGALITY OF ARREST—EVIDENCE.

In a prosecution for robbery, evidence held to show that the officers whom defendant resisted had a right to arrest him without warrant and attempted to do so in a proper manner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 780; Dec. Dig. § 351(4).]

Davidson, J., dissenting.

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Frank Kelley was convicted of robbery with firearms after entering a plea of guilty, and he appeals. Affirmed.

W. F. Bane and El. J. Gibson, both of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction of robbery with firearms,

and appellant's punishment assessed at 99 years in the penitentiary.

This is the second appeal, the first being reported in 185 S. W. 570. The opinion there sufficiently discloses the character of case. No question arises on this appeal on which the judgment was then reversed.

Appellant on this, as on the former trial, pleaded guilty, after being properly and fully admonished by the court of the consequences, and strictly in conformity with the statute. Article 565, C. C. P. He did not testify.

[¶] In charging the jury, the court gave that which was specially requested by appellant, which, after stating the character of the charge against him by the indictment and the fact that he had pleaded guilty after being duly admonished, etc., as required by the statute, in a separate paragraph told them:

"Notwithstanding said plea of guilty has been entered by defendant, yet, before you can convict the defendant, you must believe from the evidence beyond a reasonable doubt that the defendant is guilty of the offense charged. * * *"

Then follows a definition of the offense as prescribed by statute, and requires the jury to believe from the evidence beyond a reasonable doubt that he was guilty before they could convict him. Under this charge, notwithstanding he pleaded guilty, the state had to prove his guilt beyond a reasonable doubt, and it was proper that the state should then introduce all the testimony it had to without doubt show his guilt. It could not be held that the state was thereupon merely to introduce only a part of its evidence to show his guilt. It had the right to introduce all of it. The statute (article 566, C. C. P.) expressly requires that, when an accused pleads guilty, if the punishment is not absolutely fixed by law and beyond the discretion of the jury to graduate the punishment in any manner, a jury shall be impaneled to assess the punishment "and evidence submitted to enable them to decide thereupon."

[2] It has uniformly and in a great many cases been held by this court, and it is the law, that the state may prove the flight, or attempted flight, of the defendant and the attendant circumstances as a fact to help show the guilt of the defendant. Section 135, p. 78, 1 Branch's An. P. C., and the cases there collated.

It is equally well settled that where a party is arrested, or sought to be arrested, for an offense, and he resists arrest, it is a legitimate fact to be proved. Mitchell v. State, 52 Tex. Cr. R. 39, 106 S. W. 124; Moreno v. State, 71 Tex. Cr. R. 461, 160 S. W. 361; 2 Jones on Ev. § 287.

[3] There are quite a number of bills of exceptions herein. It is unnecessary to discuss each separately. A number of them present the same question, or such a kindred question, as that the questions can be deter-

mined without separately discussing each bill.

The state introduced several police officers, who participated in arresting appellant a few hours only after the commission of the offense, and each testified to such a state of facts as to unquestionably show that appellant both attempted to flee, and also that he resisted arrest when they undertook to arrest and did arrest him for the offense charged. Each of appellant's first several bills quotes in full both on direct and cross examination the testimony of each of these witnesses on the points stated, and states that he objected to the whole of the testimony of each on the ground that it was immaterial, irrelevant, proved another and different offense committed by appellant at another and different time and place, was no part of the res gestæ of the offense herein, but that if it was admissible for any purpose it was not competent or proper for the state to prove the details and minute circumstances surrounding and accompanying the same. The court in qualifying each of these bills stated that the testimony of said respective officers was admitted for the purpose of showing flight and attempted flight and resistance of an arrest and the circumstances surrounding his arrest on the charge herein. On the previous appeal, we correctly and specially held that this testimony was admissible. The bills in no way point out, or attempt to point out, what the details and minute circumstances were which he claimed were inadmissible. Unquestionably, the testimony of each of these officers, not only tended to show, but did actually show, that appellant, as stated, attempted flight and resisted arrest when these officers sought to arrest him for the heinous crime so recently committed by him, and for that reason their testimony was clearly admissible. If there were any details and minute circumstances in their testimony which were inadmissible, it was the duty of the appellant at the time to specifically object to that part and point it out in his bill, which he did not do. The law is well settled that where evidence is introduced over objection and some of it is admissible and some of it is not, but all is objected to, no error is shown. It is necessary that the objectionable part must be specially pointed out and objected to instead of objecting to the whole. Section 211, p. 135, 1 Branch's An. P. C.; *Martin v. State*, 189 S. W. 264, recently decided, wherein we collated and cited the authorities on this point. So that none of appellant's bills on this subject show any error.

[4, 5] Appellant has other bills to the refusal of the judge to give special charges requested by him. These we consider together. In one, he wanted the judge to instruct the jury that, unless they believed beyond a reasonable doubt that the officers arresting him made known to him the authority under which they were acting, their identity, and

the reason for his arrest, it was not unlawful for him to resist such arrest; and if they had a reasonable doubt concerning the officers, or either of them, making known to him their authority and the reason for his arrest, then the resistance on his part was legal.

In another, he wanted the court to charge the jury that the law requires that in making arrests the officer shall always make known to the accused person, if he has time or opportunity, under what authority the arrest is made and the reason for his arrest.

The judge, in qualifying these bills, stated:

"The testimony shows that, at the time the officers knocked on the door of Kelley's room at the Williams Hotel, Kelley opened the door, looked out, and almost immediately began to shoot; that Police Officer Eimicke was shot before he entered said room; and that Kelley continuously from the time he opened said door shot at Police Officer Frank Smith until said officer left said room.

"The testimony further shows that, after the witness Smith had left Kelley's room, Kelley slammed the door, went to the window, and looked out on the sidewalk; that Police Officer Stepp was standing just below said window on the sidewalk; that said Stepp was in full uniform; that there was plenty of light where he was standing; and that Kelley discharged his pistol in the direction of Stepp, the bullet striking the sidewalk about three feet from where Stepp was standing.

"The testimony of C. M. Foraker discloses the fact that, in addition to Police Officer Stepp, Police Officer Yeager was also on the sidewalk and visible from the window, and that said Yeager was in full police uniform.

"The testimony further shows that the witness C. M. Foraker, subsequent to the firing of the shot of the defendant Kelley that struck the sidewalk near Police Officer Stepp, that the defendant Kelley put his head out of the window, and that Officer Foraker shot at him, the bullet going through the defendant Kelley's hat.

"On cross-examination the witness Foraker testified that he was in full uniform.

"From the foregoing testimony it is seen that the defendant Kelley, at the time he opened the door to his said room, had full opportunity to see that the men were officers; that they did not have time after the opening of the door to notify Kelley that they were officers, but, on the other hand, Kelley immediately began to shoot upon the opening of said door; that Kelley at the time he was at the window before firing the shot at Stepp had full and ample opportunity to see both Officers Stepp and Yeager on the street below."

In another, he wanted the court to charge that if the jury believed said officers, or either, forced an entrance into the room of defendant without making themselves known to him as officers and without stating their purpose, then said officers stood in the same relation to him as any other citizen, and he had the right to defend himself; and if the acts or words, or both, of said officers, created in his mind a reasonable apprehension that he was in danger of losing his life or suffering serious bodily harm at the hands of said officers, or either of them, then he had a right to defend himself from such real or apparent danger, and he was not bound to retreat in order to avoid the necessity of killing them; and if they believed he committed the assault upon said Smith and Eimicke as

a means of defense under the circumstances, or if they had a reasonable doubt of it, then that he acted within his legal rights, and his conduct could not be considered as a circumstance against him.

In another, he wanted the court to charge the jury that if they believed that he was at his place of residence, and neither of the arresting officers made known to him their authority as officers or their purpose, then the officers had no authority or right to force an entrance into his room, and that, if they did, their acts were illegal, and he had a right to prevent such intrusion, even to the extent of killing them to prevent their intrusion; or if they had a reasonable doubt of it, and he used no more force than was necessary, he was guilty of no offense, and his conduct at the time must not be considered as a circumstance against him.

The first of these bills just stated the court qualified by stating that there was no evidence in the record raising this issue, and therefore no such charge was necessary. The other, he qualified as follows:

"The testimony does not disclose that the officers attempted to force an entrance into the room of the defendant until after the defendant voluntarily opened the door to said room and had looked out and had seen said officers and had begun to shoot at them; that entrance to said room was not made by said officers until after defendant had begun to shoot, at which time said Frank Smith did force an entrance into said room, was shot by the defendant; and that officer Eimicke in attempting to enter said room was shot by the defendant. There being no testimony in the record that said officers attempted to force an entrance to said room before the defendant began to shoot, the issue contained in the special charge complained of in this bill of exceptions was not raised by the testimony, and a charge thereon was not required."

In another, he wanted the court to charge that, even though he was guilty of a felony, yet if he was not at the time about to escape, and there was time for the officers to procure a warrant for his arrest, then his arrest without a warrant was illegal, and he had a right to resist, even to the extent of killing the said officers, or any of them, if it was necessary to prevent such arrest, and, if they believed this, then not to consider his acts and conduct as a circumstance against him.

In another, he requested a charge along the same line; and, in still another, he requested another charge along the same line.

The court in qualifying each of these bills said:

"The testimony disclosed by the statement of facts in this case shows that one Dave Weidner, who was with Kelley at the time of the robbery of the said J. M. Caywood, was arrested by Officer Plant at about 12:30 o'clock on the night of the robbery; that said Weidner was thereafter taken to the oil station in Oak Cliff, where he was identified by said Caywood and others as being one of the men who had robbed said Caywood; that said Weidner was from said oil station taken back to the city hall of the city of Dallas; that the said Weidner there informed the officers as to who it was who assisted him in

the robbery of said Caywood about 20 minutes before said officers went to the Williams hotel (which was somewhere in the neighborhood of 8 o'clock in the morning); that said Weidner had told said officers that he and Frank Kelley had the room at said Williams hotel, said room being No. 7. The testimony of the witness Frank Smith shows that, at the time of the arrest of the defendant Kelley, the defendant Kelley was fully dressed.

"From the foregoing testimony it seems that the officers received the information disclosing the identity of Kelley as being one of the men who robbed said Caywood at a very early hour in the morning; that said Kelley was fully dressed at the time arrested; that he occupied a room in a hotel, and that said officers had been informed by J. M. Caywood, a reputable person, of the commission of said offense; that one of the principals in the robbery, Dave Weidner, had advised the officers as to the identity of the other man; and that, because of the lateness of the hour and all the facts and circumstances surrounding the transaction, the officers did not have an opportunity to make a complaint against said Kelley and obtain a warrant for his arrest. The issue complained of in said bill of exceptions and as covered by the special charge requested is not raised by the testimony in this case, and no charge was required thereon."

In his only other bill, he wanted the court to charge that, although the jury might find and believe from the evidence that the said officers had information from a credible person that he had committed the offense charged, and even though they believed they had a lawful right to arrest him, yet if they believed such authority was exercised in such a wanton and menacing manner as to threaten him with the loss of life or serious bodily harm, then he had the right to defend himself as it appeared to him, and he would not be bound to retreat to avoid the necessity of killing them, even though they had the legal authority to arrest him; and if he exercised only such force as was necessary to defend himself, or if they had a reasonable doubt thereof, then not to consider his acts and conduct as a circumstance against him. The court, in approving that bill, did so with this qualification:

"There is no testimony in the record raising the issue embodied on the requested charge of the defendant, the refusal of which is complained of in this bill. The record as shown by the statement of facts discloses that the defendant Kelley, immediately upon opening the door to his said room, began to shoot, and continued to shoot until the witness Smith had retired from said room to the hall; that Kelley thereupon slammed the door to his said room, went to a window of said room, and discharged his pistol out of said window in the direction of Police Officer Stepp, who together with Police Officer Yeager were in full uniform standing beneath said window; that the bullet struck the sidewalk within three feet of the said Stepp; that Officer Foraker, subsequent to the firing of this shot by said Kelley, fired a shot at Kelley from the window of the room adjoining the room which Kelley occupied; that at the time of firing said shot Kelley's head was protruding from the window of said room, the bullet from Foraker's gun going through Kelley's hat; that, immediately upon Kelley's hat being pierced by said bullet, said Kelley called out and said to the officers, 'I give up,' and permitted said officers to take him into custody."

Some of these charges announced correct legal propositions in a proper case where the evidence would make them applicable, but they were inapplicable in this case. As qualified by the court, neither of his bills presents any reversible error. We think it unnecessary to discuss any of these matters. *Cortez v. State*, 43 Tex. Cr. R. 386, 66 S. W. 453; *Smith v. State*, 48 Tex. Cr. R. 239, 89 S. W. 817; *Miller v. State*, 32 Tex. Cr. R. 319, 20 S. W. 1103; *Miller v. State*, 31 Tex. Cr. R. 639, 21 S. W. 925, 37 Am. St. Rep. 836; *Stewart v. State*, 174 S. W. 1077. As stated, appellant himself did not testify at all. He had no defense whatever. He plead guilty. Under the circumstances of this case, there can be no doubt that appellant committed the crime alleged against him. He attempted to secrete himself under an assumed name in another part of the city of Dallas from where he had committed the crime. There can be no doubt but that he anticipated and momentarily expected the officers would attempt to arrest him for the crime, whether with or without a warrant; that he deliberately prepared himself to flee from the room where he was whenever he discovered that they were after him, and prepared himself to shoot and kill them when they did attempt to arrest him, and did actually shoot two of them and shot at another as long as he had ammunition and could shoot. The officers unquestionably had the right to arrest him without a warrant, and attempted to do so in a proper manner under the circumstances of this case. Their action merits commendation and not condemnation.

The judgment is affirmed.

DAVIDSON, J. I cannot agree this case should be affirmed under the record as shown by the transcript.

DAVIDSON, J. (dissenting). I desire to say I cannot agree with my Brethren that all the facts in detail in regard to the assault case in cause No. 4162 were admissible in this case. That case has no connection with the robbery case, so far as defendant is concerned. The robbery case had ended; he pleaded guilty to the robbery. When the robbery occurred, he and his companion went away over to Dallas three or four miles distant; appellant going to bed. That transaction was completed. The robbery was a finality. If it was thought necessary or legal to introduce the fact that he assaulted the officers, certainly the details of it ought not to have been admitted. We have an old familiar rule where an extraneous crime or offense, or one thought to be a crime or offense, is used by the state, that the details and history of the case cannot be developed in the case on trial. Two cases were being tried at the same time against appellant, the robbery case at Oak Cliff, and the assault case in Dallas. It was not necessary to make the

robbery case understood in any manner to introduce the details of the transaction in Dallas, where the officers went to appellant's room and had the shooting scrape with him. What effect it may have had on the minds of the jury cannot be told except in the light of the verdict in the robbery case, which is 99 years. With the details of the assault case out of this record, the verdict may have been much less; but we do know that he was awarded 99 years, and this testimony may have produced the heavy verdict. In the judgment of the writer, it was clearly inadmissible. Appellant pleaded guilty to the robbery. The details of the robbery itself were admissible, of course, because the statute provides that in cases of pleas of guilty, among other things, evidence shall be introduced before the jury. Evidently the state thought defendant might escape with a smaller punishment for the robbery, or might not get as heavy punishment as desired. A sufficient amount of the details of the robbery should have gone to the jury so that they might arrive at a fair conclusion as to the amount of punishment to be meted out on account of the robbery. A case should not be burdened with the details of an assault and shooting scrape case occurring at different times and places. I do not believe appellant has had that fair trial accorded him by the law. Therefore, I cannot agree to this affirmance. I do not care to pursue the matter further. I respectfully enter my dissent.

VANOE v. STATE. (No. 4165.)

(Court of Criminal Appeals of Texas. Oct. 18, 1916. Rehearing Denied Nov. 15, 1916.)

1. INTOXICATING LIQUORS ⇨212—INDICTMENT—ALLEGATION OF SEPARATE SALES.

An indictment for pursuing the occupation of selling intoxicating liquors in prohibition territory, which, after alleging that defendant unlawfully engaged in and pursued the business, alleged that he "did then and there sell to J. H., J. H., R. B., and J. B. intoxicating liquors," did not allege a sale jointly to the persons named, but that the sales were made to each of them.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 252; Dec. Dig. ⇨212.]

2. INTOXICATING LIQUORS ⇨223(6)—PROSECUTION—EVIDENCE.

In a prosecution for pursuing the occupation of selling intoxicants in prohibition territory, persons not named in the indictment were properly allowed to testify that they purchased whisky from defendant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 274; Dec. Dig. ⇨223(6).]

3. INTOXICATING LIQUORS ⇨223(6)—PURSUING OCCUPATION OF SELLING IN PROHIBITION TERRITORY—PROOF OF SALES TO PERSONS NAMED IN INDICTMENT.

In addition to proving that defendant pursued the occupation, the state had to prove that he made at least two sales to persons named in the indictment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 274; Dec. Dig. ⇨223(6).]

4. INTOXICATING LIQUORS **§39** — **PROSECUTION—EVIDENCE.**

In prosecution for pursuing occupation of selling intoxicants in dry territory, the state was properly permitted to introduce into evidence orders of the commissioners' court ordering the election and declaring the result, and the certificate of the county judge showing that publication had been made, though it was not necessary to introduce all of such orders.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 33; Dec. Dig. **§39**.]

5. INTOXICATING LIQUORS **§39**—**PROSECUTION—EVIDENCE.**

In such prosecution only such orders of the commissioners' court as evidence that prohibition has been legally adopted need be introduced in evidence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 33; Dec. Dig. **§39**.]

6. INTOXICATING LIQUORS **§223(2)**—**PROSECUTION—VARIANCE OF PROOF FROM INDICTMENT.**

In such prosecution introduction in evidence of order of commissioners' court ordering election and declaring result, and certificate of county judge showing publication had been made, did not present any variance as to the necessary allegations in the indictment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 268-270; Dec. Dig. **§223(2)**.]

Davidson, J., dissenting.

Appeal from District Court, Bell County; John D. Robinson, Judge.

Leon Vance was convicted of pursuing the occupation of selling intoxicating liquors in prohibition territory, and he appeals. Judgment affirmed.

Ward & Evetts, of Temple, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of pursuing the occupation of selling intoxicating liquors in prohibition territory and his punishment assessed at two years' confinement in the state penitentiary.

The same question is presented in a motion to quash the indictment as was presented in the case of *Cleveland v. State*, 190 S. W. 177, recently decided. For the reasons stated in that opinion, the court did not err in overruling the motion.

[1] The indictment in this case, after alleging that appellant unlawfully engaged in and pursued the occupation of selling intoxicating liquors, alleges that he "did then and there sell to Joe Hall, Jeff Howard, Roe Bliton, and Jim Brown intoxicating liquors." Appellant, in a motion to quash the indictment and by objecting to Jeff Howard, Roe Bliton, and Joe Hall being permitted to testify that they and each of them purchased from appellant intoxicating liquors on various occasions, contends that the indictment alleges a sale jointly to the persons named, and not that sales were made to each of them. We do not think the language used is subject to the construction sought to be plac-

ed thereon by appellant, but that it alleges a sale made to each of the persons named.

[2, 3] Appellant also objected to persons not named in the indictment being permitted to testify that they purchased whiskey from appellant. As appellant was prosecuted for pursuing the occupation of selling intoxicating liquors, any testimony which went legitimately to prove that issue was properly admitted. Of course, in addition to proving that he pursued the occupation, the state had to prove that he made at least two sales to persons named in the indictment, and the court so instructed the jury.

[4-6] There was no error in permitting the state to introduce in evidence the orders of the commissioners' court ordering the election and declaring the result, and the certificate of the county judge showing that publication had been made. It was not necessary to introduce all of these orders, but there was no impropriety in doing so. Only such orders as evidenced that prohibition had been legally adopted were required to be introduced, but that the state went further and showed that each step was legally and properly taken in the premises would present no error. Nor did they present any variance as to the necessary allegations in the indictment.

The charge instructed the jury that they must find that appellant unlawfully engaged in and pursued the occupation of selling intoxicating liquors, and that he made at least "two different and separate sales of intoxicating liquors" to persons named in the indictment before they would be authorized to convict. It is not subject to the criticism contained in appellant's bill of exceptions.

The judgment is affirmed.

DAVIDSON, J., dissents. See *Clark Cleveland v. State*, 190 S. W. 177, decided at this term of court.

CLEVELAND v. STATE. (No. 4164.)

(Court of Criminal Appeals of Texas. Oct. 11, 1916. Rehearing Denied Nov. 1, 1916.
Dissenting Opinion Nov. 22, 1916.)

1. INTOXICATING LIQUORS **§205(2)**—**ILLEGAL SALE—INDICTMENT—SUFFICIENCY.**

Since Rev. St. 1911, art. 5728, providing that in a contest of a prohibition election the district court shall have jurisdiction to try all matters connected with the election, including the petition, proceedings, orders, final count, declaration, and publication of result putting local option into effect, provided, if no contest is filed, it shall be conclusively presumed that the election as held and the result declared are in all respects valid and binding upon all courts, an indictment for illegal sale of intoxicating liquors in prohibition territory, after alleging that the election was held and resulted in favor of prohibition, need not allege publication of the notice of the result, so that an indictment in which it was alleged that the commissioners ordered publication instead of that the county judge ordered publication was

good; the allegation as to publication being surplusage.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 225; Dec. Dig. ¶205 (2).]

2. CRIMINAL LAW ¶719(1)—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL.

Both counsel for the state and the accused should in their argument discuss only the evidence adduced on the trial and legitimate deductions to be drawn therefrom.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1669; Dec. Dig. ¶719(1).]

Davidson, J., dissenting.

Appeal from District Court, Bell County; F. M. Spann, Judge.

Clark Cleveland was convicted of selling intoxicating liquors in prohibition territory, and he appeals. Affirmed.

Ward & Evetts, of Temple, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of selling intoxicating liquors in prohibition territory, and his punishment assessed at one year's confinement in the state penitentiary.

[1] The most serious question in the case is presented in a motion to quash the indictment, on the ground that the indictment alleged "and thereupon the commissioners' court of said Bell county, Tex., did pass and publish an order declaring the result of said election and prohibiting the sale of intoxicating liquors"; the contention being that the indictment should have alleged that the publication was made by order of the county judge, and not the commissioners' court did "pass and publish an order," and that an indictment that fails to allege that the order was published by order of the county judge or as required by law is insufficient. In the *Hode Carnes Case*, 50 Tex. Cr. R. 282, 99 S. W. 98, the question of whether an indictment must contain the allegation that the order had been published by the order of the county judge and an allegation that it had been published by order of the commissioners' court is discussed at length in the opinion of the court, and in the dissenting opinion of Judge Brooks. Theretofore, as shown in the opinion of Judge Brooks, similar forms of indictment had been approved by the court, but the *Carnes Case* has been followed in a number of cases cited in Branch's Ann. Penal Code, p. 690, § 598; the last case decided so holding being *Smitham v. State*, 53 Tex. Cr. R. 173, 108 S. W. 1183. No case has been before this court in which this question was involved since the rendition of the *Smitham Case*, supra, but we would consider the cases conclusive on that question and follow them had not the Legislature, after the rendition of the *Carnes Case*, supra, amended article 5728 (old article 3397), and by this amendment provided that in the contest of an election held on the prohibition question that:

The "district court shall have jurisdiction to try and determine all matters connected with said election, including the petition of such election and all proceedings and orders relating thereto, embracing final count and declaration and publication of result putting local option into effect: And provided that if no contest of said election is filed and prosecuted in the manner and within the time provided, it shall be conclusively presumed that said election as held and the result thereof declared are in all respects valid and binding upon all courts."

It will be noticed that the Legislature by this act, if no contest of the election was held, requires the courts to conclusively presume:

"That the petition and all proceedings and orders relating thereto, embracing final count and declaration and publication of result putting local option into effect, are in all respects valid and binding."

Since the amendment of article 5728 its provisions have been frequently before this court for construction. *Hardy v. State*, 52 Tex. Cr. R. 420, 107 S. W. 547; *Phillips v. State*, 53 Tex. Cr. R. 505, 111 S. W. 144; *Evans v. State*, 55 Tex. Cr. R. 450, 117 S. W. 167; *Romero v. State*, 56 Tex. Cr. R. 436, 120 S. W. 859; *Ex parte Thulemeyer*, 56 Tex. Cr. R. 337, 119 S. W. 1146; *Jerue v. State*, 57 Tex. Cr. R. 214, 123 S. W. 414; *Wooten v. State*, 57 Tex. Cr. R. 91, 121 S. W. 703; *Wesley v. State*, 57 Tex. Cr. R. 278, 122 S. W. 550; *Gipson v. State*, 58 Tex. Cr. R. 405, 126 S. W. 267; *Doyle v. State*, 59 Tex. Cr. R. 61, 127 S. W. 815. In each and all of these cases it has been held that on the trial of a case, if no contest has been instituted, this court must conclusively presume (upon proof that an election had been held and the result declared) that all necessary steps to put it in force have been taken, and no evidence will be admitted tending to show that such election was illegal or proper orders had not been made. In the case of *Jerue v. State*, supra, it is stated that it was desired to prove that the election was illegal because the notice of election was not completed and published in the manner required by law, and it was held:

"Since the passage of the act of the Thirtieth Legislature (article 5728) in respect to contests of * * * elections and the presumption of validity, * * * this point is no longer available to appellant."

In *Evans v. State*, supra, this court says: "It follows, therefore, that the court did not err in refusing to permit appellant * * * to introduce evidence going to show irregularities or defects in the initiatory steps necessary to place local option into effect. It was proper for the court to have the county attorney to introduce sufficient number of the orders of the commissioners' court to show that the county had adopted local option. It was also proper * * * to refuse to permit appellant to contest the validity of said orders."

It is thus seen that since the adoption of article 5728, as amended after the rendition of the opinion in the *Carnes Case*, supra, whenever the question has been presented to the court for review, it has been held that on the trial of a case it is only necessary to

prove that the election was held, and prohibition received a majority of the votes, or had been adopted, and when this proof is made this court and all other courts are required by the statute to conclusively presume that all other steps necessary to putting local option into effect had been taken and were legally done.

Prior to the adoption of the statute it had been held necessary to allege and prove that the publication had been made, and that prohibition did not go into effect until it was shown that the publication had been made in accordance with law, and the Carnes Case and other cases following it held it was necessary to allege and prove that the publication had been legally made. While, if it were an original proposition, we would be inclined to hold that article 5722 was not subject to the construction given it in the Carnes Case, as that article does not provide that the publication shall be made on the order of the county judge, but rather that the county judge shall select a paper in which the order made by the commissioners' court shall be published, yet, but for the amendment of article 5728, adopted after the rendition of the Carnes opinion, and evidently superinduced in part by that opinion, we would not change the holding of the court, but follow the construction there given that article. But the Legislature had the legal right to adopt article 5728, and it has been upheld in opinions by every judge sitting on this court since its adoption, and it has been construed to mean, and in fact says, in the absence of a contest of the legality of the election and the orders declaring the result and publication of the result, the court shall conclusively presume them to be valid and binding upon all courts, and no person on the trial can raise any question of the validity of such orders on the trial of a case.

As it is no longer necessary to prove that the publication had been made, but only that an election had been held in the named territory and prohibition adopted, when the trial court and this court must conclusively presume that prohibition is in force, it is no longer necessary to allege in the indictment that the publication had been made, and, such allegation being no longer essential to the validity of the indictment, if such allegation should be held to be improperly made, it can be and should be treated as surplusage. Mr. Branch in his work on Criminal Law (section 906), correctly states the rule to be:

"If not descriptive of that which is legally essential to the validity of the indictment, unnecessary words or allegations may be rejected as surplusage"—citing *Mayo v. State*, 7 Tex. App. 342; *Warren v. State*, 17 Tex. App. 209; *McConnell v. State*, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302; *Loggins v. State*, 32 Tex. Cr. R. 358, 24 S. W. 408; *Lassiter v. State*, 35 Tex. Cr. R. 540, 34 S. W. 751; *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, 39 S. W. 110; *Clark v. State*, 41

Tex. Cr. R. 641, 56 S. W. 621; *Bolton v. State*, 41 Tex. Cr. R. 642, 57 S. W. 818; *Rawls v. State*, 48 Tex. Cr. R. 622, 59 S. W. 1071.

Again he says:

"If, eliminating surplusage, the indictment so avers the constituent elements of the offense as to apprise defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good in substance, under our Code, and therefore sufficiently charges the offense"—citing *Coleman v. State*, 2 Tex. App. 514; *Burke v. State*, 5 Tex. App. 74; *Mayo v. State*, 7 Tex. App. 342; *Holden v. State*, 18 Tex. App. 91; *Cudd v. State*, 28 Tex. App. 124, 12 S. W. 1010; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302; *Loggins v. State*, 32 Tex. Cr. R. 358, 24 S. W. 408; *Lassiter v. State*, 35 Tex. Cr. R. 540, 34 S. W. 751; *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, 39 S. W. 110; *Lomax v. State*, 38 Tex. Cr. R. 818, 43 S. W. 92; *Clark v. State*, 41 Tex. Cr. R. 641, 56 S. W. 621.

Mr. Bishop, in his work on Criminal Procedure (2d Ed.) vol. 2, § 478, says:

"Surplusage is any allegation without which the pleading would remain adequate. Needless words and averments may ordinarily be treated as mere waste material, having no legal effect whatever. They need not be proved or otherwise regarded."

Eliminating all reference to the publication from this indictment, it would read, omitting formal parts:

"In Bell county, Tex., on the 13th day of November, 1915, an election in accordance with the laws of this state was held under the authority of the commissioners' court of said Bell county, Tex., theretofore duly made, to determine whether or not the sale of intoxicating liquors should be prohibited in Bell county, and the qualified voters at said election did then and there determine that the sale of intoxicating liquors should be prohibited in said county; and thereupon the commissioners' court of said Bell county, Tex., did pass an order declaring the result of said election and prohibiting the sale of intoxicating liquors in said Bell county, Tex., and thereafter, to wit, on or about January 29, 1916, in said state and county, one Clark Cleveland did then and there unlawfully sell intoxicating liquors to Polly Parish, in violation of said law," etc.

It is seen that the indictment informs appellant that prohibition had been adopted in Bell county, Tex., and while it was in force he had unlawfully sold intoxicating liquors to Polly Parish. How could he more specifically have been informed of the charge against him? Our Criminal Code specifically provides in article 475 that matters of which judicial notice is taken and presumptions of law need not be stated in an indictment. This is not only the rule in this state by virtue of the statute above quoted, but, as stated in *Standard Enc. of Pro.* vol. 12, p. 347, it is the rule at common law in the absence of statute. It states the rule to be:

"Neither presumptions which the law makes from facts stated nor matters of which judicial notice is taken by the courts need be stated in an indictment"—citing cases from nearly all the states, including among them *Mischer v. State*, 41 Tex. Cr. R. 212, 53 S. W. 627, 96 Am. St. Rep. 780.

In that case defendant was indicted by the grand jury of Guadalupe county for rape committed in Colorado county. It was

contended that the indictment was defective because it did not contain an allegation that Gaudalupe county and Colorado county were in the same judicial district. The court held that the court was required to take judicial notice of the laws of the state, and therefore it was unnecessary to so allege in the indictment.

Article 5728 provides that, when a prohibition election is held, and not contested within 30 days, when it is proven that prohibition was adopted, this court and all other courts must conclusively presume that the petition was a legal one, and that all proceedings and orders relating thereto, embracing final count and declaration and publication of the result putting prohibition in effect, are in all respects legal and binding. As no evidence will be received to dispute these presumptions, the allegations in the indictment, omitting as surplusage all reference to publication, are sufficient, and the court did not err in overruling the motion to quash the indictment.

We do not wish to be understood to question the correctness of the ruling in the *Carnes Case*, supra, when made, as the law then required proof of publication be made, but, the Legislature having seen proper by later enactment to render it unnecessary to make that proof, and only requiring that proof need be made that an election had been held and prohibition adopted, when all courts must conclusively presume that all orders were made, and legally made, putting prohibition in force, it is no longer necessary to allege and prove that the publication had been made, and therefore the same rule does not now prevail by virtue of the statute that did prevail when the opinion in the *Carnes Case* was rendered.

[2] The only other question presented in the record is one complaining of the remarks of the district attorney. The remarks under ordinary circumstances would be improper, but the court in approving the bill states that the remark was brought about by the argument of counsel for the defendant, and was but in answer to the argument of appellant's counsel. Under such circumstances the language is not such as we would feel authorized to reverse the case on account of. However, we will state that both counsel for the state and appellant should in their argument discuss only the evidence adduced on the trial and legitimate deductions to be drawn therefrom.

The judgment is affirmed.

DAVIDSON, J. (dissenting). My Brethren have affirmed the judgment herein, and what I shall say here will also apply to causes No. 4137, *Pete Hawthorne v. State*, 190 S. W. 184; No. 4165, *Leon Vance v. State*, 190 S. W. 176; No. 4167, *Will Dupree v. State*, 190 S. W. 181. These cases involve the same question.

Omitting all portions except that directly

at issue, the indictment failed to allege that the order had been published as required by law. It alleged that the commissioners' court passed and published an order. The authorities are adverse to this as sufficient pleadings, and are collated by Mr. Branch in his recent *Annotated Penal Code*, on pages 694 and 695. These cases all hold that before there can be a violation of the local option law the result of such election must be so published as to put it into operation. In section 1231 on page 695 Mr. Branch thus states the rule:

"Local option must be shown to be in force. —The order declaring the result in favor of prohibition should be shown in the statement of facts on appeal; the court will not take judicial knowledge that local option is in force, nor of the time when it went into effect."

There are a great number of cases cited in support of that proposition, and, so far as the writer is aware, all of them, without exception, are of the same import. It is also the rule, that local option does not become operative until the order declaring the result has been published for four successive weeks. Mr. Branch has collated these decisions in his valuable *Annotated Penal Code*, on page 696, among others, *Phillips v. State*, 23 Tex. App. 304, 4 S. W. 893; *Jones v. State*, 38 Tex. Cr. R. 533, 43 S. W. 981; *Chenoweth v. State*, 50 Tex. Cr. R. 238, 96 S. W. 19; and *Beaty v. State*, 53 Tex. Cr. R. 435, 110 S. W. 449. I might cite cases at greater length. My Brethren cite a line of cases which hold that a local option election cannot be contested as a collateral matter in the trial of a local option case. The statute so provides. There is a line of cases growing out of that statute which hold that after a certain length of time a local option law shall not be contested. That article will be found in *Revised Civil Statutes* 1911, art. 5728. That contest matter, however, only refers to the election, which has nothing to do with the order of the judge declaring the result by publication. Publication is not a matter of contest. It is the election and manner of holding it, whether there were fraudulent votes and matters of that sort growing out of and incidental to the election itself only which are subject of contest. It has nothing to do with the publishing order of the judge. It will be noticed by the terms of that statute that it only provides for contesting the election. Prosecutions may go on, although there is a contest pending, but in all cases, everywhere, and under all circumstances, so far as the writer knows, the law never goes into effect, nor can a prosecution be maintained under it, until the county judge has made the proper publication, etc. Some of these cases hold that in the trial of parties for the violation of that law the defendant cannot object successfully to the introduction of the order of the commissioners' court declaring the result of the election. But this has nothing to do with the sufficiency of the pleadings in the in-

dictment. That only refers to rules of evidence. The indictment setting out the offense must conform to the statute, and cannot be maintained until the law is in force. The manner of proving the case is one thing; the sufficiency of the indictment or information is a very different proposition. The majority opinion has confused the rules of evidence with proper allegations in the indictment. The indictment must legally allege the offense. The evidence comes only in support of such allegations. It is the rule everywhere understood in our jurisprudence, whether the law be local or general, that a prosecution cannot be maintained until the law under which it is sought to be maintained becomes operative. If the Legislature sees proper to make a general law go into effect immediately, a party could be held liable for subsequent violations of that law. If it goes into effect 90 days after adjournment, prosecutions cannot occur until the 90 days shall pass. If the Legislature should see proper to extend that time and make it operative 6 months or at a later date, the courts would be bound by it. Until the law becomes operative a prosecution cannot be had under it. The Legislature was required by the Constitution to pass reasonable laws whereby the people of counties, justice precincts, cities, towns, and subdivisions can vote on the exclusion of the sale of intoxicants in such territory. The people reserved this right to themselves, and so decreed it in the Constitution. A majority vote have authority to put it into operation. When the vote has been had it does not become operative until the county judge has properly published the result. The Legislature so made it. The people so voted. They understood, and so voted, that it would not be a law until the expiration of the publication, just like they understood that the general law of the state would not be operative until the time fixed by the Legislature when its acts should become operative. Until it has been alleged that the law is operative, there is no sufficient pleading. The indictment must allege an operating law. The rules of evidence and the pleadings in an indictment are quite distinct and different. A sufficient pleading is necessary to admit required facts. Because the accused cannot except to evidence introduced under the article above cited (article 5728, Revised Civil Statutes) affords no reason why the indictment should not allege the offense. Under a code practice such as we have in Texas all necessary elements of the offense must be averred in the indictment to make it sufficient. The evidence is a different thing. The fact that a party may or may not be able to introduce a certain line of testimony under the indictment does not make the indictment sufficient. The sufficiency of the indictment is tested by the terms of the law under which it is framed. That is the

case here. The indictment here failed to allege a case under an operating law. This indictment does not charge the offense, and there is no contention that it does, but my Brethren hold that because appellant could not object to certain testimony, therefore the indictment is sufficient. The authorities they cite in support of their proposition apply only to evidence, and not to allegations in the indictment. These cases have no application as authorities to the proposition for which they are cited. Rules of evidence do not constitute valid indictments. The case must be averred as basis for the evidence.

What I have said here refers also to the cases of Pete Hawthorne v. State, No. 4137; Leon Vance v. State, No. 4165; and Will Dupree v. State, No. 4167. I have thought proper to write this much by way of dissent.

DUPREE v. STATE. (No. 4167.)

(Court of Criminal Appeals of Texas. Oct. 18, 1916. Rehearing Denied Nov. 15, 1916.)

1. INDICTMENT AND INFORMATION \S 79, 119 —UNLAWFUL SALE—CLERICAL ERRORS.

An indictment alleging sale of liquors after an election "therefore duly made and published" was good; the word "therefore" being a clerical error for "theretofore," and in any event being surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 209-214, 311-314; Dec. Dig. \S 79, 119.]

2. INTOXICATING LIQUORS \S 205(2)—ILLEGAL SALE—INDICTMENT—SUFFICIENCY.

Since Rev. St. 1911, art. 5728, providing that in a contest of a prohibition election the district court shall have jurisdiction to try all matters connected with the election, including the petition, proceedings, orders, final count, declaration, and publication of result putting local option into effect, provided, if no contest is filed, it shall be conclusively presumed that the election as held and the result declared are in all respects valid and binding upon all courts, an indictment for illegal sale of intoxicating liquors in prohibition territory, after alleging that the election was held and resulted in favor of prohibition, need not allege publication of the notice of the result, so that an indictment in which it was alleged that the commissioners ordered publication, instead of that the county judge ordered publication, was good; the allegation as to publication being surplusage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 225; Dec. Dig. \S 205(2).]

3. CRIMINAL LAW \S 726—APPEAL—INVITED ERROR.

The accused cannot complain that the state's attorney in argument went beyond the record, if the argument was occasioned, justified, or provoked by accused's attorney, as by the introduction of illegal testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1681; Dec. Dig. \S 726.]

4. CRIMINAL LAW \S 1037(2)—APPEAL—PRESERVATION OF EXCEPTIONS—IMPROPER ARGUMENT.

The accused cannot complain of alleged improper argument of the state's attorney in the

absence of request for written charge to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1891, 2645; Dec. Dig. 6-1037(2).]

5. WITNESSES 6-361(1)—IMPEACHMENT.

Where one accused of unlawful sale of liquors in prohibition territory variously attacked the state's principal witness, whose testimony made out the offense, it was proper for the court to permit the sheriff to testify that the principal witness assisted him in ferreting out violations of the local option law.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1167, 1171-1175; Dec. Dig. 6-361(1).]

6. CRIMINAL LAW 6-361(1)—EXPLANATORY EVIDENCE.

In a prosecution for unlawful sale of intoxicating liquors in prohibition territory, it was proper for the court to permit the state's witness to explain why he had transported whisky, since a witness may always explain his action from his standpoint when attacked.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802-803; Dec. Dig. 6-361(1).]

Davidson, J., dissenting.

Appeal from District Court, Bell County; F. M. Spann, Judge.

Will Dupree was convicted of unlawfully selling intoxicating liquors in prohibition territory, and he appeals. Affirmed.

Hair & Woodward and J. H. Evetts, all of Temple, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully selling intoxicating liquors in Bell county, a prohibition county, and assessed the lowest punishment. This is a companion case to that of Clark Cleveland (No. 4164) 190 S. W. 177, decided on the 11th instant, in an opinion by Judge Harper. Some additional questions arose in this which were not in said Cleveland Case.

After the allegations of the organization, etc., of the grand jury, the indictment avers:

That in said Bell county, Tex., on November 13, 1915, "an election in accordance with the laws of the state of Texas was held under authority of an order of the commissioners' court of said Bell county, Tex., *therefore* duly made and published to determine whether or not the sale of intoxicating liquors should be prohibited in Bell county, and the qualified voters at said election did then and there determine that the sale of intoxicating liquors should be prohibited in said county, and thereupon the commissioners' court of said Bell county, Tex., did pass and publish an order declaring the result of said election and prohibiting the sale of intoxicating liquors in said Bell county, Tex., and thereafter, to wit, on or about the 1st day of January, 1916, in said county and state, one Will Dupree did then and there unlawfully sell intoxicating liquors to H. M. Bryan, in violation of said law"—properly concluding.

Appellant made a motion to quash the indictment on two grounds: (1) That the allegation therein that the commissioners' court did pass and publish an order declaring the result, etc., ought to have alleged that the order was published according to

law or by order of the county judge; (2) that it is alleged that the election was held under authority of an order of the commissioners' court "therefore" duly made, etc., instead of "theretofore" duly made, etc.

[1] The court correctly overruled the motion. It is perfectly apparent from the whole indictment that "therefore" was a mere clerical error for "theretofore," and it could in no way mislead or vitiate the indictment. Again, under the well-settled rule, it could and should be rejected as surplusage. *Goodwin v. State*, 70 Tex. Cr. R. 600, 158 S. W. 275, and authorities therein cited; section 382, White's Ann. C. C. P.; section 497, 1 Branch's Ann. P. C., where he collates a large number of cases directly in point.

[2] As shown by Judge Harper in said Cleveland Case, the first ground to quash would have been good under the decisions collated and cited by Mr. Branch in 1 Branch's Ann. P. C. p. 690, beginning with *Gunning v. State*, 98 S. W. 1057. But, as shown by Judge Harper, these decisions have been superseded and avoided by an act of the Legislature on the prohibition or local option law. By an act approved May 14, 1907 (page 447), the Legislature amended article 3397 of the then Revised Statutes, now Rev. St. 1911, art. 5728, by which it was enacted that:

"At any time within 30 days after the result of the election has been declared, any qualified voter of the county * * * in which such election has been held, may contest the said election in the district court of the county in which such election has been held, which shall have original and exclusive jurisdiction of all suits to contest such election; * * * and said court shall have jurisdiction to try and determine all matters connected with said election, including the petition of such election and all proceedings and orders relating thereto, embracing final count and declaration and publication of the result putting local option into effect; and it shall have authority to determine questions relating to the legality and validity of said election. * * * That all such cases shall have precedence in the district court and appellate courts, and that the result of such contest shall finally settle all questions relating to the validity of said election, and it shall not be permissible to again call the legality of said election in question in any other suit or proceeding; and * * * that if no contest of said election is filed and prosecuted in the manner and within the time provided above, it shall be conclusively presumed that said election as held and the result thereof declared, are in all respects valid and binding upon all courts."

Clearly this statute was enacted for the purpose of avoiding and preventing any other contest about the validity or regularity of such elections and the effect thereof. And in effect this court has uniformly by a unanimous court so held.

In quoting the act of May 14, 1907 (R. S. art. 5728), we have omitted, because we think it unnecessary, another portion thereof, which requires suit to be brought within 60 days after the act took effect in any county, precinct, etc., where prohibition previously

thereto had been put in force. The principles and decisions, whether under the 30 or 60 days' times, respectively, are precisely to the same effect.

In *Hardy v. State*, 52 Tex. Cr. R. 421, 107 S. W. 547, it was shown that the state introduced the order of the commissioners' court ordering the prohibition election, to which appellant objected, because:

"There was a variance in said order to the charge alleged in the bill of information; the information charging that the order made by the commissioners' court ordering an election for the purpose of determining whether or not the sale of intoxicating liquors should be prohibited in said county; whereas the order introduced ordered an election for the purpose of determining whether or not intoxicating liquor should be sold in said county; it being contended that this is a variance"

—and another bill, that the court refused to allow appellant to prove by the county clerk that the clerk did not at any time post, or cause to be posted, any notice of an election. On these two questions this court, through Judge Brooks, held:

"This prosecution was commenced on the 29th day of July, 1907. The bill shows that the state objected on the ground that it was immaterial, and was offered in the nature of a defense to contest the legality of the local option law at a time more than 60 days after the taking effect of the act of the Thirtieth Legislature passed May 14, 1907. We hold that this objection is well taken. Said act provides that contests of elections that had theretofore been had must be contested within 60 days from the taking effect of said law, and not otherwise. The matters complained of would be mere irregularities at best, and this act makes valid and noncontestable anything pertaining to irregularities in the adoption of the local option law. The act itself provides that we shall conclusively presume that said election as held was valid in all things and binding upon all courts. We accordingly hold that said act is valid, and applies to all local option elections, and it clearly applies in this case."

In a companion case, decided on the same day, in an opinion by Judge Davidson, in *Wilson v. State*, 107 S. W. 818, the same thing was held in accordance, as he states, with said *Hardy* decision.

In *Alexander v. State*, 53 Tex. Cr. R. 505, 111 S. W. 145, the court, through Judge Brooks, again held:

"Various objections to the orders of the commissioners' court are in the record, but under an act of the Thirtieth Legislature that went into effect August 11, 1907, which provides that contests of elections where the local option law was in force at the time the act was passed should be contested within sixty days, none of the objections to the orders can be considered. The record shows there was no civil contest of the local option law"—citing *Wilson v. State*, 107 S. W. 818; *Hardy v. State*, 52 Tex. Cr. R. 420, 107 S. W. 547.

Again, in *Romero v. State*, 56 Tex. Cr. R. 436, 120 S. W. 859, this court, through Judge Brooks, showed that complaint in that case was made by appellant in permitting the state over his objections to read in evidence notice of the elections and the order of the commissioners' court putting local option into effect. He held:

"None of these questions can be considered, in view of the fact that the election under which this prosecution is instituted had taken place a year or more before the act of the Thirtieth Legislature was passed, which inhibits a contest of elections after the expiration of 60 days from the time said law went into effect. Therefore, more than 60 days having elapsed before the institution of this prosecution, there was no error in the ruling of the court in admitting same, and no error could be considered by us if the same was erroneous."

Again, in *Doyle v. State*, 59 Tex. Cr. R. 61, 127 S. W. 816, this court, through Judge Ramsey, said:

"It is contended, among other things, that the precedent steps necessary to put local option in force in Johnson county had not been complied with, and that for many reasons urged in bills of exception and insisted on in brief of counsel said election was invalid and nugatory. Whatever we might conclude in respect to these several matters, in the absence of the statute passed by the Thirtieth Legislature requiring contests to be made of local option elections theretofore or to be thereafter held, it is sufficient to say that, in the absence of a contest, we must and shall assume that the judgment and decree putting local option in force and the proclamation of the county judge had the effect to institute the law in that county, and that this presumption and conclusion are conclusive on us and on appellant."

Again, in *Wesley v. State*, 57 Tex. Cr. R. 277, 122 S. W. 550, this court, through Judge Ramsey, said:

"Many of the questions raised on the appeal relate to the sufficiency of the orders, judgments, and decrees of the commissioners' court of Howard county putting local option into effect. Since there was no contest as provided by the act of the Thirtieth Legislature, these matters cannot be considered by us, but we must assume and hold, as the court below did, that the law was in all respects regular and valid."

Again, this court, through Judge McCord, in *Gipson v. State*, 58 Tex. Cr. R. 405, 126 S. W. 268, said:

"The other bills of exceptions relate to the orders of the commissioners' court putting prohibition in effect. These cannot now be considered, as they show prohibition has been in effect in that county for several years, and no contest has been made or is pending."

See, also, *Nobles v. State*, 71 Tex. Cr. R. 124, 125, 158 S. W. 1183, and the other cases and authorities cited and quoted from in Judge Harper's opinion in said *Cleveland Case*.

The indictment, as shown, distinctly avers that the prohibition election was held in Bell county on November 13, 1915, in accordance with the laws of this state and under the authority of an order of the commissioners' court, and that the qualified voters at said election determined that the sale of intoxicating liquors should be prohibited in said county, and the commissioners' court thereupon did pass an order declaring the result of said election prohibiting the sale of such liquor in said county, and that thereafter, on January 1st, appellant unlawfully made the sale alleged, which was clearly sufficient; and the indictment was not invalid because it also alleged that the com-

missioners' court published the order declaring the result. This also disposes of appellant's bill objecting to the introduction by the state of the orders showing that the county judge selected the paper and published the order, or had it published.

[3-6] It is settled in this state by a great many decisions that an appellant cannot complain and is not entitled to a reversal because the state's attorney in argument went out of the record, if it was occasioned, justified, or provoked by his attorney. In this case appellant introduced clearly illegal testimony when he introduced and had Mr. Chaffin to testify that the state's principal witness more than two years before, in effect, had burglarized his house and stolen certain property therefrom, but that he was never prosecuted nor indicted therefor. The language complained of used by the district attorney on this subject was clearly provoked and brought about in discussing said Chaffin's illegal testimony before the jury. Besides, appellant requested no special written charge to disregard it. The appellant variously attacked the state's principal witness, whose testimony made out the offense. The court therefore did not err in permitting the sheriff to testify that said principal witness acted at his instance in assisting him in ferreting out violations of the local option law in Bell county. Nor did the court err in permitting said state's witness to explain why he had brought three gallons of whisky from Granger to Belton; a witness being always permitted to explain his action from his standpoint when attacked.

The judgment is affirmed.

DAVIDSON, J., dissents and will later write on the subject. See *Clark Cleveland v. State*, decided at this term of court.

HAWTHORNE v. STATE. (No. 4137.)
(Court of Criminal Appeals of Texas. Oct. 18, 1916.)

1. WITNESSES — §344(2) — IMPEACHMENT — PARTICULAR OFFENSES.

It is not permissible to impeach a witness by showing that he has committed a certain crime, but only by showing that he has been indicted or convicted for such crime.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1125; Dec. Dig. §344(2).]

2. WITNESSES — §350 — IMPEACHMENT — PARTICULAR OFFENSES.

Any witness can be impeached by the adverse party by proving by the witness on cross-examination that within a period not too remote he had been indicted or convicted of a felony or misdemeanor imputing moral turpitude.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1140-1149; Dec. Dig. §350.]

Davidson, J., dissenting.

Appeal from District Court, Bell County; F. M. Spann, Judge.

Pete Hawthorne was convicted of unlawfully selling intoxicating liquors in prohibition territory, and he appeals. Affirmed.

James Boyd, of Belton, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of violating the law prohibiting the sale of intoxicating liquors in Bell county, a prohibition county.

The indictment in this case is exactly like the indictment in No. 4167, *Will Dupree v. State*, 190 S. W. 181, from the same county, this day decided, and the objections the same. As held in that case, the indictment is good. The same objections were made to the introduction of the orders in this as in the Dupree Case, with the same correct result.

[1] In another bill appellant complains of the court's refusal to permit him to prove by various witnesses that H. M. Bryan, the state's main witness, had made to them, respectively, sales of intoxicating liquors in Bell county between the 1st and 3d of January, 1916. It is settled in this state that proof that any witness who testifies has committed any given crime is inadmissible. It is only permissible to impeach him by showing that he has been indicted or convicted for such crime. Section 168, p. 102, 1 Branch's Ann. P. C. Therefore the court committed no error in refusing several witnesses tendered by appellant to testify to the actual commission of the crime of illegally selling to them by said state's witness intoxicating liquors in Bell county. It would make no difference that they had asked him if he had sold whisky to the respective parties and he had denied it. Appellant was concluded by his answer.

[2] On the other hand, it is equally well settled that any witness can be impeached by the adverse party by proving by the witness on cross-examination that within a period not too remote he had been indicted or convicted of a felony or misdemeanor imputing moral turpitude. Section 167, 1 Branch's Ann. P. C. p. 101. Therefore the court committed no error in permitting the state on cross-examination of appellant to prove that he had been so indicted and tried; he also having answered that he had been acquitted.

The judgment is affirmed.

DAVIDSON, J., dissents. See *Clark Cleveland v. State*, 190 S. W. 177, decided at this term.

BECKER v. STATE. (No. 4117.)

(Court of Criminal Appeals of Texas. Oct. 11, 1916. On Motion for Rehearing, Dec. 20, 1916.)

1. CRIMINAL LAW § 661—EVIDENCE—PROOF OF GOOD REPUTATION.

In a prosecution for murder, it is not error to exclude testimony of witnesses to prove defendant's good reputation, where the state admitted that he bore such reputation prior to his difficulty with deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 758, 1606; Dec. Dig. § 661.]

2. WITNESSES § 394 — IMPEACHED WITNESS — PROOF OF REPUTATION FOR TRUTH AND VERACITY.

Where accused had been impeached as a witness in his own behalf by proof of contradictory statements, he can introduce evidence of his reputation for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1258, 1259; Dec. Dig. § 394.]

3. WITNESSES § 394 — IMPEACHED WITNESS — PROOF OF REPUTATION—WITHDRAWAL OF IMPEACHING EVIDENCE.

Where defendant had been impeached by proof of contradictory statements as to a material issue, the mere withdrawal of the impeaching evidence does not justify excluding evidence of defendant's reputation for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1258, 1259; Dec. Dig. § 394.]

4. HOMICIDE § 188(6)—EVIDENCE—SELF-DEFENSE—CUSTOM OF DECEASED.

In a prosecution for murder where defendant claimed that deceased was in the habit of going armed, it was error to exclude all evidence of instances, occurring more than two months before the homicide and not known to defendant, in which deceased had been armed since his first difficulty with defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 896; Dec. Dig. § 188(6).]

5. HOMICIDE § 188(6)—EVIDENCE—SELF-DEFENSE—RELEVANCY.

It was not error to exclude evidence of deceased carrying a pistol prior to his first difficulty with defendant of which incidents defendant was not aware.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 396; Dec. Dig. § 188(6).]

6. HOMICIDE § 191—EVIDENCE—ASSAULT ON DEFENDANT'S SON.

In a prosecution for murder, evidence of an assault by deceased on defendant's son, not known to deceased before the homicide, is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 414; Dec. Dig. § 191.]

7. CRIMINAL LAW § 413(1) — EVIDENCE — SELF-SERVING DECLARATIONS.

Self-serving declarations, made by defendant two hours prior to his difficulty with deceased, were properly excluded from evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-932, 935; Dec. Dig. § 413(1).]

8. HOMICIDE § 191—EVIDENCE—CONDUCT OF DECEASED.

In a prosecution for murder where defendant claimed self-defense and that the difficulty originated when he protested against deceased's attentions to his daughter, evidence that, when de-

ceased was arrested with a pistol some time prior to the killing, he was near the sanitarium in which the daughter then was, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 414; Dec. Dig. § 191.]

9. HOMICIDE § 189 — EVIDENCE — SELF-DEFENSE—ORIGIN OF DIFFICULTY.

In a prosecution for murder, it was error to exclude testimony by defendant's wife corroborating his testimony that his difficulty with deceased began when he protested against deceased paying attention to his daughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 398; Dec. Dig. § 189.]

10. WITNESSES § 37(4)—REPUTATION OF DECEASED—COMPETENCY OF WITNESSES.

Witnesses whose opinion that deceased generally went armed was based solely on facts they personally knew are not qualified to testify to the general reputation of deceased as a man who went armed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 84; Dec. Dig. § 37(4).]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

J. H. G. Becker was convicted of murder, and he appeals. Reversed and remanded.

Meek & Kahn, of Houston, for appellant. John H. Crooker, Cr. Dist. Atty., T. J. Harris, E. T. Branch, Elbert Roberts, and Frank Williford, Jr., all of Houston, and C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at five years' confinement in the state penitentiary.

[1] In the first bill of exceptions appellant complains of the action of the court in refusing to permit him to prove by Mayor Ben Campbell and some ten of the other leading citizens of Harris county that they had known him for many years, and that he had always borne the reputation of being a peaceable, law-abiding citizen. When the appellant made this proof by one witness counsel for the state admitted in open court that appellant's reputation up to the time of this unfortunate occurrence was that of a peaceable, law-abiding citizen, and the court in his charge instructed the jury:

"The defendant has offered to introduce testimony to prove his general character as being a peaceable and law-abiding citizen, and the state has admitted that the general reputation of the defendant as being a peaceable, law-abiding citizen is good, and you are therefore instructed that you will accept as true and as a proven fact that the general reputation of defendant in that regard is good."

Under such circumstances, there was no error in this ruling of the court. Beard v. State, 44 Tex. Cr. R. 402, 71 S. W. 960; Carver v. State, 67 Tex. Cr. R. 116, 148 S. W. 746.

[2, 3] We are inclined to think that the bill, wherein it is shown that the defendant offered to prove by a number of witnesses that his reputation for truth and veracity was good, presents error. Appellant had testi-

fied that he had known deceased for a number of years, and they had been friends until the first of the year preceding the homicide in December. Appellant lived at Hockley, and had charge of the telephone at that place. The office was in a room of the house where he resided. Appellant's daughter attended to the telephone, and deceased often visited at the telephone office; would close the door and remain in the office for some time. His wife and others called his attention to the matter and said it was calculated to cause people to talk about their daughter. He went to deceased about this conduct, and this appears to be the first break in their friendly relations. Other matters occurred, when deceased one day about the middle of February approached appellant with an axe handle in one hand and a pistol in the other and gave appellant a very severe whipping, inflicting such injuries that he had to be carried to a sanitarium, where he remained for about two weeks, and was then carried to the Larendon apartments, where he was confined by the injuries about a month longer. Appellant testified to many threats communicated to him at various times from that date until the day of the homicide; that just two days before the homicide deceased had come from Houston to Hockley, and while there drew a pistol on him and cursed him; and that he ran. He testified to facts and circumstances that, if believed, would lead one to believe that he thought he was in constant danger from deceased from the time that deceased gave him the whipping until the date of the shooting. To offset this, the state, on cross-examination, asked him if, while he was at the infirmary, Charley Almond had not visited him and talked with him. He stated that Almond had visited him. He was then asked if, during the conversation then held, Almond had not told him (appellant) that he had talked with Hamilton (deceased) about this trouble, and he (Hamilton) was desirous of letting the matter drop and did not want any further trouble with appellant. Appellant replied that no such conversation occurred, and no such statement was made to him. Appellant was further asked if he did not say he did not want to make up with Hamilton, and he answered, "No." The state then offered Almond as a witness and had him testify that he did tell appellant that he had a conversation with deceased, and told him that deceased did not want any further trouble and desired to let the matter alone and have it settled for all time, and that appellant had said he would not let it drop and would see if something more could not be done to Hamilton. After this testimony had been introduced by the state, the appellant then offered to prove that his reputation for truth and veracity was good by Otto Sens and some 25 other residents of Harris county. When this testimony was offered by appellant, the

court withdrew the testimony of Almond from the jury and refused to permit appellant to prove his reputation for truth and veracity, and after withdrawing Almond's testimony the court instructed the jury not to consider it for any purpose. It will be noticed that the testimony of Almond went to a vital part of his defense as made—that Hamilton had been constantly pursuing him, going armed all the time, threatening his life, which threats had been communicated to him, and followed by an attempt to execute them just two days before the homicide, when he (appellant) fled. Could and was the harmful and hurtful effect of this testimony removed by its withdrawal? We do not think so. It had been deliberately introduced for the purpose of impeaching appellant and breaking down his defense. It was on one of the vital issues in the case. It is a general rule, when it is thus sought to impeach and break down the testimony of the state or appellant, proof of general reputation for truth and veracity becomes admissible.

[4, 5] In several bills it is shown that appellant desired to prove that deceased, when visiting Hockley, from the date of the difficulty in February until the date of the homicide, had a pistol on his person. The court permitted him to prove those instances where the parties came and told appellant about seeing deceased armed, but refused to permit the witnesses to testify to seeing deceased armed at other times from February to September, limiting such proof to only two months prior to the homicide. Why the court limited such proof to only two months prior to the homicide, when the evidence both for the state and defendant shows that the unfriendly relations began in February, and continued until the date of the homicide, we cannot understand. We think the testimony, taking into consideration the threats of deceased and his actions on several occasions, rendered the testimony clearly admissible from and after the date of the difficulty until the day of the homicide, and on another trial this testimony will be admitted. It is true that deceased was not armed at the time he was shot, but appellant testified that he knew deceased was a man who habitually went armed, that he believed he was armed on the day of the homicide, and was reaching for his pistol when he shot, and this testimony about deceased going constantly armed from the date of the first difficulty until the final tragedy would aid the jury in passing on the reasonableness of appellant's testimony that he believed deceased was armed. It is true that he was permitted to testify to the occasions when others told him deceased was armed; but, the issue being whether or not deceased was armed virtually all the time from the date of the difficulty in February until the date of the killing, the testimony should have been admitted. How-

ever, there was no error in excluding the testimony of isolated instances of deceased having a pistol on his person, which were unknown to appellant, prior to the difficulty in February, and the beginning of the strained relations between them.

[8] Nor was there any error in excluding the testimony as to the assault or attempted assault on Oscar Becker, appellant's son, by deceased. It would shed no light on the transaction for which appellant was on trial, as appellant is not shown to have been made aware of it prior to the fatal meeting.

[7] What appellant said to W. W. Baines some two hours prior to the difficulty was properly excluded. His statements would be but self-serving declarations.

[8] We think the court should have permitted the appellant to prove that, at the time deceased was arrested with a pistol on him, he was near the Baptist Sanitarium. Appellant does testify that he had left the sanitarium and gone to the flats some two weeks prior to this incident; but the record also makes it plain that appellant's daughter, about whom the trouble arose, was then staying at the Baptist Sanitarium. It is true appellant testified he believed his girl was pure as the driven snow, but deceased's visits to the place where this girl was at work had caused comment, and the fact he was keeping it up after she left home should have been permitted to be proven; for a father would resent more intensely a man conducting himself in a way to render his daughter subject to reproach and the tongue of scandal if she was a pure girl than if she had perhaps not been so pure in thought and deed.

[9] We also think the testimony of Mrs. Gus Becker, the wife of appellant, should have been admitted. It is plain the unfriendly relations between appellant and deceased arose over deceased's conduct in going about his daughter so often. Had she been permitted, she would have testified:

"That Gussie Becker was the unmarried daughter of witness and defendant; that prior to the assault made by deceased on the defendant on the 17th day of February, 1915, said daughter, Gussie Becker, lived at the home of witness and defendant; that the telephone company had its public station at their home, and their said daughter, Gussie, was the operator, and that prior to said assault, and for several months prior thereto, deceased would go to the room where said telephone was located, and on several occasions shut the door and remain in the room with defendant's said daughter, Gussie Becker, sometimes as long as three hours, and was a frequent visitor to said room, to such an extent that it aroused the suspicion of witness, the mother of said daughter; that in the room at the time were two beds, and witness and defendant finally removed the beds from the room that deceased visited; that the visits to their daughter Gussie were so frequent that she called her husband's (defendant's) attention to said fact and told him that the neighbors would likely talk about it, their daughter being single, and deceased being a married man, and asked her husband (defendant) to go and speak to Hamilton (deceased) and ask

him to desist from making such frequent and long visits, as their actions were causing comment and would likely produce a scandal in the little village; and further that her husband did speak to deceased in reference thereto, and the daughter became angry and left their home and has remained away ever since."

It is true, the court prevented her to so testify, but all persons who knew these facts should have been permitted to testify, for these circumstances were what brought about the unfriendly relations which culminated in the death of one of the parties.

[10] We do not think that Elbert Roberts and J. E. Batte in their voir dire examination showed themselves qualified to testify to the general reputation of deceased as a man who went armed. It is made evident that it was but the opinion they held of the man from facts they personally knew, and from that fact alone.

There are several complaints of the charge of the court in the record, and, while there is no error in the charge for which we would feel authorized to reverse the case, yet on another trial the court will apply the doctrine of reasonable doubt to the charges on threats and self-defense, if excepted to, and requests for special charges to be given are made, as was done on this trial.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J. I think the court's action in excluding all evidence of appellant's general reputation for truth and veracity, under the circumstances, would not present reversible error. *Miller v. State*, 185 S. W. 29. and cases cited.

DAVIDSON, J. I concur in reversal, but am of opinion that the excluded evidence of W. W. Baines should have gone to the jury and ought not to be regarded as self-serving statements.

On Motion for Rehearing.

PER CURIAM. Rehearing denied.

PRENDERGAST, P. J. (dissenting). Upon thorough consideration of this case upon the state's motion for rehearing, I have reached the conclusion that the rehearing should be granted and the case affirmed, instead of being reversed. The state's motion for rehearing, and the brief and argument thereon by the district attorney of Harris county and his assistants and the Assistant Attorney General, so well accords with my own views that I adopt it as my opinion. It is:

"1. This court erred in holding that appellant's tenth bill, relating to the refusal of the trial court to permit him to prove his good reputation for truth, presented error, because the same under all the circumstances did not present reversible error. Appellant was only contradicted, and not impeached. And the testimony of Almon which contradicted appellant's own testimony was not only withdrawn from the jury, but the jury were charged verbally at the very time to accept the denial of appellant that he had such conversation as true; and this instruction to the jury to accept the denial as true

was also given in writing to the jury in the general charge. These instructions to the jury are not mentioned in the opinion, and we think were overlooked in considering said bill; or else the effect of such instructions was not considered in determining whether the bill presented error. There was not a mere withdrawal of the testimony of Almon, as the opinion would seem to indicate; but the withdrawal of the testimony was accompanied by the instructions to the jury just mentioned and thus accomplished all, and more, and left appellant in a better light than mere testimony as to his reputation could have done. Suppose Almon's testimony did impeach appellant, the only question for the jury would be whether Almon or appellant was telling the truth, and the only object, where a witness is impeached, in offering testimony of his reputation for truth, is to convince the jury that the impeached and not the impeaching witness was giving the truth. The supporting witnesses who testify to the good reputation for truth of the impeached witness do not purport to know the truth of the statement in dispute, and the jury might or might not infer that proof of good reputation showed that the impeached witness was correct, while in this case the contradictory statement of Almon is not only withdrawn, but the jury are directly and in terms told to accept as true the version of appellant. The object of appellant was accomplished. It should be presumed that the jury followed and obeyed the instructions of the court when nothing to the contrary is shown. The bill also shows that one witness, Jules Hirsch, had previously testified without objection that the general reputation of appellant for truth was good, and that this testimony was never withdrawn. The state also urges that the testimony of Almon was not proving conflicting statements of appellant about a material fact, but was a mere conflict in the testimony. It is nowhere shown in the bill that appellant had given any version of a conversation with Almon which was favorable to himself. See *Pettis v. State*, 68 Tex. Cr. R. 221, 150 S. W. 792, where appellant, as here, denied making the statement, and *Zysman v. State*, 42 Tex. Cr. R. 433, 60 S. W. 669, where the witness sought to be supported admitted making the statement; and see *Jacobs v. State*, 42 Tex. Cr. R. 358, 59 S. W. 1111. The fact that the testimony of Almon and appellant was in direct conflict would not authorize testimony of the good reputation of appellant for truth. *Zysman v. State*, 42 Tex. Cr. R. 433, 60 S. W. 669. The trial court left the jury in no doubt as to the purported conversation with Almon and settled that issue squarely in favor of appellant by the oral and written direct instructions to the jury, and this, together with the withdrawal of Almon's testimony, prevented any error in the proceedings, and reinstated appellant and supported him more strongly on that matter than any number of mere reputation witnesses could have done. We also urge that the bill fails to show that the testimony of Almon tended to impeach appellant by proving his statements made out of court which were contradictory of his material testimony given on the trial. The time of this purported conversation with Almon was about five months prior to the homicide, and was unimportant and was a mere contradiction upon an immaterial matter and upon which the jury were in effect instructed that appellant's version thereof was true and that Almon's was untrue, and this instruction was given by the court as a matter of law.

"2. Because the court erred in holding that proof of isolated instances of deceased having a pistol was admissible, although appellant did not know and was not informed thereof, and in holding that such testimony would aid the jury in passing on the reasonableness of appellant's testimony that he believed deceased was armed at the time of the homicide. In passing on the several bills in which this matter was sought to

be raised, the opinion reads: 'Why the court limited such proof to only two months prior to the homicide, when the evidence both for the state and defendant shows that the unfriendly relations began in February and continued until the date of the homicide, we cannot understand.' In his ruling the trial court was more liberal to appellant than required by law, as will be seen if the real ruling of the court is ascertained from the bills and the qualifications thereof accepted by appellant. What were the facts?

"The bills are numbered 2, 4, and 5½, and show that the court permitted appellant to prove by himself and by other witnesses isolated and disconnected instances of deceased having or carrying a pistol at any time where it was shown that knowledge thereof was brought home to appellant by his own or other testimony, and, in addition to this, the court extended the rule and permitted appellant to prove any disconnected or isolated instances of deceased being seen with a pistol at any time within two months prior to the homicide, whether appellant knew of such instance or not. The only testimony excluded by the court was in refusing to permit appellant to prove disconnected and isolated instances of deceased having been seen with a pistol at times more than two months prior to the homicide where knowledge of the fact that deceased at such time having a pistol was not brought home to appellant by his own or other testimony. In *Andrus v. State*, 73 Tex. Cr. R. 333, 165 S. W. 189, it was held that proof of isolated instances of deceased having a pistol is not admissible when it is not shown that such instances were known to the accused prior to the homicide. Similar to this is the ruling in *Hysaw v. State*, 69 Tex. Cr. R. 566, 155 S. W. 942. The reasonableness of appellant's testimony that he believed deceased was armed at the time of the homicide could not be aided by proof of facts which were unknown to appellant when he shot deceased. What operated or could have operated on the mind of appellant when he killed deceased? Facts then unknown to him? Appellant made no claim that he knew of any instance excluded. What he did not know in no way could have influenced him. His claimed belief that deceased was armed at the time of the homicide could not have been possibly influenced by things he had never heard of. The bills themselves show that the testimony excluded was of wholly disconnected and isolated instances, few in number, and were in no way known to appellant when he slew the deceased, and we most respectfully urge that the court was in error in the original opinion, and that the trial court was not only correct, but was exceedingly liberal to appellant, and was following the former holdings of this court.

"3. Because the court erred in holding that the trial court should have permitted the appellant to prove that, at the time deceased was arrested with a pistol on him, he was near the Baptist Sanitarium, as complained of in the seventh bill of exceptions. This incident occurred on March 16th, prior to the homicide in September, and more than two weeks after appellant left the sanitarium, and the state urges that in no event, in the light of the entire record, is the matter of such importance as to require a reversal, and the state further urges that the testimony excluded was in no way admissible for the purpose stated in the bill or for any other purpose, since appellant received the least term for murder, and the offer of this testimony was not coupled with any offer or claim that the homicide was on the first meeting after such incident, or that deceased there met or insulted the daughter of appellant, and the fact that it might, as stated in the original opinion in this case, have aroused resentment, would in no way have benefited appellant, but would have been proof of malice, and no claim of manslaughter was made on account of such occurrence, nor does the testimony raise the issue of

manslaughter on the theory of an insult to a female relation of appellant. Much stronger testimony was held correctly excluded in the cases of *Howard v. State*, 23 Tex. App. 276, 5 S. W. 231; *Cockerell v. State*, 82 Tex. Cr. R. 592, 25 S. W. 421; *Wright v. State*, 36 Tex. Cr. R. 431, 37 S. W. 732; *McVey v. State*, 81 S. W. 740.

"4. Because the court erred in holding that the testimony set out in the eighth bill of exceptions was admissible. This bill complains of the refusal of the trial court to permit appellant to prove by his wife that several months prior to the homicide the deceased would go to a room in which the daughter of appellant worked as a telephone operator, and on several occasions would shut the door and remain in the room where the young lady was, and that she called her husband's attention thereto and asked him to see deceased with reference thereto, and that her husband did so, and that their daughter became angry and left their home and has remained away ever since. This bill is qualified, and the qualification was accepted by appellant, with the explanation that the offer of said testimony was not coupled with any offer to prove that the homicide grew out of any insult to or relation of deceased with the daughter of appellant, and that appellant himself testified fully with reference to the same matters and testified all he desired to about his daughter and to his knowledge and information pertaining thereto, and further testified that the fact that deceased stayed in the telephone booth had nothing to do with the homicide, and that he thought and knew that his daughter was a pure girl. Appellant received the lowest term for murder, and the matters excluded occurred months before the homicide, and the proof showed that in fact appellant had met deceased many times since.

"The word 'meet' signifies that the parties were brought together into such proximity as would enable the defendant to act in the premises, whether he was armed or unarmed. *Pitts v. State*, 29 Tex. App. 377, 16 S. W. 189; *Gillespie v. State*, 53 Tex. Cr. R. 163, 109 S. W. 153.

"Adequate cause may be proof of malice. *Hicks v. State*, 171 S. W. 767; *Pickens v. State*, 31 Tex. Cr. R. 554, 21 S. W. 362.

"It has been frequently held that it is not error to exclude testimony of insulting words or conduct of deceased toward a female relation of the slayer, if the offer of this testimony is not coupled with any offer on the part of the defendant or his counsel to show that prior to the homicide the same was communicated to him, and thereafter he killed the deceased on his first meeting with him. *Howard v. State*, 23 Tex. App. 276, 5 S. W. 231; *Cockerell v. State*, 82 Tex. Cr. R. 592, 25 S. W. 421; *Wright v. State*, 36 Tex. Cr. R. 431, 37 S. W. 732; *McVey v. State*, 81 S. W. 740."

GUARANTY LIFE INS. CO. OF HOUSTON v. CITY OF AUSTIN. (No. 2687.)

(Supreme Court of Texas. Dec. 13, 1916.)

1. TAXATION — 276 — PROPERTY SUBJECT — SITUS OF PROPERTY.

Prior to enactment of Acts 31st Leg. c. 108, making personal property of a home insurance company taxable at the company's home office, etc., where pursuant to Acts 30th Leg. c. 170, authorizing insurance companies to deposit with the State Treasurer securities representing investments of capital stock, with the privilege of withdrawal or substitution, and giving depositing companies the right to advertise such fact and print it upon their policies of insurance, an insurance company domiciled at Houston deposited such securities consisting

of two notes with the State Treasurer at Austin and advertised such fact, the notes were taxable at Austin under Rev. St. art. 7505, making promissory notes taxable as personal property, and article 7510, providing that all property real and personal shall be assessed in the county where situated except as otherwise required, and Const. art. 8, § 11, declaring that all property shall be assessed in the county where situated; the deposit with the State Treasurer being a voluntary one, amounting to a surrender of the possession of the notes, thereby giving the notes, for the purpose of taxation, a situs different from the domicile of their owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453, 466-468; Dec. Dig. — 276.]

2. TAXATION — 276 — SITUS OF PROPERTY.

Where a particular business purpose can be accomplished only by locating property at a certain place and the property is so located and devoted to the purpose for more than a temporary period, it clearly acquires a situs at that place.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453, 466-468; Dec. Dig. — 276.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action between the Guaranty Life Insurance Company of Houston and the City of Austin. Judgment for the City was affirmed by the Court of Civil Appeals (165 S. W. 53), and the Insurance Company brings error. Affirmed.

Lane, Wolters & Storey and Wm. A. Vinson, all of Houston, for plaintiff in error. Lightfoot, Brady & Robertson, J. W. Maxwell, and J. Bouldin Rector, all of Austin, for defendant in error.

PHILLIPS, C. J. The question in the case is that of the right of the City of Austin to tax for the years 1908 and 1909 certain securities owned by the plaintiff in error and during those years on deposit with the State Treasurer in that city.

[1] The domicile of the plaintiff in error at the time was, and is now, in the city of Houston. Its capital stock was \$100,000.00, lawfully invested in the securities mentioned, consisting of two notes, secured by liens upon real estate, and of a reasonable value in excess of \$100,000.00. The notes were originally deposited with the State Treasurer on August 10, 1907, under the provisions of the Act of the Thirtieth Legislature, chapter 170, page 316, Acts of 1907. That act provided in sections 8, 9, and 10 that an insurance company such as the plaintiff in error might at its option deposit with the State Treasurer securities representing investments of its capital stock, with the privilege of withdrawing them, or substituting other securities therefor; that upon such deposit being made, the State Treasurer should issue his receipt for the securities; and the company making the deposit and holding such receipt should have the right to advertise such fact and print it upon its policies of

insurance; and that the proper officers and agents of the company making the deposit should be permitted at all reasonable times to examine its securities, detach coupons therefrom and collect the interest thereon under such reasonable rules as might be prescribed by the Treasurer and the Commissioner of Insurance.

After making the deposit of its securities and obtaining the Treasurer's receipt, the plaintiff in error advertised that fact in its business and printed it upon its policies.

One of the notes remained on deposit with the State Treasurer until April 29, 1913, when other securities were substituted for it. The other note was renewed during the year 1908. The renewal note remained on deposit until March 28, 1911, when two other notes were substituted for it. The substituted securities had remained continuously in the custody of the Treasurer to the time of the trial. At various times during each of the years 1908 and 1909, the plaintiff in error through its officers made credits of interest payments upon the notes, and upon one occasion withdrew one of the notes for the purpose of having it renewed.

The plaintiff in error rendered the securities in question for taxation in the years 1908 and 1909 to the city of Houston, and paid to that city the city taxes assessed against them for those years.

The taxes in controversy were for a period antedating the Act of 1909 (chapter 108, page 205, Acts of 1909), providing that for the purpose of state, county and municipal taxation, the situs of all personal property belonging to a home life insurance company shall be at its home office.

Under the propositions advanced in the petition for a writ of error it is necessary to consider only the contention that the notes in question, because of their property nature, were taxable only at the plaintiff in error's domicile. The basis of the contention is that promissory notes, when owned by a resident of the State, are incapable of acquiring for the purposes of taxation a situs distinct from the residence of their owner.

According to the ancient rule, all personal property followed the owner and was subject only to the laws of the jurisdiction of his domicile. This was a fiction of the law; and there can be no doubt of the power of a State to modify it by statute.

In this State promissory notes are by statute expressly made taxable as personal property. Art. 7505, Revised Statutes. In *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168, in referring to this statute and holding that promissory notes situated in Texas were taxable in Texas, though owned by a non-resident, it was said:

"A State has no authority to levy taxes upon personal property temporarily within its borders when the owner resides elsewhere. But it is equally true that tangible personal property which has acquired a *situs* within the State is subject to taxation, although the own-

er be a nonresident thereof. *Hardesty v. Fleming*, 57 Tex. 401; *Eidman v. Martinez*, 184 U. S. 578 [22 Sup. Ct. 515, 46 L. Ed. 697]; *Bristol v. Washington County*, 177 U. S. 133 [20 Sup. Ct. 585, 44 L. Ed. 701]. Promissory notes and bonds are now recognized as property and are included in the terms of the statutes of 1905 which we have quoted above. *New Orleans v. Stempel*, 175 U. S. 322 [20 Sup. Ct. 110, 44 L. Ed. 174]; *Catlin v. Hull*, 21 Vt. 152. In the first case cited the court said: 'It is well settled that bank bills and municipal bonds are in such concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a statute may not declare that if found within its limits they shall be subject to taxation.'

It was urged in that case, as it is here, that the rule with respect to personal property following the owner, above referred to, governed the question. This contention was overruled. In order to reach the decision rendered, it was necessary to first determine that the notes involved were capable of acquiring a *situs* in Texas; otherwise they were not taxable in Texas. The holding that they were taxable here necessarily affirmed that they were capable of acquiring a *situs* here. As the domicile of the owner was elsewhere, *Hall v. Miller* must be regarded as definitely establishing the rule in this State that under our laws promissory notes may for the purposes of taxation acquire a *situs* different from the domicile of their owner.

That the owner of the notes in *Hall v. Miller* was a non-resident, does not affect the question; or, as is urged by the plaintiff in error, distinguish that case from the present one. The non-residence of the owner was not the ground of the decision. Necessarily the question as to whether the notes could acquire a *situs* here was determinable alone by their property nature under our laws. The character of their owner did not give them their character as property or alter their property nature. The case simply holds that since promissory notes are for taxation purposes recognized and treated as personal property by article 7505, as it was within the power of the Legislature to characterize them, and have a concrete tangible form, they are capable of separation from their owner and acquiring for taxation purposes a *situs* distinct from his domicile. This decision was reached, not because the owner was a non-resident of the State, but notwithstanding such was the fact.

If because of their concrete form and character as personal property under our taxation laws promissory notes may in the case of a non-resident owner acquire a *situs* for the purposes of taxation apart from their owner's domicile, the same rule must obtain with respect to a resident owner. They could not be held as less capable of acquir-

ing such a *situs* merely because owned by a resident of the State, in the absence of a positive statute fixing the domicile of the owner as the place for their taxation. We have no such statute.

The Constitution and statutes of the State, of themselves, put this question at rest. The Constitution, section 11, article 8, declares that:

"All property, whether owned by persons or corporations, shall be assessed for taxation, and the taxes paid in the county where situated."

Article 7510 reads:

"All property real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property, subject to taxation and temporarily removed from the state or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

This article clearly contemplates that any property classified as personal property by article 7505 and having a concrete form may acquire a *situs* distinct from the place of the owner's residence. It provides that personal property "temporarily removed from the state or county" shall be taxed in the county of the owner's residence. This is a provision with respect only to personal property "temporarily removed from the county or state." It has no application to personal property whose removal is not temporary, but which has acquired a *situs* in a different county. If the removal from the county of the owner's residence be only temporary, it could not under the article acquire a *situs* elsewhere; it is to be regarded as still "situated" in the county of the owner's residence and is therefore taxable there. The article makes it plain, however, that if the removal be not of a temporary character and the property has acquired a *situs* in a different county, it is taxable in such county, unless within the exception of the article and therefore expressly made taxable elsewhere.

[2] The real question in the case, therefore, is whether the notes had acquired a *situs* in the City of Austin so as to subject them to taxation there for the years named. Their deposit with the State Treasurer was in August, 1907. It was voluntary upon the part of the plaintiff in error. It amounted to a surrender of the possession of the notes. It was made for a business purpose and for an evident business advantage, which could be accomplished only by placing the notes in the custody of the Treasurer, namely, the privilege of advertising that securities representing the plaintiff in error's capital stock were in the hands of the Treasurer of the State, and also having its policies of insurance attest that fact. A temporary possession by the Treasurer of the notes would not have afforded the benefit sought by the deposit, since under the law the fact of the

deposit could be advertised and printed on the plaintiff in error's policies only while the notes were in the Treasurer's possession. That the plaintiff in error had access to the notes and the right any time to withdraw them does not alter the fact that while they were on deposit with the Treasurer they were out of its possession. Under the law providing for the deposit the Treasurer's possession of the notes was necessarily exclusive. It cannot be assumed that it would have permitted advertisement of the fact of their being in his hands unless his possession was of that character. In our view the deposit had none of the aspects of a mere temporary removal of the notes from the place of the plaintiff in error's domicile. The nature of the deposit, its purpose, and the length of time the notes had remained in the Treasurer's hands in our opinion forbid that view. Where a particular business purpose can be accomplished only by locating property at a certain place, and the property is so located and devoted to the purpose for more than a temporary period, it very clearly acquires a *situs* at that place. The notes in question must, we think, be regarded as having been situated in the City of Austin, on the first days of January 1908 and 1909. They were accordingly taxable there for those years.

Ferris v. Kimble, 75 Tex. 476, 12 S. W. 689, is urged by the plaintiff in error as sustaining its position. The case may be said to announce that, as a general rule, promissory notes are taxable at the place of their owner's residence. It was not there decided, however, nor attempted to be decided, that they are incapable of acquiring a *situs* elsewhere. The facts of the case plainly distinguish it from the present one. The notes of Judge Ferris, the subject of the controversy, were at all times in his possession. They had been placed in the bank vault within the limits of the city of Waxahachie merely for safe-keeping, and no one had access to them but the owner. Being in his possession, they were necessarily taxable at the place of his residence. For this same reason Ferris v. Kimble was differentiated in Hall v. Miller.

It is to our minds illogical to say that promissory notes are incapable of acquiring a distinct *situs*. They are personal property under our laws. Because of their concrete form they are made use of as property in the everyday transactions of the people. Their presence is generally availed of as an element of such use. Because of this they constitute something more than mere evidences of debt. When they are thus made to perform the functions of tangible personal property, they have all the character of that class of property, and are as fully capable of acquiring a *situs* apart from their owner's domicile as any property of that class.

The judgments of the District Court and the Court of Civil Appeals are affirmed.

BORTON v. BORTON. (No. 7268.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 23, 1916. Rehearing Denied
Dec. 21, 1916.)

1. DIVORCE — 254 — PLEADING — TITLE TO LAND.

Allegation of original and supplemental petitions in action for divorce relating to the separate property of plaintiff and the claims of defendant with reference thereto, held to authorize judgment that plaintiff owned land in her own separate right, and quieting title thereto as against defendant.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 718-721; Dec. Dig. 254.]

2. HUSBAND AND WIFE — 205(4) — ACTIONS — RIGHT OF ACTION — PROTECTION OF SEPARATE ESTATE.

A wife is entitled to sue her husband for the protection of her separate property in his possession against damages or waste threatened by his wrongful acts, or his declared intention to use the same to her damage, and she may sue to recover her separate estate wrongfully converted by him, and also to have a resulting trust declared in her favor in lands claimed by her in her own right in his possession, her title to which he is disputing and to which he is asserting title adverse to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 748, 749, 754, 970; Dec. Dig. 205(4).]

3. HUSBAND AND WIFE — 205(4) — ACTIONS — RIGHT OF ACTION — QUIETING TITLE.

Under Acts 83d Leg. c. 32, defining separate and community property of husband and wife, and providing that the wife shall have the sole management, control, and disposition of her separate property, a wife may maintain suit against her husband to quiet title to land claimed by her as her separate property, to which he is asserting title adverse to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 748, 749, 754, 970; Dec. Dig. 205(4).]

4. APPEAL AND ERROR — 907(3) — REVIEW — PRESUMPTION — FACTS NOT APPEARING IN RECORD.

Where there is no statement of facts with the record, the review court will presume that the facts proved on the trial support the finding of the jury and the judgment of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2673; Dec. Dig. 907(3).]

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by Mrs. Lella E. Borton against W. H. Borton. From a portion of the judgment favorable to the plaintiff, defendant appeals. Affirmed.

Campbell, Sewall & Myer and Tharp & Tharp, all of Houston, for appellant. Gill, Jones, Tyler & Potter, of Houston, for appellee.

LANE, J. This suit was instituted by Mrs. Lella E. Borton, plaintiff, against her husband, W. H. Borton, defendant, for a divorce, for a partition of their community estate, for quieting her title to certain lands alleged to be her separate estate, and for injunction to restrain defendant from selling, mortgaging, or incumbering any of said prop-

erty, separate or community, or in any way wasting or destroying any part thereof.

In addition to plaintiff's allegations upon which she sought a divorce, she alleges among other things that at the time her suit was filed that she owned as her separate property three tracts of land situated in Harris county, Tex., and one in Walker county, Tex., and that as defendant had already sold seven bales of cotton belonging to said community estate and converted the proceeds of such sale to his own use, she feared he would attempt to sell, mortgage, or incumber all of said property, both separate and community. Her prayer was for a decree of divorce, partition of all community property, and for a decree quieting her title to the land alleged to be her separate estate, etc.

Defendant answered by general demurrer, general denial, and by special denial of all of plaintiff's allegations in support of her prayer for a divorce. He expressly denied that the three tracts of land situated in Harris county was the separate estate of plaintiff, and says that it is the community property of plaintiff and himself, and that the same represents the total earnings and savings of the parties for the past 37 years as husband and wife; that plaintiff is claiming said lands under and by reason of a certain instrument which upon its face appears to be a deed from him to plaintiff, conveying to her said lands, but in fact said instrument was not intended by him to be a deed, nor a transfer of his interest in said lands to plaintiff; that when said instrument was signed he was threatened with a fictitious and unfounded litigation, which was never instituted; that he executed said instrument without the knowledge of plaintiff for his own protection against said threatened suit; that said instrument was never delivered to plaintiff, but that she obtained possession of the same and placed it of record without his knowledge and consent; that same was without consideration and was void.

Plaintiff by supplemental petition denied all the material allegations of defendant's answer, and further alleged that said lands were conveyed to her by said deed, and was so intended by defendant, and that said deed was delivered to her by defendant for the purpose of conveying said lands to her.

The cause was tried before a jury, who, upon special issues submitted to them by the court, found that none of the causes alleged by plaintiff for a divorce in fact existed, but they found that defendant did make manual delivery to plaintiff of the deed in question by which he conveyed to plaintiff the lands in question. Upon such findings of the jury the court rendered judgment denying plaintiff's prayer for a divorce and partition of the community property, but rendered judg-

ment in favor of plaintiff adjudging her to be the owner of the three tracts of land in question in her own separate right, and quieting her title thereto as between her and defendant as prayed for. From so much of such judgment as adjudged said land to plaintiff, defendant has appealed.

Appellant's contentions are: First, that as appellee's suit was for a divorce, partition of the community property of herself and husband, and for the quieting of title in her to certain lands claimed by her as her separate property, the court was without authority and jurisdiction to determine the rights of appellee to the lands claimed by her as her separate property, after the jury had found that no cause existed which entitled appellee to a divorce; that a refusal of the divorce prayed for entitled appellant to judgment and the court erred in not so decreeing. Second, that if, after said divorce had been refused, the court had jurisdiction to determine the rights of appellee to lands claimed by her as her separate property from proper allegations, it had no power or authority to do so in this cause, because appellee's petition does not allege what interest she has in said lands, nor that she was in possession or entitled to possession thereof, nor that appellant had unlawfully entered upon and dispossessed her of the same, as required by law in suits of trespass to try title.

[1] The effect of appellee's original and supplemental petitions, aided by the answer of the appellant, relative to the questions presented for our consideration, is that appellee is the owner of the three tracts of land in Harris county in her own separate right; that she claims the same under a deed duly executed and delivered to her by appellant; that appellant is disputing appellee's title to said land and insisting that he never delivered said deed to appellee, and never intended thereby to convey said land to her, and that the same is not the separate property of appellee, but the community property of himself and appellee; that appellee and appellant are living separate and apart from each other; that appellant has disposed of a part of their community estate and converted the proceeds thereof to his own use; and that appellee fears that appellant will attempt to mortgage or encumber her said separate property. Upon these allegations, appellee prays for an injunction to restrain appellant from selling, mortgaging, or otherwise encumbering her said separate estate, or in any way destroying or wasting any of said property, and that upon final hearing she be quieted in her title to her said separate property.

We think that appellee's original and supplemental petitions, when considered in connection with the allegations of appellant's answer, were sufficient to authorize the trial court to render the judgment rendered in

this cause upon sufficient proof of the matters alleged.

[2] That a wife could not, independent of a suit for divorce, sue her husband under the laws of this state for the possession and control of her interest in their community estate, or for her separate property, either real or personal, prior to the passage of the act of the Thirty-Third Legislature of 1913, p. 61, wherein separate and community property is defined, cannot be successfully questioned, for the obvious reason that prior to the passage of such act the husband by express terms of the statute law was made the possessor and controller of his wife's property, both community and separate, during marriage. We do not mean, however, to be understood as asserting that a wife could not at all times prior to, as well as since, the passage of the act referred to, sue her husband for the protection of her separate property in his possession against damage or waste threatened by the wrongful acts of the husband, or his declared intention to use the same to her damage. We do not think there has ever been a rule of law established in this state which prohibited a wife from resorting to the equitable powers of our courts to prevent the husband, in whose possession the law had placed her separate property, from so dealing with the same as would result in its waste or material damage, or to cast a cloud upon her title thereto, but on the contrary we think it well settled in this state that the wife may sue the husband for the protection of her separate property in his possession. *Dority v. Dority*, 96 Tex. 222, 71 S. W. 950, 60 L. R. A. 941; *Fox v. Fox*, 179 S. W. 888; *Heintz v. Heintz*, 56 Tex. Civ. App. 403, 120 S. W. 941, and authorities therein cited.

We think it well settled by the cases cited that, besides actions for divorce, a wife may maintain a suit against her husband for the recovery of her separate estate wrongfully converted by him, and also to have a resulting trust declared in her favor in lands claimed by her in her own right in his possession, her title to which he is disputing, and to which he is asserting title in himself adverse to her.

[3] In the case of *Dority v. Dority*, supra, it is held by our Supreme Court that when the husband by nonperformance of his duties and abuse of his powers has defeated the purposes of the law in conferring upon him the right to manage the wife's property, that right should not be permitted to stand in the way of the right of the wife to sue him for the protection of her property. The right of the wife in the instant case to sue her husband to quiet her title to the land claimed by her as her separate property and to which appellant is asserting title adverse to her, however, no longer depends upon rights accruing to her as the result of the

wrongful acts of the husband hereinbefore mentioned. By an act of the Thirty-Third Legislature of 1913 (Acts 33d Leg. p. 61), separate and community property of husband and wife is defined, and it is provided therein that the wife shall have the sole management, control, and disposition of her separate property, both real and personal: Provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an incumbrance or conveyance by the wife of her lands. It is also provided that the rents from the wife's separate real estate shall not be subjected to the payment of debts contracted by the husband. It is thus apparent that since the act mentioned became a law, the husband is no longer, as a matter of law, in possession or control of his wife's separate estate, and can no longer hold the same against her will, and should he now undertake to do so we can see no legal reason why the wife may not maintain a suit against him for the possession of the same. Nor do we see any legal reason why she should not be permitted to sue him to quiet her title to her land if he be in possession of said property and asserting title thereto adversely to her, without being required to bring a suit for divorce.

[4] There is no statement of facts with the record and in the absence of such we must presume that the facts proven upon the trial support the finding of the jury and the judgment rendered by the trial court.

We have read and considered all of appellant's assignments, and what has been said disposes of all of them.

We find no error committed by the trial court in the trial of this cause, nor in the judgment there rendered; such judgment is therefore affirmed.

Affirmed.

WILSON v. J. W. CROWDUS DRUG CO.
et al. (No. 1074.)

(Court of Civil Appeals of Texas, Amarillo.
Dec. 6, 1916. Rehearing Denied Dec. 20,
1916.)

1. NOVATION — ACCEPTANCE OF NEW OBLIGATION.

Where retailer, indebted to a wholesaler, sold his business, the buyers undertaking to pay his debt for which they made cash payment and executed notes to the wholesaler, the wholesaler, not releasing the retailer in fact, did not release him in law by merely taking such notes, this being merely accommodation of the retailer, nor, although the retailer became surety of the buyer as between themselves, did he become secondarily liable to the wholesaler, since a contract once made cannot be unmade without the consent of both parties, and the mere knowledge or notification of the wholesaler as to such relations would not be sufficient, and the fact that the notes were more onerous as to terms than authorized by the retailer was immaterial

as respects his liability on the original debt, and also so far as he was concerned with the notes, since he was not liable on the latter.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. —5.]

2. NOVATION — EVIDENCE.

To produce a novation the intention of the creditor to discharge the first debtor and accept the second in his stead must be perfectly evident.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. —5.]

3. NOVATION — EVIDENCE.

In action on account for goods sold, the defense being that buyers of the business assumed the account, a telegram from defendant's attorney, authorizing plaintiff to accept the buyers' notes for the account, was admissible as showing that plaintiff's giving the buyers such additional time was an accommodation to the debtor and not a novation, notwithstanding such note contained onerous terms not mentioned in the telegram.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. —12.]

4. EVIDENCE — WHOLE OF CONVERSATION.

In such action, a declaration of plaintiff's agent that it was not his purpose to release defendant by accepting the notes of the buyers was not inadmissible as self-serving, where it was part of a conversation wherein defendant's attorney admitted the defendant did not claim a release by acceptance of the notes; the whole conversation being admissible, and the agent's assertion rendering the attorney's admission understandable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087; Dec. Dig. —271(13).]

5. APPEAL AND ERROR — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

A creditor's books, showing that the notes of a third person were entered as a credit on a debtor's account, would have had no probative force as showing an agreement to accept the notes as a novation, and, the fact of entry having been otherwise shown, there was no reversible error in excluding the books.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. —1058(1).]

6. ACCOUNT, ACTION ON — VERIFIED ACCOUNT.

Where an account is properly verified under Rev. St. art. 3712, providing for suit on sworn account, it is admissible as prima facie evidence, in absence of a sworn denial by defendant that it was not just or true, etc., as required by such statute.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 41, 42; Dec. Dig. —14.]

7. APPEAL AND ERROR — HARMLESS ERROR—ADMISSION OF ACCOUNT.

The admission of an account, incorrectly made up, was not injurious to appellant sued thereon, where the true account was substantially admitted and proven otherwise to be due and owing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166; Dec. Dig. —1051(1).]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by the J. W. Crowdus Drug Company and others against Howard T. Wilson. From judgment for plaintiffs, defendant appeals. Affirmed.

Ben H. Stone, of Amarillo, for appellant. Reeder & Dooley, of Amarillo, and Spence & Haven, of Dallas, for appellees.

HUFF, C. J. Howard T. Wilson was in business at Sweetwater, under the trade-name of Wilson Drug Company, and purchased from the J. W. Crowdus Drug Company goods from time to time, as shown by an itemized account, amounting to the sum of \$2,050.

On the 22d day of June, 1914, Wilson sold his stock of goods at Sweetwater to C. W. Carder and T. B. Holman, for the sum of \$4,050, they agreeing to pay therefor, and executed as part payment their three promissory notes for \$666.66 each, and the balance of the consideration they agreed to pay to J. W. Crowdus Drug Company of Dallas the open account said company held against Wilson, and at the same time Holman and Carder executed a chattel mortgage to Howard Wilson on the fixtures of the drug company, to secure the three notes executed by them, and to secure Wilson on the open account due the Crowdus Drug Company, in the sum of \$2,050.

After selling the drug store, Howard T. Wilson went to Lexington, Mo. Afterwards, Bramlett, a representative of appellee, called on Holman and Carder and was notified that Wilson had promised to obtain an extension of time. Bramlett wrote to Wilson about the matter, and Wilson wired him to, "See Ben Stone, he represents me." Stone wired the appellees the following:

"Replying to Bramlett's letter to Howard T. Wilson, am authorized to wire you to give additional time on the basis of \$250.00, cash, balance in twelve equal monthly payments."

It appears that afterwards Holman and Carder paid the \$250 cash and executed twelve notes, dividing the balance as near as possible in equal amounts, the notes payable monthly, providing for interest, attorneys' fees, and a failure to pay one note should mature all. Wilson admits that he purchased the goods and that he had never paid for them, and admits that he made no agreement that he should be released from the payment of the account and that when Holman and Carder executed the notes appellee did not tell him they would release him from payment. Carder testifies that there was no agreement between Wilson and his firm when they purchased that Wilson would be released from the claim himself; that, when he and Holman bought from Wilson, Wilson stated that he owed the Crowdus Drug Company an account for goods shipped to him in the amount of \$2,050; that they assumed the payment of that in the trade with him; and that he did not make any agreement with him that he would be released from the payment of it. After the notes were executed, Mr. Bramlett, who represented the appellee in the adjustment of its accounts, went to see Mr. Stone and told him

that it was not his purpose at any time in dealing either with Stone or Wilson, or the Holman-Carder Drug Company, and all parties knew it, to release Mr. Wilson in any of the transactions, and that his instructions were absolutely not to do so; that Stone told him at that time:

"You can proceed against Carder and Holman, and if you can make anything out of them, all right, we are not pleading release and are not seeking a release, and haven't claimed a release, and we will pay the balance of it."

He said:

"If you don't do that, we will undertake to beat you out of it."

Howard T. Wilson admitted in open court upon the trial the following:

"It is admitted by the defendant, Howard T. Wilson, that the Crowdus Drug Company never did say that they would take Holman and Carder's notes and release Wilson, but that the allegation in the defendant's answer that it was agreed by and between the parties that the notes should stand in place of the account was intended to encompass this item, that the release would follow as a matter of law from the facts as plead, and that there was no actual agreement except as the acts the plaintiff did make the agreement."

The appellee in this case brought suit against Wilson, Holman, and Carder on the account as originally made by Wilson with the appellee, and brought into court the twelve notes executed by Holman and Carder, and tendered them into court and offered to surrender them to the defendant Wilson. The trial court instructed a verdict for the appellee against Wilson and Holman and Carder, on the account, less the \$250 credit, and, upon the jury's verdict, judgment was rendered against all parties for that amount; Wilson alone appealing this case.

[1] The first assignment of error is to the action of the court in instructing a verdict for the appellee in the sum of \$1,772.89. Propositions presented thereunder are that when Wilson sold the business to Holman and Carder, who assumed the amount of the Wilson indebtedness, they became principals and Wilson a surety, and, by extending the time of payment to Holman and Carder without Wilson's consent to the extension made, Wilson was discharged from liability to appellee, and that the evidence shows that the account was settled by the payment of \$250 cash by Holman and Carder, and the execution of their twelve notes; that this was either a payment or novation. It is unquestionably true that, when Holman and Carder assumed the indebtedness due appellee by Wilson, they became principal obligors, and Wilson the surety, as between themselves; but this would not necessarily render Wilson a surety as to appellee so as to entitle him to the treatment and protection from appellee as a surety for the debt. This will depend upon whether appellee consented to so change the character of Wilson's liability from principal to surety. A contract, when

once made, cannot be unmade without the consent of both parties. The mere knowledge or notification to appellee of such assumption will not be sufficient. *Shapleigh v. Wells*, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783. See, also, *Montague County v. Meadows*, 21 Tex. Civ. App. 256, 51 S. W. 556; *Heard v. Thrasher*, 71 S. W. 811; *Witt v. Amarillo National Bank*, 135 S. W. 1108; *Abernathy v. McDougale*, 187 S. W. 503; *Newby v. Harbison*, 185 S. W. 642.

The fact that Holman and Carder made their notes to appellee and paid \$250 on the debt does not of itself operate as a payment or novation. It may be evidence that the appellee has accepted the obligation of the vendees to pay, upon which they may recover. *Hill v. Hoeldtke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672. It may be doubted whether this is sufficient to show or present the issue whether the appellee consented to "so change the character of his (Wilson's) liability to such creditor from principal to surety, as to entitle him" to the protection and treatment of a surety. Under our decisions, we are not at all certain that such a result will necessarily follow from the acceptance of the obligation of the vendee alone. If such is not a payment or a novation, the original debt may be sued on and recovery had, and as to such the character and relation of the parties are unchanged, unless the creditor consents thereto. If there is no agreement by the parties that the new evidence of the debt shall be a payment or novation of the old, then the old debt based upon the original contract fixed the character, liability, and responsibility of the parties. This case must therefore turn on the question whether the original debt, as based on the original contract, was paid or novated. If there was not a payment by the notes or a novation, it is a matter of no concern, in so far as Wilson is affected, whether the notes were more onerous than his telegram directed. If the debt was paid by the notes, or if it was novated then Wilson is not liable, his obligation or contract has been discharged, and the question of suretyship becomes immaterial in disposing of the case. There is no evidence in this case that the appellee, at the time Wilson sold to Holman and Carder, knew of the trade, assented to it, or agreed to accept them on such debt. On the contrary, it is shown Wilson took a mortgage on the fixtures of the drug store to secure him against the payment of this debt, evidencing that he regarded himself as liable on the debt. At that time there was no consent on the part of appellee to change the character of the debt. If, in giving the parties time, according to the request of Wilson, there was no agreement to pay the original debt, it is yet in force. It seems to us the case of *Otto v. Halff*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56, is in point. The Supreme Court there says:

"The rule is established by the great weight of authority in England and the court of the American states that where a debt exists, and a note is given therefor, by the debtor, the right of action is suspended upon the original consideration until the note becomes due, and if it is unpaid at that time the creditor may elect to sue upon the original indebtedness, or upon the note, unless the note was accepted as payment of the pre-existing debt. If suit be brought upon the original consideration, and the note be negotiable, the plaintiff must show that it has not been transferred and is lost or destroyed or he must produce and surrender it." 2 Cyc. 183.

The appellee declared upon the account and sought a recovery thereon, and upon which the trial court entered judgment. The pleadings in this case, therefore, bring it within the rule recognized in the case of *Casey v. Anderson*, 37 Tex. Civ. App. 223, 83 S. W. 840. The above case of *Otto v. Halff* is valuable upon the question, even though the notes may not be enforced by reason of an unauthorized change from the terms of the telegram, yet, if there was no agreement that there should be a payment of the debt, the original debt is not forfeited by the change in the notes, but suit may be had therefor upon the original consideration. Certainly this case is stronger for appellee than the case cited. The only contention herein is that the extension authorized was a payment in twelve equal installments, while the extension granted was upon twelve notes, with ten per cent. interest and attorneys' fees, and the stipulation that a failure to pay one should mature all. The telegram itself does not purport to direct how the extension shall be evidenced, or the interest to be allowed, or the like. There is no fraud shown in taking the notes or in the change from the terms of the telegram. We think it would be a strained construction to hold the telegram did not authorize the notes. The notes did not purport to bind Wilson to their payment. It in no way obligated him upon them or to their terms. If he was not thereby released from the original debt, their form would not affect him upon his obligation. We do not believe the facts in this case will authorize a finding that there was a novation.

[2] To produce a novation, the intention of the creditor to discharge the first debtor, and to accept the second in his stead, must be perfectly evident. *Scott v. Atchison*, 36 Tex. 76; *Id.*, 38 Tex. 390.

"Novation can only exist by mutual consent and agreement of all the interested parties, and it is subject to the same rules of evidence that obtain in regard to any other kind of contract. Not only is it necessary to prove that the creditor took a new debtor, but it must be made to appear, in order to release the old debtor, that there was an extinguishment of the old debt, and an agreement to look to the new debtor alone. The mere taking of a new debtor for the old debt would not, standing alone, be sufficient to show novation." *Gimble v. King*, 43 Tex. Civ. App. 188, 95 S. W. 7; *Rushing v. Citizens' National Bank*, 162 S. W. 460.

The facts in the King Case, in many of its features, are quite analogous to the instant case. In this case there was no agreement between appellee and Wilson to take Holman and Carder and to release Wilson; in fact, it was admitted in the trial court there was no such agreement. There was no agreement whatever between any of the parties to take Holman and Carder for the debt instead of Wilson. On the contrary, Wilson took a chattel mortgage to secure himself and payable to himself. Under the uncontroverted facts and admission in this case, there could have been no substitution of a new debtor with the intention to release the old one. In fact, the telegram itself shows that it was only intended by Wilson to get an extension of the debt and not to procure the payment of the debt by the substitution of a new debtor.

[3] The second assignment of error will be overruled. The telegram from Stone to appellee, to the effect that the appellees were authorized to accept \$250 cash and the balance in twelve equal monthly payments, was, we think, admissible. Wilson had directed the appellee to Stone as his attorney. The notes had not then been executed. This telegram was not immaterial, but showed that Wilson did not consider the cash and notes a payment or a novation of the account, but he agreed thereby to extend the time for its payment. He did not, in so far as appellee was concerned, at that time stand in the attitude of a surety, and the facts that the notes contained provisions for attorneys' fees and 10 per cent. interest, and default of payment of one of the notes should mature all, while not mentioned in the telegram, did not render the message inadmissible on that account. If Wilson is liable upon the original contract, the provisions added to the notes did not affect the admission of the telegram or defeat Wilson's liability on his original undertaking.

[4] The third assignment will also be overruled. This assignment is based on the admission of the declaration of Bramlett to the effect that it was not his purpose to release Wilson by taking the notes and cash payment. This declaration was made after the notes were taken and in the conversation with Stone, the attorney for Wilson. Stone, in that conversation, admitted that he and Wilson were not claiming a release by the acceptance of these notes. This testimony was in its nature an admission that there was no release. The whole conversation relating to that matter we think admissible. Bramlett's assertion would render Stone's admission understandable; that is, that it was not the purpose of either party to effect a release from the original debt. We therefore think the court correctly ruled that this would not fall under the rule excluding self-serving declarations.

[5] The fourth assignment is also overruled. We think there was no reversible error in excluding the appellee's book of entry, showing a credit on the account by the notes. This fact appears to have been shown in Bramlett's testimony otherwise, and its exclusion would not be reversible error on that account. However, this entry would not prove or show an agreement to accept the notes as a novation or as a payment. Under the surrounding circumstances, the telegram of Wilson to appellee, authorizing the extension of time, the admission on his part and that of his attorney, that there was no agreement, and also his admission that he was liable on the account and no pretense that there had been any such agreement actually made except in so far as the act of taking the notes may have shown one, we do not think the mere entry in accordance with bookkeeping would have been entitled to any probative force on the question of agreement. The facts show that the account was credited with the notes, and this was all the book of the account could have shown. There was no reversible error in excluding the evidence.

[6, 7] The sixth assignment presents as error the admission of the verified account sued on for the reason that it does not show a credit proper to August 30, 1913. It is claimed that the \$250 paid by Holman and Carder is shown by the petition to have been made, and the account does not appear to have been credited with that amount. The account is properly verified under the statute. Article 8712, Revised Civil Statutes. Wilson did not file a sworn denial that it was not just or true in whole or in part as required by the statute. In the absence of such a plea, the account was prima facie evidence and admissible in testimony. In addition to the above, there was no injury in admitting this account, for it is substantially admitted and proven otherwise that the account for which the judgment was rendered was due and owing by Wilson.

We find no reversible error, and the case will be affirmed.

RABINOWITZ v. SMITH CO. (No. 995.)

(Court of Civil Appeals of Texas, Amarillo.
Nov. 15, 1916. Rehearing Denied
Dec. 20, 1916.)

1. TRIAL \S 284—INSTRUCTIONS—FAILURE TO OBJECT.

Mere failure to object to the general charge of the court does not estop a party from requesting instructions and excepting to refusal of such requests, since under Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, if there is no objection to the general charge, the objection only is waived and the charge is not approved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 683-685; Dec. Dig. \S 284.]

2. PLEADING \S 34(3) — GENERAL EXCEPTION — EFFECT — PRESUMPTIONS.

Every reasonable intentment will be indulged in favor of the allegations in the petition under a general exception.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 69; Dec. Dig. \S 34(3).]

3. BROKERS \S 82(1) — ACTIONS — PLEADING — SUFFICIENCY.

A petition in a broker's action for commission, alleging that he was to make a sale for part cash, the balance due to suit the purchaser, and that the lot was sold upon terms required by the seller to a purchaser willing and able to pay all cash, or to make terms to suit the seller, is not subject to a general exception.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 101; Dec. Dig. \S 82(1).]

4. PLEADING \S 228 — MISJOINDER OF COUNTS — NECESSITY OF OBJECTION.

If a petition is defective in failing to plead several alternative allegations by separate counts, special exceptions should be made on that ground, which a general exception will not reach.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 584-590; Dec. Dig. \S 228.]

5. PLEADING \S 248(4) — AMENDMENT — SUBSTITUTION OF NEW CAUSE.

Where a broker's petition for commissions alleged that the price at which he was to sell the land was \$8,000, \$2,500 to be paid in cash, a subsequent amendment, repeating the allegations of the petition, except that the amount of cash was not to be less than \$2,500, did not allege a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 701-706, 708½; Dec. Dig. \S 248(4).]

6. BROKERS \S 57(1) — COMMISSIONS — ACTIONS — EVIDENCE.

Where a broker was authorized to sell a lot at \$8,000, \$2,500 to be paid in cash and the balance in terms to suit the purchaser, and the purchaser to give vendor's lien notes, and he sold the lot for \$8,000, \$4,500 in cash, the purchaser to assume certain vendor's lien notes which in fact had no existence, he was not entitled to commission, not having made the sale upon the terms required.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 66, 67, 72; Dec. Dig. \S 57(1).]

Appeal from Dallas County Court; T. A. Works, Judge.

Action by the Smith Company against D. Rabinowitz. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Adams & Stennis, of Dallas, for appellant. Thompson, Knight, Baker & Harris, of Dallas, for appellee.

HUFF, C. J. The Smith Company, appellee, sued D. Rabinowitz for commission alleged to have been earned in the sale of a certain lot in the city of Dallas. The contract of listing is alleged as follows:

(1) "That on January 18, 1910, defendant (Rabinowitz) re-enlisted the said property with the plaintiff at the gross price of \$8,000 (eight thousand dollars), \$2,500 of which to be paid in cash by the purchaser, and the balance of the purchase price was to suit the purchaser as to the payment of same."

(2) "That the terms upon which said property was listed with plaintiff for sale was \$2,500.00

cash, upon delivery of warranty deed and the residue of the purchase price to be secured by vendor's lien upon said property."

(3) After this cause had been pending in the court for some four or five years, on March 23, 1915, by an agreement appellee inserted in the petition the following: "That if the property was not listed with Smith Company upon the exact terms hereinabove set forth, it was listed to be sold upon the following terms, to wit: For \$8,000, not less than \$2,500 to be cash; balance in vendor's lien notes bearing 8 per cent interest upon terms to suit purchaser."

It is also alleged that it was agreed to pay 5 per cent. commission upon the gross sum of \$8,000 "on and for the sale of said property." Four days after the re-enlistment plaintiff sold the property to one C. P. Dawson for the sum of \$8,000, who was ready, willing, and able to meet the terms of defendant, or to pay all cash for said property, or to make the terms to suit the defendant. Again it is alleged:

"That the said plaintiff did sell the said property to the said C. P. Dawson upon terms required by defendant, but plaintiff avers that defendant, when requested to perform said contract made by plaintiff, as defendant's duly authorized and constituted agent, renounced said contract and refused, and still refuses, to perform the same, or to transfer the said property to said purchaser, notwithstanding he has been requested and urged to do so."

It is also alleged:

"That at no time after the said property was listed with plaintiff for the gross price of \$8,000 did defendant change or modify the price, terms, or conditions on and for which said property was listed to be sold by plaintiff, but, on the contrary, and from time to time, over and always confirmed the said contract of enlistment, and urged these plaintiffs to employ their best energies to find a purchaser for the said property."

The appellant answered by exceptions, general denial, and as to the plea added March 23, 1915, interposed the plea of two-year statutes of limitation.

We shall first consider appellee's objections to the appellant's assignments of error, in which complaint is made to the action of the trial court in refusing four special requested instructions. The objections to the assignments are:

"That appellant waived said assignments of error for the reason that he approved the court's charge, which submitted an issue of fact for the jury's decision, and determination by his failure to object to such charge."

[1] Two of the requested instructions were peremptory, and requested a directed verdict, on the ground that there is no evidence showing that a sale was effected on the terms of the listing contract. The other two were instructions, requesting an application of the law to the facts on that issue. Proper bills of exceptions were taken and preserved to the action of the court in refusing the request. In the case of *Railway Co. v. Alcorn*, 178 S. W. 833, this court, speaking through Judge Hendricks, while reviewing the case of *Steele Co. v. Dover*, 170 S. W. 812, with reference to the construc-

tion given to the amendment of the statutes regulating charges, said:

"We disagree, however, with that holding, and think that a more reasonable construction of the statute, viewed as a whole, is that if a litigant makes a presentation in a special charge of an element of recovery, or of defense, appropriately based upon the facts and not embodied in the main charge, and sufficiently succinctly calls the court's attention to the omission, he is entitled to the submission of the charge, though he failed to object to the general charge on account of such omission."

In the recent case of *Roberts v. Houston*, etc., 188 S. W. 257, the Court of Civil Appeals for the First District apparently in part concur with this court, while as to certain classes of requested instructions hold that a failure to object to the main charge would be an approval of the charge, and that a special requested instruction would not be considered. It is obvious, however, in the light of the construction given these statutes by the Supreme Court, in the case of *Railway Co. v. Dickey*, 187 S. W. 184, that the various Courts of Civil Appeals have reached their conclusion from a wrong premise; as, for instance, it is frequently said a party failing to object to the main charge will be considered as having approved it. The Supreme Court points out very clearly that the articles with reference to objections to the main charge do not require exceptions, and that article 2061, as to taking bills of exception, refers to requested instructions, and it is therefore the given or refused instructions which are approved when there is no bill of exceptions. If there is no objection made to the general charge, it is waived under article 1971. It is the objection that is waived; the charge is not approved as being the law applicable to the case by failing to object. The courts have time and again said since this act that if there is an omission, an objection to the main charge because of the omission will not sufficiently present error, but an instruction must be asked covering the omission. *Modern Woodmen of America v. Yanowsky*, 187 S. W. 729. It is apparently held because no objection is filed to a charge submitting the facts to the jury that this would be held to be an approval of the charge and, we presume, an admission that there are facts for the determination of a jury. If there are no facts raising an issue, there is nothing to submit or to be determined by the jury. This rule has long been followed in this state by all the courts. *Mitchell v. De Witt*, 20 Tex. 294; *Henne v. Moultrie*, 97 Tex. 218, 77 S. W. 607. A party should not be estopped from calling attention to the fact that there is no evidence, either by a special charge or upon motion for a new trial, simply because no objection was presented to the charge of the court. It has been the holding of the Supreme Court that a requested instruction, presented after the court has prepared its charge, is not invited error or an estoppel. *Telegraph Co. v. Bowen*, 97 Tex. 621, 81 S.

W. 27; *Railway Co. v. Eyer*, 96 Tex. 72, 70 S. W. 529. It has also been held, where it appears the charges requested by the appellant were asked in explanation and amplification of the charge of the court, that this does not estop the appellant. *Railway Co. v. Pickens*, 118 S. W. 1183; *Paris Gro. Co. v. Burka*, 56 Tex. Civ. App. 223, 120 S. W. 552. An invitation to do a thing is in some respects a waiver of any injury resulting from the doing of the thing. We call attention to this line of authorities because it has been suggested by some of the decisions cited in the brief that a general charge to which appellant does not object should be treated as invited error. We cannot very well conceive why a failure to object should be held to have invited the court to write the charge it did. The court writes its charge and submits it to counsel for objection, who may then prepare and present such instructions as he desires. If the court's charge is not full enough or does not correctly present the law as applied to the facts, we cannot see why the appellant should be estopped or be held to have waived his right to request proper instructions by the mere failure to object to the charge. It has also been suggested that if the charge is not objected to and special instructions are requested and given, there would be such a conflict between the two that the case would be reversed under that line of decisions requiring a reversal upon inconsistent charges. In the first place, we are not to presume the court will do a thing of that kind; the presumption should be that he will withdraw the erroneous charge and give the correct one, as the law requires that he shall. *Railway Co. v. Dickey*, 187 S. W. 184. If he does not do so, then in the face of that presumption the court ought not to assume that appellant has waived his rights, which are preserved under the statutes giving him the right to request such instructions as he might desire. If the charges requested should have been given and were proper to have been given, the question of objection to the main charge of the court should have nothing to do with it. The objections provided for under the statutes were evidently intended to correct a well-known evil—such a charge not in the proper form, upon mere construction of the language of the charge liable to be considered as a charge upon the weight of the evidence, and the like—well-known considered evils known to the profession. To hold a failure to object waives the right to request special instructions is to hold in effect a repeal of articles 1973 and 1974, giving the right. This cannot be done by any rule of statutory construction.

This court, in the case of *Insurance Co. v. Rhoderick*, 164 S. W. 1067, and *Railway Co. v. Culver*, 168 S. W. 514, called attention to the statutes, and suggested simply that the record must, in some appropriate manner, reveal the action of the court in overruling objections to the charge; that the rec-

ord must also show the objections were presented before the charge was read to the jury. We suggested that a bill of exception perhaps would be a proper manner, but we did not hold that this was the only method to be pursued in preserving the error of the court in overruling objections. In the Culver Case we expressly called attention to article 1972, which provides that the court's charge shall be regarded as excepted to and subject to revision for error without the necessity of taking a bill of exceptions, and we also called attention to article 2062, providing that where the ruling of the court appears otherwise of record, no bill is required. We did not attempt in those cases to construe the articles further than to apply them to the question there under consideration.

In the case of *Railway Co. v. Galloway*, 165 S. W. 550, where there was no objection to the general charge and a special instruction was requested on the same issue, without taking a bill to its refusal, and an assignment was based on the refusal of the court to charge and to the refusal of the special instructions on that issue, this court held that the failure to give the requested instruction under article 2061, in the absence of an exception to the action of the court refusing it, would be held to be approved, and in the absence of an objection to the general charge on that issue would be regarded as waived. We have not held that the failure to object would be an approval of the court's general charge, or that it would deprive the aggrieved party of the right to present error upon the refusal of requested instructions if properly presented by bill of exceptions. We note that the above cases have been cited as if supporting the latter proposition. This court has never intended to make such holding, but in the *Alcorn Case*, *supra*, expressly held a failure to object to the general charge would not defeat the right to assign error upon the refusal of the specially requested instruction.

[2, 3] The first assignment presents that the court was in error in overruling appellant's general exceptions to the petition. Every reasonable intendment will be indulged in favor of the allegations in the petition under a general exception. The objection appears to be that the petition alleges the authority of the agent was to make a sale, and the balance due on the purchase price "was to suit the purchaser as to the payment of same," or "upon terms to suit purchaser," and that the lot was sold "upon terms required by defendant," the seller. It was also alleged that the sale was made to a purchaser, "willing and able to pay all cash for said property, or to make terms to suit the defendant." We think it is reasonably apparent that it was alleged the agent was authorized to sell for a stipulated price, giving the cash required, and the balance was to be paid by the purchaser at such time as would suit him; that, a purchaser was found

who was willing to take it on the terms mentioned or to pay all cash, or to make the terms, payments, to suit the defendant; that these terms, or either of them, suited the purchaser. The petition is not, in our judgment, subject to a general exception.

[4] The second assignment is overruled. If the petition is defective in failing to plead several alternative allegations by separate counts, the appellant should have presented a special exception on that ground. A general exception will not reach the defect, if any.

[5] The third assignment asserts that the third count or allegation, set up for the first time March 23, 1915, alleged a new cause of action, and was therefore barred by the statute of limitation. We do not think so. The contract of agency, in all the several ways alleged, is substantially the same. In all the price of the land was \$8,000, \$2,500 cash, and the balance to be secured by vendor's lien. In the last it is alleged the cash was to be not less than \$2,500. The cause of action alleged in each as to whether it is the same cause of action will meet the test laid down by the Supreme Court, in *Phoenix Lbr. Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707. The original allegations and that added by insertion evidently declare upon the same transaction, and differed only as to the terms and effect of the agency contract. *Green v. Loftis*, 132 S. W. 507; *Burton v. Beyer*, 34 Tex. Civ. App. 276, 78 S. W. 248.

[6] The fourth and fifth assignments of error urge that the court should have given the first and second specially requested instructions, which in effect directed a verdict for the appellant, for the reason that the appellee did not make a sale upon the terms upon which the property was listed. The witness, Milam, who testifies he was manager of the real estate department of appellee at the time the property in controversy was listed, and who made the listing contracts, testified:

"On January 18, 1910, it (the lot) was listed at a gross price of \$8,000, \$2,500 of this to be cash; that is, the cash payment was not to be less than \$2,500, and the balance in vendor's lien notes bearing 8 per cent. interest. The Smith Company was to get 5 per cent. on the gross price of \$8,000 for making the sale of said property."

This witness further testified that he sold this property to C. P. Dawson and entered into a written contract with him; that Dawson was financially able to buy the property; "he was ready and willing and able to comply with the terms of his contract to purchase said property;" that he informed appellant of the sale and showed him the contract; that appellant said he thought the property would sell for more, but that he was willing to take the price and pay the commission, but that his brother, who was interested with him, was unwilling to take that for the land; that witness, up to the time when appellant refused to deed the land,

did not know that appellant's brother or brother-in-law had any interest in the lot, and asked appellant why he had not told him of that fact. Appellant replied his brother had been willing to sell for that price, but had since refused to take the price and wanted more. This witness testified that:

"I did sell said property on January 22, 1910, to C. P. Dawson. I negotiated the sale selling said property for \$8,000, on the following terms: \$4,500 cash and the (assumption?) of \$3,000 vendor's lien notes, which I understood at the time were outstanding against said property, but later found out that there were none."

Smith, the general manager of the company, testified to the terms of the listing contract substantially as did Milam. Smith says Dawson was willing to pay more cash than agreed upon in the contract; that it was understood there were \$3,500 in notes against the property, and that Dawson would have to assume them, but if there were no notes, then Dawson would pay all cash, if appellant wanted it; that he was willing to meet the terms of appellant, and was financially able to do it. Smith says he drew the written contract. There is no testimony showing that there was a contract to sell the land for all cash, or that appellant was ever notified that Dawson would pay all cash. The testimony shows positively he was not present when the purported trade was made between Dawson and the Smith Company. There was in fact no incumbrance on the lot for \$3,500, or for any sum of money, and it is not pretended that appellant represented there was. The listing slip offered in evidence shows: "Price \$8,000.00 gross; terms, \$2,500.00 cash; incumbrance, ———;" and under the word and dash is written, "Bal. \$3,500.00 to suit." A written contract was entered into on the 22d day of January, 1910, signed by C. P. Dawson, and "Smith Company by W. H. Milam, Sales Manager's Agent for D. Rabinowitz." This contract recited the land was sold for \$8,000, to C. P. Dawson; \$4,500 cash, and the "balance in the assumption by Dawson of \$3,500.00 incumbrance now against the said property; interest on said notes to be paid by said Rabinowitz to date of transfer." Four hundred dollars was paid into the hands of the agents. "Balance of cash payment to be made and notes and deed of trust to be executed at once when general warranty deed is presented when property conveyed hereinbefore described. All taxes to be paid up to and including the year 1909; rents to go to grantee to date of transfer." The contract further evidences that 30 days were allowed in which to prepare abstracts and conclude transfer. The rents on the property was \$45 per month. C. P. Dawson testified that he entered into a contract as shown by the writing for the purchase of the property, and identified the written contract as the one signed by him. He testified: "I was ready, willing, and able to comply with my contract to purchase said property;"

that he demanded of appellant a compliance with the sale "according to the terms of the contract." Appellant, according to his recollection, refused to deed the property because he had previously sold it. On cross-examination Dawson testified that he had the money to pay the cash called for, and that he was able and willing to comply with his contract. The agents, according to the uncontradicted testimony, were authorized to sell the lot for \$8,000, with at least \$2,500 cash, balance to be secured by vendor's lien notes, bearing 8 per cent. interest. They made a written contract with Dawson to sell for that price, and to pay \$4,500 cash and to assume \$3,500 incumbrance, which in fact had no existence. The appellant, under the contract, could not have compelled the execution of such note. He, according to appellee, stipulated that he should have vendor's lien notes. The appellees made no contract requiring the purchaser to execute such notes. Again, the appellee was not authorized to give the purchaser the rents on the property until the matter was closed up. Ordinarily, a proposed purchaser gets the use of his money and the proposed seller the use or rents of his property until the trade is finally consummated. It is certain a written contract was not executed according to the terms the agents were authorized to give the purchaser. The Smith Company failed to pursue the authority given them; therefore no valid sale was made. It was required to strictly pursue the method and the power granted it in the listing contract. This it did not do, and therefore was not entitled to commissions to a sale it never made. *Colvin v. Blanchard*, 101 Tex. 281, 106 S. W. 323; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959; *Evants v. Fuqua*, 102 Tex. 430, 118 S. W. 132, 132 Am. St. Rep. 892; *Hagler v. Ferguson*, 102 Tex. 432, 118 S. W. 133, 133 Am. St. Rep. 895; *Henderson v. Gilbert*, 171 S. W. 304; *Caldwell v. Scott*, 143 S. W. 1193.

Appellee apparently insists that if the contract was not in accordance with the terms given it, a purchaser was nevertheless found who was willing, and able, to pay all cash, which would be within the terms of the listing contract. Dawson may have been willing to pay cash, but he did not so contract, and the appellant could not have forced him to do so. *Hagler v. Ferguson*, and *Evants v. Fuqua*, supra. Both Milam and Dawson testified that Dawson was willing and able to take the land according to the terms of the contract made. Smith testifies that Dawson wanted to pay cash, but could not do so because of the incumbrances. The agent never so notified appellant, and Dawson never agreed to pay cash or entered into any such contract. It was incumbent upon appellee to show a sale in accordance with their authority in the listing contract, and this was not done.

The fourth, fifth, and eight assignments are sustained.

It will be unnecessary to notice other assignments. The case will be reversed and rendered for the appellant.

BORSCHOW v. WILSON. (No. 1685.)

(Court of Civil Appeals of Texas. Texarkana.
Dec. 8, 1916. Rehearing Denied
Dec. 21 1916.)

1. EVIDENCE \S 441(11)—PAROL EVIDENCE—VARYING TERMS OF CONTRACT.

In an action on notes transferred as part consideration for an exchange of property under a written contract agreeing to sell and convey the notes, where the written contract was clear and unambiguous, and there was no averment in the pleadings that there was any fraud or mistake which made it an incomplete or incorrect memorial of the agreement entered into, parol evidence was inadmissible to prove terms either additional to or different from those contained in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1799-1812, 2043, 2044; Dec. Dig. \S 441(11).]

2. BILLS AND NOTES \S 280—ACCOMMODATION INDORSER.

If one not having an assignable interest in promissory notes joined in an indorsement for the purpose of assignment alone, his liability would have been that of a surety or guarantor and not that of an ordinary indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 622, 627; Dec. Dig. \S 280.]

3. PRINCIPAL AND AGENT \S 109(4)—LIABILITY OF PRINCIPAL—INDORSEMENT OF NOTE BY AGENT.

An indorsement of a note by an agent in his own name does not bind the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 322, 365; Dec. Dig. \S 109(4).]

4. PRINCIPAL AND AGENT \S 171(1)—LIABILITY OF PRINCIPAL—ACTS OF AGENT IN HIS OWN NAME.

The fact that a principal received the benefit of a transaction is not alone sufficient to make him liable for the agent's undertaking in his own name.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 644, 645, 653, 654; Dec. Dig. \S 171(1).]

5. FRAUD \S 47—ELEMENTS—INJURY TO PLAINTIFF.

Where a count charged the alleged partner of the indorsee of notes with conspiracy to convey to plaintiff notes worth less than their face value, in the absence of evidence that either maker or payee, both liable personally for payment of the notes, were insolvent, no injury to plaintiff, the first essential in an action for fraud, was shown, and there was no liability.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 42; Dec. Dig. \S 47.]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Suit by A. M. Wilson against Max Borschow and others. From a judgment for plaintiff against named defendant and defendant J. N. Label, named defendant appeals. Reversed and rendered.

Samuels & Brown, of Ft. Worth, for appellant. J. Lee Zumwalt, of Dallas, for appellee.

HODGES, J. In August, 1914, the appellee, A. N. Wilson, instituted this suit in the district court of Cherokee county against G. H. Moss, J. S. Brasher, and J. N. Label, alleging, in substance, as follows: That G. H. Moss had made, executed, and delivered to the defendant Brasher three promissory notes for \$500 each, with interest from date at the rate of 8 per cent. per annum, due April 21, 1914, 1915, and 1916, respectively. The notes contained the stipulation that a failure to pay any one of them at maturity would at the option of the holder mature all of them. These notes were given in part payment of the purchase money for a tract of land described in the pleadings, which had been sold by Brasher to Moss. The notes were thereafter, for a valuable consideration, and before maturity, sold to J. N. Label, and were by Label assigned and transferred to the plaintiff. One of the notes had matured but had not been paid, and plaintiff had exercised his option to declare all of them due and had placed them in the hands of an attorney for suit. The petition concluded with a prayer for a personal judgment against the parties mentioned, and for a foreclosure of the vendor's lien upon the land described. In January, 1915, the plaintiff, Wilson, filed an amended original petition, retaining as defendants Moss, Brasher, and Label, and making the appellant Max Borschow also a party defendant. In addition to the averments contained in the original petition, it was alleged, in substance, that Brasher had transferred all of the notes to Label and Borschow; that Label and Borschow had assigned and transferred the notes to the plaintiff, and as a part of the trade had agreed to indorse the notes with recourse on themselves; but that the notes were in fact transferred by Label alone, without indorsement. It was further averred, if the plaintiff was mistaken as to the ownership of the notes being in Label and Borschow, that these parties in their dealings with him were acting as a partnership. It was also charged that Label in transferring the notes was acting as the agent of Borschow. Borschow under oath denied the existence of the partnership between him and Label, denied that Label was his agent in any transaction with the plaintiff, and also denied that he was in any way connected with the trade between plaintiff and Label. Moss and Brasher filed no answer, and judgment was rendered against them by default for the amount of the notes, with a foreclosure of the vendor's lien. The trial then proceeded upon the answers of Borschow and Label.

The facts as disclosed by the testimony were, in substance, as follows: In August, 1913, Wilson was the owner of a stock of goods in the town of Justin, Denton county, Tex., which he desired to sell. After some negotiations, he and J. N. Label agreed upon

the terms of a trade, which they subsequently embraced in the following written agreement:

"State of Texas, County of Denton.

"Know all men by these presents:

"That we, A. M. Wilson, party of the first part, and J. N. Label, party of the second part, have entered into the following agreement and contract, for the exchange and sale of property and merchandise:

"First. The party of the first part bargains, sells and exchanges to the party of the second part as follows: One stock of groceries, general merchandise and fixtures situated in the town of Justin, Tex., Denton county, said stock to be sold at wholesale cost price.

"Second. And in consideration the party of the second part bargains, sells and conveys to the party of the first part as follows: Two tracts of land. One being 160 acres in Henderson county, seven miles south of the town of Athens, known as the Henry McCall place. Also one 75-acre tract located 10 miles southwest of the town of Jacksonville, Tex., known as the Robert A. Smithers place. Also two groups of vendor's lien notes totaling the amount of \$2,340.00. The value of the entire property, land and notes, being \$7,250.00.

"Third. It is further agreed and understood by each of the parties to this contract, that should the stock and fixtures invoice more than the land and notes amount to then the party of the second part agrees that the difference shall apply to the transferable indebtedness of the party of the first part on the stock transferred, and if the difference should be more than this indebtedness, then the remaining difference is to be paid in cash.

"Fourth. Should either party to this contract, after good and sufficient titles have been furnished, refuse to deliver possession of said property on completion of the inventory to the above-mentioned stock, then the party in default shall surrender, forfeit and deliver all papers to the party complying with the contract.

"Fifth. It is agreed and understood that the party of the second part is not to assume any contracts made by the party of the first part for goods to be delivered after the present date.

"Witness our hands this the 12th day of August, A. D. 1913.

A. M. Wilson.
J. N. Label."

Wilson testified that before this written contract was executed he and Label discussed the manner in which the notes referred to were to be transferred and that it was agreed between them that they were to be assigned by Label's written indorsement without any qualification. He was corroborated by another witness, who wrote the contract and was present at the time. Wilson also testified that after an inventory of the goods had been completed, and during his absence, Label brought to his office and left for delivery to him a written assignment of the notes, stipulating that they were transferred without recourse. Wilson refused to accept that assignment, and went over to the store to see Label about it. He was informed, however, by Mr. Borschow, that Label was not in town, but that he (Borschow) would see Label, and was assured by Mr. Borschow that the matter would be arranged satisfactorily.

This oral testimony on the part of Wilson was admitted over the appellant's objection. Label denied that he had entered into any agreement with Wilson to assign the notes

by written indorsement and testified that no such agreement was ever made between them.

It appeared from other testimony that one group of the notes, transferred by Label to Wilson as a part of the consideration in that trade, belonged originally to Borschow, but that the notes involved in this suit belonged to Label.

At the conclusion of the evidence, the appellant, Borschow, requested the court to peremptorily instruct a verdict in his favor. This was refused and the case was submitted on special issues, which resulted in a finding of the following facts: (1) That Label and Borschow jointly purchased the stock of goods from Wilson. (2) That Label acted for himself and as agent for Borschow in that purchase. (3) That Label agreed to assign the notes involved in this suit by a plain and unqualified written indorsement. (4) That in making that agreement he was acting both for himself and Borschow. Upon these findings the court entered a judgment in favor of the appellee, Wilson, against both Label and Borschow as indorsers on the notes. Borschow alone has appealed from that judgment.

It will be observed that in the amended original petition filed in this case the liability of the appellant, Borschow, is based upon the ground that he, together with Label, agreed to indorse the notes without any qualification. It is also alleged that Label in contracting with Wilson was acting as the agent of Borschow, and that Label and Borschow were partners in the undertaking. In a trial amendment filed by the appellee, the liability of Borschow is based upon the ground that he and Label entered into a conspiracy to defraud Wilson by inducing him to trade for and accept promissory notes that were "worth less than their face value."

[1] Appellant's liability upon the first count of the appellee's pleadings must be determined by the terms of the written contract, which has been heretofore quoted. It appears to be conceded by counsel for both parties that this contract is the only writing which contains any of the foregoing statement of the facts. The court, over the objection of appellant, permitted Wilson to testify that Label expressly agreed to assign the notes by a plain indorsement. This testimony was either superfluous or inadmissible. The written contract was clear and unambiguous, and there is no averment in the pleadings or statement in the evidence that there was any fraud or mistake which made it an incomplete or an incorrect memorial of the agreement entered into at that time. Parol evidence was therefore inadmissible to prove terms either additional to or different from those contained in the writing. On the other hand, if it can be said that the terms of the written contract to sell and convey the promissory notes implied an assignment by a plain indorsement, the parol testimony of

Wilson was superfluous and added nothing to the stipulation to be considered in construing the contract. Hence, in disposing of the issue of liability under the first count, we are confined to the written contract alone.

[2-4] The question then is: Did the terms employed by the parties in this contract imply that Label was to assign by written indorsement? In other words, did the terms "sell and convey," when applied to negotiable promissory notes, carry the implication that the sale and conveyance were to be in the form of an indorsement without any qualification? The common-law rule pertaining to the assignment of promissory notes and other choses in action does not prevail in this state. *Word v. Elwood*, 90 Tex. 130, 37 S. W. 414; *Prouty v. Musquiz*, 94 Tex. 87, 58 S. W. 721, 906. The contract by its terms bound only Label. There was no evidence that Borschow had agreed to participate in the sale and conveyance of the notes. Let us then suppose that Label had performed the contract, according to Wilson's understanding, and had actually indorsed the notes without any qualification: Would that indorsement have bound Borschow also? The indorsement being for the purpose of assignment alone, it could not have been within the contemplation of the parties that one having no assignable interest should join in the indorsement, without an express agreement to that effect. Had Borschow also indorsed the notes, his liability would not have been that of an ordinary indorser, but that of a surety or a guarantor. *Latham v. Houston Flour Mills*, 68 Tex. 127, 3 S. W. 462; *Brooks v. Stevens*, 178 S. W. 30; *Jones v. Lynch*, 137 S. W. 395; 8 Cor. Jur. 79, and cases cited in notes. Had Label by authority written Borschow's name on the back of the notes, the situation of the latter would have been the same as if he had himself put it there. It follows then that, in the absence of proof that Borschow or Label had agreed that Borschow should be bound upon the notes, the judgment appealed from is unsupported by the evidence. Label could not have acted as Borschow's agent in conveying Label's own property; this is true even though they may have been partners in the result of the negotiations. These notes were negotiable instruments; and, under the rule prevailing in this and many other states, an indorsement by an agent in his own name does not bind the principal. *Texas Land & Cattle Co. v. Carroll & Iler*, 63 Tex. 48; *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913; *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 88 S. W. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677, and cases cited in notes. The fact that the principal received the benefits of the transaction is not alone sufficient to make him liable for the agent's undertaking. We therefore conclude that the evidence was insuffi-

cient to hold Borschow liable upon the contract to indorse.

[5] The next question is: Was Borschow liable upon the ground that he conspired with Label to convey notes worth less than their face value? Treating the averments in this count of the appellee's petition as sufficient to charge an actionable conspiracy to defraud, there is no evidence to support a finding against Borschow upon that issue. The notes were executed by Moss payable to the order of Brasher, and by the latter transferred to Label by plain indorsement. Both Moss and Brasher became liable personally for the payment of the notes. There was no evidence from which it might have been concluded that either of these parties was insolvent; and, unless they were, no injury to the appellee has been shown, and the first essential in an action for fraud was lacking. There was therefore no basis for a judgment against the appellant upon that count.

For the reasons stated, we are of the opinion that the court should have given the peremptory instruction. The judgment therefore will be reversed, and judgment here rendered in favor of the appellant, Borschow.

LUCK v. ALAMO PRINTING CO. (No. 5697.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 1, 1916. Rehearing Denied Dec. 20, 1916.)

1. CORPORATIONS — §33 — LIABILITIES — CONTRACTS — NOTICE OF CORPORATE EXISTENCE.

The appearance of the name of an association on the office door with the names of the individuals with whom the representative of plaintiff dealt did not necessarily give notice to plaintiff of a corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. §33.]

2. SALES — §52(6) — ACTIONS FOR PRICE — EVIDENCE.

In an action for the agreed price for printing and supplies, evidence held to support the jury's finding that the plaintiff, through its agent, dealt with defendant, binding him individually.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. §52(6).]

Appeal from Bexar County Court for Civil Cases; Ed H. Wicks, Special Judge.

Action by the Alamo Printing Company against J. J. Luck and others. From a judgment for plaintiff, defendant J. J. Luck appeals. Affirmed.

Williams & Hall, of San Antonio, for appellant. Wm. H. Russell, of San Antonio, for appellee.

SWEARINGEN, J. Appellant was sued, with other defendants, for \$193.20, being the agreed price for certain printing and supplies. The county court gave the jury two general instructions, and submitted one special issue, which was:

"Question No. 1. Was any contract made for the printing by plaintiff, the Alamo Printing

Company, through its agent, M. C. Hill, with the defendant J. J. Luck, binding him individually? Answer yes or no"

—to which the jury answered, "Yes." The court rendered judgment in favor of appellee against defendants, J. J. Luck, E. A. Luck, and Neal Currie, and also against the U. S. Fidelity & Guaranty Company, surety on the appeal bond of the defendant J. J. Luck, for \$193.20 and interest at the rate of 6 per cent. from October 19, 1915, together with costs incurred in both the justice and county courts. Appellant J. J. Luck alone appealed.

Appellee made, among others, the following allegation:

"This plaintiff would further show that the defendant J. J. Luck personally bound and obligated himself to pay the account sued on by reason of the fact that prior to the time the said account was made and at the time the prices thereon were submitted to the defendant, J. J. Luck, it was understood and agreed between the parties that the defendant J. J. Luck was to pay for the same."

Appellant, J. J. Luck, filed a plea in bar, wherein he averred as follows:

"He further shows to the court that he never purchased of the plaintiff herein any goods, wares, or merchandise as claimed by plaintiff herein, nor did this defendant ever authorize any one to purchase from plaintiff for him any such goods, wares, or merchandise."

Appellant filed an additional plea which contained a general denial and the following special denial:

"(3) He (J. J. Luck) denies positively that he ever dealt with plaintiff individually in any transaction whatever."

The evidence was conflicting upon the issue made by the pleadings as above indicated. The agent of appellee, Hill, testified:

"That after receiving manuscripts, etc., from E. A. Luck he called at the office in Frost Building over door of which names of Mexico-American Colony Association, E. A. Luck and J. J. Luck appeared; that E. A. Luck was seated at one desk and J. J. Luck at another. After giving prices to E. A. Luck, said E. A. Luck introduced witness to J. J. Luck, stating to witness that said J. J. Luck was his father, and that he desired his father to pass upon the prices, as his father, J. J. Luck, was to do the paying. That witness then handed said prices, etc., to J. J. Luck, who asked E. A. Luck if the prices were in line, and when E. A. Luck said, 'Yes,' that J. J. Luck said, 'All right,' and handed the papers back to witness, who thereupon returned to office of Alamo Printing Company, and the printing was done."

"Joe Naylor, a witness for plaintiff, testified that he took several statements of the account sued on to the office in the Frost Building, and on one occasion handed a statement to J. J. Luck in person, and that J. J. Luck took the statement, and said, 'All right; we will attend to it.'"

[1] The name, Mexico American Colony Association, did not necessarily give appellee notice of a corporation. Appellee had no direct information that it was dealing with a corporation. The articles of incorporation were not filed with the Texas secretary of state, so appellee is not charged with constructive notice of a corporation. The defendants did not

state that they dealt as officers or directors of a corporation. Appellant, Luck, had in fact furnished a large part of the money for the expenses incident to the contemplated business of the association, and had taken the individual notes of defendants Currie and E. A. Luck.

[2] The direct evidence and the corroborative circumstances above mentioned are sufficient to support the jury's answer to the issue submitted. G., H. & S. A. Ry. Co. v. Garrett, 44 Tex. Civ. App. 406, 98 S. W. 932.

No objection was made by appellant to the submission of the issue, and no bill of exceptions taken thereto. Essex v. Mitchell, 183 S. W. 399.

In deference to the jury's verdict, we conclude that the errors of the trial court, if any, assigned by appellant, did not amount to such a denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case. Rule 62a (149 S. W. x).

All of appellant's assignments are overruled, and the judgment of the trial court is affirmed.

OGBURN GRAVEL CO. et al. v. WATSON CO. et al. (No. 7585.)

(Court of Civil Appeals of Texas. Dallas. Nov. 18, 1916. Rehearings Denied Dec. 13, 1916.)

1. ASSIGNMENTS ~~56~~—ORDERS ON DEBTOR—ACCEPTANCE.

Where a contractor paid money due a subcontractor into court and sought to have claimants therefor interplead, the court properly rendered judgment of distribution, giving preference to those who had received orders from the subcontractor on the contractor, although such orders were not accepted, as they constituted an assignment of the fund to the extent of their respective amounts.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 66; Dec. Dig. ~~56~~.]

2. MECHANICS' LIENS ~~115~~(4) — NOTICE — SUFFICIENCY.

When the materialman furnishes material, and it is used in the construction of the building, and gives notice to the owner, before the owner has paid out all of the contract price to the proper parties, the failure to give notice to the owner at the time each article is delivered becomes immaterial, in order to fix the lien, provided the statute is otherwise complied with, as no injury would result to interested parties.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 157-159; Dec. Dig. ~~115~~(4).]

3. MECHANICS' LIENS ~~20~~—CONSTITUTIONAL AND STATUTORY PROVISIONS—"OWNER."

Under Const. art. 16, § 37, providing that mechanics, materialmen, etc., shall have a lien on the building for the value of labor or material furnished, and the Legislature shall provide for the speedy enforcement of such lien, and the laws providing for such liens on buildings and lots necessarily connected therewith, and that notice shall be given the owner, in view of Rev. St. 1911, Final Title, § 3, providing that the common-law rule that statutes in derogation of common law shall be strictly construed shall have no application to the Re-

vised Statutes, as "owner" in the mechanic's lien law does not mean the absolute owner, but the owner of an estate or interest which the court may order sold, a holder of a 99-year lease which required the construction of a building with power to destroy and rebuild improvements, although it made lessee liable personally for liens, had the right to subject the property to the mechanic's lien, and its estate was subject to such lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 21; Dec. Dig. ¶ 20.

For other definitions, see *Words and Phrases*, First and Second Series, Owner.]

Error from District Court, Dallas County; Kenneth Foree, Judge.

Interpleader by the Watson Company against A. A. Greer and others. From the judgment fixing the rights of the parties, and from the overruling of their motion for a new trial, defendants Ogburn Gravel Company and others bring error. Reversed and rendered in part, and otherwise affirmed.

Burgess, Burgess, Germany & Chrestman, O. D. Brundidge, and W. J. Rutledge, Jr., all of Dallas, for plaintiffs in error. Holloway & Holloway and Adams & Stennis, all of Dallas, for defendants in error.

RAINEY, C. J. Watson & Co., building contractors, on February 21, 1914, entered into a written agreement with Nelman-Marcus Company to construct a four-story fire-proof building, to cost about \$100,000, on a lot of ground the fee-simple title to which was in the estate of J. C. O'Connor, deceased, and which lot of ground was held by Nelman-Marcus Company under a lease for 99 years, made with the trustees of said O'Connor estate, beginning on September 1, 1912. On May 18, 1914, Watson Company, as general contractors, entered into a written agreement with Greer & Co., as subcontractors, by which Greer & Co. were to do certain portions of the work, and to furnish certain materials, for said building, in consideration of \$6,600; Greer & Co. giving bond for \$3,000, with the American Surety Company of New York. Greer & Co., after partly filling their contract, abandoned it, and it was finished by Watson Company at a cost of \$81.25, leaving still due Greer & Co. on the subcontract \$1,242.98. Various parties furnished Greer & Co. material which went into the building, for which Greer & Co. still owed at the time of their abandonment of the work. Greer & Co. gave to several of his creditors written orders on Watson Company for the amounts due them, but Watson Company did not pay them.

On August 15, 1914, Watson Company filed suit in the nature of a bill of interpleader in the Fourteenth district court, Dallas county, against the following defendants: A. A. Greer and L. A. Painter, copartners doing business under the name of A. A. Greer & Co.; American Surety Company of New York, a private corporation; G. E. Moore;

Paul Cooper and J. W. Ogburn, copartners doing business under the name of Ogburn Gravel Company; Dallas Builders' Supply Company, a Texas private corporation; Moroney Hardware Company, a Texas private corporation; John L. Boyd; Nelman-Marcus Company, a Texas private corporation; Leonard E. Baldwin and Jim M. Harry, copartners doing business under the name of Baldwin-Harry Company; H. L. Tenison; Southern States Steel Company, a private corporation; Ira T. Moore and Alfred A. Moore, copartners doing business under the name of Moore & Co.—alleging the condition and claims of each, and tendered into court the sum of \$1,242.98, and asked that each party be required to establish their respective claims; that the property of Nelman-Marcus Company be released and discharged from all liens and claims of all parties arising out of its subcontract with A. A. Greer & Co., asking that, if any liability in addition to the sum so tendered into court be fixed against plaintiff, then that it have judgment over against American Surety Company of New York for all such amounts as may be established against it. Nelman-Marcus Company answered by general demurrer, general denial, and specially, if judgment was rendered against it, that it have judgment over against Watson Company. The others answered, in effect, asserting their claims for material furnished Greer & Co., that they had fixed a mechanic's lien upon said property, and that notice had been given Nelman-Marcus Company, who at the time of notice held \$12,000 of the contract price due Watson Company. The American Surety Company answered, denying the claim asserted against it that Greer & Co. had performed its contract, and asked for judgment, and by trial amendment alleged that Baldwin-Harry Company were partners of A. A. Greer & Co. in the performance of the subcontract between A. A. Greer & Co. and Watson Company, and denied that Baldwin-Harry Company was entitled to any lien against the property, or any judgment either against the fund paid into court or any other parties, by reason of its claims, and asked for judgment over against Baldwin-Harry Company in the event any judgment was rendered against it.

Watson Company by supplemental petition denied that it had accepted or promised to pay any amount to Moore & Co., or to Ogburn Gravel Company, or to any other parties, on orders drawn by A. A. Greer & Co., and denied that Dallas Builders' Supply Company had a just claim against it, or the property described above, for its amount of \$181.05, for the reason that the material to that amount claimed to have been furnished Baldwin-Harry Company could not be the basis for a lien against Watson Company or A. A. Greer & Co., or against the building

into which the material was wrought, and denied, further, that it was liable to Dallas Builders' Supply Company for the sum of \$25.50, because no lien or claim of lien had been asserted for said sum. They further denied that any of said claimants gave any notice of liens as the materials were furnished, and that any of them gave any notice until after Watson Company had paid A. A. Greer & Co. all funds due them, except the balance tendered into court. They further denied that the claims of materialmen's liens were properly filed, and pleaded that no valid materialmen's liens existed on said property, and that said claimants were estopped from claiming liens beyond the amount tendered into court. Baldwin-Harry Company, by supplemental answer, denied the partnership as alleged between them and A. A. Greer & Co., and remitted \$347 of the amount asserted in their original answer, leaving a balance of \$1,179.64 as their claim.

Upon the pleadings as presented the case went to trial before the court without a jury on December 23, 1914, and a judgment by default was rendered against A. A. Greer and L. A. Painter, composing the firm of A. A. Greer & Co., John L. Boyd, and Southern States Steel Company; further, that Watson Company's liability was limited to the amount of \$1,242.98 tendered into court; and the property of Neiman-Marcus Company was discharged from all liens or claims of liens asserted by any of the parties to said suit. G. E. Moore was given judgment for \$867.60 against A. A. Greer & Co., and was awarded payment in full of said amount out of the fund in the registry of the court, with the provision that Moore & Co. were entitled to receive \$630.27 of said amount in satisfaction of their claim. Dallas Builders' Supply Company received judgment for \$25.50 against A. A. Greer & Co., and was awarded payment of that amount out of the fund in the registry of the court. Moroney Hardware Company was given judgment against A. A. Greer & Co. for \$33.40, and was awarded payment of that amount out of the fund in the registry of the court. Ogburn Gravel Company was given judgment against A. A. Greer & Co. for \$218.35; Baldwin-Harry Company, for the use and benefit of H. L. Tenison, was given judgment against A. A. Greer & Co. for \$1,179.64; and said parties were awarded payment of pro rata amounts of the balance of \$316.48 remaining in the registry of the court, in the proportion that \$218.35 bears to \$1,179.64. American Surety Company was discharged from all liability. Said judgment further provided that the costs of court be paid by the parties recovering judgment out of the funds in the registry of the court, and that said parties bear their pro rata portions of the costs in the proportion that the respec-

tive amounts recovered by each bore to the total amount in the registry of the court.

Motions for new trial by plaintiffs in error were made and overruled, and later they sued out this writ of error.

The Ogburn Gravel Company and the Baldwin-Harry Company, with H. L. Tenison, have filed briefs, the consideration of which is objected to by defendants in error on what we consider technical ground; but we are of the opinion that all errors upon which a reversal is sought sufficiently present the errors relied on and require a consideration. The case is here presented upon an agreed statement of the facts presented on trial, and about which there is no controversy. Where the facts have not been above stated, we will state them when necessary in a discussion of the respective points treated hereafter.

[1] As to the money deposited in registry of the court due to Greer & Co. by Watson Company, the court was correct in its judgment of distribution, giving preference to those who had received orders from Greer & Co. on Watson Company, although not accepted by Watson Company, as such orders constituted an assignment of said fund to the extent of their respective amounts.

[2] Were the steps taken by plaintiffs in error to fix a mechanic's lien on said property sufficient, provided under the facts the interest of Neiman-Marcus Company was subject to the mechanic's lien? We think so. The claims were shown to be just and due. The material furnished to Greer & Co. was used in the building. Due notice of its being furnished was given to Neiman-Marcus Company and Watson Company before the time for fixing a lien had expired, and when Neiman-Marcus Company had in their hands \$12,000 of the contract price, which had not been paid over to Watson Company. Due affidavits were made within the time prescribed by law for fixing the lien. But it is urged that the affidavits failed to show that notice was given to the owner of the property, or that notice of each item furnished was given when it was delivered. While this is true, notice of the items was given before the lien was fixed, and while Neiman-Marcus Company owed the contractor. When the materialman furnishes material, and it is used in the construction of the building, and gives notice to the owner before the owner has paid out all of the contract price to the proper parties, the failure to give notice to the owner at the time each article is delivered becomes immaterial in order to fix the lien, provided the statute is otherwise complied with, as no injury would result to interested parties. *Johnson v. Improvement Co.*, 88 Tex. 505, 31 S. W. 503; *Nichols v. Dixon*, 99 Tex. 263, 89 S. W. 765.

The next question for consideration, under the facts as shown by the record, is whether

or not the property and building erected thereon by Neiman-Marcus Company under a lease for 99 years is subject to the payment of debts for a mechanic's lien fixed by complying with the statute? Article 16, § 37, of our Constitution provides that:

"Mechanics, artisans and materialmen, of every class shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

In *Strang v. Pray*, 89 Tex. 525, 35 S. W. 1054, Mr. Justice Brown, in treating of said section 37, said:

"It was the intention of the members of the convention which framed and adopted this section of the Constitution to give full and ample security to all mechanics, artisans, and materialmen for labor performed and material furnished for the erection of all buildings and other improvements, and the courts must give such construction to this language as will carry out that intention. It is the well-established rule that if one devises or conveys a house or building to another, and there be nothing in the terms of the instrument or circumstances under which it is made which show a contrary intention, the land necessary to the use and enjoyment of the house or building, or which is so designated and set apart as to show that it was intended to be used in connection therewith, will pass by such conveyance or devise. * * * We conclude that a proper construction of the language of the Constitution of this state, as hereinbefore quoted, gives to mechanics, artisans, and materialmen a lien upon the interest or estate that the person causing such building or improvements to be made thereon has in the land upon which they are situated, for the value of the labor performed or material furnished in the erection and construction of such buildings, to the extent that the lands are necessary to its enjoyment or may be designated and set apart as intended to be used and enjoyed in connection with such building or improvement. The lien does not depend upon the statute, and the Legislature has no power to affix to that lien conditions of forfeiture."

[3] The Legislature has enacted laws in obedience to the Constitution by providing for fixing and enforcing liens on buildings, including "lots or lots of land necessarily connected therewith." In neither the Constitution nor the statutes does it specify what character of ownership in the land or building is necessary for the lien to be created. The only stipulation in the law is that notice shall be given to the owner in order to fix the lien. "The term 'owner,' as used in the mechanic's lien law, does not mean the absolute owner, but merely the owner of an estate or interest which the court may order sold." 27 Cyc. 52. In construing the statutes, the rule, as prescribed by R. S. 1911, under Final Title, § 3, is:

"That the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this state respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

In construing the statute in reference to mechanics' liens, we conclude that it was the

intention of the Legislature that such liens could be fixed upon a building and the lot upon which it is built, if the party having it constructed had such an interest in the property as to be entitled to its use, possession, and control thereof for a long period of time. Neiman-Marcus Company has the property leased for a term of 99 years, and to that extent is owner of the property. The Constitution and statutes, in providing for such lien, does not in express terms require the person having the building erected to be the absolute owner of the property. By the terms of the lease under which Neiman-Marcus Company hold, they were not only authorized and empowered, but required, to build such a house on said lot. They had possession of, and were exercising control of, said property. They were empowered to sublet the building in whole or in part, and to destroy and rebuild the improvements erected on said premises, and may maintain an action of trespass involving said premises, which property is to revert to the O'Connor estate at the end of the lease. This shows that Neiman-Marcus Company had the right to subject the property to the mechanic's lien, if not the estate of J. C. O'Connor, at least to the interest they had in it, although the lease made them personally liable for any lien so fixed.

The question here involved seems never to have been decided in this state. But in many of the older states, where leases of land for long terms are more common and have existed for a longer time, it is held by the higher courts that such liens can be enforced on a leasehold estate. In support of this we cite the following authorities: *Jones, Landlord & Tenant*, § 378; *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203, 58 N. E. 347; *Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S. W. 405; *Jones v. Menneke*, 168 N. Y. 61, 60 N. E. 1053; *Boyer v. Keller*, 258 Ill. 106, 101 N. E. 235, Ann. Cas. 1916B, 628; *Lumber Mill Co. v. Amusement Co.*, 13 Cal. App. 4, 108 Pac. 891; *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383; *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608; 27 Cyc. 58. In Cyc., supra, it is said:

"It is usually held that, where a lease contains a provision authorizing the lessee to make repairs or improvements at the cost of the lessor, either generally or by deducting the cost from the rent, or where a part of the consideration for the lease is the making by the lessee of improvements, which become a part of the realty, or that improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished pursuant to a contract with the lessee."

The judgment will be reversed as to plaintiffs in error, and here rendered against Neiman-Marcus Company, foreclosing the mechanic's lien on the interest of said Neiman-Marcus Company, and in favor of Neiman-Marcus Company against Watson Company for the amount of said lien, and in fa-

vor of Watson Company against American Surety Company of New York for the amount Watson Company has to pay; and in all other respects it is affirmed.

SCOTT v. NORTHERN TEXAS TRACTION CO. (No. 7547.)

(Court of Civil Appeals of Texas. Dallas. Nov. 4, 1916. Rehearing Denied Dec. 18, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1005(3)—CONFLICTING EVIDENCE.

Where the trial court has sustained a verdict of the jury based on conflicting evidence, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3949; Dec. Dig. \Leftrightarrow 1005(3).]

2. WATERS AND WATER COURSES \Leftrightarrow 171(1)—FLOODING BY RAILROAD EMBANKMENT — LIABILITY—PROXIMATE CAUSE.

A railroad company is not liable for alleged damages to land from overflow even though caused by its negligent construction or maintenance of embankments and culverts, diverting the natural flow of surface or creek waters, if such overflow occurred when natural conditions would have caused the same damages, even if the embankments and culverts had not existed, for in such case the construction and maintenance of its roadbed is not the proximate cause of the damage.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. \Leftrightarrow 171(1).]

3. TRIAL \Leftrightarrow 214—REQUEST FOR CHARGES ON SPECIAL FACTS.

A defendant is entitled to have presented to the jury any specified group of facts developed at trial, which, if true, would in law establish a given defense, provided the evidence represented is not substantially covered by the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. \Leftrightarrow 214.]

4. NEGLIGENCE \Leftrightarrow 56(1)—PROXIMATE CAUSE.

A defendant is not liable for damages for his negligence, if such negligence was not the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. \Leftrightarrow 56(1).]

5. NEGLIGENCE \Leftrightarrow 82—CONTRIBUTORY NEGLIGENCE.

That plaintiff in a suit for damages is guilty of negligence will not preclude recovery if such negligence did not proximately contribute to his injuries, but they were caused solely by the negligence of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. \Leftrightarrow 82.]

6. WATERS AND WATER COURSES \Leftrightarrow 179(6)—ACTION AGAINST RAILROAD FOR FLOOD DAMAGES—QUESTIONS FOR JURY—NEGLECT.

In action against railroad for damages to land from flood caused by negligent construction or maintenance of its embankment and culverts, the question whether the damages were caused by such embankment and culverts or would have occurred from natural conditions is for the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 256, 258, 259, 264; Dec. Dig. \Leftrightarrow 179(6).]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by G. W. Scott against the Northern

Texas Traction Company. From judgment for defendant, plaintiff appeals. Affirmed.

Parks & Hall, of Dallas, for appellant. J. Hart Willis and Thompson, Knight, Rob-
er & Harris, all of Dallas, for appellee

RASBURY, J. Appellant sued appellee for damages to his land, crops, and fences, alleged to have been the result of appellee's negligence in constructing and maintaining its interurban railway along and adjacent to appellee's lands. The specific acts of negligence relied upon were appellee's failure to construct necessary culverts and sluices according to the natural drainage of the land where its line crossed the channel and lowlands or valley of Mountain creek, and by reason of which the waters of Mountain creek were diverted from their natural course and thrown upon appellant's land submerging his crops, eroding his lands, and carrying away his fences. Appellee denied the allegations of negligence, averred that its railway was properly constructed, that its culverts and sluices were adequate, and that no damage resulted to appellant thereby; and affirmatively alleged that if appellant was damaged as claimed it was the result of overflows resulting from natural conditions, and from which appellant would have suffered the damages alleged if appellee's line of railway had never been built.

There was jury trial resulting in verdict for appellee. Judgment was in accordance with the verdict, from which this appeal is perfected.

The following material and undisputed facts, in relation to the situation of appellant's land and the construction of appellee's railway across Mountain creek and its valley, are deducible from the evidence. Appellee's railway is an interurban line operated in and between the cities of Dallas and Ft. Worth. In its course it crosses Mountain creek at a point about 7 miles west of the city of Dallas. Mountain creek has its source south of appellee's railway and in its meanderings pursues a general northerly course, emptying finally into the Trinity river at a point north of appellant's lands and appellee's railway. Appellant's land is south of appellee's railway. The stream in its general course north makes many abrupt turns from its general course, running at times south, west, north, and east of appellant's land, inclosing appellant's land, and a portion of appellee's railway in what may be termed an irregular circle, open at the southeast point. In its course the creek also crosses appellee's railway three times. The first crossing is west of appellant's land. After flowing in a general northerly direction it turns abruptly south and again crosses appellee's railway east of appellant's land (forming at this point the irregular circle referred to). Pursuing a southeasterly direc-

tion it again turns abruptly north, crosses the railway a third time, flowing thence north until it reaches the Trinity river. Appellant's land is contained in the described circle and is highest at the creek banks, and is no higher than the banks and slopes away from the creek towards the hills of adjacent highlands, being at the foot of the hills from 1 to 2 feet lower than the bank of the creek. Appellee's embankment upon which its tracks are laid and adjacent to which appellant's land is situated is on an average about 6 feet higher than the natural lay of the land. There are four openings through the embankment, three for the purpose of permitting the waters of the creek to pass through, and one the waters of a slough at the extreme west end of the embankment. All the openings are spanned by ordinary trestles. The east opening is 178½ feet. The next or middle opening is 181 feet. The third opening is 180 feet. The slough or extreme west opening is 82 feet.

The testimony was in conflict concerning the proximate cause of the overflow which caused the damage to appellant's lands, etc. Appellant's testimony tended to show that the embankment built by appellee across the creek valley did not have sufficient openings to carry away the normal fall of water, and that in addition appellee had partially dammed the bed of the creek openings with rock and refuse cable wire, by reason of which the natural drain of the waters were impeded, the creek caused to overflow, and its waters diverted upon the lands of appellant. Appellee's testimony tended to show that the openings in its embankment were sufficient to carry away the normal water fall, and that the rock and cable wire were to prevent the washing of the bridge abutments, and did not tend to impede the flow of the water through the creek openings. Its testimony also tended to show that as the result of natural conditions appellant's lands had been similarly overflowed for many years prior to the construction of its railway embankment.

[1] By his first assignment of error appellant asserts, in substance, that the verdict is without support in the evidence since it appears by the undisputed evidence that appellee constructed and maintained its embankment without sufficient openings therein for drainage, and that as the proximate result thereof the waters of the creek were diverted upon his lands, injuring him as alleged, and asserts as matter of law resulting from the premises that the court erred in not granting his motion for new trial. The proposition would of course be correct if, as assumed in the assignment, appellee was by the undisputed facts shown to have been negligent in the respect stated. The evidence, however, is conflicting on the issues comprehended by the assignment. The jury resolved the conflict in favor of appellee. Their action was presented for review to the trial court, who heard the witnesses and

observed their demeanor. He sustained it. It has been repeatedly held that in such cases this court will not substitute its judgment for that of the jury and the trial judge, since to do so would be to exercise an authority it does not possess.

Appellant, however, further asserts that the undisputed evidence discloses that appellee's negligence in the construction of its railway contributed to and concurred with natural conditions to cause his injuries, which, being true, appellee would be liable as matter of law. The difficulty is that the very facts stated in the proposition were in dispute. Being in dispute and the fact in issue having been decided against appellant, the rule invoked is without application. The trial court on the issue we are discussing correctly charged the jury that even though appellant's lands during the rainy season were subject to overflow, still if appellee so constructed its embankments, sluices, and culverts as to throw a greater amount of water upon appellant's land than before such construction and such additional water in concurrence with the natural flow proximately caused or contributed to cause any part of appellant's damage, to find for appellant. The verdict, however, was for appellee, which necessarily involved the finding that the construction of the embankment, sluices, and culverts did not throw any additional water upon appellant's lands, or, if it did, that the damage resulted from natural causes, and not from any concurring negligence on the part of appellee.

Nor do we think as further urged that appellee proximately contributed to create a private nuisance upon appellant's land for which appellee was liable for nominal damages, even though all actual damages resulted from natural causes. The verdict for appellee precludes such a holding as matter of law, since their findings in substance were, as we have said, that appellee's embankment, sluices, and culverts had been properly constructed, or that appellant's damages resulted from natural causes, neither of which would support the conclusion in law that appellee created a nuisance, since whether it did or not is, under the evidence in this case, at least an issue of fact.

Under the second assignment of error it is contended that the verdict of the jury is so contrary to the great preponderance of the evidence and to justice and right as to shock the conscience of a court of justice, and ought for that reason to be vacated and set aside. This assignment we also conclude should be overruled. While we have not attempted to state in detail the facts fairly deducible from the evidence tendered by both sides, since to do so would serve no useful purpose, we have nevertheless carefully considered the evidence and conclude that it will not authorize a holding on our part that it conclusively preponderates one way or the

other. The most that can be said is that it is in conflict on the material issues.

[2] The third assignment complains of the following special charge given at the request of appellee:

"Even though you find and believe from the evidence that the construction and maintenance of defendant's railway embankments and culverts, or any of them, diverted the natural flow either of surface waters or of Mountain creek and caused the same to flow over plaintiff's lands or other property, but you also find from the evidence that the natural conditions of surface waters and the waters of Mountain creek in flood time would have caused plaintiff the same injuries which he did sustain, even if defendant's railway embankments and culverts had not been constructed and maintained as claimed, you are instructed that defendant would not be liable for plaintiff's alleged damages, and you will accordingly return a verdict in favor of defendant."

[3] The special charge was requested under authority of the well-settled rule that the defendant is entitled to have presented to the jury any specified group of facts developed at trial, which, if true, would in law establish a given defense, provided the defense so presented is not substantially covered by the main charge. *St. Louis, S. F. & T. Ry. Co. v. Overturf*, 163 S. W. 639, and cases cited. The facts grouped in the quoted charge do find support in the evidence. Hence no unsupported fact was grouped. There was evidence adduced by appellant, which would have supported a finding that the embankment was negligently constructed, and that by reason of such negligent construction the natural flow of the surface waters and those of Mountain creek were diverted and caused to flow over appellant's land. There was also evidence that appellant's injuries were sustained during "flood" time and would have resulted during said time without reference to the manner of constructing appellee's embankment. The question then arises, Is the charge erroneous as matter of law? Appellant contends it is. One of the reasons assigned is in substance that appellant having adduced testimony tending to show that appellee had constructed its railway in violation of the statutes, thereby proximately contributing to cause the surface and creek waters during "flood" time to be thrown upon appellant's land, appellant was entitled to recover nominal damages, even though the jury may have believed he would at the time have suffered the same injuries as the result of natural conditions. We do not believe the contention correct, viewed from the evidence and the verdict of the jury. The verdict was a general one. The jury may have concluded that the appellee's embankment was as matter of fact constructed in compliance with the provisions of the statutes and did not impair the usefulness of Mountain creek, nor obstruct the flow of the waters thereof, as the charge of the court permitted them to do. Such finding is not without support in

the evidence. On the other hand, if the jury believed that the construction of the embankment did divert the creek and surface waters upon appellant's land, but that his injuries were due to the fact that his lands were "overflow" lands, it would not in our opinion follow that appellant was entitled as matter of law to nominal damages. The first impediment to such conclusion is that the verdict was a general one, and we cannot say that the jury believed that the water was in fact diverted as claimed. The stronger reason, however, is that the present case, in our opinion, is unlike that class of cases relied upon by appellant and of which *Champion v. Vincent*, 20 Tex. 815, is typical, which hold that the plaintiff, in cases of libel, slander, or trespass *vi et armis* is entitled to nominal damages, even though he fails to show actual damages. Most, if not all, of such cases announce the rule that the failure to prove actual damages in such cases will not preclude the right to nominal damages when trespass is shown. In the present case, however, no right to any damage arises save upon a showing of actual damages. The building of the embankment was lawful and could not be said to be a trespass in the light of the rule stated. The most that can be said is that appellee did a lawful thing in a negligent manner. For such negligence the penalty is, we are persuaded, the payment of such actual damages as proximately flow therefrom.

[4-6] It is next urged, in substance, that the charge is erroneous for the reason that by directing the jury to return a verdict for appellee in the event they believed appellant would have suffered the injury he did suffer from natural causes, though the embankment did divert the water upon his land, the court ignored and excluded from consideration of the jury appellee's negligence in constructing and maintaining the embankment. The effect of the charge was to direct the jury to find for appellee, even though negligent, if that negligence did not proximately contribute to or was not the efficient cause of appellant's injury. Such rule, we think, is a familiar and well settled one. For if appellee's negligence was not the proximate cause of appellant's injury appellee was not liable in damages therefor, and it was the trial court's duty to present that specific issue when requested so to do. Even though a plaintiff in a suit for damages is guilty of negligence, that fact will not preclude a recovery if the jury believe from all the facts that such negligence did not proximately contribute to his injuries, but was the result alone of the negligence of the defendant. It is true that in the present case it was not attempted to be shown that appellant's damage was caused by his negligence. The claim was that it

was the result of another agency, in short of natural conditions. But still we are unable to see that the dissimilarity in agencies is controlling, or changes the rule, since the issue always is, Are the damages sued for proximately the result of the negligence of the party against whom recovery is sought? As said in a recent case:

"If each party to the suit was guilty of negligence, then it became a question for the jury to determine, the trial being had before a jury, whose negligence proximately caused the injury." *Wells Fargo & Co. v. Benjamin*, 179 S. W. (Sup.) 513.

It seems to us that it is in like manner also a question for the jury when the evidence raises the issue of two contributing agencies, and that the issue is unchanged because neither of the contributing agencies happens to be the plaintiff. We think such conclusion inevitably true in the light of the further rule that one can only be held liable in damages for his own or contributing negligence.

For the reason stated, we believe it to be our duty to affirm the judgment of the trial court.

YEAMAN et al. v. GALVESTON CITY CO.
et al. (No. 7204.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 17, 1916. Rehearing Denied
Dec. 14, 1916.)

1. CORPORATIONS \Leftrightarrow 109 — **STOCK-LOST CERTIFICATES—DUPLICATES.**

Where an owner of certificates of stock in a company which have been destroyed procures the issuance of an equal number of duplicate certificates and sells them and they are redeemed by the company, the fact that some of the duplicates are erroneously numbered gives him no further right against the company for shares under the original certificates.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 462; Dec. Dig. \Leftrightarrow 109.]

2. TRIAL \Leftrightarrow 139(1) — **CASE FOR JURY.**

Though plaintiff makes out a prima facie case on undisputed evidence, some rebutting evidence alone carries the case to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. \Leftrightarrow 139(1).]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Suit by Robert Triplett Yeaman and others against the Galveston City Company and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Geo. E. Mann, of Galveston, and Ramsey, Black & Ramsey, of Austin, for appellants. Maco Stewart, Barret Gibson, and James B. & Charles J. Stubbs, all of Galveston, and Clarence Milhelser, of Houston, for appellees.

PLEASANTS, C. J. This suit was brought by appellants as heirs and devisees of Robert Triplett, deceased, to establish their ownership of five shares of stock in the appellee company, a corporation chartered by an act

of the Congress of the republic of Texas passed on February 5, 1841, and to recover the accrued and unpaid dividends on said stock and their interest as such shareholders in the property of the corporation in event of its dissolution, which had been voted for by the remaining stockholders.

The pleadings of plaintiffs and defendants are very lengthy, and will not be set out in this opinion. This is the second appeal of the case. Upon the trial from which the former appeal was prosecuted the trial judge sustained numerous exceptions to plaintiffs' petition, and in the opinion of this court rendered on that appeal, which is reported in 173 S. W. 489, there is a full statement of the pleadings. On motion for rehearing this court certified the main questions raised on the former appeal to the Supreme Court, and the opinion of that court in answer to the certified questions (167 S. W. 710) affirmed the judgment of this court reversing and remanding the cause.

The opinions referred to held that the owners of stock certificates issued by trustees appointed by the joint owners of the property, which constituted the capital of the company, before a charter was granted and the corporation organized, became by virtue of such stock ownership stockholders in the corporation, and, being such stockholders, the defenses of laches and stale demand were not available against the assertion of their rights, and that limitation was not available as a defense to a suit by the owners of such stock to establish their rights as stockholders in the corporation in the absence of proof of repudiation by the corporation of the trust relation existing between it and the holders of said trustees' certificates. These questions, having been settled on the former appeal, will not be discussed in this opinion. The five shares of stock to which plaintiffs seek to establish ownership are numbered 184 to 188, inclusive, out of Book E of the so-called trustees' stock of the Galveston City Company.

In addition to a general denial and pleas of limitation, the defendants specially pleaded that all of the stock ever owned by Robert Triplett in the Galveston City Company was sold and transferred by him in his lifetime and was redeemed from his assignees by the company in accordance with its by-laws. They further pleaded a compromise and settlement with the executors of the will of Robert Triplett of all claims of his estate to the ownership of stock in defendant corporation.

The cause was tried in the court below without a jury, and resulted in a judgment in favor of defendants. The findings of fact and law filed by the learned trial judge sustain each and all of the defendants' pleas stated above. The appellants, under an appropriate assignment of error, assail each and all of these findings.

The evidence establishes the following facts:

"In 1836 the Congress of the republic of Texas authorized the sale to M. B. Menard and associates of the league and labor of land on the east end of Galveston Island, upon the payment by Menard of \$50,000. The associates of Menard were nine persons, and did not include Robert Triplett, Neblett, Gray, or Green. On June 15, 1837, Menard, joined by Triplett, Neblett, and Gray, conveyed said land to Johnson, Jones, and Green as trustees, authorizing said trustees to issue 1,000 shares to be evidenced by certificates, and to sell 600 of same at not less than \$1,500 per share, and directing that 400 certificates that had previously been issued by Jones should be regarded as 400 of said 1,000 shares. Any two of the trustees were authorized to act. It is provided the land shall be held subject to the orders of the shareholders; any party in interest had the right to purchase shares to be charged up to such interest.

"The trustees had printed and bound in five books, lettered A, B, C, D, and E, a large number of blank certificates, there being in each of the books A, B, C, and D 200 certificates signed in blank by Green and Jones, trustees. Book E contained 210 blank certificates signed in blank by Johnson and Green, trustees. The trustees sold only 17 certificates (and these 17 were out of Book E and sold to one Coleman); they failed to sell any others. Failing to sell the certificates, Jones and Menard left Book E at Richmond, Va., in the hands of the trustees Johnson and Green, for the Virginia interests, and returned to Galveston, and there divided the other certificates among Menard and his associates.

"On April 13, 1838, there was organized at Galveston an unincorporated association styled the Galveston City Company; it not now being known or ascertainable who participated in said organization, beyond the fact that M. B. Menard was elected president, and McKinney, Williams, Baker, and Hardin elected directors, and Levi Jones appointed secretary. Minutes of the meeting effecting this organization are preserved and held among the archives of defendant Galveston City Company. The trustees of 1839 conveyed said land to the officers of said unincorporated association styled Galveston City Company. The company laid out said land into town lots, the site of the city of Galveston, and adopted the policy of selling lots for credit, and accepted in payment for lots and for debts the trustee certificates that had been issued by said trustees. The company issued certificates in the name of said company from time to time, accepting trustees' certificates (issued by the trustees, Jones, Green, and Johnson), in exchange for certificates of stock in the Galveston City Company.

"In December, 1838, the Galveston City Company passed a by-law declaring it the duty of the holders of trustees' certificates issued by the trustees, Green, Jones, and Johnson, to surrender same and take out in lieu thereof a certificate in the name of the company, stating the number of shares to which the party was entitled.

"On February 5, 1841, the Congress of Texas, incorporated the stockholders of the Galveston City Company 'under the same name and style.' The corporation thus created continued to operate with the same officers and on the same plan and method that existed prior to incorporation. In 1838, Menard having paid the \$50,000, received a grant of land from the republic of Texas, and in 1842 Menard conveyed said land to the corporation.

"Triplett is not shown to have participated in any of the proceedings of the Galveston City Company, unincorporated or incorporated. He lived at Yellowbanks (afterwards Owens-

boro), Ky. Green delivered to him 87 trustees' certificates out of Book E, including certificates Nos. 184, 185, 186, 187, and 188, now in suit. These 87 were all the certificates ever owned by Robert Triplett, except Nos. 189 and 190, hereinafter mentioned. Of these 87 certificates, 12 were transferred by Triplett and by his transferees returned to the company at an early date. Of the remaining 75 certificates Robert Triplett transferred one to William S. Triplett and 24 to John R. Triplett. In 1842 the 24 certificates held by John R. Triplett were destroyed by fire in Richmond, Va., and application was made by said John R. Triplett to the trustees Green and Johnson at Richmond for the issuance of 24 duplicate certificates in lieu of those destroyed. Robert Triplett's order to the trustees for the issuance of certificates to John R. Triplett is as follows:

"Owensboro, Jan. 28, 1843.

"Messrs. W. R. Johnson & Thomas Green: "Whereas, I heretofore transferred to John R. Triplett twenty shares of Galveston stock, being shares No. 830 to 850, inclusive, and also one share to William Triplett, No. 851, and three other shares in my own name, held by him, you will please issue in the name of same Jno. R. Triplett twenty-four shares from 830 onward. Robert Triplett."

"There is a patent ambiguity in this order. Certificates Nos. 830 to 850 would be 21 and the 3 others held by John R. Triplett in the name of Robert Triplett would make the 24 for the issuance of which the order was given; the certificate owned by William Triplett not being included in the order. This was the construction placed upon it by the parties, as only 24 certificates were issued."

John R. Triplett died before these duplicate certificates were issued, and his executor and his devisee requested said trustee to issue such 24 certificates to Robert Triplett, which was done, a mistake being made in the numbering of the duplicates. But the full number of 24 duplicate certificates being then issued to Robert Triplett. These 24 then represented the entire interest of Robert Triplett. He transferred 21 of said duplicates to A. T. Burnley and transferred 3 of them, being Nos. 50, 51, and 53, to James Hewitt. The 21 so transferred to Burnley were by the latter presented to and taken up by the company.

In the settlement by the company with Burnley, as assignee of the 21 duplicate certificates issued to Robert Triplett, it was discovered that original certificates 45 and 52, for which duplicates of like numbers had been issued, were not destroyed by fire as claimed by John R. and Robert Triplett, but had been transferred by Robert Triplett and redeemed by the company from his assignees. The duplicates were, however, redeemed by the company, and, it appears from an entry on the books of the company, were charged against unissued certificates Nos. 199 and 200 in said Book E. When duplicates Nos. 51 and 53 were presented to the company for redemption by the assignee of Robert Triplett, it was also found that the originals for which these duplicates had been issued had not been lost in the fire as claimed by the Triplett, but had been theretofore transferred by Robert Triplett and redeemed by the

company. Upon the refusal of the company to recognize these duplicates Triplett settled with his assignee therefor, and the company issued to Triplett in lieu of said duplicates certificates Nos. 189 and 190. This occurred in 1845. The settlement with Burnley above mentioned occurred on December 25, 1847. In 1846 the Galveston City Company gave notice that the originals of the 24 trustees' certificates which were lost in the Triplett fire and for which duplicates had been issued would not be recognized by the company after January 1, 1847. But after said date said:

"Duplicate certificates of stock will be received and new certificates [of the corporation] issued to the legal holders thereof and the original [trustees'] certificates barred from any claim upon the company unless in the meantime they shall be presented at the office of the Galveston City Company in Galveston."

Robert Triplett knew in 1846 that this order and notice of the company had been made and issued. Triplett died a widower in 1853, by will leaving his estate to his three children (who were also his heirs at law), and appointing three executors, Wing, Weir, and Pegram, who duly qualified in Kentucky. Wing and Weir in 1860 executed a power of attorney to Pegram, authorizing the latter to make demand and claim on the Galveston City Company of all right, interest, and claim of every character of Robert Triplett in, to, and against said company, and especially any rights under said certificates Nos. 51, 53, 189, and 190, authorizing Pegram to compromise and settle with said company. Pegram came to Galveston in 1860 and made a settlement and compromise with said company.

The direct evidence as to what was included in this settlement, as might be expected after this lapse of time, in the absence of a written memorandum of the terms of the settlement, is not definite and certain. Wm. P. Ballinger, James P. Cole, secretary of the company, and C. B. Adams represented the company in effecting the settlement. All of those who made the settlement are long since dead. The only written evidence of the settlement are the indorsements on certificates 189 and 190 and an indorsement on the envelope in which those certificates were found, with other papers, in the files of the company. On the back of each of the certificates there is the following indorsement:

"For three thousand dollars to us paid by C. B. Adams, we hereby assign the within share of stock to the Galveston City Company to the credit of said C. B. Adams.

"Witness our hands and scrawls for seals this 27th of January, 1860. W. B. Pegram, James Weir, S. M. Wing, Executors of Robert Triplett, by W. B. Pegram, Attorney in Fact of Said Weir and Wing. Witnesses: Sydney T. Fontaine, George H. Treat.

"Done in my presence this 27th January, 1860. J. P. Cole, Chief Justice C. C."

There is written on the back of the envelope the words "Triplett Compromise." This

indorsement on the envelope is in the handwriting of Mr. Ballinger.

Sydney T. Fontaine testified in the case:

That he was present when the settlement was made, and signed as a witness the transfers and indorsements on the certificates above set out, and that to the best of his recollection the settlement "purported to be a settlement of any interest held by Robert Triplett in the Galveston City Company, which papers signed by me as a witness will show for themselves. It was a settlement between the estate of Robert Triplett, deceased, and C. B. Adams for the interest of the estate in the Galveston City Company and a considerable sum of money passed. I saw it, but did not count it. The money was paid by Adams or for him to W. B. Pegram, and the settlement seemed complete and satisfactory to all parties present."

The executor of the estate of Robert Triplett, James Weir, presented a final account in the settlement of said estate which was approved by the county court of Davless county, Ky., in which the administration of the estate was pending, on June 18, 1878. After the settlement in 1860, above mentioned, no claim was made by the executors of Robert Triplett's will, nor by any of his heirs or devisees themselves, to any interest in the Galveston City Company, until shortly before this suit was filed.

It is agreed by the parties in this case that the five identical original trustees' certificates E-184 to E-188, inclusive, claimed to be owned by appellants, have never been surrendered to or taken up by the company. It is further agreed that James P. Cole, secretary, reported to the company from time to time the number of outstanding certificates, including original trustees' certificates and renewal certificates issued by the corporation, and that in all of these reports the trustees' certificates in controversy are shown to be outstanding. The last report made by him showing these certificates to be outstanding was in 1884. Wm. S. Triplett was the executor of John R. Triplett, and as such signed the request for the issuance to Robert Triplett of the 24 duplicate certificates in lieu of the 24 lost in the fire.

There was introduced in evidence a book belonging to the defendant company and known as "Agent's Report and Stock Register," in which is entered an account of the 1,000 shares of trustees stock, and on this book the 5 shares in controversy in this suit appear to have been issued to Robert Triplett, and do not appear thereon to have been surrendered to the company.

There is evidence showing that at least one trustees' certificate other than those in controversy has been redeemed, and no record of such redemption is disclosed by the books or the papers now in possession of the company. The books further show that one trustees' certificate was redeemed twice. The evidence further shows that during the war between the states the books and papers of the company were several times taken to Houston and returned to Galveston.

It would serve no useful purpose and

would greatly lengthen this opinion to discuss in detail the various assignments of error presented in appellants' brief and we shall not so discuss them.

[1] The trial court held that duplicate certificates Nos. 45, 51, 52, and 53 were not void because of the fact that the original certificates bearing said numbers and which were supposed to have been destroyed in the Richmond fire were not in fact destroyed, and had been redeemed by the company before the duplicates were offered for redemption, but that said duplicates were valid and proper evidence of the right of the holder to four shares of the 24 of the stock of the company represented by the 24 certificates which were destroyed, and in lieu of which the 24 duplicates were issued, and that, all of the other 24 certificates lost in said fire having been accounted for, these four erroneously numbered certificates should be held to have been issued in lieu of 4 of the certificates in controversy. The court further held that the certificate sold to William Triplett was the remaining one of the 5 certificates. The evidence shows that of the 37 certificates of stock originally issued to Robert Triplett 12 were redeemed by the company before the fire occurred in which 24 of the original 37 certificates were destroyed. The affidavit and statement of John R. and Robert Triplett that 24 of said 37 certificates were lost in the fire are uncontradicted, and so is the statement of Robert Triplett that he had sold the remaining one of said 37 certificates to Wm. Triplett. The evidence further shows that none of the five certificates in controversy were included in the 12 that were redeemed by the company prior to the fire, nor was the certificate which had been transferred to Wm. Triplett among said number. We think this evidence fully justifies, if it does not compel, the finding that 4 of the 5 certificates were destroyed by the fire, and that the other one was the certificate that had been transferred to Wm. Triplett. There being no evidence to show any ownership or right of appellants to the certificate that was sold by Robert Triplett to Wm. Triplett, the above finding that said certificate was one of the 5 in controversy disposes of appellants' claim to one of the shares involved in this suit. Appellants very earnestly contend that the trial court erred in holding that the duplicate certificates 45, 51, 52, and 53 were not void and could be held to represent other lost certificates than the originals having the same numbers as said duplicates. This contention is thus stated in their brief:

"We contend in the first place, substantially, that a duplicate certificate, like a duplicate check, or any other duplicate for that matter, represents in law and in fact only the original certificate or check or other paper which it purports to represent. We further contend that, when a duplicate certificate or duplicate check is issued as such, marked on its face as a duplicate, and it develops that the original certificate or check had been surrendered before the dupli-

cate, that the duplicate becomes and is void, being issued only as a mere substitute for the original supposed to be lost, and when the original turns up the duplicate becomes both in law and in fact and in accordance with the intention of the parties, a nullity. We further contend in the same connection that such a duplicate stock certificate or check cannot then be regarded as valid and as representing an entirely different share or original certificate from the one which the parties designated in issuing it. Whatever may be the general rule as to the rejection of numbers as applied to original certificates of stock, it can have no application to duplicate certificates. If duplicate certificates of stock do not represent the original certificates which they purport to represent, then they represent nothing. They are issued merely as substitutes for the original certificates of the same book and number supposed to be lost or destroyed, and when it develops that the original certificate was not lost or destroyed, but in existence and had been honored, the duplicate certificate containing on its face evidence of its own weakness, becomes a nullity. We acknowledge that there is some force in the reasoning of the trial court as applied to original certificates, though we do not concede it to be correct as thus applied, but it has no application to duplicate certificates. There is no principle of law or rule of business practice that would authorize duplicate certificates definitely numbered and marked and issued as duplicates to be held to represent any other or different shares of stock than the shares evidenced by the original certificates of the same numbers."

We do not think the general rule as to the essential character and validity of duplicate instruments, invoked by appellants in support of their contention, can be applied in this case. It goes without saying that a bank, having paid an original check supposed to be lost, cannot thereafter pay a duplicate issued by the drawer and hold the drawer responsible for such payment. But there is no analogy between the payment by a bank of a duplicate check after it had paid the original and the redemption by appellee in this case of the duplicate certificates of stock which had been erroneously numbered. In the case of the duplicate check the drawer cannot be required to make a double payment, and for a like reason the appellee should not be required to redeem original lost certificates after it had redeemed duplicates thereof merely because said duplicates were erroneously numbered. We think this can be illustrated by comparing the certificates of stock to certificates of deposit issued by a bank. Suppose a bank issues two certificates of deposit, Nos. 45 and 52, for \$500 each. The original depositor sells No. 45, which the purchaser collects from the bank, and the other, No. 52, is lost in a fire. Upon representation of the depositor that certificate No. 45 was the one destroyed the bank issued a duplicate certificate No. 45 for \$500, which the depositor also sells, and upon presentation by the purchaser is paid by the bank. We do not think it would be contended in the case stated that the depositor could recover from the bank the \$500 originally represented by the lost certificate No. 52. He through his assignees has received from the bank all that it owed him,

and there is no rule of law nor principle of equity that would permit him to recover more because the duplicate was erroneously numbered. So it is in this case. Robert Triplett procured the issuance of 24 duplicate certificates in lieu of the 24 which were destroyed. He sold all of these duplicates, and all of them have been redeemed by the company, and he could not, nor can his heirs, require the company to account for more than 24 shares on the ground that 4 of said duplicate certificates were erroneously numbered. As between the holders of original certificates Nos. 45, 51, 52, and 53 and the holder of the duplicates, of course the duplicates would have been invalid, and if the 5 certificates had not been destroyed and had been sold by Triplett, the duplicates would not affect the rights of the holders of the originals. This is all that is decided in the cases of *Keller v. Eureka Brick Co.*, 43 Mo. App. 84, 11 L. R. A. 472, *Benton v. Martin*, 40 N. Y. 345, and other cases cited and relied on by appellants to sustain their contention.

The evidence shows that when duplicate certificates Nos. 45 and 52 were redeemed by the company they were charged against unissued certificates E-199 and E-200, which it appears from the evidence Robert Triplett was entitled to have issued to him. This transaction occurred in 1847, six years before the death of Robert Triplett, and we agree with appellants' counsel that it must be presumed that Robert Triplett knew of this transaction and knew that the company had canceled unissued certificates Nos. 199 and 200. After this lapse of time we think the evidence before set out is sufficient to sustain the finding that there was a settlement between the company and Triplett for any claim he may have had against it for said unissued certificates. We think it may well be doubted whether in this suit, which is to establish the rights of his heirs in the company by virtue of his ownership of certificates Nos. 184 to 188, inclusive, they could recover the interest that they might have by virtue of his ownership of certificates Nos. 199 and 200, but we do not deem it necessary to decide this question.

In so far as duplicate certificates Nos. 51 and 53 are concerned, the undisputed evidence shows that, when their redemption was refused by the company and they were presumably redeemed or repurchased by Triplett from his assignee, Burnley, the company issued to Triplett in lieu of said duplicates certificates Nos. 189 and 190, which were afterwards redeemed by the company from Triplett's estate, and there can be no question of his having received from the company his interest in these two of the five shares now claimed in the company by plaintiffs. What we have before said in regard to the certificate sold to Wm. Triplett dis-

poses of the remaining interest claimed in this suit.

We think all of the facts and circumstances, considered together, justify the conclusion that Robert Triplett, his assigns and estate, have long since received from the appellee company all interest in said company which Triplett ever owned by virtue of his original ownership of the five shares of stock in controversy, except the one share sold by him to Wm. Triplett, and the plaintiffs in this suit show no right to recover the interest in the company represented by said share.

We do not regard the various reports made by the secretary of the company prior to 1884 showing nine outstanding trustees' certificates, including the five involved in this suit, as at all conclusive of the fact that said certificates had not been settled for. We agree with the trial judge that in view of all the evidence this report meant nothing more than that the identical nine certificates had never been returned to the office of the company, and it was not known what had become of them or in whose hands they might be.

[2] In the conclusions of law filed by the trial judge he says:

"It has been urged by plaintiffs' counsel that the true rule of law, where the plaintiff has made out a prima facie case on indisputable evidence, is that in the absence of the establishment of an affirmative defense a peremptory legal presumption arises in favor of plaintiff. I do not so understand the law. The accepted view, I understand it, in this state and everywhere else, is that, if the defendant offers some rebutting evidence (as in the case at bar of the transfer by plaintiffs' ancestor of the stock sued for), such evidence alone carries the whole case to the jury. It is thus, for instance, that this court, in the exercise of its exclusive province as a jury, in dealing with the facts of the case, determines the insufficiency of the evidence to establish as a fact the plaintiffs' ownership of the stock in question."

We think this is a correct statement of the law, and that the evidence justified the trial court in finding that plaintiffs had failed to establish their ownership of the stock in the company claimed by them, and in rendering judgment for the defendants.

We have considered all of the assignments of error presented in appellants' brief, and, in our opinion, none of them should be affirmed.

It follows that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

COLLIN COUNTY SCHOOL TRUSTEES et al. v. STIFF et al. (No. 7773.)

(Court of Civil Appeals of Texas. Dallas. Nov. 11, 1916. Rehearing Denied Dec. 16, 1916.)

1. ACTION ~~68~~—DISMISSAL AND NONSUIT ~~56~~—PARTIES ~~29~~—NECESSARY PARTIES.

All parties, plaintiffs and defendants, necessary to the final disposition of the main issue in a suit should be joined therein, and when it

appears that such parties have been omitted, it will require either a dismissal of the suit or a stay of proceedings until such parties can be brought in.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 739-743; Dec. Dig. ¶¶ 68; Dismissal and Nonsuit, Cent. Dig. §§ 95, 124-128; Dec. Dig. ¶¶ 56; Parties, Cent. Dig. §§ 41, 47-49, 51; Dec. Dig. ¶¶ 29.]

2. INJUNCTION ¶114(1)—PARTIES—PART SUING ON BEHALF OF ALL.

In a suit to enjoin the redistricting of a county brought by 48 out of 137 districts, being an action to prevent the destruction of the districts which instituted the suit, and incidentally to maintain the status quo of those which are not parties, the remaining districts were not necessary parties, whether they proposed to oppose or support the action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. ¶114(1).]

3. QUO WARRANTO ¶5—SCHOOLS AND SCHOOL DISTRICTS ¶32—REDISTRICTING—RESTRAINING.

A suit by school districts and taxpayers against the county school trustees to enjoin a redistricting of the county could be maintained as an ordinary suit between the parties, and need not be by a proceeding by quo warranto under the statute to review the acts of the county school trustees.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 6; Dec. Dig. ¶5; Schools and School Districts, Cent. Dig. §§ 52-54; Dec. Dig. ¶32.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶32—REDISTRICTING—COMPLAINT—SUFFICIENCY.

In a suit to enjoin the redistricting of a county, a petition, alleging that a county containing 137 districts, each with a sufficient and accessible school, will be divided by defendants into 78 districts without notice to trustee of existing districts, causing children to walk from 2½ to in many cases between 5 and 7 miles to school across impassable country, resulting in a practical denial of school privileges, and that such proposed acts are a gross abuse of authority and a fraud upon rights of plaintiffs, was sufficient basis upon which to grant the relief sought.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 52-54; Dec. Dig. ¶32.]

5. SCHOOLS AND SCHOOL DISTRICTS ¶39—REDISTRICTING—APPEAL TO DISTRICT COURT.

Acts 34th Leg. c. 38, section 4a giving the district court general supervisory control over the action of the county board of school trustees in creating, changing, and modifying school districts, is not controlled by section 10 of the act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4509-4510), providing for appeals from the actions of the trustees, etc., to the state superintendent and thence to the state board of education, but appeals from the action of the school trustees may be made to the district court, since the appeal provided by section 10 has reference to purely administrative and ministerial acts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 68, 69; Dec. Dig. ¶39.]

6. SCHOOLS AND SCHOOL DISTRICTS ¶32—REDISTRICTING—TEMPORARY INJUNCTION.

In a suit to enjoin the redistricting of a county by county school trustees, evidence held to sustain a judgment granting an injunction pendente lite.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 52-54; Dec. Dig. ¶32.]

7. APPEAL AND ERROR ¶1010(1)—REVIEW—JUDGMENT.

Where the evidence is sufficient to support a judgment of the trial court, the appellate court is without authority to disturb the judgment, as it would in like manner be without authority to disturb the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ¶1010(1).]

8. APPEAL AND ERROR ¶253—VERIFICATION OF COMPLAINT—SUFFICIENCY.

The fact that petition for injunction was not properly verified as required by Vernon's Sayles' Ann. Civ. St. 1914, art. 4649, should be raised in the trial court by exception, and failure to except is waiver of the sufficiency of the affidavit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1485, 1488, 1491-1493; Dec. Dig. ¶253.]

9. INJUNCTION ¶122—VERIFICATION OF COMPLAINT—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4649, providing that an injunction shall not be granted unless the applicant shall verify his petition by affidavit in an action by school districts of a county to enjoin redistricting, it being necessary that verifications in injunction proceedings be definite and positive enough to support an indictment for perjury if untrue, the affidavit may be made by any one of the joint applicants cognizant of the facts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 262-268; Dec. Dig. ¶122.]

Appeal from District Court, Collin County; M. H. Garnett, Judge.

Information by J. H. Stiff and others against the Collin County School Trustees and others, to enjoin a redistricting of school districts in Collin county. From judgment enjoining action by respondents pendente lite, they appeal. Affirmed.

G. R. Smith, of McKinney, for appellants. R. C. Merritt and W. R. Abernathy, both of McKinney, for appellees.

RASBURY, J. This is a proceeding by the county attorney of Collin county in behalf of the state on information by and at the instigation of the trustees of 48 common school districts in Collin county and of certain taxpayers and patrons of the schools in said districts, to enjoin the county school trustees from concluding a proposed and threatened redistricting of such school districts by disestablishing, consolidating, and rearranging the existing districts. Upon hearing in chambers the trial judge enjoined the respondents as prayed pendente lite. From such action this appeal is perfected.

Any necessary statement of the pleadings or of the facts deducible from the evidence will be appended to our discussion of the several assignments of error.

[1, 2] Appellants' first assignment is that the court erred in not sustaining their general demurrer to appellees' petition. The first proposition thereunder is that the petition omits necessary parties. This proposition is bottomed upon the fact, appearing from the petition, that only 48 of the 137

districts joined in the suit. The contention is that all were necessary parties. It is, as contended, the well-settled rule that all parties, plaintiffs or defendants, necessary to the final disposition of the main issue in a suit should be joined therein. When it appears that such parties have been omitted, it "will require either a dismissal of the suit or a stay of proceedings until such party can be brought in." *Townes' Texas Pleading*, 288. The inquiry then is, Were the other common school districts necessary parties to this proceeding? Appellants maintain they were under authority of *Miner et al. v. McVea et al.*, 185 S. W. 1048. We are persuaded, however, that that case is without application in this proceeding. The purpose sought in the case cited was to enjoin the collection of certain taxes. Those taxes were levied in order to create a sinking and interest fund, as well as to supplement the state school fund to defray the expense of a school for a common school district created prior to the levy of the tax and the commencement of the suit. The ground upon which the collection of the tax was sought to be enjoined was that the common school district had not been created and established in the manner provided by law. The suit was against the county judge and the county commissioners, who at that time were clothed with authority to create common school districts, while now that authority rests with the county school trustees. General Laws, 34 Leg. c. 36. It was held that since the purpose was the destruction of the common school district and since it was a body corporate, the trustees were necessary parties. The purpose of the present case is not to destroy the common school districts not parties to the suit, but to prevent the destruction of those districts which instituted the suit, and incidentally to maintain the status quo of those which were not parties. Had the other districts been parties they could only have done that which appellees sought to do. In that case they are protected fully by the action of the district judge. If, on the other hand, they desired to support the proposed action of the county school trustees, they were not necessary parties, since those districts which opposed the proposed change would nevertheless be entitled to maintain the suit under the allegations of their petition.

[3] It is next urged that the general demurrer should have been sustained for the reason that the legality of the acts of the county school trustees as such could only be reviewed in a proceeding by quo warranto by the state of some one by its authority upon information, which, it is claimed, was not done in this suit. In support of the foregoing it is asserted that petition for leave to file information in the nature of quo warranto was not filed by the county attorney, and hence such permission has not been granted, nor the information ordered filed. The

record supports the claim. The suit as we have stated purports to be by the county attorney on the relation of the district trustees, taxpayers, and patrons of the schools complaining, and is an ordinary proceeding by petition to restrain certain proposed and threatened acts, and is signed by counsel, but not by the county attorney, and filed by the clerk as in ordinary cases. Hence it cannot be said that the necessary steps to constitute the proceeding one technically by quo warranto have been observed. Without determining the issue here raised, but proceeding on the assumption that the proceeding is not technically in compliance with the statute, we nevertheless conclude that it will not result in an abatement of the suit, but that the same can be maintained as an ordinary suit between the interested parties. It has been held that an office may be recovered from a usurper by the party entitled to it in an ordinary suit and without proceeding by an information in the nature of a quo warranto. *McAllen v. Rhodes*, 65 Tex. 348. In that case it was said that quo warranto was a proper proceeding to recover office, but that it had never—

"been held that this is the only remedy that may be pursued, nor does the statute contemplate that it should be. The sixth section declares that the remedy and mode of procedure therein prescribed shall be cumulative of any then existing. If, therefore, there was, previous to the passage of the act, any method of recovering an office withheld from the true owner by an intruder, that method may be still pursued, notwithstanding the act provides the remedy by quo warranto."

Incidentally our present quo warranto statute is the one the court was then construing. The court then proceeds obviously to hold that there were remedies prior to the act, one of which was an ordinary suit between the parties. From such holding it is clear, and we hold, that even though the present proceeding was in neither form nor substance a proceeding by quo warranto under the statute, it is nevertheless sufficient as an ordinary suit between the parties, and may be maintained as such. For if a suit to determine the right to an office may be determined between the parties by an ordinary suit, there is as much or more reason why this one may be, when it is considered that the interest of the state in the instant proceeding is certainly no greater than in one to recover an office, and that the state is as much a nominal party here as it is in the former, and is but little interested in either.

[4] It is next urged, in substance, that the general demurrer should have been sustained because the facts alleged in the petition were insufficient upon which to base the relief sought. Omitting formalities, the petition alleges, in substance, that Collin is a large county, approximately 30 miles square, and divided into 137 school districts, each with a school sufficient to accommodate all its patrons, and easily accessible to all; that the defendants are preparing to, and will, unless

enjoined, disestablish the existing districts, and by annexation and consolidation include them into 78 districts, appropriating the money of the existing districts for the benefit of the proposed new districts, all of which is being done without calling a meeting of the trustees of the existing districts, and without their knowledge or consent; that the result of the proposed action will, in most cases, cause the children to travel more than $2\frac{1}{2}$ miles to reach the schools in the proposed new districts, and in many cases 5 to 7 miles, and to cross impassable swamps, streams, and bad roads, resulting in a practical denial of school privileges to the children in the appellees' districts; that such proposed acts are a gross abuse of the authority of the county school trustees and a fraud upon the rights of appellees, the patrons of the schools, and the taxpayers in the existing districts. Do the foregoing allegations of fact, if true, furnish a sufficient basis upon which to grant the relief sought? We conclude they do. In *Minear's Case*, supra, it was said:

"When the commissioners' court flagrantly abuses its discretion, with the result that districts which are not convenient to the scholastic population are created," a redistricting may be compelled.

If redistricting may be compelled on such facts, it may, of course, be in like manner prevented as is sought to be done in this case. In *Jennings v. Carson*, 184 S. W. 562, it was by analogy held that the relief here sought should have been granted upon a showing that the school children had to travel a distance of 7 miles, and when the streams were swollen were unable to attend at all. Under the foregoing authorities, we conclude that the allegations of the petition were sufficient.

[5] It is further urged that the general demurrer should have been sustained for the reason that the allegations of the petition fail to disclose that appellees had pursued the remedy provided by law in such cases. The issue thus presented is bottomed upon the provision of article 4510, Vernon's Sayles' Stats., conferring upon the superintendent of public instruction authority to hear and determine all appeals from rulings of subordinate school officers, and upon article 4509, Vernon's Sayles' Stats., permitting an appeal from the ruling of the superintendent of public instruction to the state board of education. This proposition has been recently decided adversely to the appellants in two cases. *Jennings v. Carson*, 184 S. W. 563; *Clark v. Hallam*, 187 S. W. 964. Those cases construe the recent act of the Legislature, cited supra, which amended, to some extent, the existing law, and hold in reference to the issue we are discussing, that the amended act (section 4a), which confers general supervisory control upon the district court over the acts of the county school trustees in "creating, changing and modifying

school districts," is not controlled by section 10 of the same act, which provides for appeals from the actions of the trustees, etc., to the state superintendent, and thence to state board of education, but that appeals from the action of the county school trustees may be made to the district court, the appeal provided by section 10 having reference purely to administrative and ministerial acts sought to be reviewed. We can add nothing to what has been said in those cases, and adopt the ruling there announced as our conclusions in this case.

[8, 7] By the second assignment of error it is contended that appellees' sworn petition, when considered in connection with appellants' sworn answer, fails to show sufficient basis for granting the relief the judge did grant, which is but to say that the evidence is insufficient to support the judgment. At another place in this opinion we have stated the substance of the facts alleged by appellees. The evidence adduced at trial fairly supports such allegations, and as a consequence sustains the judgment. In such cases we are without authority to disturb the judgment of the court, as we would in like manner be without authority to disturb the verdict of a jury.

[8, 9] By the fourth assignment it is urged that the petition was not properly sworn to. In such connection, article 4649, Vernon's Sayles' Stats., provides, in substance, that injunction shall not be granted unless the applicant shall verify his petition by affidavit taken before some officer authorized to administer oaths. The contention is that in compliance with the statute each of the joint applicants should have verified the application by his individual affidavit. The record does disclose that only one of the applicants did so. While we think that the issue here presented should have been raised in the trial court by exception (*Thouvenin v. Helzle*, 3 Tex. 57), which was not done, and that the failure to except is a waiver of the sufficiency of the affidavit, we also conclude, assuming the issue to be properly presented, that the contention is without merit. The construction sought to be placed upon the statute is too literal. By the current of opinion it is said of verifications in injunction proceedings that they should be so definite and positive as to support an indictment for perjury if untrue. The purpose of the affidavit is revealed by the rule stated, which is, that under the penalties of such an affidavit the court may assume that the facts alleged, and upon which the extraordinary writ is sought, are probably true. It is the character of the affidavit to be made rather than the number who shall subscribe to it, that is contemplated by the statute. We think any one cognizant of the facts could make the affidavit. So do we think that any one of several joint applicants could, on behalf of the others, make the affidavit. Such a conclusion is, in our opinion, more in consonance

with the purpose of the affidavit and the practical and convenient presentation of such applications.

In view of what we have said, and because the action of the district judge is supported by the pleading and evidence, it becomes our duty to affirm the judgment.

Affirmed.

WINFIELD STATE BANK v. FIRST NAT. BANK OF WINFIELD. (No. 1671.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 24, 1916. Rehearing Denied Dec. 7, 1916.)

GARNISHMENT —56—DEPOSITS IN BANK.

Defendant, a mule buyer, having only a small balance in bank, arranged to buy mules for his principal, giving his own checks in payment. Such checks were to be taken up by his principal, and the latter drew a check in defendant's favor sufficient to cover all checks drawn by him. Such check was deposited, but before all of the checks drawn by defendant had been paid his account was garnished, whereupon the bank demanded and received a note, signed by the buyer and his father, before honoring defendant's checks. *Held*, that the proceeds of the principal's check deposited to the account of defendant were subject to garnishment; the bank not having paid defendants' checks out of such proceeds, but out of proceeds of the loan made to him, and the transaction creating the relation of creditor and debtor between defendant and his principal.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 110, 111; Dec. Dig. —56.]

Appeal from District Court, Titus County; J. A. Ward, Judge.

Action by the Winfield State Bank against J. R. Fuquay, in which the First National Bank of Winfield was summoned as garnishee. From a judgment principally in favor of the garnishee, plaintiff appeals. Reformed.

Having a judgment against J. R. Fuquay, on which there was a balance of \$990.52 unpaid, appellant, on November 19, 1915, sued out a writ of garnishment against appellee. The latter answered that it was not indebted to Fuquay, and did not have in its possession effects belonging to him. The answer having been controverted by appellant, facts as follows were shown by testimony heard at the trial: One Cook had employed Fuquay to buy mules on his (Cook's) account, and had agreed to pay Fuquay \$5 for each mule he purchased. Fuquay bought a number of mules, paying for same with checks drawn by him on appellee, with whom he had a checking account. At the times the mules were purchased Cook and Fuquay were together, it seems, and the animals were paid for with checks drawn by the latter, instead of by the former, because the latter was known to the sellers, and the former was not, and checks drawn by him, therefore, would not have been as readily accepted by them in payment for the mules. The balance (\$1.88) in Fuquay's favor on his account

with appellee at the time he drew the checks was not sufficient to cover same, but it was understood between Fuquay and Cook that the latter would give the former a check drawn by the latter on a Ft. Worth bank in favor of the former for a sum equal to the amount of the checks given by him in payment for the mules, and that Fuquay would have the check to be given to him by Cook cashed and the proceeds credited on his (Fuquay's) account with appellee, and in that way provide a fund with which to pay the checks he had given to persons of whom he had purchased mules. In conformity to this understanding Cook, on November 16, 1915, gave Fuquay a check for \$1,615, and the latter had appellee to cash it and credit his account with the proceeds. Fuquay, at the time he had appellee to cash the check, advised it that he had drawn checks against it for the amount thereof. At the time the writ was served on appellee, checks drawn by Fuquay to pay for mules, amounting to \$665, had not been presented to appellee by the holders thereof, and therefore had not been paid. Hence there was then a balance amounting to \$665 of the proceeds of the Cook check to Fuquay's credit with appellee, which, with \$1.88 he had with it when it cashed the check, made a total of \$666.88 then to Fuquay's credit with appellee. After the writ was served on it, appellee had Fuquay and his father to make a note in its favor for \$665, the amount of the checks drawn by Fuquay and unpaid when the writ was served. Thereupon appellee gave Fuquay credit on its books, but not upon the account it then had with him, for the amount of the note, and as it paid said checks charged same against the credit in Fuquay's favor so created. With reference to this note, appellee's cashier, Barrett, testified that the balance with it to Fuquay's credit when the writ was served on it was \$666.88, and that "since we have been garnished herein J. R. Fuquay has not used any of said money." He further testified:

"Before I would pay those checks I had Fuquay and his father to make a note, which I used in the same sense as a replevy bond. It was to protect the bank's interest in the matter. I don't remember the date of that note. I don't think it was dated prior to the time I paid those checks. I am not sure about that. I could not give the date of the note; I don't remember. I should think the note was dated prior to the payment of the checks. A. J. and J. R. Fuquay signed that note. A. J. Fuquay is the father of J. R. Fuquay. I am not sure which is the principal. The note was made to cover the amount of those checks. I think it is a demand note. * * * He made a note for \$665 and his father went on it—a regular banking note—and placed it in the bank as an asset, and it now goes in as a loan and discount as offset to the deposit. We count it as an asset; it is included in the loans and discounts, like other notes. I gave him credit for it, but did not discount it. I gave him credit for the face of the note. Immediately after that I paid those checks. * * * At the time of the garnish-

ment J. R. Fuquay came in the bank and found he had this many checks unpaid. Instead of making a regular replevy bond, he and his father made a note, which created a credit or balance which took care of those outstanding checks. * * * I am of the opinion there is an A. J. Fuquay account, and the note and these checks may be charged to his account. I am not sure about that."

J. R. Fuquay testified that he made the note "to keep the checks from being turned down that were out when the account was garnished. The note was put up as collateral to secure the bank."

Cook intervened in the suit claiming the proceeds still with appellee of the check given by him to J. R. Fuquay to be his property, on the theory that he had advanced same to said Fuquay to use in paying for the mules. But, testifying as a witness, he said:

"I have no money that I know of in the First National Bank of Winfield now."

The trial was before the court without a jury. He was of the opinion that only \$1.88 of the \$666.88 held by appellee on J. R. Fuquay's account was subject to the writ, and rendered judgment accordingly, and in favor of appellee for \$15 as an attorney's fee for preparing its answer to the writ. The judgment was, further, that Cook take nothing by his intervention. The appeal was prosecuted by appellant.

J. M. Burford, of Mt. Pleasant, for appellant. T. O. Hutchings, of Mt. Pleasant, for appellee.

WILLSON, C. J. (after stating the facts as above). We are of opinion it appeared as a matter of law that appellee was indebted to Fuquay in the sum of \$666.88, and that the trial court erred when, instead of rendering judgment in appellant's favor for that amount, he rendered judgment in its favor for the sum of only \$1.88. It is not necessary to inquire whether under the circumstances of the case appellant might, after the service of the writ on it, lawfully have paid the checks Fuquay had drawn on it out of the proceeds of the Cook check, then to his credit with it, or not (*House v. Kountze*, 17 Tex. Civ. App. 402, 43 S. W. 561; *Neely v. Bank*, 25 Tex. Civ. App. 513, 61 S. W. 559; *Bank v. Moline Plow Co.*, 168 S. W. 420; *Bank v. Davis*, 149 S. W. 290; *McBride v. American Ry. & Lighting Co.*, 60 Tex. Civ. App. 226, 127 S. W. 229; *Elliott v. Bank*, 135 S. W. 159); for, as is shown by testimony referred to in the statement above, it conclusively appeared it did not pay same out of those proceeds, but, instead, paid them with money it loaned to Fuquay on the note made by him and his father to it. Appellee's contention that \$665 of the \$666.88 to Fuquay's credit with it at the time the writ was served belonged to Cook, and not to Fuquay, is believed to be unsound. When Fuquay, at Cook's request, gave his own checks in payment for the mules, he became liable to the

respective holders thereof, and Cook became liable to him for the amounts thereof. When Cook gave Fuquay the check on Ft. Worth for \$1,615, he paid a debt he owed to Fuquay, and the proceeds of the check belonged to him, and not to Cook.

Appellee's counterassignment, attacking the sufficiency of the writ of garnishment to require it to answer, is believed to be without merit, and therefore is overruled.

The judgment will be so reformed as to adjudge a recovery by appellant against appellee of \$666.88, instead of \$1.88, and, as so reformed, will be affirmed.

STEWART v. BRIGGS. (No. 1692.)

(Court of Civil Appeals of Texas. Texarkana. Dec. 7, 1916.)

1. USURY \Leftrightarrow 20—PAYMENT—PROPERTY.

Usury may be paid in property.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 39; Dec. Dig. \Leftrightarrow 20.]

2. USURY \Leftrightarrow 20—PAYMENT—USURIOUS INTEREST.

Rev. St. art. 4982, provides that if usurious interest shall be received, the person paying the same may recover double the amount from the person receiving the same. Plaintiff executed two interest notes, which called for interest in an amount that was usurious, and after paying the first in money defendant accepted a bale of cotton in payment of the second. Held that, while property may be received in the payment of usury, the momentary value of the property will determine whether usury was received, and despite presumptions as to its value no usury was collected where the value of the bale of cotton was less than the amount of the note and did not exceed the lawful amount of interest that could have been charged.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 39; Dec. Dig. \Leftrightarrow 20.]

3. APPEAL AND ERROR \Leftrightarrow 1149—REVIEW—REFORMATION OF JUDGMENT.

Where an erroneous judgment was rendered, and the error plainly appears from the record, the appellate court may reform the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483-4496; Dec. Dig. \Leftrightarrow 1149.]

Error from Bowie County Court; Lee Tidwell, Judge.

Action by G. G. Briggs against J. G. Stewart. Judgment for plaintiff, and defendant brings error. Reformed.

J. B. Manning, of New Boston, for plaintiff in error. Geo. W. Johnson, of New Boston, for defendant in error.

HODGES, J. Defendant in error sued the plaintiff in error to recover the sum of \$220 alleged to be double the amount of usurious interest which had been theretofore paid by him to the plaintiff in error. The evidence shows that in February, 1913, plaintiff in error held two notes for \$250 each, executed by the defendant in error, payable on December 1, 1913, and 1914, respectively. These notes were to bear interest at the rate of 11

per cent. per annum. To better secure the interest payments, two other notes for \$55 each were executed by the defendant in error and delivered to the plaintiff in error. The first of these interest notes was paid in full at or near maturity; the other was satisfied in the fall of 1914 by the delivery of a bale of cotton to the plaintiff in error. At the time this cotton was delivered its market value did not exceed 8 cents per pound, and the cash market value of the entire bale was less than \$50. The plaintiff in error testified, in substance, that on account of poor crops and the scarcity of money he agreed with the defendant in error to accept a bale of cotton in settlement of that debt. He further testified that some time later a bale of cotton weighing 501 pounds was delivered to him by the defendant in error in pursuance of that agreement. At that time that grade of cotton was worth only 7½ cents per pound in the market, and this was well understood by all parties. Defendant in error admitted that the market value of the cotton did not exceed 8 cents per pound at the time the bale was delivered, but claimed that it weighed 555 pounds. He further testified, however, that he could have obtained a credit of 10 cents per pound from his creditors with whom he had traded during the current year, and could also have obtained 10 cents per pound in cash from people who were then buying a bale of cotton each for the purpose of stimulating the market. This testimony regarding what the defendant in error might have received from his creditors and from some persons buying cotton for the purpose of boosting the market was admitted over the objection of the plaintiff in error. During the course of the argument the attorney for defendant in error used the following language in his address to the jury:

"Gentlemen of the jury, you need not take into consideration the cash market price of this bale of cotton at the time it was turned over to the defendant at Hooks, Tex., December 1, 1914. But you can consider, and ought to consider, what plaintiff could have got for his cotton on the debt he owed to Rachel Bros., or on any other debt he owed; and you can and ought to consider, furthermore, that cotton was not bringing what it was worth at that time; and you can consider the intrinsic value of cotton then and there at that time."

Counsel for plaintiff in error objected to these remarks, and asked that the jury be instructed to disregard them. The court overruled the objection, and stated in the presence and hearing of the jury:

"That he did not by his charge intend to confine the jury to the cash market value of the bale of cotton turned over to the defendant by the plaintiff, but the jury could consider anything else on that line—that they could consider what plaintiff could have got for his cotton on his debts."

All of this was excepted to. Upon the merits of the case the court submitted to the jury only two issues of fact—one as to the payment of the first interest note, and the other as to the payment of the second

interest note. The jury found that in each instance the defendant in error paid the amount of \$55. A judgment was thereupon rendered in favor of the defendant in error for the sum of \$220, which was double the amount of the two interest notes.

[1, 2] It is conceded that both of these interest notes were usurious. It must also be treated as conclusively shown that the first of these was paid in full. The only question presented on this appeal is, Was usurious interest collected on the second note in the settlement shown by the evidence? Counsel for defendant in error insist that usury may be paid in property. It may be admitted as a proposition of law that that contention is correct; in fact, that has been so held by one of the Courts of Civil Appeals in this state. *Taylor v. Sturgis*, 29 Tex. Civ. App. 270, 68 S. W. 538. They also insist that when the debt represents usury and property is accepted in payment the acceptance carries with it the presumption that the property is the equivalent of the debt. Article 4982 of the Revised Civil Statutes provides:

"If usurious interest, as defined by the preceding articles, shall hereafter be received or collected upon any contract, either written or verbal, the person or persons paying same, or their legal representatives, may, by action of debt, institute in any court of this state having jurisdiction thereof, in the county of the defendant's residence, or in the county where such usurious interest shall have been received or collected, or where said contract has been entered into, or where parties paying same reside when such contract was made, within two years after such payment, recover from the person, firm or corporation receiving the same double the amount of such usurious interest so received and collected."

It will be observed that this statute authorizes the recovery of double the amount of the usurious interest "received" or "collected" by the creditor. Where interest is paid in a medium other than money, the only way to ascertain whether or not the payment exceeds the conventional rate allowed by law is to reduce the medium of payment to its equivalent in dollars and cents. If the value of the medium when tested in that manner is more than 10 per cent. per annum on the debt upon which the interest is paid, it amounts to the collection of unlawful interest. The evidence in this case conclusively shows that the market value of the cotton accepted in payment of the last installment of interest was less than \$50, and that if only its equivalent in money had been paid no usurious interest would then have been collected. It is immaterial what special value the bale of cotton may have been to the defendant in error. The lawfulness of the transaction is to be tested, not by what the debtor parts with, but by what the creditor "collects" or "receives." In this instance the creditor received just what the commodity delivered was worth in the market. No other criterion of value can be safely adopted. This statute was enacted to prevent oppres-

sion in the way of exorbitant interest charges, and should be limited to those transactions it was designed to reach. There certainly can be no oppression in an instance like this, where a creditor compromises with his debtor and accepts as payment a sum less than he had a right to demand. If this note had been paid in a sum of money less than what the note called for and which did not exceed the lawful date of interest on the original debt, that fact might have been shown as a partial defense to this suit. We can see no good reason why the same defense is not available when payment is made in cotton.

[3] We think the errors complained of led to the rendition of an improper judgment; and inasmuch as there was substantial conflict in the testimony, we think the judgment may be modified and affirmed in this court. Judgment will therefore be here entered reforming the judgment of the trial court so as to limit the recovery to \$110, double the amount of the first interest note. The costs of this appeal will be taxed against the defendant in error.

CAFFARELLI BROS. v. BELL. (No. 5721.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 22, 1916. Rehearing Denied Dec. 20, 1916.)

1. PLEADING \S 236(6) — AMENDMENT — PETITION — DISCRETION OF COURT.

Permission to plaintiff to interline in the petition the words "fifty" and "ten" in the blank space left for the amount of special damages for medical attention and drugs was within the discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601; Dec. Dig. \S 236(6).]

2. PLEADING \S 176 — SUPPLEMENTAL PETITION — SUBJECT-MATTER.

Under Rev. Civ. St. art. 1829, as amended by Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829), providing that any defensive fact pleaded by a defendant shall be taken as confessed by the plaintiff if not denied, where the answer alleged contributory negligence, a supplemental petition, denying such allegation, was a proper pleading, though it contained a substantial repetition of the allegations as to the nature of the injuries, as to which no special exception was taken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 343, 345-353; Dec. Dig. \S 176.]

3. TRIAL \S 41(8) — RECEPTION OF EVIDENCE — EXCLUSION OF WITNESSES — DISCRETION OF COURT.

Where, after a minor for whose benefit suit was prosecuted by his next friend had finished his direct and cross-examination and was undergoing redirect examination, defendants invoked the rule for the exclusion of witnesses, the refusal to exclude the next friend was not an abuse of the discretion, in the absence of anything tending to show that the defendants were prejudiced.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 103; Dec. Dig. \S 41(8).]

4. TRIAL \S 85 — RECEPTION OF EVIDENCE — OBJECTIONS.

Admission of testimony of physician that plaintiff was very nervous, restless, and could

not sleep at nights, over the objection that it was hearsay, was not error, the only portion that was hearsay being the reference to sleeping at nights.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 222, 223-225; Dec. Dig. \S 85.]

5. APPEAL AND ERROR \S 692(1) — RECORD — QUESTION PLEADED FOR REVIEW — ADMISSIBILITY OF EVIDENCE.

Where a bill of exception does not show what answer was expected to a question, complaint as to the exclusion of the testimony cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2905, 2906; Dec. Dig. \S 692(1).]

6. TRIAL \S 62(2) — RECEPTION OF EVIDENCE — ORDER OF PROOF.

Where plaintiff introduced the testimony of physicians as to the nature and extent of his injuries, and defendants attempted to refute this testimony by the testimony of another physician, the introduction by plaintiff of further testimony by physicians on rebuttal as to the nature and evidence of his injuries was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 149; Dec. Dig. \S 62(2).]

7. APPEAL AND ERROR \S 213 — OBJECTIONS — SUBMISSION OF ISSUE.

Where the court, without objection from defendants either in the form of exception to the charge on a request for a peremptory instruction, submitted the issue of contributory negligence, this was an admission by defendants that the evidence justified such submission, and they cannot complain on appeal that there was no evidence to sustain the finding of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1149, 1165, 1304-1308; Dec. Dig. \S 213.]

8. APPEAL AND ERROR \S 301 — REVIEW — ESTOPPEL TO ALLEGE ERROR.

Under rule 25, Rules for the Courts of Civil Appeals (142 S. W. 2d) requiring the specification of error to refer to that portion of the motion for a new trial in which the error is complained of, an assignment cannot be considered which is not found in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1743, 1753-1755; Dec. Dig. \S 301.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Arthur Bell, a minor, by his next friend, Jose Penaloza, against Caffarelli Bros. From a judgment for plaintiff, defendant appeals. Affirmed.

C. A. Keller and W. S. Anthony, both of San Antonio, for appellant. R. G. Cater, of San Antonio, for appellee.

SWEARINGEN, J. Appellee, Arthur Bell, a minor, having neither parent living and no guardian, by his next friend, Jose Penaloza, sued R. C. and F. P. Caffarelli, doing business as a partnership under the name of Caffarelli Bros., to recover damages on account of personal injuries alleged to have been sustained by the minor. The cause was tried with a jury upon the verdict of which the court rendered judgment for the appellee against appellants for \$1,000. Appellants' amended motion for new trial was overruled by the court.

Appellee made substantially the following allegations:

"That plaintiff was riding upon a bicycle on the right side of West Commerce street, that is on the north side of said street going west, and that defendants' said servant was driving said wagon along and upon the same side of said street, and going in the same direction as plaintiff was going; that defendants' said servant was driving said wagon in pursuance of instructions of his said employers, R. O. Caffarelli and F. P. Caffarelli, and in the usual course of his employment; that said defendants' said servant was driving said wagon in a negligent and careless manner and at a negligent and high rate of speed, and that defendants' said servant saw this plaintiff, or by the exercise of ordinary care should and would have seen him; and that defendants' said servant drove said team and wagon upon and over plaintiff without warning and with a reckless disregard of the safety and the life of this plaintiff."

"Plaintiff alleges that by reason of the negligence of defendants and their said servants, as above set forth, he was severely and permanently injured, internally, and in the left side and lower region of the abdomen, and in his back and spine, and in his heart and nervous system; that as a result of his said injuries he has suffered mental anguish and severe physical pain, and that he will continue to suffer mental anguish and physical pain the balance of his life."

"Plaintiff says that his said injuries are the result of the negligence and carelessness of defendants and their said servant, as above stated, and that his said injuries are not due to any fault or negligence of this plaintiff."

Appellants answered substantially as follows:

"Appellants by their first amended original answer filed February 9, 1915, excepted generally to the sufficiency of the petition, and by special exceptions denied the sufficiency of the same, and denied categorically the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 9, 10, admit that plaintiff is a boy, but deny that his injuries, if any, were permanent, or that plaintiff's earning capacity had been seriously impaired, but alleged that plaintiff was in as good physical condition at the time of filing said first amended original answer as he was at the time of said alleged injury, and that he was at said time capable of earning as much money as at any time in his life; and defendants, further answering, say that if plaintiff was injured by any act or acts of any servant employed by them that said servant was acting beyond the reasonable scope of his authority and employment for which they were not liable. Defendants, further answering, denied that plaintiff had been damaged in any sum or amount for loss of wages as alleged in paragraph 9 of said first amended original petition; and defendants, further answering, denied that plaintiff had been damaged in any sum or amount as alleged in paragraph 10 thereof. Defendants, further answering, pleaded that plaintiff was guilty of contributory negligence at and before his injury, which was the direct and proximate cause of plaintiff's injury."

To the answer of appellants, appellee filed "Plaintiff's First Supplemental Petition," in which was alleged, substantially, the following:

"That by reason of the negligence and carelessness of defendants and their said servant, as set out in plaintiff's first amended original petition, he was severely and permanently injured, internally, in his heart, in his kidneys and bowels, and in the left side and lower region of the abdomen, and in his back and spine; that his back was twisted, wrenched, and

sprained, injuring his spinal cord and nervous system; that his heart and nerves, his kidneys and bowels, do not perform their functions properly as a result of said injuries, and that his said injuries incapacitate plaintiff from doing any kind of hard work or manual labor; that as a result of his said injuries plaintiff has suffered severe physical pain and mental anguish; and that he will, as a result of his said injuries, continue to suffer mental anguish and physical pain the balance of his life; and, further replying to paragraph 8 of defendants' first amended original answer, alleged that plaintiff was injured by the negligence and carelessness of defendants' said servant, and denied that he was guilty of negligence which caused his injuries, and again prayed for judgment for his damages, and for relief, special and general, as prayed for in his first amended original petition."

[1] Appellants, by their first assignment, complain that the court erred in permitting appellee to interline in appellee's original petition the words "fifty" and "ten" in the blank space left for the amount of special damages for medical attention and drugs, respectively. This permission was within the discretion of the trial court and was, of course, the proper thing to do. "It was, we think, of the class of mere clerical error which we have heretofore, held as amendable at any time." *Austin & Clapp v. Jordan*, 5 Tex. 130; *Burdett v. Marshall*, 8 Tex. 24; *Gardner v. Alexander* (Ky.) 181 S. W. 180; The first assignment is overruled.

[2] The second assignment says that it was error to permit appellee's supplemental petition to be read to the jury, and the reason given as to why such was error is that the supplemental petition contained allegations that should have been embraced in an amended pleading, and was not pertinent to a supplemental petition. This supplemental petition was filed March 19, 1915, at which time Rev. Civ. St. art. 1829, as amended in 1913, was in force. By that article any defensive fact pleaded by a defendant was taken as admitted by the plaintiff if not denied. The defendants, in answering the plaintiff's original petition, by paragraph 7 of the answer averred that plaintiff was guilty of negligence which was the proximate cause of plaintiff's injury. To this allegation the appellee replied by the supplemental petition, the second paragraph of which specifically denied the allegation in the seventh paragraph of defendants' amended answer. The supplemental petition was therefore a proper pleading, made necessary by the statute in force at that time and until repealed by General Laws 1915, c. 101, § 3. It is true the supplemental petition contained a substantial repetition of the allegations showing the nature of the injuries, but no special exception was made to this particular portion of the supplemental petition. The second assignment is overruled.

[3] The third assignment is that after the minor, for whose benefit this suit was prosecuted by his next friend, Jose Penalosa, had finished his direct and cross-examination and was undergoing a redirect examination, the

minor being the first witness examined, appellants invoked the rule for the exclusion of witnesses. All witnesses were excluded except Jose Penalzoa, the party who brought the suit as next friend, whom the court refused to exclude. This refusal of the court was excepted to and assigned as error requiring a reversal. As stated by Mr. Justice Neill in *Railway v. West*, 36 S. W. 102:

"The right of parties litigant to have witnesses placed under the rule is 'subject to such judicious regulations, confided to the judge's discretion, as right and justice exact.'" *Watts v. Holland*, 56 Tex. 60.

We cannot say that the refusal of the trial court to exclude the party to the suit, as next friend, after the minor had given his testimony, in the absence of anything in the record tending to show that appellants were prejudiced thereby, was an abuse of the discretion confided to the trial judge, requiring a reversal of the judgment. *Railway v. West*, 36 S. W. 102; *Rotan Grocery Co. v. Martin*, 57 S. W. 706. The third assignment is overruled.

[4] The fourth assignment is that the court erred in permitting the witness, Dr. Parker, to testify that the plaintiff "was very nervous, restless, and could not sleep at nights" after defendants' attorney had asked the witness, "You don't know that only from what he tells you?" and the witness answered, "That's all." The witness, Dr. Parker, afterwards testified without objection that he knew that the plaintiff minor was very nervous and restless, and that he had fever. The only hearsay was that the boy could not sleep at nights, and this the witness afterwards explained he did not know of his own knowledge. The court might have excluded the portion of the testimony that the boy "could not sleep at nights," had the objection been to that portion of the testimony only; but the objection went to the portion of the testimony that was not hearsay as well, and should have been overruled. However, the admission of the hearsay testimony, in the face of a proper objection, would have been harmless error in view of the other testimony in evidence, and in view of the very slight importance of that particular symptom introduced in the testimony. Rule 62a (149 S. W. x); *Railway v. Renfro*, 83 S. W. 21; *Railway v. Moore*, 188 S. W. 24. The fourth assignment is overruled.

[5] Error is charged against the trial court in the fifth assignment because appellant was not allowed to ask his witness "whether or not it was possible for him to have avoided the collision as it occurred." The bill of exception does not show what the answer would have been. "Without being informed of what the answer of the witness would have been, we cannot tell that the appellant has suffered any injury by its exclusion." *Fox v. Houston & T. O. Ry. Co.*, 186 S. W. 856. The fifth assignment is overruled, and for the same reason the sixth assignment is

overruled. The sixth assignment is without merit for the further reason that a question, not leading, was asked and answered on redirect examination.

[6] The eighth assignment complains that the court erred in permitting the plaintiff to introduce the testimony of a physician as to the injuries suffered by the injured plaintiff, over defendants' objection. Appellee had introduced the testimony of physicians to prove the nature and extent of appellee's injuries in opening the case. Defendants attempted to refute this testimony by the testimony of Dr. Withers in developing the defense. Then appellee introduced the testimony complained of as rebuttal of the attack on the issue of the nature and extent of the injuries. This seems to be proper practice. We quote from the opinion in *Markham v. Carothers*, 47 Tex. 27:

"This additional testimony was rendered proper by the effort of the plaintiff to discredit the statements of the witnesses originally introduced. Such additional testimony was a 'direct answer' to that produced on the part of the plaintiff; and the rule is said to be 'that anything may be given in evidence in reply, which is a direct answer to that produced on the part of the defendant.' *Scott v. Woodward*, 2 McCord, 161; *Bouvier's Law Dic. Title Rebuttal*. Tested by this rule, the evidence offered was evidence in rebuttal."

Moreover, it does not appear that the trial court, in the matter complained of, abused the discretion vested as to the order of the introduction of the testimony. *Railway v. Williams*, 136 S. W. 527. The seventh assignment is overruled.

[7] The eighth assignment is that the verdict is not sustained by the evidence in this: That the testimony shows that the plaintiff was guilty of contributory negligence which proximately caused the injuries, if any. Without objection from appellants, either in form of exception to the charge or a request for a peremptory instruction, the court submitted to the jury the issue of contributory negligence. This was an admission by appellants that there was evidence that justified the submission of the issue of contributory negligence, and appellants cannot complain, after the jury determined that issue, that there was no evidence to sustain the finding of the jury. Furthermore, there was evidence to support the verdict of the jury that the proximate cause of the injuries suffered by the plaintiff minor was the negligence for which appellants were liable, and the verdict is conclusive. The eighth assignment is overruled.

[8] The ninth assignment cannot be considered, because the assignment is not to be found in the amended motion for a new trial. Rule 25 (142 S. W. xi) Rules for the Courts of Civil Appeals; *Freeman v. Railway*, 182 S. W. 1158; *Dawson v. Falfurrias State Bank*, 181 S. W. 553.

The judgment is affirmed.

ORE CITY CO. v. ROGERS. (No. 1657.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 20, 1916. Rehearing Denied
Nov. 30, 1916.)

1. VENDOR AND PURCHASER — 36(1)—RESCISSI—ON—FRAUD.

Where town-site company sold lots stating a railway under construction would build its depot on its right of way at a point opposite the lots, the buyer was not entitled to rescind when the railway located its depot 100 feet away from such point; the railway not being connected with the town-site company, and no fraud or collusion appearing.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 52; Dec. Dig. — 36(1).]

2. FRAUD — 13(1)—REPRESENTATIONS—FAL—SITY.

In order that representations may warrant relief, they must be false, and false at time of representation, and a change in circumstances making representations incorrect does not render them fraudulent, where originally made in good faith.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 3; Dec. Dig. — 13(1).]

3. COVENANTS — 1.

The sale of lots by a town-site company, accompanied by a statement that a railway under construction would build its depot on its right of way at a point opposite the lots, was not a contractual obligation in the nature of a covenant to erect the depot; the railway not being connected with the town-site company.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 1; Dec. Dig. — 1.]

Appeal from District Court, Gregg County;
W. C. Buford, Judge.

Suit by the Ore City Company against J. C. Rogers, in which defendant pleaded in reconvention. From judgment for defendant, plaintiff appeals. Reversed and rendered.

The appellant, a town-site corporation, brought the suit to recover of appellee on his two notes executed in part payment of the purchase price of two lots in the town of Ore City, and to have decreed foreclosure of the vendor's lien expressly retained on said lots. Appellee, besides his answer, pleaded in reconvention against appellant, seeking to have decreed rescission of the contract of purchase and sale, or in the alternative to recover damages, upon the ground that it was induced by fraud and deceit. He alleged, as material here to state, that:

"At the time of the contract of purchase and sale of said lots the plaintiff represented unto the defendant that the depot of the railway would be built opposite said lots, and furnished the defendant with a blueprint map and plat of said Ore City showing the blocks and lots and railway and where the depot was to be built, and promised that said depot was to be built as shown on said map and blueprint. Defendant, relying upon the said promise and agreement that said depot be built at the place opposite said lots as represented by the plaintiff, purchased said lots in good faith, agreeing to pay the consideration, both cash and notes, therein expressed. Defendant says and represents unto the court that the plaintiff practiced a fraud on him in said transaction, and that the depot was not built at the place

they represented to him that it would be built at, but was built at a different place, and that the defendant would not have purchased said lots if he had known that said depot would not be built at said place it was to be built, which fact was known to the plaintiff, and, by reason of the fact that said depot was not built at the place it was to be built at, that the property was of very little value."

The trial was before the court without a jury; and judgment was rendered in favor of the defendant, decreeing cancellation of sale of the property.

The court made the following findings of fact and conclusions of law:

"I find as a fact that on October 15, 1911, the defendant purchased from the plaintiff Lots Nos. 25 and 26 in block No. 5 as laid down on the map of Ore City, in Upshur county, Tex., and that the defendant paid cash in the sum of \$167.70, and executed his two certain vendor lien notes as balance of said purchase price for the sum of \$166.65 each, payable one and two years, respectively, from date. I find that the representative of the plaintiff gave to the defendant, J. C. Rogers, a blueprint of Ore City showing the location of the lots and represented by the blueprints where the depot would be built in said Ore City across the street from the lots, and the blueprints showing that the depot would be built at such place, and that said representations as to the depot were made by the agent of the plaintiff as an inducement to sell the defendant the said lots. And I find as a fact that said depot was not built at the place where they represented it would be built, and that the defendant, J. C. Rogers, would not have bought the lots had he known the depot would not be built at the place marked on said blueprint where it was to be built; that as soon as the depot was built at a different place I find the defendant, J. C. Rogers, asked for a rescission of the contract from the plaintiff, which the plaintiff refused.

"Conclusion of Law.

"That the above facts constitute fraud in the purchase and sale of the lots, entitling the defendant to a rescission of the contract and sale and to all rights thereunder."

To make clearer the findings of the court the further statement is made, as disclosed by the evidence, that the Port Boliver Iron Ore Railroad was under construction at the time of the laying out of the town of Ore City and at the time of the sale of the lots to appellee. The roadbed was being graded, and the laying of the steel rails had begun at the lower or south end of the road. The survey route and a right of way extended from the city of Longview on the south to the point of the proposed town of Ore City. The town-site company is not shown to have any connection or relation with the construction of the railway or railroad company, and it does not appear that the railroad company has any interest in the town-site survey. It seems that the town-site company owned the land that the town was laid out on, except a survey route or right of way through the same which was owned by the railway company before the laying out of the town site. The only evidence in the record respecting the map and the marking on it, and as to the platting of the town site,

is the testimony of the witness Little, managing agent of the town-site company. The testimony of Little is to the effect that, before beginning the laying out of the town site, he went to the chief office of the Port Boliver Iron Ore, with the view of obtaining information as to the proposed location of the depot at the terminal point of the road, which would be included within the town of Ore City. The blueprint map of the railway company was by the railway engineer exhibited to him, showing the railway survey and the marked or designated point for a depot on the right of way at the terminus of the road. The witness then told the engineer that the town-site company wanted to locate on the ground the main street of the proposed town of Ore City at a point where the railway company was to build its depot. The railway engineer, in accordance with the request, then came on the ground and pointed out the place on the right of way selected and established for the proposed location of the depot. The railway engineer, assisted by the town-site engineer, then ran out on the ground from the depot point first the main street and then the parallel streets of the town. The railway engineer, as the witness says, "drew all the railway points," and the town-site company "platted the rest of the town from that point." "Any one," the witness said, "had as much chance to get the information as we had to get the information as to where the depot was to be located." The plat or map is not in the record, but the evidence indicates that the plat as drawn exhibited and showed the streets, blocks, and lots, with their numbers, and the railway route or way through the town, and a marking on the map, on the right of way of the railway company, the words, as given by the court, "Where the depot would be built," or "The depot would be built at such place."

Appellee testified that before the purchase of the lots he was never on the town site and never in that part of the country, and had no information as to the location of the depot, except such as the blueprint map exhibited to him by the selling agent disclosed to him. Appellee knew at the time of the purchase of the lots that the proposed railway had not entered nor been completed to Ore City. Appellee purchased the lots with the view of conducting a business thereon. And there is proof that a lot opposite the depot is of more value than a lot not fronting the depot. Appellee proved the simple fact that after the date of his purchase of the lots the railway company erected its depot on its right of way in Ore City, at a point opposite block 6 at the head of Main street, about 100 feet above the point marked on the map in evidence. The exact date the railway erected its depot is not given, but inferably it was either in December or January following October 15th, the date of appellee's deed. The subsequent change of location of the

depot was by the railway company, and there is an absence of any evidence tending to show that appellant had authority to locate the depot, or knew at any time of a purpose or intent of the railway company to change the location of the depot to another point in Ore City.

Campbell & Wyche and F. J. McCord, all of Longview, for appellant. Martin & Nelson, of Longview, for appellee.

LEVY, J. (after stating the facts as above). Appellant by its assignments makes the point that the appellee may not predicate, as a matter of law, any right to rescind the transaction and recover the amount paid by him on the purchase price of the lots upon the facts found by the court. Looking to the precise facts found by the court, the selling agent of the appellant town-site company exhibited to appellee, with the view of inducing him to purchase lots in the town site, a blueprint or plat of the newly laid out town of Ore City, which blueprint or plat exhibited and showed the survey subdivided into streets and blocks and lots with their numbers, and the railway route and a point on the railway right of way designated and marked, as given by the court, with the words, "Where the depot would be built," or "The depot would be built at such place." And appellee, as further found by the court, purchased of appellant, through the agent, lots 25 and 26 in block 5, relying upon the representation on the blueprint map that the said two lots were located across the street from and facing the point marked "Where the depot would be built," or "The depot would be built at such place." Within two or three months after the sale of the lots the railway company erected its depot at a point opposite block 6 and above the point marked on the map. It is not shown that appellant had authority to locate or change the proposed location of the depot.

[1, 2] The case must stand, it seems, as ground for fraud and deceit or misrepresentation, upon the determination of the nature and effect of the marking on the map the words, as given by the court, "Where the depot would be built," or "The depot would be built at such place." The words were marked, it is observed, upon the survey route or right of way of the railway company, and not upon the town property of appellant as separated from the railway right of way. The words quoted, as they appeared on the map, do not necessarily convey to the mind of the purchaser of the lots the idea of any statement or representation that the depot building was actually or then being erected upon the right of way at the point marked on the map. And in the light of the facts, outside of what appears on the face of the blueprint map, it must be regarded that appellee knew that no such meaning was intended to be attached or understood by the words; for the records admit that appellee

understood that at the time of the sale of the lots the proposed railway had not entered and was only being constructed in the direction of Ore City. And, as it does not appear from the words on the map, nor from the circumstances outside the face of the map, that the town-site company had authority to locate the depot for the railway company, the appellee would be presumed to have known that the power and authority to locate the depot on its survey route or right of way rested with the railway company. So then the scope of the representation according to the map, in the clear light of the record, may be regarded as relating to a future action of the railway company, afterwards to be performed by such railway company, respecting the proposed location of its depot on its survey route or right of way situated within the newly laid out town site of Ore City. Appellee having knowledge of the scope, as construed, of the representations according to the map, he may only be regarded as believing or relying upon the fact as true that the town-site company had information from the railway company as to the place where it would locate its depot when the railroad entered Ore City. The precise representations thus made were not, in the evidence, false. It appears without dispute that before the platting of the town site by the appellant the authorized railway engineer went upon the ground and located the place where the railway company proposed to build the depot, and "drew all of the railway points," and that it was in virtue of this act and upon this information that the town-site company marked on the plat the very point that the railway engineer, acting for the railway company, located on the ground. And there is no evidence to show collusion or wrong between appellant and the engineer, nor that the railway company did not intend at the time to actually erect its depot, at the point so designated. In order that representations may warrant relief, they must be false, and false at the time of the transaction. 2 Pom. Eq., § 876; 12 R. C. L. §§ 10, 82; 20 Cyc. p. 12; Jackson v. Stockbridge, 29 Tex. 394, 84 Am. Dec. 290; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Lovelace v. Suter, 93 Mo. App. 429, 67 S. W. 737. And if the original transaction between appellant and appellee was made without design and in good faith at the time of the making, as appears from the evidence, it cannot be rendered fraudulent and rescindable by subsequent events, such as in the instant case, of change by the railway company of the proposed site for location of its depot. Railway Co. v. Titterington, 84 Tex. 218, 19 S. W. 472,

31 Am. St. Rep. 39; Electrical Works v. Railway Co., 29 S. W. 412.

The Titterington Case, *supra*, held, it is true, that the railway company may be held for damages, but it was upon the ground, not of tort, but for breach of a contractual obligation in the nature of a covenant. And the instant case is distinguishable from the case of Henderson v. Railway Co., 17 Tex. 560, 67 Am. Dec. 675. There the events represented or assured would be done in the future, were in the nature of a positive representation by the agent of the railway company as to what the railway company would do, and were such undertakings which the railway company could fulfill. In the instant case the effect of the representation was a mere expression of opinion as to what the railway company intended to do in the future, and was not an act or event which depended entirely, as in the Henderson Case, *supra*, upon the acts of the party making the representation.

Appellee relies upon the case, among others similar, of Buchanan v. Burnett, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900, as applicable and illustrative of appellee's right to rescind. In this case and the similar ones the representation of the vendor that he had a good title and could make a good title was false in fact and untrue at the time of the representation. The difference between a statement that something exists at the time which does not and a statement or representation that some other party may or would do something in the future, like the instant representation, is obvious. Therefore the instant case is readily distinguishable from the cases relied on by appellee.

[3] Since the facts do not establish fraudulent misrepresentations, there is not afforded, it is believed, grounds for rescission, or to form the basis of an action for damages, as alternately pleaded by appellee. Appellee predicates his cross-action, it is remarked, on tort, and not in contract. A suit for damages as for nonperformance of a covenant or promise may not be maintained on the precise representation or statement relied on and proven, for that it is not, and does not have the legal effect of, a contractual obligation in the nature of a covenant to erect or maintain a depot either on the property of appellant or in the immediate front of appellee's lots.

The judgment therefore should be reversed, and judgment here rendered in appellant's favor for the amount sued for and for foreclosure of the vendor's lien, with costs of the court below and of this court to be taxed against appellee; and it is accordingly so ordered.

GRANT et al. v. GRANT. (No. 1669.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 16, 1916. Rehearing Denied
Nov. 23, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 722(1)—ASSIGNMENTS OF ERROR—MOTION FOR NEW TRIAL. Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, and rule 24 for Courts of Civil Appeals [142 S. W. xii], the grounds set up in the motions for new trial constitute the assignments of error on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990, 2994-2996; Dec. Dig. \Leftrightarrow 722(1).]

2. APPEAL AND ERROR \Leftrightarrow 742(1)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error not followed by propositions, as contemplated by rule 30 (142 S. W. xiii), need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. \Leftrightarrow 742(1).]

3. APPEAL AND ERROR \Leftrightarrow 741—REVIEW—ASSIGNMENTS OF ERROR—MULTIFARIOUSNESS.

An assignment of error, complaining that the court erred in overruling appellant's motion for new trial because the judgment was contrary to the law and against the evidence and the findings of the jury and on account of newly discovered evidence, is plainly multifarious and bad.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3037, 3038; Dec. Dig. \Leftrightarrow 741.]

Appeal from District Court, Upshur County; R. M. Smith, Judge.

Action by Fannie Grant against Anthony Grant and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellant Parker Grant and appellee were husband and wife. Appellant Anthony Grant was the son of Parker Grant and stepson of appellee. The land in controversy was 100 acres of the William King survey in Upshur county and half an acre of the G. B. King survey in Wood county, which had been conveyed by the owners thereof to Anthony Grant. Appellee claimed that the 100-acre tract was paid for with money belonging to her separate estate furnished by her to Grant Parker, who, instead of having same conveyed to her as he agreed to do, had same conveyed to Anthony Grant; and that the half-acre tract was paid for with money belonging to her said estate furnished by her to Anthony Grant, who, instead of having it conveyed to her as he agreed to do, had it conveyed to himself. Her suit was against Anthony Grant and Parker Grant to recover the two tracts of land, on the theory that she was the real owner thereof and that the former held the legal title thereto in trust for her. Appellant J. S. Barnwell, to whom, after the institution of the suit, Anthony Grant conveyed the 100-acre tract, was made a party defendant at the instance of said Anthony Grant. The appeal is by Parker and Anthony Grant and Barnwell from a judgment granting appellee the relief she sought.

J. S. Barnwell, of Gilmer, for appellants.
Warren & Briggs, of Gilmer, for appellee.

WILLSON, C. J. (after stating the facts as above). [1-3] Each of the appellants filed a motion for a new trial in the court below. The grounds of the motions were the same, to wit, that the judgment was contrary (1) to the law, (2) to the evidence, and (3) to the findings of the jury, except that in his motion appellant Barnwell set up certain "newly discovered" (as he alleged) evidence as an additional ground for granting it. By force of the statute (Acts 1913, art. 1612, Vernon's Statutes), and rule 24 for the government of this court (142 S. W. xii), the grounds set up in the motions constituted the assignments of error on appeal. Appellants have ignored this in presenting the cause, and in their briefs, instead of confining their complaint against the judgment to the grounds specified in the motions, seek a reversal of it on other grounds. Indeed, the grounds specified in the motions are not presented on the appeal otherwise than in the tenth assignment in the brief, as follows:

"The court erred in overruling appellant J. S. Barnwell's motion for a new trial, because said judgment as entered is contrary to the law and against the evidence and the findings of the jury and on account of newly discovered evidence."

This assignment is not followed by propositions as contemplated by rule 30 (142 S. W. xiii), and, plainly, is multifarious. *Hemphill v. National Iron & Steel Co.*, 142 S. W. 845; *Chambers v. Wyatt*, 151 S. W. 867; *Ry. Co. v. McDuffey*, 50 Tex. Civ. App. 202, 109 S. W. 1108; *Deutschmann v. Ryan*, 148 S. W. 1141; *Williamson v. Powell*, 140 S. W. 361; *Browder v. School District*, 172 S. W. 152.

As none of the assignments in the briefs are entitled to be considered, it must be said that appellants have failed to show error in the judgment. Therefore it is affirmed.

MARSHALL MILL & ELEVATOR CO. v. SCHARNBERG. (No. 1686.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 30, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 351—EMPLOYERS' LIABILITY ACT—CONSTRUCTION.

Employers' Liability Act (Acts 38d Leg. c. 179) pt. 3, §§ 6, 9-11, provides that the Employers' Insurance Association shall not issue policies until not less than 50 employers with not less than 2,000 employes have subscribed to the plan, and not until specified conditions have been complied with, or when the number of subscribers falls below 50 or the number of the employes below 2,000. Part 4, § 2, provides that any insurance company, lawfully transacting liability or accident business within the state, shall have the same right to insure the liability to pay the compensation provided for by part 1, and that when such company issues a policy conditioned to pay such

compensation the holder of such policy shall be regarded as a subscriber so far as applicable under the act. *Held*, that the last provision brings within the operation of the act not only every employer entitled to its benefits who has not become a subscriber to its plan, but also every such employer who has procured insurance against his liability as such and complying with the requirements as to notice to his employes, etc., whether the insurance procured is by the association created by the act or by some other insurance company, so that the operation of the act is not dependent upon whether the employer elects to become a subscriber to the association or not, nor upon the number of employers and their employes who did or not.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ¶351.]

2. APPEAL AND ERROR ¶200—IMPROPER REMARK IN ARGUMENT ON EXCEPTION TO PETITION—WAIVER.

In a servant's action for injuries, where, in argument on exception to the petition, in the presence and hearing of the jurors afterwards chosen to try the case, plaintiff's counsel stated to the court that defendant had elected to take out indemnity insurance to protect himself from loss which was of an entirely different character from the insurance provided for in the Employers' Liability Act, but defendant accepted the jurors to try the case without protest of any kind, defendant could not thereafter complain of the argument.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶200.]

3. NEW TRIAL ¶44(3)—MOTION—MISCONDUCT OF JURY—ABUSE OF DISCRETION.

In a servant's action for injuries, where defendant claimed that verdict for plaintiff for \$4,500 resulted from the jurors' knowledge that defendant carried insurance, and that plaintiff's attorneys would be entitled to part of the sum found for him, but the jurors who heard the discussion in the jury room on the point testified that they were not influenced to find in plaintiff's favor a greater sum than they otherwise would have found, the trial court did not abuse his discretion in denying motion for new trial on the ground of the jury's misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 82-84; Dec. Dig. ¶44(3).]

4. DAMAGES ¶132(8)—PERSONAL INJURIES—EXCESSIVE VERDICT.

In an action for injuries by a servant, who earned \$75 per month, and whose fall bruised his shoulder, knocked a couple of holes in his head, broke his arm, and stiffened his fingers, injuries which were likely to be permanent and which disabled his hand, so that he earned nothing since the injury, verdict for \$4,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 379; Dec. Dig. ¶132(8).]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Suit by H. W. Scharnberg against the Marshall Mill & Elevator Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Appellee was employed by appellant to assist in the operation of its mill and elevator plant. It became necessary to repair a defect in the head of the elevator shaft. At the command of appellant's superintendent, one Wheat, in charge of the operation of the

plant, appellee went with him to the top of the shaft, in the attic of the building, to assist in removing the cap (a box about 6 feet long, 1½ feet wide, and 3 feet deep) of the shaft, so the defect could be repaired. Without stopping the operation of the elevator, Wheat and appellee removed the cap and repaired the defect. There was no floor around the shaft where they were at work, and they had to stand on joists 2 by 4 or 4 by 6 inches in size. In attempting to replace the cap, it was, it seems, hit by buckets revolving in the shaft, which caused appellee to lose his balance and fall 12 or 15 feet to the floor below. As a result of the fall appellee sustained serious and permanent injury to his person. Alleging negligence on the part of appellant as the cause of the injury, appellee sued and recovered the judgment of \$4,500, for which the appeal is prosecuted. On special issues submitted to them the jury found, among other things, which need not be set out: (1) That appellant was guilty of negligence in directing appellee to assist in removing and replacing the cap under the circumstances shown by the testimony; (2) that appellee was injured as the result of such negligence; (3) that appellee was not himself guilty of negligence; and (4) that he was damaged in the sum of \$4,500.

Beard & Davidson and Hobart Key, all of Marshall, for appellant. Bibb & Bibb, F. M. Scott, and Brown & Hall, all of Marshall, for appellee.

WILLSON, C. J. (after stating the facts as above). The provisions of Act April 16, 1913 (Gen. Laws, p. 429), known as the "Employers' Liability Law," do not apply—

"to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employes of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employes of any person, firm or corporation having in his or their employ not more than five employes."

Other employers of labor than those specified may become "subscribers" to its plan or not, as they may choose. If they do not become subscribers "the consequence attached to their not consenting to it," said the Supreme Court in *Middleton v. Texas Power & Light Co.*, 185 S. W. 559,

"is the denial of the right, existing in common-law actions, to interpose the common-law defenses of fellow servant, assumed risk, and contributory negligence in suits for the recovery of damages for personal injuries suffered by their employes in the course of their employment."

[1] In his petition appellee alleged that appellant had more than five employes assisting in the operation of its mill and elevator, and was not a "subscriber" within the meaning of the act. The purpose of the allegation was to show that appellant was not

entitled to assert against the recovery sought either of the common-law defenses specified by the Supreme Court. Appellant excepted to the allegation on the ground that the act was unconstitutional, and therefore could not operate to deprive it of such defenses. In its brief appellant concedes that all the reasons urged by it in support of its contention were held to be invalid in the Middleton Case, except one, to wit, that the Legislature could not—

"delegate to some outside individual or corporation the right or power to put into effect or suspend the operation of the law."

The contention that the Legislature undertook to do that is based on the fact that employers entitled were not required to become subscribers to the insurance association created by the act, and to provisions therein that that association should not issue policies until not less than 50 employers having not less than 2,000 employes had subscribed to the plan, not then until specified conditions had been complied with; nor when the number of subscribers fell below 50 or the number of their employes below 2,000. Sections 6, 9, 10, and 11, pt. 3. But for the provision made in section 2, pt. 4, of the act the contention might be a sound one and require a determination of a question as to whether the Legislature could delegate such power or not. Part of section 2 referred to is as follows:

"Any insurance company, which term shall include mutual and reciprocal insurance companies lawfully transacting a liability or accident business within this state, shall have the same right to insure the liability to pay the compensation provided for by part 1 of this act, and when such company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable under this act."

The effect, as we understand it, of this provision is to bring within the operation of the act not only every employer entitled to its benefits who has not become a subscriber to its plan, but also every such employer who has, by procuring insurance against his liability as such and complying with the requirements as to notice to his employes, etc., whether the insurance procured is by the association created by the act or by some other insurance company. If this is true, then the operation of the act is not dependent upon whether the employer elects to become a subscriber to the association or not, nor upon the number of employers and their employes who do or not. It is in force, and the employer who has complied with its requirements is entitled to its benefits, when and so long as he complies therewith, without reference to whether other employers entitled to do so have elected to accept its benefits or not.

[2] In the argument on the exception to the petition, above referred to, had in the presence and hearing of jurors for the week afterwards chosen to try the cause, appellee's counsel stated to the court that appellant—

"had elected to take out indemnity insurance to protect themselves from loss, which was of an entirely different character from the insurance provided for in the Employers' Liability Act."

The statement was excepted to, on the ground that it was prejudicial to appellant's rights to make it in the presence of said jurors. In view of the fact that appellant was insisting in its answer to the suit, that it was entitled to the benefits of the act, if constitutional, it is not clear that the statement to the court was improper; but if it was, it is clear appellant should not be heard to complain of it after accepting said jurors to try the cause, without protest of any kind. *Clark v. Elmendorf*, 78 S. W. 538.

[3] The refusal of the court to grant appellant a new trial on the ground that the jury was guilty of misconduct to its prejudice is assigned as error. The contention is that it appeared for evidence heard by the court on the motion that the jury were induced to find in appellee's favor for a greater sum than they otherwise would have found, because they assumed as facts, which influenced their verdict, that appellant carried insurance against the liability established against it, and that appellee's attorneys would be entitled to a part of the sum which might be found in his favor. Several of the jurors testified that while they were deliberating suggestions that appellant was protected by insurance it carried and that appellee's lawyers would share in the sum awarded him were discussed, and one of them testified that he thought the discussion caused him to be more liberal in rendering his verdict. On cross-examination, however, this juror further testified:

"When I found this verdict for \$4,500, I did so because I thought the plaintiff was entitled to it, irrespective of anything else that might have been in the case. The insurance matter did not influence me in finding for plaintiff. I was in his favor before it was mentioned. In the end I based my verdict on what I thought the man was entitled to under the facts of the case."

All the other jurors who heard the discussion and testified said they were not thereby influenced to find in appellee's favor a greater sum than they otherwise would have found.

It has been held that under the provisions of the statute (article 2021, Vernon's Statute) the burden rests—

"upon the party seeking to impeach or discredit the verdict, and the judgment of the court on the testimony adduced must have the same force and effect as would his judgment in any other case on the facts; that is, if there is evidence to support it, it cannot be disturbed by an appellate court. The law places the discretion, as to sustaining or overruling the motion for a new trial on the grounds specified in the statute, in the trial court; and appellate courts have no authority to disturb the ruling thereon, unless it is apparent that there has been an abuse of such discretion." *San Antonio Traction Co. v. Cassanova*, 154 S. W. 1190.

It is not apparent to us that the trial court abused the discretion he possessed when he denied the motion, and therefore we overrule the assignment. *Railway Co. v. Blalack*, 128 S. W. 706; *Railway Co. v. Gray*, 105 Tex. 42, 143 S. W. 606; *Gulf States Telephone Co. v. Everts*, 188 S. W. 289.

[4] It is insisted that the verdict is excessive. But we think it cannot be so held as a matter of law. Testifying two years after he sustained the injuries complained of appellee said:

"My shoulder was bruised and a couple of holes knocked in my head. My shoulder still hurts now at the changes of the weather, and three fingers are stiff. I broke my right arm just above the first joint; the injury was received in January, 1914. I never had any trouble with my arms before the injury. It is getting weaker all the time now, and my fingers are getting stiffer all the time—the little finger and the next two fingers. I cannot close these fingers or grip anything with them. I have had a physician to treat my arm. These three fingers are shiny and colorless and are cold all the time, and haven't the feeling in them that I have in my other fingers. I cannot do any work to amount to anything with this hand. The other fingers on this hand are not as strong as they were before the injury. I have been trying to farm, but cannot hold a plow with this hand. I have a negro helping me most of the time. My inability to use this hand prevents me making money as a farmer or doing the work I used to do. At the time I was injured I was earning \$75 per month, and since that time I haven't earned anything."

Other testimony indicated that the injury to appellee's arm and fingers was a permanent one.

Other contentions made in appellant's brief also are overruled.

It is believed there is no error in the judgment authorizing its reversal. Therefore it is affirmed.

BLOUNT-DECKER LUMBER CO. v. MARTIN. (No. 1681.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 16, 1916.)

1. APPEAL AND ERROR \S 930(4)—REVIEW—VERDICT.

Through defendant's negligence in operating its locomotive a house belonging to defendant was fired, and in an action for the destruction of her household goods therein contained, there was evidence on the part of the plaintiff that defendant consented to plaintiff's occupation of the house as a subtenant. *Held*, that in view of such testimony, a judgment based on a verdict for plaintiff cannot be set aside on the ground that defendant owed plaintiff no duty, it being presumed that the jury found in plaintiff's favor on the contention that defendant consented to her occupancy.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3760, 3761; Dec. Dig. \S 930(4).]

2. EVIDENCE \S 588, 589—PROVINCE OF JURY—DISREGARDING TESTIMONY.

The jury may disregard testimony of either party or his witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2437, 2438; Dec. Dig. \S 588, 589; *Witnesses*, Cent. Dig. § 1164.]

3. RAILROADS \S 482(1)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit against defendant for negligently firing house in which plaintiff was living, evidence held to warrant a finding that plaintiff was continuing to occupy the premises, which belonged to defendant, with its acquiescence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1730; Dec. Dig. \S 482(1).]

4. RAILROADS \S 470—FIRES—TRESPASS.

Where a lumber company owning houses occupied by its employes consented to an employe subletting his house to his sister, the sister was not a trespasser in the house, which was on the right of way of the lumber company, and the lumber company owed her the duty of exercising ordinary care in operating its locomotives so as not to fire the house and destroy her household goods.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1666; Dec. Dig. \S 470.]

5. RAILROADS \S 461—FIRES—NEGLIGENCE.

Where one occupying a house on right of way of railroad operated by lumber company knew that sparks escaping from the engine had started fires on different occasions, she was not guilty of contributory negligence in failing to remove her property from the house, having the right to assume that the company would not thereafter operate its locomotives so as to endanger her property.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1682; Dec. Dig. \S 461.]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Action by Mrs. Essie Martin against the Blount-Decker Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a suit by appellee against appellant to recover, as damages suffered by her, the value of certain household goods destroyed by fire, as the result, she claims, of negligence on the part of appellant in the operation over its line of railway of a locomotive engine without a proper spark arrester. The appeal is from a judgment for \$300 in her favor. The sufficiency of the testimony to support findings involved in the judgment: (1) Of negligence on appellant's part as charged, if it owed appellee a duty to use care; and (2) that appellee was damaged as determined—is not questioned by any of the assignments. Appellant's contentions are: (1) That appellee was a trespasser on its property, and that in operating the engine as it did in the condition it was in it violated no duty it owed to her; (2) that if it violated a duty it owed to her, she was guilty of contributory negligence which deprived her of a right to recover of it; (3) that the risk from the fire which destroyed her property was one appellee had assumed. The circumstances of the case, so far as they relate to the contention stated, appear to be as follows: Appellant, a corporation, owned a locomotive engine which it operated over its line of railway used in connection with its lumber manufacturing business. It also owned a number of wooden dwelling houses situated near the track of said railway,

which it rented to its employes. One of these houses, situated about 127 feet from the railway track, was destroyed by fire kindled by cinders emitted from appellant's engine. At the time the fire occurred appellee, a widow, and her children and her mother, an invalid, it seems, resided in the house. Appellant claimed that appellee's occupancy of the house was unlawful, because she was there without its consent, it asserted, as a subtenant under her brother, one Bartholomew, to whom it had rented the premises at a time when he was its employé, but who had ceased to be its tenant. There was some conflict in the testimony as to the circumstances connected with the occupancy of the house by appellee. It seems that she was occupying another house at the time Bartholomew began to work for appellant, and that a man named Marshall was then occupying the house in question. Appellee testified:

"At the time my husband died I wasn't living in the house that burned later. We lived in another house then. I made a trade with Mr. Decker (appellant's manager) about moving into the house that burned; that is I talked with him about it. I asked Mr. Decker if it would be all right for Mr. Marshall (who then occupied the house in question) and me to swap houses. And he said it would be all right with him. I told Mr. Decker I would pay my brother \$3 per month rent for the house, for my part of the rent. He told me that was all right, for he wanted the house I was living in then anyway. I told him I would pay my brother \$3 per month rent for the house I moved in, which was the house that burned. My brother wasn't living in the house that burned at the time I told Mr. Decker that. * * * Six dollars per month was the regular rent for this house, and I told Mr. Decker I would pay my brother \$3. My brother was to pay the other \$3 per month. I moved into the house with the understanding as I have just stated it. I paid my \$3 per month rent all of the time I lived in the house, on up until it was destroyed by fire. * * * My brother and my mother kept house together before my husband died. * * * After my husband's death I kept house for my mother and brother. I did not move into the house with them, for my things were moved into the house before they moved into it. That was the house that burned that I am talking about now. We all moved into the same house, but I moved into it first, and then they moved there, and I kept house for them. I had my children in the house also, of course. I wouldn't say that I had charge of the house, but I was paying rent for it all right. * * * As to whether or not my brother had left me and had moved out of the house before it was destroyed, I will say that he wasn't at home when the house burned. He had left there just a while before then. He left me in charge of the house, I guess you would say. As to whether or not I had complete charge of the house, and my brother left me in complete charge of the house, all I could say is that he never said anything to me about that. My brother left some of his things in the house when he went off, and I was still paying him rent for it. He took some things—some clothes and the like—when he left. I guess you would say that I had charge of the house after my brother left there. It was my home at the time it was destroyed, and was not my brother's home then."

Decker denied agreeing with appellee that she might occupy the house with her brother, paying rent to him, and testified that

when her brother ceased to work for appellant, he notified him in writing to vacate the house within ten days thereafter. The notice, the testimony indicated, was given about two weeks before the fire occurred. With reference to the notice Decker testified:

"I know he received the written notice because he came to my office the next day or two afterwards, and had the notice in hand and wanted to know why I wanted him to vacate the house. And possibly one week or ten days after that I had another conversation with him about the matter. At that time he told me that, on account of the illness of his mother, he hadn't been able to move out of the house, but he said he had a job at Wells, and expected to move down there the next week. That was about Friday or Saturday of the week, and he told me he would try to move the next week down to Wells. I never gave Mrs. Martin (appellee) any notice to vacate this house. I never instructed anybody else to give her any such notice."

Decker further testified:

"I heard the plaintiff testify about a conversation she claims to have had with me about this house and the rent, etc., but I never had any such conversation with her at all. I didn't have any knowledge that she was paying her brother any rent for the house. I didn't consent for her brother to subrent this house or any part of it to her or anybody else; nor did the Blount-Decker Lumber Company consent to anything of the sort."

On special issues submitted to them the jury found: (1) That the house was destroyed by fire from appellant's engine; (2) that appellant was guilty of negligence in operating the engine in the condition it was in; (3) that appellee's occupancy of the house was as a subtenant—"that is, she was renting from Bartholomew"—(4) that appellant agreed for her to live in the house; (5) that by the destruction by the fire of property belonging to her appellee was damaged in the sum of \$300.

Norman, Shook & Gibson, of Rusk, for appellant. Perkins & Perkins, of Rusk, for appellee.

WILLSON, C. J. (after stating the facts as above). [1] The testimony showed that the house was destroyed by fire emitted from the engine because of the manner in which it was operated while equipped with an insufficient spark arrester. Whether appellant was guilty of negligence in so operating the engine or not depended upon whether it owed to appellee a duty to use care in equipping and operating it or not. Appellant insists it did not appear that it owed appellee such duty, because the testimony showed, and the jury found, that appellee's occupancy of the house was as a subtenant of her brother John Bartholomew, and it did not appear, and the jury did not find, that she was such tenant with its consent. The argument is that it therefore appeared that appellee was a trespasser on its property to whom it owed no duty except not to willfully injure her.

We do not agree that the jury did not find that appellee was a subtenant with appel-

lant's consent. She testified that appellant's manager, Decker, agreed that she might occupy the house with Bartholomew, paying him rent therefor. Decker testified that he did not so agree; that nothing had ever been said to him by any one about appellee's occupying the house either as a subtenant or otherwise. In the light of this testimony, which was all there was on that issue, we think the finding of the jury that appellant agreed that appellee might live in the house must be regarded as determining the conflict in her favor and as a finding that appellant did consent that she might occupy the house as a subtenant. If she was such a tenant with appellant's consent at the time the fire occurred, there can be no doubt appellant owed her a duty to use care in the equipment and operation of its engine.

[2, 3] Appellant insists, however, that if the finding of the jury should be so construed, it was unauthorized, because, it asserts, it appeared from a great preponderance of the testimony that if appellee was ever such a subtenant she ceased to be such before the fire occurred. The contention is based on testimony of Decker alone, but not contradicted, that Bartholomew, about two weeks before the fire occurred, ceased to be an employé of appellant; that it was "tacitly understood" that when a person occupying one of appellant's houses quit working for it, he would at once vacate the house; and that he (Decker) at the time Bartholomew ceased to work for appellant notified him in writing to vacate the house within ten days from the date of such notice. The argument is that Bartholomew's occupancy of the house after the expiration of the ten days was unlawful, and that appellee's occupancy thereof thereafterwards likewise was unlawful, because her right to do so as Bartholomew's tenant ceased when he ceased to be appellant's tenant.

But we think the finding of the jury is supportable on either one of two theories: (1) That, as they had a right to do (Coats v. Elliott, 23 Tex. 613; Dubinski Electric Works v. Lang Electric Co., 111 S. W. 169; Ins. Co. v. Villeneuve, 29 Tex. Civ. App. 128, 68 S. W. 203), the jury disregarded Decker's testimony that he had notified Bartholomew to vacate the house; (2) that they thought such notice had been given, but also thought from Decker's testimony that he had tacitly agreed with Bartholomew that he might occupy the house until the condition of his mother's health permitted him to move her therefrom.

The jury might have found from the testimony that the fire occurred Tuesday of the week following the week during which Decker had the conversation with Bartholomew

referred to in Decker's testimony set out in the statement above. The jury might have believed that when Bartholomew explained to Decker that he had not moved out of the house because of the illness of his mother, but expected to move out "the next week," Decker, by not then objecting to the delay, tacitly agreed that Bartholomew might continue to occupy the house until his mother's health improved, or, anyhow, during the "next week."

[4] If the jury might have so found from the testimony, then clearly, we think, it cannot be held that their finding that appellant agreed that appellee might live in the house should not be referred to the time when it was destroyed by fire. If appellee was in the house as a subtenant of her brother with appellant's consent, as, we think, the jury must be held to have found she was, on testimony authorizing it, then she was not, of course, a trespasser as claimed by appellant, and appellant owed her the duty to use ordinary care in equipping and operating its engine.

In this view of the record, it is not necessary to inquire whether, had it appeared from the testimony and findings that appellee was a trespasser, appellant would have owed her any other duty than the duty not to willfully injure her, and, if it did not, whether the testimony was sufficient to support a finding that in operating its engine as it did appellant violated its duty not to "willfully" injure her.

[5] It appeared from the testimony that the fire emitted from the engine was not, in the first instance, communicated to any property belonging to appellee on the premises, but to the roof of the house. If, therefore, appellee's occupancy of the house was as a subtenant with appellant's consent, as, we have seen, was determined by the jury, we do not think the testimony made an issue as to contributory negligence or "assumed risk" on her part. The mere fact that she knew sparks escaping from the engine had started fires on other occasions did not make it her duty to move her property from the house in order to avoid the loss of same. Notwithstanding she might have known that appellant was guilty of negligence on those occasions, she was not bound to assume it would continue to operate the engine in the condition it was then in, or in the manner it then operated it, and so endanger her property. On the contrary, she had a right to assume it either would repair the defect in the engine or so operate it as to avoid injury to her property.

The judgment is affirmed.

WOOD v. LOVE et al. (No. 1659.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 9, 1916. Rehearing Denied
Nov. 30, 1916.)

1. JUDGMENT \S 107—DEFAULT—ANSWER ON FILE.

A judgment by default when an answer was on file will not be set aside, where the defendant did not call the trial court's attention to the answer or move to set the judgment aside during the term at which it was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 198-200; Dec. Dig. \S 107.]

2. JUDGMENT \S 17(1)—DEFAULT—RECORD — REQUISITES.

To support a judgment by default, the record must show affirmatively, either service of process on the defendant, a waiver of such service, or an appearance by him, and where the record is silent as to service of a citation in the cross-action by one defendant against another, a judgment by default on such action must be set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 25; Dec. Dig. \S 17(1).]

3. APPEAL AND ERROR \S 1173(1)—DISPOSITION OF THE CASE—REVERSAL OF JUDGMENT IN CROSS-ACTION.

Where in trespass to try title against a party and his grantee, a judgment in plaintiff's favor for the land was properly entered by default, and a judgment was improperly rendered by default on the grantee's cross-action against his codefendant, the latter judgment can be reversed without reversing the former, under Court of Civil Appeals rule 62a (149 S. W. 2d), providing that where the error affects part only of the matter in controversy and the issues are severable, the judgment shall be reversed only as to the part affected by the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4562-4567, 4569, 4656; Dec. Dig. \S 1173(1).]

Error from District Court, Bowle County; H. F. O'Neal, Judge.

Trespass to try title by B. F. Love and others against F. M. Wood and one Groves. Judgment for the plaintiffs against both defendants, and for the defendant Groves against the defendant Wood and defendant Wood brings error. Judgment in favor of plaintiffs against both defendants affirmed, and judgment in favor of defendant Groves against defendant Wood reversed.

This was a suit of trespass to try title, the land in question being about 400 acres of the David Jarrett survey in Bowle county. It was commenced by defendants in error Love, the Davises, and Street, who hereinafter will be designated as plaintiffs, against plaintiff in error Wood and defendant in error Groves, April 17, 1914. May 19, 1914, Wood filed an answer, in which, after pleading "not guilty" and denying that plaintiffs had title to the land, he set up title in himself by virtue of the three, five, and ten years' statute of limitations. On the same day, to wit, May 19, 1914, Groves filed an answer, in which he (1) disclaimed as to all the land except 75 acres thereof, pleading "not guilty" as to said 75 acres; (2) set up that Wood had conveyed the 75 acres to him in

consideration of \$1,000 paid and promissory notes aggregating \$500, by a deed containing a covenant warranting the title; and (3) prayed that in the event plaintiffs recovered the 75 acres of him he have judgment against Wood for the \$1,000 he had paid to him and canceling the notes referred to. June 29, 1915, judgment was rendered in favor of plaintiffs against both Wood and Groves for all the land sued for, and in favor of Groves against Wood for \$1,000, interest thereon from April 22, 1913, the date of the deed to the former from the latter, and canceling the notes referred to. The cause is before this court on a writ of error sued out by Wood December 24, 1915.

S. A. Brown and Chas. S. Todd, both of Texarkana, for plaintiff in error. J. B. Manning and Johnson & Boswell, all of New Boston, and Mahaffey, Keeney & Dalby, of Texarkana, for defendants in error.

WILLSON, O. J. (after stating the facts as above). [1] In the judgment it is recited that the plaintiffs and Groves appeared by their respective attorneys—

"but the defendant F. M. Wood failed to appear, either in person or by attorneys; and a jury being waived and all parties present announced ready for trial, and the matter of law as well as of evidence and pleadings being submitted to the court, the court, after hearing the evidence, law, and argument of counsel, is of the opinion that plaintiffs ought to recover of the defendant, and that J. M. Groves ought to recover against F. M. Wood on their cross-action herein."

It is insisted that it appears from the recital just set out that the judgment against Wood was by default, and that it should be set aside in so far as it is in favor of plaintiffs, because, Wood having filed an answer to their suit, such a judgment against him was unauthorized, and that it should be set aside in so far as it is in favor of Groves, because it was rendered in the absence of notice to Wood of Groves' cross-action against him.

If the judgment in plaintiffs' favor should be construed as one by default, it would not follow that Wood's contention that it was erroneous as to him should be sustained, because he had filed an answer to their suit. It does not appear from anything in the record sent to this court that the attention of the trial court was called to the fact that he had filed an answer, or that he asked that the judgment be set aside at the term during which it was rendered. It has often been held that under such circumstances a judgment by default will not be disturbed. London Association Corporation v. Lee, 66 Tex. 247, 18 S. W. 508; Lytle v. Custead, 4 Tex. Civ. App. 490, 23 S. W. 451; Hopkins v. Donaho, 4 Tex. 336; Bartlett v. Jones, 103 S. W. 707; McQueen v. McDaniel, 109 S. W. 219.

In London Association Corporation v. Lee,

cited above, the judgment was by default when an answer was filed. The cause was before the appellate court on writ of error, as this one is. The Supreme Court said:

"There is nothing in the record to show that the defendant called its pleading to the attention of the court or insisted upon their consideration, or asked that the judgment be set aside at the term during which it was rendered. It was presumptively in court after it had answered, and its duty was to look after its interest in the cause. It neither objected to the interlocutory judgment by default, nor appeared to look after the case when before the court upon writ of inquiry. This court has frequently held that, under such circumstances, it will presume that the defendant waived an answer and the judgment will not be disturbed."

In *Lytle v. Custead*, another of the cases cited above, the Court of Civil Appeals said:

"One of the errors assigned is the action of the court in rendering a judgment by default against defendants when their answer was on file. This assignment is untenable. Something more is required of a defendant than the mere filing of an answer. He is then presumed to be in court, and ready to see his rights protected, to call the attention of the court to his answer, and demand proof of plaintiff's claim."

As supporting his view of the law Wood cites *Ryburn v. Nail*, 4 Tex. 305; *McKaughan v. Harrison*, 25 Tex. Supp. 461; *Middleton v. McCamant*, 39 Tex. 146; *City of Jefferson v. Jones*, 74 Tex. 635, 12 S. W. 749; *Cruger v. McCracken*, 26 S. W. 282; *Sevier v. Turner*, 33 S. W. 294; and *Railway Co. v. Epps*, 117 S. W. 1012. An examination of these cases will show that in each of them, where the question was involved, the appellant either was present, urging a consideration of his answer, or had sought during the term at which the judgment against him was rendered to have same set aside. None of them, therefore, can be said to support Wood's view of the law.

[2] Wood's contention with reference to the recovery had by Groves against him is that same was unauthorized because it "appears of record" that "there was never any process of citation issued or served" on him, and that "there was never any appearance by" him "to answer the cross-action." It does not so appear in the record sent to this court. On the contrary, the record here is silent as to whether Wood had notice of the filing of the cross-action or not. But treating the judgment in Groves' favor as one by

default, as we think it should be treated, it should be reversed, notwithstanding the silence of the record, if, to authorize it, Wood must have had notice of the filing of the cross-action; for the rule is that to support a judgment by default the record must show affirmatively, either service of process on the defendant, a waiver by him of such service, or an appearance by him in answer to the adverse party's suit. *Bates v. Casey*, 61 Tex. 592; *Shook v. Laufer*, 84 S. W. 277; *Mayhew v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 957; *Burditt v. Howth*, 45 Tex. 466. That judgment by default on the cross-action was unauthorized in the absence of a citation to Wood is established by the following, among other cases: *Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172; *Boyce v. Concho Cattle Co.*, 70 S. W. 356; *Field v. O'Connor*, 80 S. W. 872; *Schwartzlose v. Wagner*, 36 Tex. Civ. App. 83, 81 S. W. 70; *Breneman v. Lumber Co.*, 12 Tex. Civ. App. 517, 34 S. W. 198; *Simon v. Day*, 84 Tex. 520, 19 S. W. 691; *Roller v. Ried*, 87 Tex. 69, 26 S. W. 1060; *Crain v. Wright*, 60 Tex. 515.

It follows from what we have said that we are of opinion the judgment should be affirmed in so far as it is in favor of the plaintiffs against Wood and Groves, and reversed in so far as it is in favor of Groves against Wood. It will be so ordered, and the cause will be remanded for a new trial as between Wood and Groves.

[3] In the oral argument on the submission of the cause it was urged on behalf of Wood that if it was determined that the judgment was erroneous in so far as it was in favor of Groves, it should be set aside, not only in that respect, but also in so far as it was in favor of plaintiffs. The issue between the plaintiffs and the defendants Wood and Groves was one of title to the land. The issue between Wood and Groves was as to the right of the latter to recover on the contract of the former warranting the title. Both Wood and Groves having had their "day in court" on the issue between them and plaintiffs, we see no reason in law, why the judgment disposing of that issue should be disturbed; and, without disregarding the rules applicable (rule 62a [149 S. W. x] for the government of Courts of Civil Appeals; *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548), we think it cannot be disturbed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. SMITHA. (No. 1666.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 17, 1916. Rehearing Denied Nov. 23, 1916.)

1. EXECUTORS AND ADMINISTRATORS ¶11 — "ESTATE"—CHOSES IN ACTION.

In view of Act Cong. April 22, 1908, c. 149, § 1, 35 Stat. 85, and Act Cong. April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. 1913, §§ 8657, 8665), providing that interstate railway carriers are liable in damages to injured servants or the survivors of servants who are killed, and that the right of action shall survive to their personal representatives, such right is an "estate" on which administration may be granted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. ¶11.]

For other definitions, see Words and Phrases, First and Second Series, Estate.]

2. EXECUTORS AND ADMINISTRATORS ¶12 — SITUUS OF ASSETS.

Where a switchman was injured in interstate commerce, and could under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 26, have sued in any county where the carrier had an agent, and he sued in one county, his cause did not continue transitory, but, being fixed, survived to his administrator in that county.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. ¶12.]

3. EXECUTORS AND ADMINISTRATORS ¶12 — SITUUS OF ASSETS.

As a general rule, for the purpose of founding administration, simple contract debts, and tort actions, are assets at the domicile of the debtor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. ¶12.]

4. EXECUTORS AND ADMINISTRATORS ¶12 — SITUUS OF ASSETS.

Where a switchman was injured in interstate commerce on the line of a Texas corporation operating wholly within the state, and was therefore entitled to recover under Act Cong. April 22, 1908, as amended by Act Cong. April 5, 1910, but died pending suit, an administrator was properly appointed in the Texas county court where deceased sued, since an administrator appointed outside the state could not have sued.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. ¶12.]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Action by D. A. Swain against the St. Louis Southwestern Railway Company of Texas. On plaintiff's death, E. A. Smitha, on application, was appointed administrator and asked leave to continue the suit. From a judgment of the district court affirming a judgment of the county court denying defendant's petition to vacate and annul the order appointing the administrator, defendant appeals. Affirmed.

Appellant's switching yard in Texarkana is partly in Arkansas and partly in Texas. December 23, 1913, one Swain was in appellant's service as a switchman in its said yard. His home was in California, where his wife

resided, but he boarded and lodged in a house in Texarkana, Tex. On the day named he was assisting other employes of appellant in moving a car, or train of cars, from a point in the portion of appellant's yard in Arkansas to a point in the portion thereof in Texas. Swain claimed that while so engaged he was employed by appellant in interstate commerce. He further claimed that as a result of negligence on appellant's part, while he was so engaged in the part of its yard in Arkansas, he suffered injury to his person entitling him to recover damages of appellant. April 1, 1914, he commenced suit against appellant in the district court of Bowie county. October 1, 1914, while his suit was pending in said district court, he died in California. January 14, 1915, appellee Smitha applied to the county court of said Bowie county for appointment as administrator of Swain's estate. In his application Smitha alleged:

"That at his death said D. A. Swain had an estate situated in Bowie county, Tex., which consists of a cause of action for damages, on account of personal injuries, against the St. Louis Southwestern Railway Company of Texas. That such cause of action arose in favor of the said D. A. Swain in his lifetime, in this, that while he was a servant of said company, it being a common carrier, engaged in interstate commerce, he, the said D. A. Swain, while working for said company and while engaged in interstate commerce, received personal injuries as a result of the negligence and carelessness of said company. That in his lifetime the said D. A. Swain instituted suit on said cause of action against said company in the district court of Bowie county, Tex., which was pending at his death and is now pending in said court. This petitioner shows that there exists a necessity for an administration on the estate of said D. A. Swain in said Bowie county, particularly for the purpose of prosecuting said suit to judgment; he having left surviving him a wife and children."

The county court of Bowie county granted Smitha's application, and by an order made January 26, 1915, appointed him administrator of said Swain's estate. February 6, 1915, Smitha qualified as such administrator, and March 27, 1915, applied to said district court for leave as such to prosecute the suit commenced by Swain as hereinbefore stated. April 1, 1915, appellant petitioned the county court to vacate and annul its order appointing Smitha administrator. Appellant's petition contained allegations as follows:

"Your petitioner alleges that this court was without jurisdiction to grant letters of administration upon the estate of the said D. A. Swain, deceased, and that the order granting such letters of administration was and is null and void because it appears in the application of the said E. A. Smitha for letters of administration herein that the said D. A. Swain, at the time of his death, resided in Los Angeles, in the state of California, and not within the state of Texas; and because it does not appear from said application that the said D. A. Swain then had, or that he has ever had, any property situated in Bowie county, Tex. In this connection, your petitioner alleges and shows to the court that said D. A. Swain, at the time of his death, had a fixed domicile in and was a resident of the state of

California, and that he never resided in Bowie county, Tex.; that he did not have, at the time of his death, and has not now and has never had, any property situated in Bowie county, Tex.

"Your petitioner further avers that, as shown from the petition of said E. A. Smitha, as administrator, in the suit against your petitioner herein, in the district court of Bowie county, Tex., if the said D. A. Swain was injured while employed by your petitioner, he did not receive his alleged personal injuries in the state of Texas but received same if any in the state of Arkansas. Your petitioner still further avers that said administration is and was not sought for the best interest of said estate, but for the sole purpose of enabling suit to be brought against your petitioner in the courts of Texas, and in an attempt to confer the jurisdiction of the courts of Texas over your petitioner; that no facts now exist and none have ever existed giving this or any other court in the state of Texas jurisdiction to grant letters of administration on the estate of the said D. A. Swain, deceased; that none of the jurisdictional facts authorizing this court to grant letters of administration on the estate of said D. A. Swain, mentioned and set out in article 3209 of the Revised Statutes of 1911, exist now, and no such jurisdictional facts have ever existed authorizing this court or giving it jurisdiction of the estate of the said D. A. Swain, deceased, or empowering it to grant E. A. Smitha letters of administration herein."

The relief it sought having been denied by the county court, appellant prosecuted an appeal to the district court of Bowie county, where judgment was rendered against it. This appeal is from the judgment rendered by said district court.

Glass, Estes, King & Burford, of Texarkana, and E. B. Perkins and Dan Upthegrove, both of Dallas, for appellant. Mahaffey & Keeney and Turner, Graham & Smitha, all of Texarkana, for appellee.

WILLSON, O. J. (after stating the facts as above). It appearing that the basis of the suit commenced by Swain in Bowie county, Tex., was injury he suffered in Arkansas, and it further appearing that he died in California, where he resided, from an injury inflicted on him there, if the action of the trial court in overruling appellant's motion to remove appellee as administrator is sustained, it must be on the ground that Swain owned no estate subject to administration in Bowie county. It is conceded that, if the claim for damages asserted by his suit was not such an estate, he owned none in that county. Therefore the question presented by the appeal may be stated as follows: (1) Did Swain's claim against appellant for damages constitute an "estate" subject to administration? (2) If it did, then was such estate subject to administration in Bowie county, Tex.?

[1] The first question should be answered in the affirmative. It appeared that appellant was a common carrier engaged in commerce between the several states, and that Swain's claim for damages against it was predicated on his claim that he was injured by its negligence while he was employed in such commerce. The act of Congress approv-

ed April 22, 1908 (1911 Supplement to U. S. Compiled Statutes, pp. 1322, 1323 [U. S. Comp. St. 1913, § 8657]), provided that:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines," etc.

The liability created by the statute in Swain's favor, if he was injured as he claimed he was, was property belonging to him in his lifetime. *Rivera v. Railway Co.*, 149 S. W. 227; *Lessler v. De Loynes*, 153 App. Div. 903, 138 N. Y. Supp. 505; *State v. Fidelity & Deposit Co.*, 35 Tex. Civ. App. 214, 80 S. W. 553; *Womach v. City of St. Joseph*, 201 Mo. 467, 100 S. W. 447, 10 L. R. A. (N. S.) 140; *Richards v. Riverside Ironworks*, 56 W. Va. 510, 49 S. E. 437; *Railway Co. v. Beezley*, 153 S. W. 652; *Reiter v. Hamlin*, 144 Ala. 192, 40 South. 290; 11 *Ruling Case Law*, p. 72, and authorities there cited.

The statute (Act Cong. April 5, 1910 [U. S. Comp. St. 1913, § 8665]), further provides:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé," etc.

The provision just quoted operated, when Swain died intestate, to pass to the administrator of his estate, when appointed, the right to enforce, for the benefit of his wife and children, the liability created by the statute. As the right could be exercised by none other than such an administrator (*Railway Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 37 L. Ed. 1129, Ann. Cas. 1914C, 156; *Fithian v. Railway Co.* [C. C.] 188 Fed. 845), if Swain's claim for damages was not an "estate" subject to administration before its enactment, it is believed the statute operated to make it such an estate (*Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. O. A. 417; *Rivera v. Railway Co.*, 149 S. W. 227; *Brown's Adm'r v. Railway Co.*, 97 Ky. 228, 30 S. W. 639; *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. [N. S.] 1).

[2] The second question should also, we think, be answered in the affirmative. The right of action in Swain's favor was transitory in its nature. He could have sued on it in any county in Texas in which appellant operated its line of railway or had an agent. Article 1830, subd. 26, *Vernon's Statutes*; *T. & P. Ry. Co. v. Conway*, 182 S. W. 52; *Ry. Co. v. Weese*, 32 Fla. 212, 13 South. 436. Appellant operated its line of railway in Bowie county, and had an agent there for the transaction of its business as a common carrier. Therefore the suit commenced in

that county by Swain in his lifetime was maintainable there. The cause of action in his favor should not, we think, thereafter, and so long as the suit was pending, be regarded as a transitory one. The institution of the suit located it. This being true, as we think, it should be held that the right of action, which by the terms of the statute survived to his administrator, included the right to continue the prosecution of the suit founded on that cause of action in the tribunal where it was pending.

[3] But if the right of action should be regarded as transitory, notwithstanding suit had been instituted on it, its situs for the purpose of administration nevertheless was, we think, in Texas. The general rule has been stated to be that:

"For the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor." 11 Ruling Case Law, p. 71.

The rule is not different as to obligations for tort and obligations in contracts. *Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 693, 111 C. C. A. 417. In discussing it, the reasons for the rule were stated by the Supreme Court of California as follows:

"It is true * * * that for most purposes a chose in action adheres to the person of the owner, but for the purpose of founding administration this is not true. For such purpose the situs is where the debtor resides. For this exception there are at least two good reasons: It may be necessary to bring an action upon notes to enforce payment, and this a foreign administrator or executor cannot do. As to other personal property, it may be necessary to have the aid of the law for its recovery and protection. But the main reason, no doubt, why local administration is provided for, is for the protection of local creditors and claimants. No state should allow property to be taken from its borders until debts due its own citizens have been satisfied." *Murphy v. Crouse* [185 Cal. 14] 66 Pac. 971 [87 Am. St. Rep. 90].

And see *Speed v. Kelley*, 59 Miss. 51; *Richards v. Riverside Ironworks*, 56 W. Va. 510, 49 S. E. 437; and *Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. C. A. 417.

[4] Another reason for the rule stated exists in the circumstances of cases like the one before us. Only by the application of such a rule can the right conferred by the act of Congress be enforced in the courts. If the contention of appellant, supported by the decision of the Court of Civil Appeals in *Angier v. Jones*, 28 Tex. Civ. App. 402, 67 S. W. 449, to wit, that the situs of a chose in action for the purpose of administration is the residence of the owner, should be sustained, the right of action given by the statute, and which by its terms survived to Swain's administrator for the benefit of his

wife and children, became by his death unenforceable; for appellant being a Texas corporation, and its line of railway being wholly within this state, suit against it could not be maintained in the courts of any other state (12 Ruling Case Law, p. 107 et seq.; 19 Cyc. p. 1323 et seq.), and an administrator of Swain's estate appointed in some other state could not as such maintain a suit against appellant in any of the courts sitting in this state (*Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Railway Co. v. Marvin*, 59 Fed. 91, 8 C. C. A. 21; *Green v. Rugely*, 23 Tex. 548; *Copper v. Railway Co.*, 41 Tex. Civ. App. 596, 93 S. W. 205).

In *Angier v. Jones*, referred to above as supporting appellant's contention, it appeared that one Foreman, when he died in Morris county, Tex., had no fixed place of residence and owned no property, except a half interest in a judgment he had recovered in Walker county, Tex., against a railway company. At the time he died the cause in which he recovered the judgment was pending on an appeal prosecuted by the railway company. In affirming a judgment denying Angier's application to the county court of Walker county for letters of administration on Foreman's estate, the Court of Civil Appeals, after quoting the statute (article 3209, *Vernon's Statutes*), said:

"We think it clear from the evidence in this case the jurisdiction to administer upon Foreman's estate exists only in the county court of Morris county—the county in which he died. We do not think the contention sound that, because the only property he owned at the time of his death was a judgment rendered in the district court of Walker county, in the purview of the statute above quoted his principal property was situate in said county. The situs of a judgment or of any chose in action follows the residence of the owner, and cannot, in law, be regarded as being situate elsewhere; and it cannot be said that Foreman owned any property in Walker county at the time of his death. *Ferris v. Kimble* [75 Tex. 476] 12 S. W. 689."

The case cited (*Ferris v. Kimble*) as supporting the ruling made does not support it. In that case the holding of the court was that credits are taxable at the place of residence of the owner. As, however, the writ of error applied for in the *Angier* Case was refused, it must be assumed that the Supreme Court approved the ruling of the Court of Civil Appeals. The ruling is clearly against the great weight of authority in other jurisdictions, and we think does not lay down the rule which should control in cases with facts like those in the *Angier* Case, and certainly not the rule which should control in cases with facts like the one before us.

The judgment is affirmed.

OLSEN v. GREELE et al. (No. 5664.)

(Court of Civil Appeals of Texas. Austin.
June 21, 1916. Rehearing Denied
Nov. 15, 1916.)

1. TENANCY IN COMMON §=15(7, 8)—ADVERSE POSSESSION—NOTICE.

The execution of a deed by a tenant in common conveying the entire tract of land and its registration by the grantee, who took open and adverse possession thereunder and paid the taxes, was notice to the other cotenant of the assertion of an adverse claim.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 49; Dec. Dig. §=15 (7, 8).]

2. LIMITATION OF ACTIONS §=19(1)—FORGED DEED—STATUTE.

The five-year statute of limitations, declaring that no one claiming under a forged deed shall be allowed its benefits, refers to the deeds relied on in support of the plea, and not to prior deeds in the chain of title, not necessary to support the plea.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85; Dec. Dig. §=19(1).]

Appeal from District Court, Mills County; John D. Robinson, Judge.

Suit for partition by Wm. Olsen against Wm. Greele and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James Kaley, of San Antonio, for appellant. E. B. Anderson, of Goldthwaite, for appellees.

KEY, C. J. Appellant brought this suit against appellees, alleging that he was the owner of an undivided one-half of a 320-acre tract of land, and sought to have the same partitioned between him and the defendants. Among other things, the defendants pleaded the three, five and ten year statutes of limitation, and denied the right of the plaintiff to any of the land. The trial court sustained the two last-named pleas, and rendered judgment for the defendants for all of the land, and the plaintiff has appealed.

The trial judge did not file findings of fact, but the statement of facts sustains his holding that the plaintiff's claim was defeated by the five-year statute of limitation. It is not contended in appellant's brief that appellees failed to show actual possession of the land, together with the payment of taxes, under deeds duly recorded, for more than five years before the suit was brought; but the contention is that the pleas of limitation are unavailing, for the reason that appellant and appellees were cotenants, and therefore the latter's possession and payment of taxes did not constitute such an ouster as was necessary to start the running of limitation, and authorities are cited which lay down the doctrine in general terms that limitation will not run in favor of the cotenant until it is shown that he has repudiated the title of his co-owner, and that the latter had no-

tice of such repudiation. It is also contended that the statute of limitations cannot avail in this case, because it was shown that one of the deeds in appellees' chain of title was a forgery.

The appellees base their plea of five-year limitation upon deeds executed by William T. and S. J. Allen, conveying in the aggregate the entire 320-acre survey to appellees. Those deeds had been recorded and possession held under them, together with the payment of taxes, for more than five years before this suit was instituted. Appellant contends, however, that as the Allens were joint owners and tenants in common with him, if their deeds conveying all the land constituted a repudiation of his claim of title, still it was not shown that he had any knowledge or notice of that claim until a short time before this suit was commenced.

[1] Counsel for appellees contend, and the weight of authority supports their contention, that the registration of the deeds from the Allens conveying the entire tract of land constituted sufficient notice of the repudiation of appellant's claim to support the statute of limitation. That identical question was passed upon by this court in *Robles v. Robles*, 154 S. W. 230, where it was held that the execution of a deed by a tenant in common, and its registration by the grantee, who took open and adverse possession thereunder, and paid the taxes, was notice to the other cotenant of the assertion of an adverse claim. See, also, *Byers v. Carll*, 7 Tex. Civ. 423, 27 S. W. 190; *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. 645, writ of error refused 93 Tex. 711; *Lewis v. Terrell*, 7 Tex. Civ. App. 314, 26 S. W. 754; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 23 S. W. 360, writ of error refused 93 Tex. 693; *Stubblefield v. Hansen*, 94 S. W. 406, writ of error refused 101 Tex. 661; *Naylor & Jones v. Foster*, 44 Tex. Civ. App. 599, 99 S. W. 114; *Church v. Waggoner*, 78 Tex. 203, 14 S. W. 581; *Morgan v. White*, 50 Tex. Civ. App. 318, 110 S. W. 491; *Carr v. Alexander*, 149 S. W. 218; *Bracken v. Jones*, 63 Tex. 184; *Brownson v. Scanlan*, 59 Tex. 222.

[2] But it is also contended on behalf of appellant that the five-year statute of limitation cannot avail in this case, because the undisputed testimony shows that a deed in appellees' chain of title, executed many years prior to the Allen deeds hereinbefore referred to, and purporting to have been executed under power of attorney from appellant, was a forgery. It is true that the statute relating to five-year limitation declares that "no one claiming under a forged deed or deed executed under a forged power of attorney, shall be allowed the benefits of this article"; but in their plea of five-year limitation appellees did not base their right to such limitation upon the deed charged to be a forgery, but upon deeds executed by the

Allens, as hereinbefore stated, and which deeds were free from any suspicion of forgery. We hold that the provision of the statute denying the right to use a forged deed as the basis of the five-year statute of limitation has reference to the deeds relied on in support of that plea, and not to other deeds, not necessary to support such plea of limitation. Hence we hold that the proviso in the statute referred to has no application to this case.

All of the questions presented in appellant's brief have been duly considered, and our conclusion is that the judgment ought to be affirmed; and it is so ordered.

Affirmed.

MORRIS v. PARSONS et al. (No. 1682.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 23, 1916.)

1. TRIAL \S 140(2)—DIRECTION OF VERDICT—TESTIMONY OF PARTY.

In trespass to try title, it was error for the court to direct a verdict for plaintiffs based on the testimony of one of them that her ancestors had a deed to the land from the original patentee, which deed had been lost, since the court had no right to compel the jury, who are the sole judges of the credibility of the witnesses, to accept as true the testimony of an interested party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 335; Dec. Dig. \S 140(2).]

2. ADVERSE POSSESSION \S 115(1)—QUESTION FOR JURY.

In trespass to try title, evidence held sufficient to require the question of defendant's right to the property under the five-year statute of limitations to be submitted to the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S\S$ 691, 701; Dec. Dig. \S 115(1).]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Trespass to try title by Mrs. Irene Parsons and others against S. J. Morris. Judgment for the plaintiff for part of the land in controversy and defendant appeals. Reversed and remanded.

O. B. Pirkey, of New Boston, and J. S. Crumpton, of Texarkana, for appellant. Mahaffey, Thomas & Hughes, of Texarkana, for appellees.

HODGES, J. The appellees instituted this suit against the appellant in the form of an action of trespass to try title, seeking to recover 60 acres of land, a part of the Hawkins survey, situated in Bowie county. The appellant pleaded as a defense the general issue and the different statutes of limitation applicable to such suits. At the conclusion of the testimony the trial court instructed the jury to return a verdict in favor of the

defendant for 55 acres of the land, and for the plaintiffs for 5 acres. The appellant not only complains of the action of the court in giving that charge, but also in refusing to instruct peremptorily in his favor. The appellees have filed no brief in this case, and we take it that the statement set out in the appellant's brief is correct.

[1] It devolved upon the plaintiffs in the suit, as in every action of this character, where common source is not relied upon, to deraign title from the sovereignty of the soil. The evidence here relied upon to establish title in the appellees was a patent from the state to Hawkins, the original grantee, and the oral testimony of Mrs. Parsons, one of the appellees. She testified that her ancestors once had a deed from the heirs of the original grantee; that this deed included the land in controversy. She was unable, however, to detail, on cross-examination, any of the lines or corners. She also testified that the deed referred to had been lost or destroyed. In this state of the evidence it was not proper for the court to assume as a matter of law that Mrs. Parsons, an interested party, had testified correctly and truthfully concerning those facts. The jury in all such cases are the judges of the credibility of the witnesses; and where the witness is an interested party and testifies in the presence of the jury, the court has no right to compel the jury to accept as true what the witness says. We think, therefore, for that reason the court erred in giving the peremptory instruction to find in favor of the appellees for the 5 acres of land.

[2] According to the testimony of the appellant and the deeds offered in evidence by him, he had purchased a tract of land some time in 1901 from M. D. Tilson and Davis & Davis, which included the land in controversy. He offered in evidence a deed from M. D. Tilson conveying an undivided one-half interest in the land. He also offered in evidence two other deeds—one from each of the Davises—in which one conveys a nine-tenths interest in an undivided half of the land, and the other a one-tenth interest in an undivided half. The appellant testified that he had used and occupied the land and had paid taxes thereon under a claim of ownership for more than five years before the institution of this suit. It appears to us that these deeds, if followed by the other statutory requirements, constituted a sufficient basis for the five-year statute of limitation, and the court erred in not so holding. The issue of adverse possession, or limitation under the five-year statute, should at least have been submitted to the jury.

For the error indicated, the judgment of the district court is reversed, and the cause remanded.

UNION MEN'S FRATERNAL & BENEFICIARY ASS'N et al. v. STATE.

(No. 675.)

(Court of Civil Appeals of Texas. El Paso. Dec. 13, 1916.)

1. CORPORATIONS \S 613(1) — **FORFEITING CHARTER—PROCEEDINGS—WHO MAY BRING.**

A county attorney may not bring suit to forfeit the charter of a private corporation; Const. art. 4, \S 22, providing that the Attorney General shall take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power not authorized by law, conferring exclusive authority on him in that respect.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2431-2434; Dec. Dig. \S 613(1).]

2. INTOXICATING LIQUORS \S 274—**NUISANCE—INJUNCTION—PETITION.**

The petition alleging that defendant without a license engaged in business of a liquor dealer, that it conducted a saloon, that it had misused its corporate privileges, in that it has unlawfully sold intoxicating liquors, does not show a present actual, threatened, or contemplated pursuit of the business, so as to authorize injunction under Rev. St. art. 4674, as for a nuisance; but rather a violation some time in the past.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 410; Dec. Dig. \S 274.]

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

Petition by the State against the Union Men's Fraternal & Beneficiary Association and others. From an order granting injunction, defendants appeal. Reversed and dismissed.

M. W. Stanton and Hudspeth & Dale, all of El Paso, for appellants. C. W. Croom and P. H. Marcum, both of El Paso, for the State.

WALTHALL, J. On September 27, 1916, the following petition was filed in the Thirty-Fourth district court of El Paso county:

"To the Honorable Dan M. Jackson, Judge of said Court:

"Comes now the state of Texas, hereinafter called plaintiff, by her proper county attorney, C. W. Croom, complaining of the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, and Joe Sullivan and Lee Alexander, hereinafter called defendants, and for cause of action says:

"(1) That Joe Sullivan and the said Lee Alexander are residents of the city and county of El Paso, and state of Texas, and that the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, is a private corporation duly and legally organized under and by virtue of the laws of the state of Texas. That Joe Sullivan is the president and Lee Alexander is the secretary of said corporation, upon whom process against the same may be served.

"(2) Plaintiff, complaining, now says that the defendant the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, was duly and legally organized as a private corporation for the purposes hereinafter set out, to wit, for purposes which are to the county attorney unknown.

"(3) Plaintiff alleges that, immediately after the issuance of its corporate charter, the defendant corporation engaged in the business and occupation as of a retail liquor dealer. That

the said corporation leased, owned, and controlled certain premises located on the third floor of building occupied by the 'Fashion Store' on San Antonio street, in the city and county of El Paso, Tex. That upon the premises aforesaid, the defendant corporation conducted a saloon and buffet, and sold therein and therefrom spirituous, vinous, and malted liquors in quantities of one gallon and less, to be drunk upon the premises, and that the defendant corporation, nor any one for it, upon the said premises, had taken out a license, or paid to the state of Texas, the county of El Paso, or the city of El Paso, any occupation tax, as is required by law of those who engage in the business or occupation as that of a retail liquor dealer.

"(4) Plaintiff further alleges that the defendant corporation has misused and abused its corporate privileges, both expressed and implied, in this: That it has unlawfully sold intoxicating liquors, and liquors capable of producing intoxication, upon its premises, in quantities of one gallon and less, and that the same were drunk, or were to be drunk, upon the premises. That the defendant corporation had for a long time prior to the date of the filing of this petition and information maintained under the name of its corporate charter, and acting through the officers of said corporation, and under their direction and control, a saloon and buffet. That the said defendant corporation, by its officers, agents, servants, and employes, has conducted and carried on a saloon business and the occupation of retailing intoxicating liquors. That the said corporation, by its agents, servants, and employes, sold and retailed intoxicating liquors and liquors capable of producing intoxication, on all the days of the week, including Sundays, and all the hours of the day, especially between the hours of 9:30 p. m. and 6 o'clock a. m. of the following day, on all the days of the week, including Sundays.

"(5) Plaintiff further says that said corporation has, since the issuance of its charter aforesaid, constantly violated the laws, in this: That it has sold intoxicating liquors and liquors capable of producing intoxication, without a state license therefor; that by such sale of intoxicating liquors aforesaid it has usurped a franchise to which it is not entitled under the laws of the state of Texas; that, such corporation having been incorporated for the purposes as set out hereinbefore, it had no right nor authority under or by virtue of its corporate franchise, either expressed or implied, to engage in the business or occupation as that of a retail liquor dealer; that such sale of intoxicating liquors was not necessary to the enjoyment of the corporate purposes, nor was it reasonably appropriate to the purpose for which the state of Texas issued its said charter. Plaintiff further alleges that the corporation, by its servants, agents, and employes, has permitted its premises to be used for the playing of games with cards, in violation of the laws of this state.

"(6) Plaintiff further says that the sole purpose of the organization and its corporation has been for the purpose of illegally and fraudulently enabling the said corporation by its agents, servants, and employes, to run a saloon and buffet upon the premises aforesaid.

"Wherefore, premises considered, plaintiff prays:

"(1) That the court grant and issue a writ of injunction enjoining and restraining the defendants Joe Sullivan and Lee Alexander, president and secretary, and the defendant the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, from using the premises or any part thereof, for the purpose of selling spirituous, vinous, or malted liquors; from selling spirituous, vinous, and malted liquors on the premises; from keeping on the premises, for the purposes of dispensing, selling, or giving

away to the members of the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, or their invited guests, spirituous, vinous, or malted liquors; that the defendant Joe Sullivan, president, not only be enjoined from doing the acts herein complained of, personally, but likewise through any agent, servant, employé, or any other person; that the court issue a writ of injunction commanding the said the Union Men's Fraternal & Beneficiary Association of El Paso, a corporation, its officers, servants, and employés, to desist from selling, keeping for sale, dispensing, or giving away, upon its premises, spirituous, vinous, and malted liquors, and from further permitting games to be played with cards upon the premises of the Union Men's Fraternal & Beneficiary Association of El Paso, or any part thereof, until a final hearing of this cause shall be had.

"(2) Plaintiff prays that this petition be filed as an information in this cause, and that the defendants, and each of them, be cited to appear and answer in this behalf, that the defendant corporation be cited to appear, by service upon Joe Sullivan, its president, that upon final hearing of this cause that the plaintiff have judgment, that the defendant corporation be ousted of all its franchises and corporate privileges, and that the said charter heretofore granted it by the Secretary of State of the state of Texas be forfeited, for costs of suit, and for such other and further relief as both in law and in equity the plaintiff may be entitled to.

"[Signed] C. W. Croom, Co. Atty.
"P. H. Marcum."

On the presentation of the petition, the district judge ordered "that the petition be filed as an information in this cause," and directed that the clerk issue the writ of injunction for all things as prayed for in the petition; the injunction to be subject to the further order of the court. The writ of injunction was directed to the corporation as named, and "Joe Sullivan, President," and, after reciting the subject-matter of the petition and the order of the court, commanded that they jointly and severally refrain from doing the matters complained of. On the 29th day of September, 1916, an order of the court recites that the defendants came into open court and through their attorneys gave notice of appeal and requested the court to make a further order suspending the enforcement of its previous order for injunction and fix the amount of the supersedeas bond upon appeal, which request the court granted; the bond was given, and the case is before this court on appeal from the order granting the injunction. The defendants answered by general exception.

[1] The contention of the appellants is that article 4, § 22, of the state Constitution, confers exclusive authority upon the Attorney General of the state to represent the state in all inquiries into the charter rights of all private corporations and, in the name of the state, to take such action in the court as may be proper and necessary to prevent any private corporation from exercising any power or privilege not authorized by law, and, whenever sufficient cause exists, seek judicial forfeiture of such charters; that it does not appear from the petition filed by C. W. Croom, county attorney, that he was authorized to file and prosecute said cause;

that appellant corporation be ousted of all of its franchises and corporate privileges, and that the charter granted be forfeited; and that, for the reason stated, the trial court was in error in granting the temporary injunction upon the petition filed by the county attorney. It is also the contention of defendants that, if any statute of the state confers authority upon the county attorney to file a petition and information to forfeit the charter of a domestic corporation, such statute would be in contraversion of and conflict with said article of the Constitution, and for that reason inoperative.

It is quite clear to us, for many reasons, that the petition does not state a cause of action against either Sullivan or Alexander, and we need not discuss or consider the issues further as to them. If, as claimed by appellant corporation, the state Constitution confers exclusive authority upon the Attorney General of the state to inquire into the charter rights of all private and domestic corporations, and, in the name of the state, to take such action in the courts as may be necessary and proper to prevent them from exercising powers and privileges not authorized by law, we take it as a self-evident proposition that the county attorney at his own initiative could not effectively file a petition in the court inquiring into the charter powers and privileges of such corporation and take a forfeiture of its charter privileges. Article 4, § 22, has reference to the Attorney General, and, in part, provides:

"He shall represent the state in all suits and pleas in the Supreme Court of the state in which the state may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the state, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or collecting any species of taxes, toll, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law."

In *State v. International & G. N. R. R. Co.*, 89 Tex. 562, 35 S. W. 1087, the county attorney of Galveston county, by leave of the judge of the district court, filed an information in the nature of a quo warranto in the name of the state, against the railway company, a private corporation, operating under the laws of this state, charging that it was exercising powers not conferred upon it by law, and demanding, receiving, and collecting charges and fares or tolls without being authorized to do so by law. On demurrer of defendant, the cause was dismissed by the trial court on the ground that neither the county attorney nor the district attorney had authority to institute or conduct the proceedings. The question was certified to the Supreme Court whether or not, under our Constitution and laws, those officers are clothed with such authority. The court held they were not. A similar ruling was made in *State v. Moore*, 57 Tex. 309. In *State v.*

Paris Ry. Co., 55 Tex. 76, in which the county attorney had filed the suit in the name of the State ex rel. S. E. Clement et al., to enjoin the railroad from building its track along a street in Paris, on the ground that, if built, it would create a nuisance, in discussing the article and section of the Constitution in question, the Supreme Court, through Judge Gould, said:

"We think it manifest that the institution of suits in the name of the state to enjoin private corporations from exceeding their powers and thereby creating public nuisances is such action as, under this section of the Constitution, it is for the Attorney General to take, or cause to be taken, when, in his judgment, it may be proper and necessary. The power given county attorneys * * * (under Constitution, art. 5, § 21) does not extend to the institution of suits like this, unless it be done with the sanction and in the name of the Attorney General."

We think the above authorities are conclusive upon the question of the authority of the county attorney of El Paso county to file a suit to forfeit the charter of a private corporation. As said by the Court of Civil Appeals for the Fifth District:

"The state would not be bound by a judgment in such unauthorized proceeding, and as the state is not bound the defendant would not be." *Oriental Oil Co. v. State et al.*, 135 S. W. 722.

See, also, *Brady v. Brooks*, 99 Tex. 366, at 379, 89 S. W. 1052.

There is another feature of this case, which it seems to us is not necessarily involved in the question above discussed. The petition alleges, in the third paragraph, that the appellant corporation "engaged in the business and occupation of a retail liquor dealer; * * * that the defendant corporation conducted a saloon and buffet and sold therein and therefrom spirituous, vinous, and malted liquors." The petition does not state that the defendant at the time of the filing of the petition was so engaged, nor when it was so engaged. In the fourth paragraph, it is alleged that "the defendant corporation has

misused and abused its corporate privileges both expressed and implied, in this, that it has unlawfully sold intoxicating liquors," etc.

The allegations in the fourth paragraph, we take it, was intended by the pleader to allege, as it did, that the corporation had exceeded and abused its corporate powers and privileges, and for that reason should forfeit its charter. The fifth paragraph of the petition is a repleading of substantially the facts contained in the third and fourth, and deny in the defendant the right to engage in the business of retail liquor dealer.

[2] We think we need not discuss the question of the authority of the county attorney to bring a suit for injunction against a corporation in behalf of the state strictly under article 4674, Revised Statutes, and articles following, as the petition does not show a present actual, threatened, or contemplated pursuit of the business denounced in article 4674, but rather shows that the defendant has at some time in the past violated the provisions of that article, and that, for having done so, the forfeiture of its charter is sought in the suit filed. True, the petition prays that defendant be enjoined from using the premises described as a place for dispensing liquors and from doing the acts complained of, but from the prayer alone it can hardly be inferred that appellant is then actually doing, threatening, or contemplating the doing of the things complained of, and that, independently of the purpose to forfeit the appellant's corporate franchise, it is sought to enjoin the appellant from selling liquors. We disclaim any intention in this opinion of passing upon the question of the right of the county attorney to file a suit in behalf of the state to enjoin appellant or any person from a violation of matters denounced in article 4674, Revised Statutes.

For the reasons stated, the case is reversed, and the cause dismissed.

ADAMS v. HARRIS. (No. 1670.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 9, 1916.)

1. VENDOR AND PURCHASER \S 278—EXTENSION OF LIEN—LIMITATION OF ACTIONS.

Under Vernon's Sayles' Ann. Civ. St. arts. 5693, 5694, limiting the foreclosure of liens on land either by exercise of power of sale or by foreclosure suit to four years after the maturity of the indebtedness, unless extended as provided by article 5695, which required the extension to be in writing, acknowledged and filed for record, the extension of a vendor's lien note, not recorded, does not authorize foreclosure after the expiration of the limitation period even as between the parties thereto.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 776, 777; Dec. Dig. \S 278.]

2. LIMITATION OF ACTIONS \S 148(4)—RENEWAL OF PROMISE—STATUTE.

But such extension, when signed by the party to be charged, as required by article 5706, is a sufficient renewal of the note as a personal obligation, and entitles the vendor to judgment thereon.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 601; Dec. Dig. \S 148(4).]

Appeal from District Court, Titus County; J. A. Ward, Judge.

Suit by Mrs. Mary J. Harris against James R. Adams and another, to recover the balance due on a promissory note and foreclose a vendor's lien. Judgment for the plaintiff for a part only of the amount due on the note and denying foreclosure of the vendor's lien, and both parties named appeal. Judgment reformed as to the amount of recovery, and otherwise affirmed.

Price & Beaird, of Tyler, for appellant. J. M. Burford, of Mt. Pleasant, for appellee.

HODGES, J. In November, 1915, Mrs. Mary J. Harris, the appellee, filed this suit against C. H. Wallace and the appellant, J. R. Adams. The object of the suit was to recover a judgment for the balance due on a promissory note originally executed by Wallace for \$400, and to foreclose a vendor's lien upon certain described real estate. The material facts are set out in the findings of the trial court, which are, in substance, as follows: On April 29, 1901, J. E. Taylor sold and conveyed by a general warranty deed a tract of land situated in Titus county to C. H. Wallace, a part of the consideration being a note for the sum of \$400 payable to Taylor or bearer January 1, 1902. The note contained the usual provisions for interest and attorney fees, and expressly reserved a vendor's lien upon the land conveyed. Some time before the maturity of the note Taylor, for a valuable consideration, assigned it, together with the lien, to the appellee, Mary J. Harris. The note was not paid at maturity, but the interest appears to have been paid as it accrued. On December 9, 1913, the note being out of date, Wallace, the maker of the

note, executed the following contract of renewal:

"In order and for the purpose of renewing the hereto attached note given by Dr. C. H. Wallace on April 29, 1901, for the sum of \$400.00 in favor of J. E. Taylor or bearer, I, Dr. C. H. Wallace, do hereby acknowledge in writing that said note, less the credits on same is just, due and unpaid, and that all liens securing the same are valid and binding. [Signed] C. H. Wallace."

This agreement was attached to the note. On December 23, 1914, Wallace, joined by his wife, conveyed the land for which the note was given to James R. Adams, the appellant. As a part of the consideration Adams assumed the payment of the above-mentioned note for the extent of \$300. On April 30, 1915, Adams, desiring to secure an extension of the note, entered into a contract to that effect, which was duly signed and acknowledged by him and Mrs. Harris. Neither of these contracts of renewal was recorded as provided for by law. At the time of the last renewal there was due upon the note \$342.17.

Upon these facts the court concluded that both contracts of renewal were ineffectual because neither was recorded as required by the statute. He further concluded, however, that by reason of the assumption on the part of Adams, as stated in the deed from Wallace to him, of the payment of \$300 on the note, Adams was personally liable to the plaintiff for that amount, with legal interest from January 1, 1915. He rendered judgment accordingly, but refused to foreclose the vendor's lien. Judgment also was rendered against Wallace for the amount of the note sued on, with interest. Both parties have appealed from that judgment. Adams assigns as error the action of the court in rendering judgment against him for any sum. Mrs. Harris complains that the court erred in failing to render judgment in her favor for the full amount of the note, and further in refusing to foreclose the vendor's lien stipulated in the note.

[1] Article 5693 of Vernon's Sayles' Statutes provides that the power of sale in any mortgage or deed of trust shall expire four years after the maturity of the indebtedness secured. Articles 5694 and 5695, as amended by the act of 1913 are as follows:

"Art. 5694. The right to recover any real estate by virtue of a superior title retained in any deed of conveyance heretofore or hereafter executed, or in any vendor's lien note or notes heretofore or hereafter executed, given for the purchase money of such real estate, shall be barred after the expiration of four years from the maturity of such indebtedness, and if suit is not brought for recovery of such real estate, or for the foreclosure of the lien to secure such note or notes within four years from the date of the maturity of such indebtedness, or if suit is not brought within such time for the recovery of the land by the original vendor, or his transferee, or for the foreclosure of the lien given to secure such notes, the purchase money therefor shall be conclusively presumed to have been paid in any suit to recover such land or to enforce a lien thereon, and the lien reserved in any such notes and deeds conveying the land shall cease to

exist four years after the note or notes have matured, provided the lien reserved in such note or notes may be extended as provided in section 5695 of this chapter and provided, if several obligations are secured by said deed of conveyance, the same may be enforced at any time prior to four years after the note or obligation last maturing has matured and may be enforced as to all notes not then barred by the four years statute of limitations.

"Art. 5695. When the date of maturity of either debt referred to in either of the foregoing articles is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance by the party or parties obligated to pay such indebtedness as extended and filed for record in the county clerk's office in the county in which the land is situated, the lien shall continue and be in force until four years after maturity of the notes as provided in such extension, the same as in the original contract and the lien shall so continue for any succeeding or additional extension so made and recorded. The date of maturity set forth in the deed of conveyance or deed of trust or mortgage or the recorded renewal and extension of the same shall be conclusive evidence of the date of maturity of the indebtedness therein mentioned. Provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendors' lien notes reserved in deeds of conveyance which were executed prior to July 14, 1905, and which are more than four years past due at the time this act takes effect as shown by the original mortgage, deed of trust or conveyance, or last record extension shall have twelve months after this act takes effect within which they may obtain such record extension as hereinbefore provided for, or bring suit to enforce the liens securing them if same are valid obligations when this act takes effect and if such debt is not so extended of record, or suit is not brought within such time, the right to extend such debt of record, or bring suit to enforce such liens shall be forever barred," etc.

It will be observed that articles 5693 and 5694 fix four years after the maturity of the debt as the limit within which the lien created to secure its payment may be enforced either by the execution of a power of sale or through judicial proceedings. But in that connection it is also provided that such liens may be extended in the manner specified in article 5695. Briefly stated, it is required by the latter article that the contract of extension must be in writing, signed and acknowledged by the party to be bound thereby, and filed in the office of the clerk of the county court of the county in which the land is situated. It is urged by counsel for the appellee that, as between the parties to the renewal contract, registration is not essential to its validity; that this provision of the statute was inserted only for the benefit of third parties having a right to rely upon the deed records for notice that the lien had been extended. The force of that contention is weakened, if not destroyed, when we consider the evil which the law was intended to correct and the language employed with reference to contracts made prior to July 14, 1905. The Legislature must have had in mind the frequent embarrassments resulting from protracted delays in asserting outstanding superior legal titles where the purchase money of land had not been paid, and in enforcing liens which had been renewed without the

evidence having been placed of record. The Legislature had the power, if it saw fit to exercise it, to make registration in such cases essential to the validity of contracts of extension beyond the lifetime of the vendee's original obligation.

Article 5695 provides a method for ascertaining the maturity of debts secured by liens for the purpose of determining whether or not the lien is barred. It is expressly provided that the date of maturity as set forth in the deed of conveyance, the mortgage or deed of trust, or the recorded renewal and extension shall be conclusive evidence of the date of maturity. In the absence of any recorded renewal and extension, the date specified in the conveyance, deed of trust, or mortgage must control.

In this case the debt and lien were created prior to July 14, 1905. Neither had been discharged in 1913 when the present law was enacted. By the express terms of the statute the holder was allowed 12 months after it went into effect to do one or the other of two things—procure and have recorded a contract of extension, or file suit for the enforcement of the lien. It is provided that:

"If such debt is not so extended of record, or suit is not brought within such time (one year), the right to extend such debt of record, or bring suit to enforce such liens shall be forever barred."

The appellee, in this instance having failed to comply with either of these requirements, must suffer the consequences. Her lien became barred.

[2] But the court also held that the renewal contract which had been made by Wallace at one time and Adams at another did not have the effect of perpetuating the personal obligation to pay the original note. In this we think there was error. In enacting the statute which has been discussed the Legislature was undertaking to deal with liens and the superior legal titles to real estate, and no attempt was made to disturb, or modify, the provisions of article 5705, which prescribes the manner of renewing personal obligations which have become barred by limitation. The renewal contracts executed by Wallace and Adams, while ineffectual for the purpose of renewing and extending the lien because not executed within the time prescribed by the statute, nor recorded as there required, were sufficient to renew and extend the original personal obligation to the extent specified. According to the findings of the court the appellant, after purchasing the land, did enter into a contract with the appellee by which he agreed to pay the balance due on the original purchase-money note. That contract is valid and enforceable personal obligation, notwithstanding the expiration of the lien by limitation.

The judgment of the trial court will therefore be reformed as to the amount awarded against the appellant. In all other respects it will be affirmed.

HENSLEY et ux. v. PENA. (No. 688.)

(Court of Civil Appeals of Texas. El Paso.
Dec. 7, 1916.)

APPEAL AND ERROR ¶773(2)—BRIEFS—FAILURE TO FILE—DISMISSAL.

Under Rev. St. art. 2115, providing that not less than five days before the time of filing the transcript in the Court of Civil Appeals, the appellant for plaintiff in error shall file with the clerk of the district court a copy of his brief, and rule 39, Rules for the Courts of Civil Appeals (142 S. W. xiii), making a failure to comply with such provision without showing cause for such failure ground for dismissing the appeal, where appellants have offered no excuse for failing to file a copy of the brief with the clerk of the district court, the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108; Dec. Dig. ¶773(2).]

Appeal from District Court, Presidio County; P. R. Price, Judge.

Suit by Mrs. Antonio Pena against S. J. Hensley and wife. From a judgment for plaintiff, defendants appeal. Dismissed.

J. D. Martin, of Ft. Stockton, and K. C. Miller and W. O. Jourdan, both of Marfa, for appellants. Belcher & Sutton, of Marfa, for appellee.

HARPER, C. J. This suit was filed by appellee against appellants in form of trespass to try title to an undivided one-half interest in Survey No. 350, Presidio county, Tex., and also for cancellation of a certain deed. Tried with jury and resulted in a verdict and judgment for plaintiff, from which Hensley appealed.

This cause was tried at the January term, 1916. Transcript reached the clerk of this court May 1, 1916. Copies of appellant's briefs were offered for filing in this court in October, 1916. There was no offer to file copies in the court below. Article 2115, Rev. Civ. Stat. of Texas 1911, provides that:

"Not less than five days before the time of filing the transcript in the Court of Civil Appeals, the appellant or plaintiff in error shall file with the clerk of the district court a copy of his brief, which shall be by the clerk deposited with the papers of the cause, with the date of filing indorsed thereon. * * *"

Rule 39, Supreme Court Rules for the Courts of Civil Appeals of Texas (142 S. W. xiii), provides that a failure to comply with the provisions of the above statute, without showing good cause for not complying therewith, shall be grounds for dismissing the appeal, and appellants have offered no excuse. Appellants filed motion to be permitted to file their briefs in this court, which was overruled, whereupon they filed their motion to dismiss the appeal, and said motion is sustained and appeal dismissed.

MILLER v. MEYER. (No. 7088.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 20, 1916. Rehearing Denied
Dec. 7, 1916.)

1. BOUNDARIES ¶37(3) — LOCATION — SIDE LINE—SUFFICIENCY OF EVIDENCE.

In an action to recover a strip of unlocated and unappropriated public lands lying between the west boundary of a survey and the east boundary of another survey where the maps or plats had made the west boundary of the first survey the east boundary of the second, evidence held to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186-191; Dec. Dig. ¶37(3).]

2. BOUNDARIES ¶37(3)—SURVEY—RESURVEY.

An original survey agreeing with maps in use for many years should not be held erroneous because not agreeing with resurveys made long afterwards and based upon the assumption that information furnished by living persons as to locality of the lines and corners was absolutely correct, nor where they are based upon an indefinite and uncertain starting point.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186-191; Dec. Dig. ¶37(3).]

3. BOUNDARIES ¶38(6) — CALLS — SURVEYED LINES.

The real object in applying the various calls is to find the footsteps of the surveyor, and, when found and identified, all classes of calls must yield to them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 24-29; Dec. Dig. ¶38(6).]

4. BOUNDARIES ¶11, 37(3)—ADJOINING SURVEYS—UNAPPROPRIATED STRIP.

Adjoining surveys made by the same surveyor or within a few days of each other, mapped with a common division line and calling for each other, will appropriate the land the one to the other, and very clear evidence must be adduced to justify the conclusion of the existence of any vacancy between such surveys as actually made.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 92-94, 186-191; Dec. Dig. ¶11, 37(3).]

5. ADVERSE POSSESSION ¶110(4)—PLEADING—EVIDENCE.

In an action to recover land alleged to lie between two surveys owned by defendant, with a cross-bill by defendant to recover such strip, and a plea of title by limitation to the land sued for to protect his chain of title against any defects so that plaintiff might not show an outstanding title in some one else, evidence as to the long possession and use of the land sued for by defendant was admissible.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 644, 645; Dec. Dig. ¶110(4).]

Appeal from District Court, Harris County; John A. Read, Judge.

Action by A. R. Miller against Joseph F. Meyer, with cross-action and plea in reconvention. Judgment for defendant on his cross-action, and plaintiff appeals. Affirmed.

Gill, Jones & Tyler and B. F. Louis, all of Houston, for appellant. Baker, Botts, Parker & Garwood, D. F. Rowe and Leonard Doughty, all of Houston, for appellee.

LANE, J. On the 10th day of October, 1916, we handed down an oral opinion in

this case. Appellant has filed his motion for a written opinion, and in compliance with such request we present the following:

For the purpose of clearly presenting the contentions of the parties, we make the following statement:

On the 29th day of September, 1838, Surveyor H. Trott surveyed and located a tract of land known as the Owen's survey in Harris county. He began this survey at its northeast corner; and from thence he ran south 2,888 varas for its southeast corner; thence west 2,888 varas for its southwest corner; thence north 2,888 varas for its northwest corner; thence east 2,888 varas to the place of beginning.

On the 9th day of October, 1838, the same surveyor surveyed and located what is known as the W. N. Bronaugh survey in said county. His field notes by which this survey was located call to begin at a stake near the head of the south fork of Bray's bayou for its southwest corner; thence east 3,818 varas to a stake for its southeast corner; thence north 2,200 varas to a stake for its northeast corner, the same being the Owen's southeast corner; thence west 3,818 varas to a stake and mound in prairie (with said Owen's line crossing said bayou at 940 varas, passing his and Hooker's corner at 2,888 varas and with Hooker's line 828 varas to Aiken's southeast corner and Hooker's southwest corner); thence south 2,200 varas to beginning—thus locating the Bronaugh survey south of the Owen and Hooker surveys, and making the combined south lines of the Owen and Hooker the north line of the Bronaugh, and making the southwest corner of the Hooker the southeast corner of the Aiken, hereinafter described, and the northwest corner of said Bronaugh a common corner for all three of said surveys. The Hooker survey referred to is the same as the Brown shown on the maps introduced in evidence.

The records from the General Land Office, introduced in evidence by defendant in this suit, show that on the 10th day of October, 1838, H. Trott, the same surveyor who surveyed and located the two surveys, Owen and Bronaugh, on the 29th of September and October 9, 1838, respectively, surveyed and located what is known as the Aiken survey. His calls for the boundaries of said survey are substantially as follows: Beginning at a stake in prairie the southeast corner of Black's survey; thence north 1,900 varas for the northwest corner of this (Aiken) survey; thence east one mile to stake for northeast corner; thence south one mile to a stake for southeast corner; thence west one mile to beginning.

The records from the General Land Office showing the survey and location of the Hooker shows that Surveyor H. Trott, in seven or eight months after he had surveyed and located the Owen, Bronaugh, and Aiken surveys, to wit, in June 1839, again went to the

same locality and surveyed and located the Hooker survey, making its south, west, and east boundary lines, respectively, to run as follows: Beginning at Owen's southwest corner on the Bronaugh's north line; thence west with said line 928 varas to the southeast corner of the Aiken; thence north with the east line of the Aiken; and then, after reaching the west line of the Owen, he ran with said Owen's west line south to place of beginning. Thus locating the Hooker or Brown north of the Bronaugh and appropriating all the land lying between the Owen and Aiken, 928 varas in width.

In April, 1840, Surveyor Henderson surveyed and located the Simmons, now shown on the official map as the Ely, and in his field notes, by which the same was located, he makes the south line of the Aiken the north line of the Simmons, and the southeast corner of the Aiken the northeast corner of said Simmons. He then calls to run south 1,344 varas with the west line of the Bronaugh; thence west 1,344 varas, etc. Thus making the west line of the Bronaugh and the east line of the Simmons a common boundary between the two surveys.

The probative force of the undisputed facts as above stated is that the records of the surveys mentioned, in use in the General Land Office, show that Surveyor H. Trott surveyed and located the Owen survey on September 29, 1839; that ten days later he surveyed and located the Bronaugh survey south of the Owen, and made the south line of the Owen and south line of the Hooker (surveyed later) the north line of the Bronaugh; and that in running this north line of the Bronaugh he began at the southeast corner of the Owen and ran with the south lines of the Owen and Hooker surveys west 3,818 varas to the Aiken southeast corner, passing the southwest corner of the Owen 828 (928) varas east of the southeast corner of the Aiken; that on the day after locating the Bronaugh he surveyed and located the Aiken, with its east boundary line 928 varas west of the Owen west line; that within seven or eight months thereafter the same surveyor returned to the field of operations and located the Hooker between the west line of the Owen and east line of the Aiken and making its south line rest on and run with the north line of the Bronaugh 928 varas to the southeast corner of the Aiken, thus appropriating all the unlocated land lying north of the Bronaugh, and between the Owen on the east, and Aiken on the west; that Surveyor Henderson in April, 1840, located the Simmons, and in doing so made the west boundary line of the Bronaugh the east boundary line of the Simmons, and called for the southeast corner of the Aiken as the northeast corner of the Simmons.

The maps or plats of the Owen, Bronaugh, Aiken, Hooker, and Simmons surveys in general use in the General Land Office from

1861 to 1869, introduced in evidence, show the relation of these surveys, one to the other, as they are located by the field notes of the locating surveyor, as hereinbefore stated. The title to all the land actually embraced within the boundaries of the Bronaugh and Simmons surveys has passed by mesne conveyances from the sovereignty of the soil to defendant Meyer.

On November 21, 1896, a map or plat was prepared and filed in the General Land Office which, if true, shows that there was a narrow strip of unlocated and unappropriated public land lying between the west boundaries of the Bronaugh and Hooker, and the east boundaries of the Aiken and Simmons, thus pulling apart these surveys and destroying the common boundaries between them which are shown to exist by all the field notes and maps with reference to said surveys in the General Land Office from 1861 to 1896, by locating the west lines of the Bronaugh and Hooker several hundred varas east of the conceded east line of the Simmons and Aiken, and thereby encroaching on the territory formerly shown to be embraced within the boundaries of the Bronaugh and Hooker.

In July, 1908, plaintiff A. R. Miller made application for a survey of said unappropriated strip as shown by the map of date November 21, 1896. Upon such application, said apparent unappropriated strip was surveyed, and thereafter, on the 4th day of February, 1909, was awarded to said Miller upon his application to purchase.

From the foregoing statement, it clearly appears that appellant's contention is that the west line of the Bronaugh is not the same as the east line of the Simmons, but in fact is several hundred varas to the east thereof, and that there is unappropriated public land lying between the true west line of the Bronaugh, which he contends is shown by the map of 1896, and the conceded east line of the Simmons, and that the award of the same to him in 1909 passed the title thereto to him.

A. R. Miller instituted this suit against Joseph F. Meyer to recover the title and possession of about 128 acres of land which he contends was public school land in 1909 lying between the east line of the Simmons (now Ely) survey and the west line of the Bronaugh survey in Harris county, which he alleges was awarded to him by the state of Texas in 1909. Joseph F. Meyer answered and denied that there was any such vacant land as claimed by Miller and pleaded not guilty, and further by cross-action and plea in reconvention pleaded that he was the owner of all the land embraced within the boundaries of the Bronaugh and Simmons (Ely) surveys, and prayed for judgment over against Miller for the title to said land. He also pleaded the statute of limitation of three, five, and ten years. The cause was tried before a jury, who were instructed by the trial judge, in substance, that the controlling ques-

tion in the case was as to the true location of the west boundary line of the Bronaugh survey; and that the burden of proof was upon the plaintiff Miller to establish by a preponderance of the evidence that the east boundary of the Ely (Simmons) and the west boundary of the Bronaugh surveys were originally so located as that there was left between them a vacancy as contended by Miller; that in determining such question they should, if possible, follow the footsteps of the original surveyor as they were actually made on the ground when he located the surveys. Other instructions applicable to the facts and law of the case were given. The court then propounded to the jury six questions, among which was question No. 1, as follows:

"As surveyed by the original surveyors, do, or do not, the Bronaugh and Ely surveys join each other along the extent of the east boundary lines of the Ely survey? You will answer this question by saying, 'They do,' or, 'They do not,' as you may find the fact to be. If in answer to the preceding question you say that the Bronaugh and Ely surveys do so join each other, then you need inquire no further, but return your answer as your verdict. If you do not so find, you will answer the following questions."

The jury answered this question, "They do," and made no further answers to the remaining questions. Upon this answer of the jury the court rendered judgment for the defendant Meyer for the land sued for in his cross-bill, which included the land sued for by Miller.

[1] The main contention of appellant for the reversal of the judgment rendered in favor of appellee is that while the surveyor H. Trott, who surveyed and located the Bronaugh survey, in his locative field notes, in running the north line of the Bronaugh, called to run west 3,818 varas to the southeast corner of the Aiken survey, the distance called for did not in fact reach the southeast corner of the Aiken, but fell short thereof the width of the land claimed by him; that the Aiken southeast corner was marked by no object and could not be definitely identified and located, and therefore the call for such corner did not carry the surveyor to the same, and that under such circumstances the distance called for should control rather than the call for such corner. In other words, it is insisted that the great weight and preponderance of the evidence is so overwhelmingly against the answer of the jury to question No. 1 submitted to them by the court, that their finding should be set aside on appeal, and that the judgment rendered in the lower court should be reversed and the cause remanded for another trial.

We have already seen that the records and maps relative to the location and boundaries of the Bronaugh, and other surveys with which it in some manner connects, make a prima facie case for appellee Meyer. We have carefully examined all the evidence relied upon by appellant for a judgment in his

favor, together with all the facts and circumstances proven, and have reached the conclusion that as a whole the evidence falls very far short of being such conclusive evidence as would or should require from the jury a verdict favorable to appellant.

On page 4 of appellant's brief it is said:

"The testimony showed that the H. Aiken survey was fixed without contradiction to the extent of its east line, so far as its location to the east from the post oak upon the Thomas Dickson survey is concerned, and that the testimony without contradiction, therefore, locates the east line of the Ely (Simmons) survey as at a point no further east than the east line of the Aiken."

It follows then that the southeast corner of the Aiken is fixed and established by the uncontradicted testimony.

[2] The uncontradicted evidence shows that H. Trott surveyed and located the Bronaugh, Aiken, Owen, and Hooker (or Brown) surveys practically at the same time, and by his calls makes the southeast corner of the Aiken, also the northwest corner of the Bronaugh, and the southwest corner of the Hooker (or Brown) surveys. We think the fact that the same surveyor called for this one point as the common corner for all of these surveys, made practically at the same time, was sufficient evidence to support the finding of the jury. It is inconceivable that the surveyor who made these surveys could have been mistaken as to the location of this point at the time he called for it as the northwest corner of the Bronaugh, and it follows from what has been said that, if the Bronaugh northwest corner is at the same point as the southeast corner of the Aiken and the northeast corner of the Simmons (or Ely), the west line of the Bronaugh and the east line of the Simmons (or Ely) is a common division line of both surveys, and therefore there is no vacancy between the two surveys as contended by appellant. We attribute but little importance to the fact that the field notes by which the Aiken was located show that the Aiken southeast corner was established one day later than the line of the Bronaugh, which calls to run to such corner, for evidently both surveys were made by the same surveyor practically at the same time. Nor do we give any weight to the testimony of the witness Rosenberg as to pencil marks on the original field notes of the Bronaugh survey, made by the surveyor who located said survey. Such testimony does not raise the issue as to whether certain words were erased from said field notes before the issuance

of the patent. Where an original survey agrees with maps that have been in use for many years, as in the instant case, it should not be held erroneous because it does not agree with resurveys made long afterwards, and based upon the assumption that information furnished by living persons as to the locality of the lines and corners is absolutely correct, nor where they are based upon an indefinite and uncertain starting point. *McCombs v. Sheldon*, 28 S. W. 1114; *Lyon v. Waggoner*, 37 Tex. Civ. App. 205, 83 S. W. 46.

[3, 4] The real object in applying the various calls is to find the footsteps of the surveyor. When these are found and identified, all classes of calls must yield to them. *Fulton v. Frandolig*, 63 Tex. 330; *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1081; *Ruling Case Law*, vol. 4, § 56, p. 117. "Adjoining surveys made by the same surveyor within a few days of each other, mapped with a common division line and calling for each other, will appropriate the land the one to the other. Very clear evidence would have to be adduced to justify the conclusion that any vacancy existed between such surveys as actually made." *Wyatt v. Foster*, 79 Tex. 413, 15 S. W. 679; *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262; *Booker v. Hart*, 77 Tex. 146, 12 S. W. 16.

We think the finding of the jury that the line between the Bronaugh and Simmons (or Ely) surveys was a common division line, and that there was no vacancy between them, is amply supported by the evidence and is decisive of the issues in this case.

[5] We do not think the court erred in permitting witnesses to testify as to the long possession and use of the land embraced within the boundaries of the Bronaugh and Ely surveys, sued for in defendant's cross-bill. He pleaded title by limitation to the land sued for in his cross-bill as a means, and out of precaution, to protect his chain of title against any defects, to the end that appellant might not show an outstanding title in some one else. We think the evidence admissible for the purpose for which it was offered.

We have examined and considered all of appellant's assignments and overrule them.

We find no error in the trial which resulted in the rendition of the judgment in favor of appellee. The judgment of the trial court is affirmed.

Affirmed.

**INTERNATIONAL ORDER OF TWELVE,
KNIGHTS AND DAUGHTERS OF TA-
BOR, v. BROWN et al. (No. 1690.)**

(Court of Civil Appeals of Texas. Texarkana.
Nov. 30, 1916.)

INSURANCE — §814—MUTUAL BENEFIT INSURANCE—WAIVER OF PROCESS—STATUTE.

Under Acts 33d Leg. c. 113, § 17 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4844), providing that service of citation in a suit against a fraternal beneficiary society shall be made on the commissioner of insurance, and that legal process shall not be served on such society in any other manner, which act was passed after the previous statute had been construed to provide only an additional method of service, service on the commissioner is the exclusive mode of service, whether the society is incorporated or not, and judgment by default cannot be rendered, where service was had only on the recorder of a local lodge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1995; Dec. Dig. § 814.]

Error from Franklin County Court; O. L. Reaves, Judge.

Action by Tommy Brown and others against the International Order of Twelve, Knights and Daughters of Tabor. Judgment for plaintiffs by default, and defendant brings error. Reversed and remanded for new trial.

R. T. Wilkinson, of Mt. Vernon, for plaintiff in error. L. W. Davidson, of Mt. Vernon, for defendants in error.

WILLSON, C. J. The writ was prosecuted from a judgment by default against plaintiff in error in favor of Tommy Brown, in his individual capacity and as next friend of the minors, Tommy, Jr., Rosellee, Mary Ella, William, and Louella Brown, for \$300, the sum claimed to be due them as the beneficiaries named in a benefit certificate issued by plaintiff in error to Hattie Brown, deceased.

It appears that the judgment was unauthorized, because service, as required by law, of a citation was not had on plaintiff in error before it was rendered. The service was on one Lottie Gatlin, chief recorder of one of plaintiff in error's local lodges, when it should have been on the commissioner of insurance; for, it seems, plaintiff in error was a fraternal beneficiary society (but whether incorporated or not does not appear in the record). The Legislature in section 17 of Act April 2, 1913 (Gen. Laws, p. 227), after declaring the service of a citation in a suit against such a society shall be made on the commissioner of insurance, declared:

"Legal process shall not be served upon any such society except in the manner provided herein."

Defendants in error cite Bankers' Union of the World v. Nabors, 36 Tex. Civ. App. 38, 81 S. W. 91, and Modern Woodmen of America v. Metcalfe, 154 S. W. 662, as cases supporting his contention that the mode of serv-

ice of a citation provided by the act was merely cumulative of the general law upon the subject, and, therefore, that the service had on the chief recorder of the local lodge was sufficient. The ruling made in the first of the two cases mentioned was with reference to Act May 12, 1899 (Gen. Laws, p. 195), and that in the other case with reference to Act May 1, 1909 (Gen. Laws, p. 357). The act of 1899 was repealed by the act of 1909, which in turn was repealed by Act April 2, 1913, above referred to, which was in force at the time the service was had. Neither the act of 1899 nor the act of 1909 contained the provision in the act of 1913 set out above. It would seem, therefore, that that provision was made because of the rulings in the cases cited and with the intent on the part of the Legislature to provide an exclusive mode of service of a citation in such cases. That such was the intent of the Legislature is further indicated by the fact that the language used in the act of 1909 was that "service *may* only be made upon such" commissioner, while that used in the act of 1913 is that "service *shall* only be made upon such" commissioner.

The judgment will be reversed, and the cause remanded for a new trial.

RIDLING v. FANNIN COUNTY. (No. 1689.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 30, 1916.)

1. APPEAL AND ERROR — §389(3)—PAUPER'S APPEAL—PROOF OF INABILITY TO GIVE SECURITY FOR COSTS—STATUTE.

Under Rev. St. art. 2098, providing that where appellant is unable to pay the costs of appeal or to give security, he shall be entitled to prosecute his appeal, but must make strict proof of his inability to pay costs, either before the county judge of the county where he resides or before the court trying the case, where the party seeking to appeal as a pauper is a non-resident of the state, he must make proof of his inability to give the required security before the court which tried the case, and the certificate of a county judge in another state that he has made proof is of no legal value in perfecting the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2075; Dec. Dig. § 389(3).]

2. APPEAL AND ERROR — §792—FUNDAMENTAL DEFECT IN PERFECTING—NOTICE BY COURT—ACTION BY ADVERSE PARTY.

Where a nonresident seeking to appeal as a pauper did not make proof of inability to give the required security before the court which tried the case, as required by Rev. St. art. 2098, the defect in perfecting the appeal is fundamental, of which the Court of Appeals is required to take notice without action by the opposing party, so that the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3137-3141; Dec. Dig. § 792.]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Suit between Sid T. Ridling and Fannin

County. From a judgment for the county, Ridling appeals. Appeal dismissed.

J. H. G. Lee and H. G. Evans, both of Bonham, for appellant. A. S. Broadfoot, of Bonham, for appellee.

HODGES, J. The appeal in this case is prosecuted upon an affidavit in lieu of an appeal bond. In his original petition the appellant alleged that he was a resident of Miller county, Ark. As proof of his inability to make the bond required for an appeal he presents an affidavit to that effect made before a notary public of Miller county, Ark. Accompanying this affidavit he has filed the following certificate from the county judge of Miller county, Ark.:

"The State of Arkansas, County of Miller.

"I, J. M. Oats, county judge of the county of Miller and state of Arkansas, do hereby certify that Sid T. Ridley, the plaintiff in the above cause, has this day made proof before me of his inability to pay the costs of the appeal in said cause, or any part thereof, and that he is unable to give security therefor."

Article 2098, Rev. St., which regulates appeals to this court, is as follows:

"Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the cost, which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this article, to his appeal."

It will be observed that there are two tribunals before which proof of inability to give the required security may be made—one, the court trying the case, and the other, the county judge of the county where the appealing party resides. It has been definitely decided that the reference in this statute to the county judge of the county in which the

appealing party resides is limited to the county judges of counties in Texas, and is not available to nonresidents attempting to appeal in forma pauperis. *Harvey v. Cummings*, 62 Tex. 187; *Fletcher v. Anderson*, 145 S. W. 622. See, also, *Smith v. Buffalo Oil Co.*, 99 Tex. 77, 87 S. W. 659. In the last-mentioned case Associate Justice Williams said:

"The statute defines what the proof it requires shall be, when it provides that it 'shall consist of the affidavit of said party, stating his inability to pay costs'; * * * and 'its evident purpose is to enable the appellant to make prima facie proof of his inability to give the required security and to enable those having conflicting interest to controvert such proof'—citing *Wooldridge v. Roller*, 52 Tex. 451.

He continues:

"When it is made before the court trying the case, if in session, the statute requires no other action if there be no contest. It is only where the affidavit is made before some officer not authorized to determine the facts in case of a contest that it has been held or intimated by this court that it must be presented to one who is so authorized for further action on his part."

[1, 2] It follows from what has been decided in the cases referred to that the appellant in this instance should have made his proof of inability to give the required security before the court which tried the case, and the certificate of the county judge of Miller county, Ark., is of no legal value in perfecting this appeal. The record fails to show that the affidavit of the notary public was ever presented to the court which tried the case, and for that reason there is no evidence that the statute was complied with. It has been frequently decided that it must affirmatively appear from the record that the statutory requirements for perfecting an appeal have been followed. *Sanders v. Benson*, 51 Tex. Civ. App. 590, 114 S. W. 435, and cases there cited. Other cases might also be mentioned in which similar holdings are announced, but we deem it unnecessary. The defect here referred to is a fundamental one of which we are required to take notice without any action on the part of the opposing party.

The appeal will therefore be dismissed.

RUSSELL v. KOENNECKE. (No. 5738.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 13, 1916.)

1. APPEAL AND ERROR ⇨509—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL.

Where the transcript shows that no notice of appeal was given by appellant in open court, the Court of Civil Appeals has no authority to consider the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2317; Dec. Dig. ⇨509.]

2. APPEAL AND ERROR ⇨417(1)—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL.

A paper which in no way identifies the case, whether by its style, file number, or the description of any judgment or order, and which is not signed, though filed with the clerk of court, does not constitute notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140, 2141; Dec. Dig. ⇨417(1).]

3. APPEAL AND ERROR ⇨417(1) — PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL.

Under Rev. Civ. St. art. 2085, providing that where the appellant is not required by law to give bonds, the appeal is perfected by the notice provided for in the preceding article, which authorizes notice of appeal in open court, a notice of appeal, made by filing a written statement with the clerk, if not brought to the attention of the court, does not amount to a notice in open court, and is not sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140, 2141; Dec. Dig. ⇨417(1).]

Appeal from District Court, Gillespie County; N. T. Stubbs, Judge.

Suit by A. E. Russell against Albert Koennecke. From a judgment for defendant, plaintiff appeals. Dismissed.

James Raley, of San Antonio, for appellant. A. W. Mouraund, of Fredericksburg, for appellee.

SWEARINGEN, J. Appellant, A. E. Russell, filed a partition suit against appellee, A. E. Koennecke. Appellee answered by a general demurrer to appellant's petition. On the 22d day of February, 1916, the court rendered the following judgment:

"No. 995. A. E. Russell v. Albert Koennecke. February 22, 1916. On this day came on to be heard the above numbered and styled case, defendant's demurrer to plaintiff's original petition, and after hearing the same and plaintiff's petition, it is considered by the court that the law is with the defendant, wherefore it was ordered and adjudged that the said demurrer be sustained, and, plaintiff refusing to amend, it was further ordered and adjudged that this case be and is dismissed, that the defendant, Albert Koennecke, have and recover from plaintiff, A. E. Russell and the sureties, James Raley and Jennie Raley, all costs in this behalf expended, for which execution will issue."

On February 23, 1916, the following was filed:

"Plaintiff, having filed a trial amendment, refuses to further amend, and the cause is dismissed, to which plaintiff excepts and gives notice of appeal on the ground that the petition

is a good one and the demurrer was not called to the attention of the court at the first term when the business of the court did not interfere."

The only assignments complain of the order of the court sustaining the demurrer; consequently there is no statement of facts.

[1] The transcript shows no notice of appeal given by appellant in open court. For this reason this appellate court has no authority to consider the case. W. U. Tel. Co. v. O'Keefe, 87 Tex. 423, 28 S. W. 945; McMillan v. White House Lumber Co., 149 S. W. 734; Houston & T. C. R. Co. v. Parker, 104 Tex. 162, 135 S. W. 370; El Paso & S. W. R. Co. v. Kelley, 99 Tex. 87, 87 S. W. 660; Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486.

[2, 3] The paper filed February 23, 1916, and copied above in no way identifies the case at bar. The style of the case and the file number do not appear on it; neither does it describe any judgment nor order, and it is not signed. Even if it did identify the case, filing it with the clerk does not constitute notice of appeal. Notice of appeal made in a particular manner is necessary to give this court jurisdiction of the cause. R. C. St. art. 2085.

Furthermore, if notice of appeal could be given by filing a written statement to that effect with the clerk, still, if it was not brought to the attention of the court, it was not notice made in open court, which is the manner of giving the notice required by the statutes. Gibson v. Singer Sewing Machine Co., 147 S. W. 284.

Because the record does not show that appellant gave notice of appeal in open court, the cause will be dismissed from the docket of this court; and it is so ordered.

Dismissed.

DODSON v. JONES, County Superintendent. (No. 5752.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 6, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨144(5) —TEACHERS—COMPENSATION.

Where the court found that a contract to pay relator \$75 a month as school principal and \$50 a month as janitor out of the free school money of the state was made to evade Rev. St. 1911, arts. 2780, 2781, providing that a teacher holding a first-grade certificate shall in no event receive more than \$75 a month from the public free school fund, and also found that another person was employed as janitor in the same school, vouchers granted by the trustees for the additional salary to the principal as janitor were properly rejected by the county superintendent.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 313; Dec. Dig. ⇨144(5).]

2. SCHOOLS AND SCHOOL DISTRICTS ⇨144(5) —TEACHERS—COMPENSATION.

Rev. St. 1911, art. 2772, providing that the state and county available school funds shall be used exclusively for the payment of salaries

of teachers and superintendents and fees for taking the scholastic census, and that the surplus of the state fund may be used to pay janitors and for other enumerated purposes, does not authorize payments from the free school fund to a principal as janitor.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 313; Dec. Dig. ¶ 144(5).]

Appeal from Val Verde County Court; J. Q. Henry, Judge.

Application by J. L. Dodson for mandamus to Josephine Jones, County Superintendent. From a judgment denying the application, the relator appeals. Affirmed.

J. L. Dodson, of Dallas, for appellant. Phil B. Foster, of Del Rio, for appellee.

FLY, C. J. Appellant sought a writ of mandamus to compel appellee, the superintendent of public instruction for Val Verde county, to pay certain vouchers which he claimed evidenced certain sums due him for services as janitor of a public school. The court heard the application and denied the mandamus.

Appellant was the principal of school No. 1, district No. 2, and was being paid the sum of \$75 out of the free school money of the state. About the same time of his employment as principal, he was also employed by the trustees as janitor with a salary of \$50 a month. Vouchers were issued to appellant for his services as janitor, and the county superintendent, N. S. Jones, approved two of them before he went out of office. He was succeeded by Miss Eva Strickland, and she refused to approve the seven remaining vouchers. The matter was appealed to the county board of education, then to the state superintendent, and finally to the state board of education; the last two mentioned sustaining the county superintendent. No special tax was levied by schools 1 and 2, with which appellant was connected, but were run on state money alone. Appellant performed services both as principal and janitor for nine months, the time for which he was employed by the trustees. Miss Strickland resigned and was succeeded by appellee. The vouchers were not presented to her for approval.

[1] The court found that the contract with appellant for his services as janitor was made to evade the terms of articles 2780 and 2781, Revised Statutes, which provide, among other things, that a teacher holding a first-grade certificate shall in no event receive more than \$75 a month from the public free school fund. The court also found that a man named Tristan Maldonado was also employed as janitor in the same school in which appellant was employed as principal and janitor. The law could not be evaded in that way, and the vouchers granted by complacent trustees were properly rejected by the county superintendent. It is a preposterous proposition

that a country school, or two country schools, would require the services of two janitors. We are of opinion that it was never intended that the principal of a school should be paid two salaries out of the public free school money.

[2] The first section of article 2772, Rev. Stats., which is cited by appellant, provides that the state and county available school funds shall be used exclusively for the payment of salaries of teachers and superintendents and fees for taking the scholastic census, and we fail to see what aid or comfort that gives a man who is endeavoring to obtain a part of the school fund for services as a janitor, when he was drawn for the same time pay as principal of the school. It is true that in the second section of the article cited it is provided that a surplus of such state fund may be used to pay janitors and for other enumerated purposes, but not to increase the pay of teachers. The other articles and decisions cited do not sustain the contention of appellant.

The judgment is affirmed.

CARR v. WRIGHT. (No. 1073.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 6, 1916.)

1. APPEAL AND ERROR ¶ 1051(3)—HARMLESS ERROR—RULING ON EVIDENCE.

Any error in allowing plaintiff to testify that T. made the contract as agent of defendant was harmless; defendant testifying that T. made it both for himself and as representative of defendant, and it appearing that after it was made the whole matter was submitted to the defendant and the terms approved by him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4164, 4167; Dec. Dig. ¶ 1051(3).]

2. PARTIES ¶ 84(2)—NONJOINDER—ACTION AGAINST PARTNER—WAIVER.

Defect of the petition in suing one partner alone on the firm's obligation is waived by defendant not interposing plea in abatement.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 136, 168, 141, 142; Dec. Dig. ¶ 84(2).]

Appeal from Roberts County Court; J. E. Kinney, Judge.

Action by J. P. Wright against J. J. Carr. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Sanders, of Canadian, for appellant. Coffee & Holmes, of Miami, for appellee.

HALL, J. Appellee, plaintiff below, sued appellant, alleging, in substance, that during the year 1915 he was the owner of a threshing outfit; that the defendant Carr, acting by and through his duly authorized agent, Sam Teague, employed plaintiff to thresh certain crops of wheat, milo maize, etc., located on the defendant's farm; that he contracted with defendant through his agent Teague to do the threshing at 8 and 10 cents per bushel; that by the terms of the contract plaintiff was to furnish a dependent crew, consist-

ing of engineer, separator man, and water hauler; and that defendant was to furnish the remainder of the crew and outfit consisting of men, wagons, and teams, and that feed and coal should be hauled to the threshing by such teams. In the alternative it is alleged that if no such contract was formed, then defendant was indebted to plaintiff for services rendered in threshing said crops to the reasonable amount of 8 and 10 cents per bushel; that only \$40 had been paid on the account, leaving a balance due plaintiff of \$309.08.

Defendant answered by general demurrer, special exceptions, and general denial, and alleged in substance as follows: That plaintiff was to have, as compensation for threshing, 8 and 10 cents per bushel, but that plaintiff should furnish an independent crew—that is, furnish all the help necessary to properly do the threshing; that the contract set up by plaintiff was not a contract between plaintiff and defendant, but was a contract between plaintiff on one side and the defendant, and Sam Teague, who jointly owned with defendant the grain threshed, on the other side. Defendant further pleaded payment to the amount of \$336.55, by reason of which plaintiff had already overpaid in the sum of \$32.50, and prayed for judgment for said overplus.

A trial before a jury resulted in a verdict and judgment for plaintiff in the sum of \$234, being the sum fixed as reasonable compensation for services rendered.

[1] The first error assigned is the court erred in permitting appellee to testify that Teague made the contract with him as the agent of Carr. Carr testified that Teague made the contract with appellee as the representative of both himself and Carr. It further appears from the statement of facts that after appellee and Teague had made the contract the whole matter was submitted to Carr and the terms approved by him. The error, if any, is therefore harmless.

[2] The remaining assignments in various ways insist that because Teague was jointly interested in the crops with Carr, or, as is stated by several witnesses, was a partner with Carr in the grain to be threshed, no judgment should have been rendered against Carr alone for the whole amount. Appellant did not seek to abate the action because of the defect of parties defendant by sworn plea, as required under the statute. They therefore waived this defect in the petition. *Vernon's Sayles' Civil Statutes*, art. 1906, subsec. 5; *Slayden-Kirksey Woolen Mill v. Robinson*, 143 S. W. 294; *Sellers v. Puckett*, 180 S. W. 640; *Holman v. Vickery*, 106 S. W. 430; *St. Louis Southwestern Ry. Co. v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 344; *Brackenridge v. Claridge*, 42 S. W. 1005.

We find no reversible error in the record, and the judgment is affirmed.

HILL et al. v. STATE et al. (No. 7252.)

(Court of Civil Appeals of Texas. Galveston. Nov. 29, 1916.)

1. PROCESS \S 6—AMENDMENT OF PLEADING—NEW CAUSE OF ACTION.

When a defendant has once been served with citation, he must take notice of any amendment of the petition not setting up a new or additional cause of action, but when the amendment presents an additional or new cause of action, citation must be issued thereon and served on him to authorize judgment by default thereon.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 5; Dec. Dig. \S 6.]

2. JUDGMENT \S 17(1)—DEFAULT JUDGMENT—TAX JUDGMENT.

Where, in a suit by the state for unpaid land taxes, the amended petition sued for a much larger amount than the original, claiming taxes for additional years, and a number of defendants sued in the first were not joined in the second, the cause of action was changed, and default judgment on the amended petition without service of citation thereon was unauthorized.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 25; Dec. Dig. \S 17(1).]

3. JUDGMENT \S 101(1)—DEFAULT JUDGMENT—TAX JUDGMENT—VERIFICATION.

Under Rev. St. art. 7688, requiring petition in suit to collect delinquent taxes to be verified, etc., an unverified petition in such suit will not support judgment by default.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 168, 170; Dec. Dig. \S 101(1).]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Suit by the State against H. Masterson and others, in which amended original petition was filed, making additional defendants, George A. Hill and another, and also a second amended original petition, making defendants George A. Hill and others. Judgment for the State, and defendant George A. Hill and others bring error. Reversed and remanded.

Geo. A. Hill, Jr., of Houston, for plaintiffs in error.

PLEASANTS, C. J. The state of Texas brought this suit against H. Masterson and five other defendants, one of whom was plaintiff in error Julia Hill, to recover \$484.94 alleged to be the amount of the state and county taxes due for the years 1901, 1904, 1905, 1907, and 1908 on a tract of land which was described in the original petition as "1,000 acres of land in the David Harris survey, abstract No. 26, said 1,000 acres being the same property referred to in a deed from Mrs. Annie H. Boxley to H. Masterson, dated and recorded in volume 145, page 28 of the deed records of Harris county, Tex., all said property being situated in the county of Harris in the state of Texas." By an amended original petition filed on April 12, 1913, additional defendants were made, among whom were plaintiffs in error George

A. Hill and Raymond Hill. The amount claimed by the amended petition was \$724.12, state and county taxes for the years 1901 and 1904 to 1911, inclusive, upon land described as in the original petition. Plaintiffs in error George A. Hill, Julia Hill, and Raymond Hill were duly served with citation on said amended petition, but did not appear or answer in said cause. On June 18, 1915, a second amended original petition was filed, in which only the plaintiffs in error and J. J. Sweeney and the Texas Town Lot & Improvement Company were made defendants. The amount claimed in this petition was \$835.91, "taxes due for the year 1901 and the years 1904 to 1914, inclusive, on 949 acres of land, more or less, in the David Harris survey, and being the unsold portion of a 1,000-acre tract conveyed by Mrs. Annie Boxley to H. Masterson." This petition was not verified by affidavit of the attorney who brought the suit, nor of the county judge of Harris county, as required by the statute. No citations were issued on this petition, and no answers were filed, and no appearance made by any of the plaintiffs in error. On July 12, 1915, judgment by default was rendered on said second amended petition in favor of the state of Texas against plaintiffs in error and J. J. Sweeney and the Texas Town Lot & Improvement Company for the sum of \$1,081.95, and foreclosure of tax lien for said amount on 929 acres of land out of the David Harris survey in Harris county.

Plaintiffs in error ask a reversal of this judgment upon two grounds: First, because they were not served with citation upon the second amended petition on which the judgment was rendered, and did not answer or make any appearance in said cause, and the amount claimed in said petition being larger and being taxes claimed for additional years to those mentioned in the petition upon which plaintiffs in error were cited, and the claim not being against all of the defendants named in the petition on which they were served with citation, the trial court was not authorized to render a default judgment against them; and second, that the judgment

was not authorized because the petition upon which it was rendered was not verified as required by the statute. Both of these objections to the judgment are valid and must be sustained.

[1, 2] It is unnecessary to cite authorities on the proposition that a judgment by default is unauthorized when the defendant against whom it is rendered has not been served with citation and has not answered or made appearance in the cause. When a defendant has once been served with citation, he must take notice of any amendment of the petition which does not set up a new or additional cause of action, but when the amendment presents an additional or new cause of action, citation must be issued thereon and served on the defendant to authorize a judgment by default upon such new or additional cause of action. The cause of action alleged in the petition upon which the judgment was rendered was not the same as that alleged in the petition upon which plaintiffs in error were served with citation. The amount sued for was much larger and is claimed as taxes for other years in addition to those mentioned in the first amended petition, and a number of the defendants who were sued jointly with plaintiffs in error in the first amended petition were not sued by the petition on which the judgment was rendered. *Franklin v. City of Houston*, 22 Tex. Civ. App. 459, 54 S. W. 913.

[3] It is provided by article 7688 of our Revised Statutes that a petition in a suit to collect delinquent taxes "shall be verified by the affidavit of" the attorney bringing the suit, "or the county judge, to the effect that the averments contained in said petition are true to the best knowledge and belief of affiant." It has been held, and we think correctly, that an unverified petition in a suit of this kind will not support a judgment by default. *Cockrell v. State*, 22 Tex. Civ. App. 568, 55 S. W. 579.

For the reasons indicated, the judgment of the court below against plaintiffs in error is reversed and the cause remanded.

Reversed and remanded.

STATE v. COOPER. (No. 19023.)

(Supreme Court of Missouri, Division No. 2.
Dec. 23, 1916.)

CRIMINAL LAW \S 1091(1), 1124(1), 1125 —
BILL OF EXCEPTIONS—REVIEW.

Where the bill of exceptions in a criminal case does not contain or call for a motion for new trial and in arrest of judgment, the appellate review is limited to the record proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2803, 2828-2830, 2939, 2947, 2949; Dec. Dig. \S 1091(1), 1124(1), 1125.]

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

James Cooper was convicted of having unlawful possession of certain burglarious tools, and appeals. Affirmed.

A. T. Dumm, of Jefferson City, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen. (J. B. Billings, of Jefferson City, of counsel), for the State.

WILLIAMS, C. Upon an information charging him with a violation of section 4529, R. S. 1909, by having in his custody, etc., certain burglarious tools, defendant was tried in the circuit court of Lawrence county, found guilty, and his punishment was assessed at two years in the penitentiary. Defendant has appealed.

The bill of exceptions filed herein does not contain or call for the motion for a new trial and in arrest of judgment. Under such condition of the record, the appellate review is confined to the record proper. State v. Roan, 221 Mo. 550, 120 S. W. 766. Upon reviewing the record proper, we find the same to be free from error.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

STATE v. BOBBST. (No. 19684.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW \S 636(3) — TRIAL — PRESENCE OF ACCUSED.

That accused was not present when his case was set for trial did not require a reversal, in the absence of a request to be present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1470, 1471; Dec. Dig. \S 636(3).]

2. CRIMINAL LAW \S 1115(2) — REVIEW — CHALLENGE TO JUROR.

Where the bill of exceptions failed to disclose any challenge to a juror, a contention of accused that the court erred in failing to sustain a challenge could not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2927; Dec. Dig. \S 1115(2).]

3. JURY \S 83(2) — RIGHT TO UNPREJUDICED JUROR—OPINIONS.

That a prospective juror, not one of those selected to try the case, stated on his examination that he had known accused for several years, but from his acquaintance and observation of him had formed no opinion as to his sanity or insanity, and later testified as a witness that from his observation of accused there was nothing to make him believe that accused was unsound; that accused acted like an ordinary man and had "sufficient mind to know that he would be punished if he killed his wife"—did not present a discrepancy on which error could be predicated.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 228; Dec. Dig. \S 83(2).]

4. CRIMINAL LAW \S 923(2)—TRIAL—OBJECTIONS.

An objection that there was a prejudicial discrepancy between the statements of a prospective juror on his examination to determine his competency to sit as a juror in a criminal case, and his subsequent testimony as a witness for the state, came too late when made for the first time in the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2226; Dec. Dig. \S 923(2).]

5. HOMICIDE \S 308(8)—INSTRUCTIONS—EVIDENCE.

Where the state's evidence, if believed, showed that defendant was guilty of murder in the first degree, and defendant's evidence, if believed, showed that he was insane and therefore guilty of no crime, the court did not err in refusing an instruction on murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 644; Dec. Dig. \S 308(3).]

6. CRIMINAL LAW \S 761(9)—INSTRUCTION—EVIDENCE—ASSUMPTION OF FACT.

Where there was strong and uncontradicted evidence that accused killed his wife, an instruction on the defense of insanity was not erroneous because it assumed the fact of such killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1731, 1754; Dec. Dig. \S 761(9).]

7. HOMICIDE \S 286(3) — INSTRUCTION — "DELIBERATELY."

An instruction, defining the word "deliberately" as "done in a cool state of the blood, not in a sudden passion engendered by lawful or some just cause of provocation," and stating that there was no evidence tending to show such passion and provocation, was not erroneous where in fact there was no such evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 591; Dec. Dig. \S 286(3).]

For other definitions, see Words and Phrases, First and Second Series, Deliberately.]

8. CRIMINAL LAW \S 800(7)—INSTRUCTIONS—DRUNKENNESS.

Instructions that drunkenness is no defense to a criminal charge were not erroneous for failure to further define or explain the term "drunkenness," where they fully covered the subject and clearly distinguished drunkenness from insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1803; Dec. Dig. \S 800(7).]

9. CRIMINAL LAW \S 53—DEFENSE—DRUNKENNESS.

Drunkenness alone in any degree constitutes no defense to a criminal charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 65, 761; Dec. Dig. \S 53.]

10. CRIMINAL LAW — 781(6) — CAUTIONARY INSTRUCTION—EXTRAJUDICIAL STATEMENTS.

The refusal of an instruction, cautioning the jury as to the weight to be given to any proven extrajudicial statements made by accused, concerning the homicide, was not error, where there was no dispute as to the cause of decedent's death or as to the fact that defendant caused same, and no such lapse of time had intervened as would likely affect the memory of the witness, and there were no other circumstances calling for such an instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1868; Dec. Dig. — 781(6).]

11. HOMICIDE — 294(1) — INSTRUCTIONS — INSANITY—EVIDENCE.

Where the evidence in a homicide case did not show any prior condition of defendant's mind different from the apparent condition when the act was committed, and showed a condition of moral degeneracy rather than a prior condition of insanity, and it appeared that the question of insanity was one to be determined, not from a presumption springing from a clearly proven prior condition of insanity, but from a consideration of all the facts in evidence down to the time of the act, the court properly refused to instruct that if the evidence showed that defendant, prior to the day of the act, was in a habitual permanent or chronic state of insanity, it would be presumed that such insanity continued to the time of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. — 294(1).]

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Harry M. Bobbst was convicted of murder in the first degree, and appeals. Affirmed.

Upon an indictment charging him with murder in the first degree for killing his wife, defendant was tried in the circuit court of St. Charles county, found guilty, and his punishment assessed at imprisonment in the penitentiary for life. Defendant has duly appealed.

The killing occurred about 4:30 a. m., November 10, 1914, at the home of defendant's wife, in the city of St. Charles. For several months prior thereto defendant and his wife were living apart, she, together with her daughter Beulah, and a young man named Henry, a boarder, occupied a three-room house in St. Charles.

It appears that the police of St. Charles held a warrant for defendant's arrest for peace disturbance, and for this reason he was living away from his family. Defendant's son, Eddie, 13 years old stayed with his father across the river most of the time.

Defendant had no regular occupation but made a little money gathering rags and old junk. He was a strong drinker, and spent most of his money in that way. Sometimes the neighbors across the river would give him something to eat, and sometimes his wife would go across the river and take him something to eat, and sometimes would take him whisky. Defendant, although he had no means of supporting his family, constantly demanded of them that they move across the river with him, and he told many of his associates across the river that if his wife

did not come and live with him, he would kill her. In talking to others he would frequently charge his wife and daughters with being prostitutes, and complain because the boarder, Henry, remained at the house, stating that he was attempting to ruin his youngest daughter Beulah. He also accused his wife of having other men come to her house. It appears that the wife was a hard-working woman of good character, and that these charges were unfounded. About a week before the homicide, defendant and his wife were standing on the St. Charles bridge, and defendant was urging his wife to go back with him across the river. She refused, and defendant attempted to throw her off the bridge.

The 15 year old daughter was the only eyewitness to the homicide. She testified that about 1 o'clock a. m., on the night of the killing, defendant and his son Eddie came to the door and knocked. The deceased opened the door and let them in. Defendant then began to quarrel with the deceased over the fact that Mr. Henry was sleeping in an adjoining room with the door not locked. Defendant got in bed without removing his clothing, and it appeared that they quarreled more or less the remainder of the night. The defendant and his wife and the daughter Beulah and the son Eddie all occupied the same room. The defendant was drinking, but was not drunk. He drank some whisky during the night, but did not threaten to kill his wife that night. He did ask his wife to leave St. Charles and go away with him.

About 4:30 o'clock in the morning the daughter left the room to prepare breakfast, and the deceased started to accompany her, but was held by defendant. After the daughter left the room the defendant fastened the door from the inside by sticking his knife in the jamb. The deceased was heard to tell the defendant that she wanted to get breakfast because she "wanted to go to work for Bushman's," and the defendant replied that she "would not see Bushman's any more." About five minutes after the daughter left the room, she heard a shot and heard her mother scream. She immediately rushed back into the room. She reached the room just as the second shot was fired. She saw the defendant with one arm around the deceased, with a pistol in his hand pointed at the deceased. Defendant said nothing, but was gritting his teeth and pulling the trigger of the pistol. He fired five shots in all. The daughter grabbed the pistol and received one shot in her arm and leg. In the struggle that ensued the defendant received a wound from one of the bullets. The waist of the deceased was on fire, and she took a few steps and fell. The defendant ran from the room, and in a short time Henry, the boarder, ran out after him. Defendant went immediately to the home of his daughter and son-in-law and

said to his daughter: "I want to get away. I don't want to die in this hole."

Shortly after this the defendant was found by the police under the floor of his son-in-law's house. He was brought out and placed under arrest. He had about a pint of whisky and three or four cartridges. At the time of his arrest, the son Eddie said to the defendant:

"Pa, I told you to leave that damn gun at home; if you had, you would not be in this trouble. I told you to leave it at home, and you paid no attention to me."

A short time after the defendant was arrested he told his son-in-law that if he (the son-in-law) had not kept the deceased from coming across the river, "possibly it would never have happened."

The wife was taken to the hospital, but died in a few hours from the effects of the bullet wounds. A short time before her death she stated to the people attending her that she had been shot by her husband; and before she was taken to the hospital, and while she was at her home, she reached under her pillow and took out a pistol, and said that was the gun the defendant used in shooting her. She handed this pistol to the doctor. It was identified and introduced in evidence at the trial.

The attending physician testified that there were three bullet wounds on the deceased's body, and that death was due to an internal hemorrhage caused by the bullet wounds.

The evidence on the part of the defense did not undertake to deny the killing, but tended to show that appellant was insane at the time the act was committed. The evidence in this regard tended to show that defendant's father "was never considered very bright" and was peculiar; that defendant's mother 35 years ago took to her bed because her husband would not build the kind of a house she wanted, and had remained in bed ever since; that defendant had been guilty of petty thievery all his life, and had associated with negroes and was frequently seen drinking alcohol and other liquor in alleys and saloons. The children in St. Charles called him "Oats" because it was rumored that at one time he sold oats and put sand in them. In reply to this epithet he would run after children with a club. Some of the witnesses testified that he looked like a "tough" man; that he would stand around the street apparently "not caring whether he stayed in this world or not"; that he quarreled with his bedridden mother and would talk to himself and cry and walk around at night; that he was a heavy drinker; that he wrongfully accused his wife of being intimate with other men. About ten nonexpert witnesses testified that in their opinion he was insane, or a person of unsound mind, and could not distinguish between right and wrong.

Dr. J. O. Hudson, of Montgomery City, Mo., testified that he had known the Bobbst

family since 1877, and that in that year he was called to see defendant's mother, who had been in bed several years; that he advised that she be taken out of bed and into the yard, and that after lying outside a while she went back into the house and went to bed again, and has been there ever since; that defendant's father was a man of low mental caliber, filthy, of low morals, and a kleptomaniac; that the defendant was a moral degenerate; that he associated with negroes; became intoxicated, and had the reputation of being a thief; that during the summer previous to the tragedy defendant came to his house at Montgomery City and told him all of his daughters were prostitutes, and cried and became hysterical. After this occurred, defendant's wife brought defendant to the doctor's office, at Montgomery City, for consultation; that upon examining defendant he found him very nervous, and that while examining him he had a convulsion and could not talk for awhile. The doctor said that it was a form of insanity and advised that defendant be taken where he could get proper diet. The doctor further testified that, in his opinion, the defendant did not have sufficient mind to distinguish between right and wrong. Two other physicians examined appellant while he was awaiting trial, and gave it as their opinion that his mind was unsound, and that he was not able to distinguish right from wrong.

In rebuttal the state offered evidence tending to show defendant's sanity. Dr. Strumberg examined the defendant while he was in jail, and gave it as his opinion that the defendant had sufficient mind to know right from wrong. In addition to this the state called over 40 nonexpert witnesses, persons who had known him before and up to the time of the tragedy, all of whom testified that in their opinion appellant had sufficient mind to know right from wrong, and to know that he would be punished if he killed a person. One witness said he was "shrewd and foxy in his dealings," another that he never saw anything peculiar about him, and another that he was "anything else but crazy."

B. H. Dyer, of St. Charles, and Rosenberger & Dowell, of Montgomery City, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen. (James P. Kem, of Kansas City, of counsel), for the State.

WILLIAMS, C. (after stating the facts as above). [1] I. It is contended that the case must be reversed because the defendant was not present in court on March 2, 1915, when the case was set for trial. We are unable to agree with this contention. In the case of State v. Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422, relied upon by appellant, the court refused the defendant's request to be present in court for the purpose of challenging the array of grand ju-

rors, and for that reason the case was reversed. In the later cases of *State v. Taylor*, 171 Mo. 465, 71 S. W. 1005, and *State v. Miller*, 191 Mo. 587, 90 S. W. 767, it was expressly held that if the defendant failed to request permission to be present to challenge the array of grand jurors, his absence should not work a reversal of the case. In the present case defendant made no request to be present when the trial date was fixed. Applying the same logic here, and assuming that the presence of defendant upon the fixing of the trial day is a matter of as much importance as is his presence upon the day the grand jurors are impaneled (a matter we need not here determine), yet the absence of defendant, absent a request to be present, would not work a reversal of the case. *State v. Miller*, supra, and cases therein cited.

[2] II. It is contended that the court erred in not sustaining defendant's challenge to Juror Hyppolyte Hunn. This point must be ruled against appellant because the bill of exceptions does not disclose that such a challenge was made. In the absence of a challenge, specifying the grounds therefor, the matter is not for review. *State v. Dipley*, 242 Mo. 461, loc. cit. 474, 147 S. W. 111, and cases therein cited.

[3, 4] III. When the panel of 40 were being examined, John Miller, one of the prospective jurors, in response to questions asked him, stated that he had known defendant for several years, but that from his acquaintanceship and observation of defendant he had not formed an opinion as to the sanity or insanity of the defendant. Miller was not selected as one of the jury of 12, but later upon the trial he was offered as a witness by the state, and testified that from his observation of defendant there was nothing to make the witness think that defendant was "unsound," that he acted like an "ordinary man," and that he had "sufficient mind to know that he would be punished if he killed his wife." Defendant insists that the conduct of this prospective juror amounted to a fraud upon defendant's rights to have a panel of 40 fair and impartial men from which to select the jury. We are inclined to the view that the discrepancy between this witness' testimony as a prospective juror and later as a state's witness was due, not to an intentional effort to deceive, but rather to a misunderstanding of, or the difference in, the questions asked. If, as the witness later testified, he had observed nothing peculiar in defendant's actions during his acquaintanceship with him, it is quite probable that he had never formed an opinion as to the defendant's sanity or insanity. Strictly speaking, it is not the common experience to form opinions as to the insanity of associates and acquaintances unless peculiarities are discovered which lead the observer to suspect unsoundness. Neither is it the common experience to consciously form opinions as to the sanity of ac-

quaintances until the sanity of such a person is put in question or the observer is called upon to give an opinion. There is nothing in this record to indicate but what the witness, had he been asked the same questions upon his voir dire as were later put to him as a witness, would have made the same answers. The matter carefully considered, we do not regard the situation as one calling for an interference by this court. Furthermore, all the facts were known to defendant before verdict, but he failed to raise the point by proper motion or objection timely made upon discovery and before verdict. Under such circumstances, the objection comes too late when raised for the first time in the motion for a new trial. *State v. Phillips*, 117 Mo. 389, loc. cit. 394, 22 S. W. 1079.

[5] IV. The court did not err in refusing an instruction on murder in the second degree. If the state's evidence is to be believed, defendant was guilty of murder in the first degree. If the defendant's evidence is to be believed, the defendant was not guilty of any crime because of insanity. There was no evidence to support the theory of murder in the second degree. *State v. Paulsgrove*, 203 Mo. 193, loc. cit. 206, 101 S. W. 27.

[6] V. We do not find merit in appellant's contention that the court committed reversible error because some of the instructions given on the defense of insanity assume that the defendant killed his wife. That defendant did kill his wife cannot be said to be a really controvertible issue under the facts here disclosed. And although, technically speaking, it was probably bad form to assume such fact in said instructions, yet it cannot be said, in view of the strong, uncontradicted evidence of such killing, that the rights of appellant were in any manner prejudiced thereby.

[7] The court defined the word "deliberately" as "done in a cool state of the blood, not in a sudden passion engendered by lawful or some just cause of provocation," and further instructed the jury that there was no evidence tending to show such passion or provocation. This identical form of instruction was in the case of *State v. Ellis*, 74 Mo. 207, loc. cit. 220, stated as the correct form to be given where there is no evidence of such sudden passion or provocation. There was no evidence of this kind in the case at bar. To the same effect are *State v. Donnelly*, 130 Mo. 642, loc. cit. 647, 32 S. W. 1124, *State v. Taylor*, 171 Mo. 465, loc. cit. 477, 71 S. W. 1005, and *State v. David*, 181 Mo. 380, loc. cit. 395, 33 S. W. 28.

Appellant contends that the above-quoted portion of the definition conflicts with the one given in *State v. Davis*, 226 Mo. 493, loc. cit. 515, 126 S. W. 470, 477, to wit:

"In a cool state of blood and not under violent passion suddenly aroused by some real or supposed grievance."

It is true that the wording of these two instructions is somewhat different, but there appears to be but little difference in the meaning conveyed. If it can be said that there is any material difference in the meaning of quoted portions of the two definitions, it appears that the definition given by the court of his own motion in the case at bar is somewhat wider in scope, and therefore of benefit rather than detriment to the defendant. We are inclined to the opinion that the instruction complained of is in better form and more accurate than the one quoted in *State v. Davis*, supra, and that the court did not err in giving the same.

[8, 9] VI. It is insisted that the court erred in failing to define the term "drunkenness," as used in the instructions given on the proposition that drunkenness is no defense to a criminal charge. We are unable to agree with this contention. The instructions given on this proposition fully covered the subject, and were in form often approved. Drunkenness and insanity were clearly and correctly distinguished by these instructions and further definition or explanation of the term drunkenness was unnecessary. It is suggested by appellant that the term drunkenness might suggest to the different jurors different degrees of intoxication. Even if this were true, it would not result in injury to appellant because drunkenness alone, in any degree, would not relieve appellant from responsibility for the crime.

[10] VII. We must disallow the contention that the court erred in refusing to give appellant's instruction "F," which in effect cautioned the jury as to the weight they should give to any proven extrajudicial statements which the jury might find the defendant had made concerning the circumstances attending the death of his wife.

In the case of *State v. Moxley*, 102 Mo. 374, loc. cit. 390, 14 S. W. 969, 15 S. W. 556, cited and relied upon by appellant, the cause of the death and the identity of the criminal agent, if any, were contested issues, relying wholly upon circumstantial evidence for their proof. Furthermore, the alleged statements of defendant in that case occurred about four years before they were detailed in evidence at the trial. Under those circumstances the instruction was undoubtedly proper. But in the case at bar there is no dispute as to the cause of the death or as to the person causing the same. Neither did such lapse of time intervene as would likely affect the memory of the witness, nor were there other circumstances making necessary such an instruction. *State v. Henderson*, 186 Mo. 473, 85 S. W. 576.

[11] VIII. Error is assigned upon the court's refusal to give the following instruction asked by appellant, to wit:

"The court instructs the jury that if you find and believe from the evidence that for some time

prior to November 10, 1914, the defendant was in a habitual, permanent, or chronic state of insanity, then and in that case the presumption of the law that the defendant was sane and of sound mind at the time he shot his wife is removed and repelled, and the law presumes that such insanity continued up to and existed at the time he shot his wife, and the defendant is not required to prove he was insane or of unsound mind at the time he shot his wife, but it devolves upon the state, in that case, to prove that at the time defendant shot his wife, he was sane and of sound mind, as explained and defined in the other instructions."

Appellant cites *State v. Lowe*, 93 Mo. 547, 5 S. W. 889, in support of this proposition. In that case the evidence clearly established the prior existence of habitual insanity for many years preceding the defendant's removal from Kentucky to Missouri some 3 years prior to the homicide, and it was properly held that under those facts the instruction as to the presumption of continued insanity should have been given.

The case at bar presents a very different situation. Here the evidence does not show any prior condition different from the apparent condition at the time the act was committed, and establishes not so clearly a prior condition of insanity as much as it does a condition of moral degeneracy, superinduced by his bad habits of living. The evidence does not prove a prior existing insanity any more clearly than it proves that defendant was insane at the time of the act. Under such a state of facts, we are unable to discover the necessity of an instruction of this kind. Here the question of insanity was one to be determined, not from a presumption springing from a clearly proven prior condition of insanity, but one which, if found to exist, would in all probability require a consideration of all the facts and circumstances detailed in evidence down to the very time of the act. A portion of the distinction here attempted is, we think, very analogous to the one made in the case of *State v. Palmer*, 161 Mo. 152, 61 S. W. 651. The point is ruled against appellant's contention.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

BIG LAKE DRAINAGE DIST. et al. v. ROLWING. (No. 19359.)

(Supreme Court of Missouri. In Banc. Dec. 4, 1916.)

1. EVIDENCE ~~§~~366(12)—DOCUMENTARY EVIDENCE—PROCEEDINGS OF DRAINAGE DISTRICT.

A record of proceedings of the board of commissioners of a drainage district, though it shows an alteration, is admissible in a proceeding for confirmation of the commissioners' report when

the only evidence as to the alteration is that of the president of the board, that the alteration was made at his suggestion only a day after the meeting, that the minutes might properly and correctly state the business transacted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1539; Dec. Dig. § 366(12).]

2. DRAINS § 76—DRAINAGE DISTRICTS—PROCEEDINGS OF BOARD—VALIDITY.

Where the minutes of one board meeting of a drainage district showed that the engineer recommended that certain lands be condemned, or that no benefits be assessed, and the board postponed action for one meeting, and at a subsequent meeting, the minutes showed that it was voted to assess the property for benefits, the proceedings were not invalidated by insertion of the advisory clause; the engineer having no power in the matter.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-81; Dec. Dig. § 76.]

3. DRAINS § 28—DRAINAGE DISTRICTS—PROCEEDINGS—PETITION—SUFFICIENCY.

Since the statute and acts amendatory thereof as to organization of drainage districts is expressly declared to be remedial and to require liberal construction, although Laws 1913, p. 241, § 16, requires procedure as to condemnation of lands for drains to follow as nearly as possible that provided for telephone and railroad rights of way, and Rev. St. 1909, § 2360, as to telephone and railroad rights of way, requires that the petition shall show that an effort has been made to agree with the owner, nevertheless the petition for appraisal of land for drainage purposes need not so allege.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 20-23; Dec. Dig. § 28.]

Appeal from Circuit Court, Scott County; R. G. Ranney, Judge.

Proceedings by the Big Lake Drainage District, W. T. Marshall, and others for a confirmation of the commissioners' report, opposed by B. G. Rolwing. From a judgment for opponent, plaintiffs appeal. Reversed and remanded.

J. L. Fort, of Dexter, and Boone & Lee and Russell & Joslyn, all of Charleston, for appellants. Haw & Brown, of Charleston, Oliver & Oliver, of Cape Girardeau, and James A. Finch, of Fornfelt, for respondent.

BOND, J. I. This is the second appeal in this case. The facts presented and the points ruled on in the first appeal are set out in *Re Big Lake Drainage District et al.*, 265 Mo. 450, 178 S. W. 110.

In that case it was held that the district was validly incorporated and the circuit court of Scott county was possessed of jurisdiction of all further proceedings to be taken in the case, and the judgment of the circuit court, purporting to annul the incorporation of said district, was reversed and the cause remanded for further proceedings.

On the second trial it was shown that a board of supervisors was duly elected which appointed a chief engineer and assistant; that a plan of reclamation was submitted to the board of supervisors which will be adverted to in the subsequent discussion; that the board of supervisors filed a petition for the appointment of commissioners to ap-

praise the land; that the regular judge of Scott county made an order in vacation appointing commissioners who made a report of their acts and doings as such, which, together with the exceptions thereto filed by respondent, was heard by Judge Ranney, who was appointed and called as special judge on account of the disqualification of the regular judge; that on September 3, 1915, the court sustained the exceptions of respondent B. G. Rolwing for the reasons alleged in its judgment, first, that no plan of reclamation was ever adopted nor filed by the board of supervisors of said Big Lake drainage district, as required by law, and, second, that the report of the commissioners filed on March 16, 1914, purported to deprive the exceptor and others of their property for the use of the district without due process of law, in that said report sought to condemn their property for rights of way and storage basins without having made an effort to agree with the owners upon the price to be paid for such property and without, after failing to agree, having stated such failure in a petition for the condemnation of such lands; wherefore the court found the issues for the exceptor B. G. Rolwing, and from this decree the drainage district duly perfected its appeal to this court.

II. Obviously the judgment of the lower court cannot be affirmed if there was a plan of reclamation in substantial conformity to the statutory requirements, and if it was not indispensable that it should appear in the pleadings that an effort was made to purchase exceptor's property before the commissioners made their report assessing damages and benefits.

We shall consider the questions thus presented in order. The present record shows a plan of reclamation reported by the body of engineers which was sufficient under the statute unless invalidated by the following suggestion therein, to wit:

"The report of the board of engineers recommended either condemnation of certain lands for storage, or of nonassessment of these lands for benefits. *After full discussion the board decided to defer this matter until the next meeting.*" (Italics ours.)

When the plan of reclamation was reported to the board of supervisors, it was competent for that body to adopt it as a whole or to modify it with the consent of the chief engineer. The above quotation appears in the records of the drainage district of date October 4, 1913. The record of the board of supervisors, dated October 6, 1913, shows a report of the chief engineer of his meeting with the board of supervisors on October 4, 1913, when the plan for reclamation was submitted, and that, in certain respects, modifications were agreed upon. Said report concluded, to wit:

"We would further report that we have made these additions and modifications on the maps,

profiles, estimates, etc., forming a part of the plan of reclamation, and that said modified plan for reclamation is herewith filed. L. T. Berthe, Chief Engineer."

The records of the drainage district show, of date October 20, 1913, that the board of supervisors passed upon the suggestion of the board of engineers above quoted and decided that the lands referred to should be assessed as other lands in the district and not condemned as a storage basin. This entry on the records of the district was objected to for the reason that it appeared to have been written above an erasure of the name of the secretary. The testimony of the president of the board of supervisors was that he was present at the meeting referred to in that record of the proceedings and wrote out the minutes of the meeting himself; that when he looked over the record subsequently he discovered that the clerk had not copied that part of the minutes in the record; that the omitted portion contained an order made at that meeting and that the records of the meeting were not complete until that order was written in; that he thought the correction was made the next day or soon afterwards; that after the correction the name of E. Lindsay Brown, Secretary, was signed and a blank space left for the signature of the president.

[1,2] The ruling of the learned circuit judge in excluding this corrected record was erroneous, since there was nothing in the testimony to show that it was occasioned by anything else than the misprision of the secretary of the board of supervisors. Besides the testimony did show that, as finally copied upon the record book, it contained the action of the board of supervisors as manifested by the minutes kept of that particular meeting. Its only utility, however, is to disclose the action taken by the board of supervisors in reference to a suggestion contained in the plan of reclamation. It in nowise impaired or affected the validity of the plan of reclamation as it had been submitted to the board of supervisors and adopted thereafter with modifications consented to by the chief engineer, as disclosed in the records of the district. The suggestion in itself and the order of the board of supervisors rejecting it and consenting to assess the property in question were both outside the statutory duties of these two officials and fell properly within the limits of the duties prescribed for the board of commissioners, whose duty it was to assess damages and benefits.

We therefore hold that the learned circuit judge was in error in ruling, as he seems to have done, that the plan of reclamation in this proceeding was invalidated by reason of the insertion therein of the above-quoted advisory clause and the temporary postponement of the consideration of it.

[3] III. Before adverting to the second ground upon which the learned judge rested his conclusion, it is well to call attention to

the express language of the statute for the organization of drainage districts by the circuit court, which, so far as concerns this case, is now substituted for the repealed portions of the Revised Statutes and acts amendatory thereof, relating to that subject, to wit:

"This act is hereby declared to be remedial in character and purpose, and shall be liberally construed by the courts in carrying out this legislative intent and purpose." Laws 1913, p. 267.

This section was also referred to in support of the statement of Faris, J., in *Re Mingo Drainage District*, 267 Mo. loc. cit. 278, 183 S. W. 614, to wit:

That the "courts in this, as in practically every other jurisdiction, have held that such statutes are to be liberally construed."

The plan of reclamation as adopted by the board of supervisors, including the modifications consented to by the chief engineer, was filed with the petition of that body for the appointment of commissioners. This identical plan, except the delayed action of the board of supervisors on the extrinsic suggestion made by the chief engineer above quoted, had been duly filed and certified to the circuit court. The petition thus filed prayed for the appointment of commissioners to appraise the land and the performance of other statutory duties. Such commissioners were subsequently appointed and duly reported their action to the circuit court, and respondent, among other grounds, excepted to the damages allowed him in said report. It is, however, insisted by the learned counsel for respondent, among other objections to the petition filed for the appointment of commissioners, that it does not show that the district made an effort to agree with respondent for the sale of the right of way over his land. In support of that contention respondent cites the statute (R. S. 1909, § 2360) relating to proceedings to condemn lands by telegraph, telephone, and railroad corporations, etc., and the adjudications thereon. The section of the statutes regulating proceedings in the establishment of drainage districts provides for "following, as nearly as possible, the procedure that is now provided for by law for the appropriation of land and other property taken for telegraph, telephone and railroad rights of way." Laws 1913, p. 241, § 16. But the drainage act does not require that it shall be alleged in any petition that an effort has been made to agree with the owner, nor is there any language in the act requiring an effort to contract with the owner antecedently to the filing of the petition for the appointment of commissioners. On the other hand, the act relating to condemnation of lands by railroads, etc., does contain a provision requiring such corporations to agree, if possible, upon proper compensation to be paid, before petitioning the circuit court for the condemnation of the land. As the drainage act contains no such provision, it is insisted in support of the judgment be-

low that such a provision should be held to be imported into it by reason of the fact that the above-quoted clause provides for a procedure, on the part of the court entertaining jurisdiction of the drainage proceedings, analogous to the procedure regulating the appropriation of land by railroads and other corporations. We cannot assent to that theory. The fair meaning of this provision is that the trial court might use, on the trial of drainage cases, the procedure, as far as applicable, employed in cases of condemnation by railroads. It was not intended by this mere reference to the procedure in other cases, to add any conditions not prescribed by statute itself for the establishment and organization of drainage districts. Such a construction of the statute would reach the rigid extreme of importing into it, by mere similarity of procedure with other statutes, a requirement not contained in it. We are not inclined to take that view, for we think it could not be done without violating the statutory command that all the terms and provisions of the drainage act shall be construed broadly and liberally to effectuate the wholesome and beneficial motives which prompted its enactment.

Other minor objections are urged to the report of the commissioners which seem not to have been noticed in the judgment of the trial court, and which we think are without merit.

Our conclusion is that the judgment sustaining the exceptions of respondent to the report of the commissioners was erroneous. It is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion. All concur.

STATE v. PARDO. (No. 19395.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. LIBEL AND SLANDER ¶21 — ARTICLE ABOUT UNNAMED PERSON.

An article about the priest of a certain parish is none the less libelous because not mentioning him by name.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. ¶21.]

2. LIBEL AND SLANDER ¶21—ARTICLE ABOUT UNKNOWN PERSON.

An article about the priest of a certain parish is none the less libelous because the writer does not know who is the priest.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. ¶21.]

3. LIBEL AND SLANDER ¶7(2) — ARTICLE CHARGING BRIBERY.

The words "he buys warrants against the editor" are libelous, as charging bribery; the statutes as to issuance of warrants nowhere providing for buying them.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 35; Dec. Dig. ¶7(2).]

Appeal from St. Louis Court of Criminal Correction; Benj. F. Clark, Judge.

Conviction of Anthony A. Pardo of libel was affirmed by the Court of Appeals (180 S. W. 578), and the cause is certified to the Supreme Court. Affirmed.

The defendant was convicted of libel, and his punishment assessed at a fine of \$100. He appealed to the St. Louis Court of Appeals, where the majority opinion by Judge Norton was in favor of affirmance. Reynolds, P. J., dissented, and the cause was certified to this court on the ground that such opinion was in conflict with the opinions of this court in *Cook v. Pulitzer Pub. Co.*, 241 Mo. 326, 145 S. W. 480, and *Diener v. Star-Chronicle Pub. Co.*, 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216, and with the opinions of the Springfield Court of Appeals in *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S. W. 721, and *Smith v. Mo. Fidelity & Casualty Co.*, 190 Mo. App. 447, 177 S. W. 737. The majority and dissenting opinions are reported in 180 S. W. 578. As stated by the Court of Appeals, the condition of the record in this case is such that the only question before us is as to the sufficiency of the information. That information, omitting those parts which we consider unnecessary in this statement, is as follows:

That Anthony A. Pardo, in the city of St. Louis, on the 20th day of October, 1911, did then and there unlawfully, willfully, knowingly, and maliciously aid and assist in making, printing, and publishing, and did cause to be printed and published, in the *Polak Amerykan*, a weekly newspaper, published and printed in the Polish language, in the city of St. Louis, Mo., a certain libel on T. T. Pudlowski, which said libel on said T. T. Pudlowski the said Anthony A. Pardo then and there knew to be false and libelous, and which said libel tended to arouse the wrath of the said T. T. Pudlowski, exposing him the said T. T. Pudlowski, to public hatred and contempt and ridicule, and depriving him, the said T. T. Pudlowski, of the benefit of public confidence and social intercourse, and which said libel was then and there published by delivering, selling, reading, and otherwise communicating to the said T. T. Pudlowski, Julius Pilinski, Casimir Nowak, Joseph Nawrocki, Frank Krupa, Sylvester Gredzinski, and Peter Moskwinski, and divers other persons unknown to informant, copies of said *Polak Amerykan* of October 20, 1911, containing said libel. The said T. T. Pudlowski, Julius Pilinski, Casimir Nowak, Joseph Nawrocki, Frank Krupa, Sylvester Gredzinski, Peter Moskwinski, and divers other persons to this informant unknown, at the time of the making, publishing, delivering, selling, reading, and otherwise communicating of said libel, as aforesaid, could read and understand the Polish language, and did read and understand the said libel contained in said *Polak Amerykan*, and which said libel was in words and figures as follows:

"Let us take the parish of St. Casimir, the Prince. From the time that this church was built until to-day so much money has flown into the parish that a dam across the Mississippi River might be thrown up with the money. And does this church belong to the Poles? By no means. Not only is the property in the bishop's name, but at present there is more debt on the church than at the time it was first built. What happened to those hundreds and

thousands which the Poles for so many years deposited there? Were they not, perhaps, lost in cards or in some licentiousness? A few weeks ago we gave proofs of how speculators handle the bonds of that church.

"Respected countrymen, shall things continue thus?

"If there were selected a good parish committee and treasurer who would receive all the income; if a fixed salary were appointed for the priest, as they do in other parishes, and if the balance of the receipts were used for paying off debt, the entire parish property would be freed of debt in the course of three or four years.

"But what takes place at present? Money given for the Glory of God instead of being used for the paying off of debts, buying holy pictures, ornaments and church utensils, is used for the police patrol wagons, lawyers, courts, the arresting and placing in jail of our brethren.

"Respected countrymen, shall things continue thus always with us in St. Louis?

"In other cities the Poles are more cultured and do not allow themselves to be imposed upon as we in St. Louis, because there they have good newspapers which write about everything and the parishioners know how their matters stand. With us in St. Louis it is not allowed to write even in a newspaper how the Poles are imposed upon. And if anything is written which is not to the taste of the priest, then, for the money which you countrymen give for holy masses, he buys warrants against the editor.

"Respected countrymen, is it not time to get together and bring order into our parish affairs."

And further the said T. T. Pudlowski, at the time of the making, printing, publishing, reading, delivering and selling of said copies of said Polak Amerykan, containing the said libel, was the pastor and priest in charge of St. Casimir's parish in said city of St. Louis, Missouri, and who, as such pastor and priest of said parish, received and handled all of the moneys and funds of the said parish for all purposes and disbursed all of the moneys for and on behalf of said parish in the payment of the debts and obligations of said parish and was the only person so authorized.

That the defendant at the time of the making, printing, publishing, reading, delivering and selling of the said copies of said Polak Amerykan did mean and intend it to be understood, and did mean and intend that it should be understood by the said T. T. Pudlowski, Julius Pilinski, Casimer Nowak, Joseph Nawrocki, Frank Krupa, Sylvester Gredzinski, Peter Moskwinski, and divers other persons unknown to this informant, and particularly by the readers of the Polak Amerykan, that the false and libelous words so used as hereinbefore set forth, were intended to apply to the said T. T. Pudlowski, who was therein by said defendant falsely charged with misappropriating and converting to his own use moneys received by him as pastor of St. Casimir's parish, and which belonged to said parish, and by using such money in playing games of chance with cards and in immoral living, and further by failing to apply moneys received by him to pay off the church debt of St. Casimir's parish to the uses intended, and with the crime of bribery of public officers.

That at the time of the making, printing, publishing, delivering, selling and reading of the said libelous publication aforesaid, the said Julius Pilinski, Casimer Nowak, Joseph Nawrocki, Frank Krupa, Sylvester Gredzinski, Peter Moskwinski, and divers other persons to this informant unknown, reading said false and libelous matter printed and published as aforesaid in said Polak Amerykan, were personally acquainted with said T. T. Pudlowski, knew at the time that he was the pastor and priest

in charge of St. Casimir's parish, aforesaid, and the person who received, handled and disbursed all of the moneys of said parish. That said false and libelous words in said libelous publication so used as aforesaid and made use of and published by the said defendant in the manner aforesaid were by the said T. T. Pudlowski, Julius Pilinski, Casimer Nowak, Joseph Nawrocki, Frank Krupa, Sylvester Gredzinski, Peter Moskwinski and divers other persons to this informant unknown, reading said false and libelous words in said Polak Amerykan, understood to mean and to be applied to and published of and concerning the said T. T. Pudlowski, and further understood said false and libelous words to mean that the said T. T. Pudlowski had been guilty of gambling and of immoral living as well as of the crime of embezzlement and of bribery of public officers, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

The language of the alleged libel as set out in the information, speaking of the affairs of the parish of St. Casimir, the Prince, in St. Louis, and of the priest in charge thereof, says:

"And if anything is written which is not to the taste of the priest, then, for the money which you countrymen give for holy masses, he buys warrants against the editor."

Simpson & Gayeski, of St. Louis, for appellant. John T. Barker, Atty. Gen. (Lewis H. Cook, Asst. Atty. Gen., of counsel), for the State.

ROY, C. (after stating the facts as above).

[1, 2] I. The fact that the priest was not mentioned by name, and that defendant may not have known who the priest was, does not render the language nonlibelous. In *Pennington v. Meeks*, 46 Mo. loc. cit. 220, it was said:

"So, if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is done wrongfully and intentionally. See *Head on Libel and Slander*, § 82, note 1, and the authorities there cited."

In *Le Fanu v. Malcolmson*, H. L. C. 637 (L. c. 668), decided in the English House of Lords in 1848, Lord Campbell said:

"That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated."

By way of inducement the information charges that Pudlowski was the priest in charge of that parish at that time, so that the libel referred to him, though not by name.

[3] II. The question arises whether the words "he buys warrants against the editor," taken in the connection in which they were used, mean that the warrants were procured by bribery. Section 4971 of our Revised Statutes provides for issuing warrants in cases where persons are charged by affidavits with misdemeanors; section 5020 relates to such procedure in felony cases; section

4955 provides for warrants in proceedings to preserve the peace; sections 5064, 5117, and 5118 relate to such writs upon information or indictment. We do not find in any of those sections nor elsewhere any provisions for buying such warrants. We conclude from the connection in which such words were used that they constitute a plain averment that the priest procured such warrants by bribery. It is needless to discuss the question whether an innuendo was necessary, as the information charges that the language was intended by the defendant to mean a charge of bribery, and that it was so understood by the readers thereof. We, therefore, hold that the information sufficiently charges the publication of a libel, and is sufficient to sustain the conviction.

III. It is claimed that the question, "Were they not, perhaps, lost in cards or in some licentiousness?" taken in the connection in which it was used, charges gambling, embezzlement, etc. It was well said in *Haynes v. Robertson*, 190 Mo. App. loc. cit. 161, 175 S. W. 292:

"There is no question but that a slanderous charge may be as effectively made and circulated in the form of an inquiry as by direct accusation, especially where, as here, the inquirer assumed the truth of the charge, and merely inquired whether the hearer has previously heard of it."

The libelous words used in that case were:

"Have you heard about Booker Haynes, the preacher, being caught in bed with Joe Leith's wife, and that he and Leith had a fight and that Leith blacked his eye, and that Haynes has gone west."

But there is a wide difference between the words which are purely interrogatory and those in which the existence of a fact is either declared or assumed.

The earliest case cited in support of the proposition that a question may be libelous is *Jordan v. Lyster*, Cro. Ellz. 273, decided in the reign of Elizabeth, in which the defendant asked a question and answered it himself thus:

"What art thou? A bankrupt, and wast a bankrupt."

It was held that the answer was a direct affirmation. So in *Thimblethorp's Case*, Moore, 418, decided about the same time, the words were:

"When wilt thou bring home my husband's sheep which thou hast stolen?"

In *Brown v. Charlton*, Keb. 359, pl. 52, the question was:

"Wilt thou murder my sister as thou didst thy wife?" (The wife was then dead.)

So in *Mayott v. Gibbons*, 2 Rolle, R. 165, the question was:

"Have you brought home the forty pounds you stole?"

In *Pennington v. Meeks*, 46 Mo. 217, supra, the proof was that defendant asked a question and answered it himself thus:

"Have you heard about Pennington stealing one of my hogs? * * * It is so."

We call attention also to the other cases cited in *Newell on Slander & Libel*, § 307, and in *Townsend*, § 164.

We have not been able to find any authority holding that a question can be construed as libelous when it neither affirms nor assumes the constitutive facts.

As the judgment herein must be affirmed for the reason stated in the first subdivision of this opinion, we will not decide whether the question set out in the information in this case is libelous. A decision of that point would be obiter dictum. We mention it merely for the purpose of calling attention to the authorities, and of showing that we have not overlooked it.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

STATE v. MALLOCH. (No. 19636.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. DISORDERLY HOUSE §12—INDICTMENT—KNOWLEDGE—"BAWDYHOUSE."

An indictment for keeping a bawdyhouse and displaying thereon the sign of an honest occupation contrary to Rev. St. 1909, § 4758, need not charge knowledge by accused that the house was kept for immoral purposes, such knowledge being presumed from the keeping charged; a "bawdyhouse" being any place, whether a habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 14-19; Dec. Dig. § 12.]

For other definitions, see *Words and Phrases*, First and Second Series, *Bawdyhouse*.]

2. DISORDERLY HOUSE §12—INDICTMENT—DESIGNATION OF PREMISES.

An indictment for keeping a bawdyhouse, describing the house as located at the northwest corner of the intersection of certain streets, sufficiently designated the house.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 14-19; Dec. Dig. § 12.]

3. DISORDERLY HOUSE §13—VARIANCE.

In prosecution for keeping a bawdyhouse, etc., indictment covering only a hotel building, admission of evidence of arrest in the hotel "annex" in another building of persons charged with lewd conduct was error.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. § 20; Dec. Dig. § 13.]

4. CRIMINAL LAW §811(2)—INSTRUCTIONS—EMPHASIZING EVIDENCE.

In such prosecution an instruction that, if proved, the general bad reputation of inmates of the house for virtue and chastity might be considered, was error as singling out evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1971; Dec. Dig. § 811(2).]

5. DISORDERLY HOUSE §4—INSTRUCTIONS.

In such prosecution an instruction that accused, a hotel keeper, had the right to furnish

lodging and home for certain witnesses, even though prostitutes, his only duty being not knowingly to permit them to ply their avocation about his premises and in his hotel, was improperly refused.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 4, 9-13; Dec. Dig. ¶¶ 4.]

Appeal from Criminal Court, Greene County; B. J. Thurman, Judge.

Fred Malloch was convicted of keeping a bawdyhouse and displaying thereon the sign of an honest occupation, and appeals. Reversed and remanded.

The defendant was convicted of keeping a bawdyhouse and displaying thereon the sign of an honest occupation contrary to R. S. 1909, § 4758. He has appealed.

The indictment charges that the defendant kept a bawdyhouse at the northwest corner of College and Market streets, in the city of Springfield, and that he displayed thereon the sign "Palace Hotel." It does not expressly charge that the defendant knew that the house was kept for such illegal purposes. That hotel was held by the defendant and his sister under a lease, they owning the furniture. The sister was away. Defendant with his family lived in the hotel, and he managed it. The main hotel at the northwest corner of the street crossing contains 24 rooms. Across the street from it is what is called the "annex" in the second story; it being connected with the main hotel by an overhead viaduct. There is ample evidence to the effect that for months before the indictment was returned the house was the resort of many persons for illicit sexual purposes, while at the same time it was extensively patronized as a hotel by people who were apparently unaware of the dual nature of the place. There was evidence tending to show that certain employes of the house managed the illegitimate part of the business without the knowledge or participation of the defendant, but there was evidence also to the contrary.

The state proved by an officer that two people were arrested and taken out of the annex for lewd conduct. To that evidence defendant objected on the ground that the annex was not covered by the indictment. The objection was overruled, and there was an exception.

The seventh instruction for the state is as follows:

"The court instructs the jury that the words 'common bawdyhouse or common assignation house,' as used in the indictment and instructions, mean a house where lewd men and women meet and resort for the purpose of having illicit sexual intercourse; and in determining whether or not the house or building described in the indictment was so used, and whether or not the defendant had knowledge of such use, the jury may take into consideration the general bad reputation of the inmates of such house for virtue and chastity, if any such reputation has been shown to your satisfaction by the evidence."

The defendant asked an instruction marked A, as follows:

"You are instructed that the defendant, Fred Malloch, had the right to furnish lodging and home for the witnesses Mabel Dennison and Margaret Dale and other women, even though you may believe and find from the evidence that said women were prostitutes at the time and were plying their avocation as such. The only duty that devolved upon the said defendant was to not knowingly permit the said women to ply their avocation about his premises and in his hotel building."

It was refused. Another instruction asked by defendant was covered by the instruction given.

Roscoe C. Patterson and George Pepperdine, both of Springfield, for appellant. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for the State.

ROY, C. (after stating the facts as above). [1] I, Appellant says that the indictment is insufficient for the reason that it does not charge that the defendant knew the character of the house at the time of the alleged offense.

Bishop's New Crim. Law (8th Ed.) § 1083, says:

"A bawdyhouse is any place, whether a habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes."

The law dictionaries, Bouvier, Wharton, and Black, say that a bawdyhouse is kept for the purpose of illicit sexual intercourse. The information here charges that the defendant was the keeper of a common bawdyhouse. That is, in effect, a charge that he kept a house for the resort of persons who came for illicit sexual intercourse. The charge presumes and includes such knowledge on the part of the defendant. To keep a house for such purposes certainly means that he had knowledge of the purpose for which the house was used. The indictment in *State v. McLaughlin*, 160 Mo. 33, 60 S. W. 1075, was like the one here in that respect. It was not criticized in that respect.

[2, 3] II. In *State v. McLaughlin*, supra, it was held that the indictment must designate the house on which the sign of an honest occupation or business is displayed. The indictment here complies with that rule. It describes the house as "located at the northwest corner of the intersection of College and Market streets." Over the objection of the defendant the state was permitted to show that the officers arrested two persons in the "annex" charged with lewd conduct. That annex was across the street from the building described in the indictment, and was not described in the indictment as being used in connection with the main hotel. We do not here decide that the indictment could not have been so drawn as to cover both the main hotel and the annex as being used in connection with each other as one establishment. That was not done. The evidence was admitted broad enough to cover both buildings, while the charge covers but one. Such evidence was improperly admitted. oogle

[4] III. Instruction 7 given for the state is improper. It calls special attention to the evidence as to the bad reputation of the inmates of the house, and tells the jury that they may take such evidence into consideration.

In *State v. Rutherford*, 152 Mo. 124, loc. cit. 133, 53 S. W. 417, an instruction was held bad which singled out certain evidence and gave it a marked prominence.

[5] IV. Instruction A asked by the defendant should have been given. The Attorney General in his brief frankly says of this instruction:

"Perhaps it may have to be admitted that abstractly considered there is nothing wrong with the declaration, but its refusal worked no harm."

In *State v. McLaughlin*, supra, it was said:

"The second instruction for the state was erroneous in that it permitted the jury to find the defendant's house was a bawdyhouse because one or more women boarded with her and received men in her house for sexual intercourse and paid her a certain part of the money received, without requiring the state to show that defendant knew the said facts or was privy to the said conduct. Moreover, it was in direct conflict with instruction 3 for defendant, which announces the true rule of law in the premises."

The instruction 3 there mentioned was not materially different from the one under discussion.

The judgment is reversed, and the cause remanded.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur; REVELLE, J., in result only.

STATE v. SWEARENGIN. (No. 19650.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. HOMICIDE §340(2)—SELF-DEFENSE—INSTRUCTION—RIGHT TO SHOOT.

Though, instead of instruction to acquit if defendant had reasonable cause to believe and did believe "that it was necessary for him to shoot and kill to protect himself," it would be preferable to use for the quoted words the words "that it was necessary for him to use his pistol in the way he did to protect himself," as avoiding implication that defendant to be entitled to shoot at all must have believed the danger impending to be so great that to avert it he must shoot "to kill," yet, the homicide being actually accomplished by intentional use of a deadly weapon on a vital spot, he may not bottom error on the language used.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 716; Dec. Dig. §340(2).]

2. CRIMINAL LAW §695½, New, vol. 17 Key- No. Series—TRIAL—OBJECTIONS—FAILURE TO RULE—EXCEPTIONS.

While it is the court's duty to rule on every objection properly and courteously made on the trial, exception to failure to rule on an objection not such as to make a ruling necessary is unavailing.

3. WITNESSES §277(4)—CROSS-EXAMINATION OF DEFENDANT—SCOPE.

Under Rev. St. 1909, § 5242, providing that no one on trial shall be required to testify but, if he does, shall be liable to cross-examination, as to any matter referred to in his examination in chief, asking defendant on cross-examination if he had not discharged his pistol at another place than, and some hours before, the homicide, a matter not referred to in his testimony, is improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 982; Dec. Dig. §277(4).]

4. HOMICIDE §169(3)—EVIDENCE—DISCONNECTED MATTERS.

The state may not show an altercation by defendant with another person than deceased, several hours before the homicide, a separate and disconnected matter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 343; Dec. Dig. §169(3).]

5. HOMICIDE §308(3)—KILLING WITH DEADLY WEAPON—PRESUMPTION—INSTRUCTIONS.

Though there is a presumption of law that an intentional killing with a deadly weapon is murder in the second degree, an instruction to that effect has no place in a case where all the facts are known from eyewitnesses, though they differ in their testimony; its effect being to compel defendant to meet by his proof both the state's proven facts and such presumption therefrom.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 644; Dec. Dig. §308(3).]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

Everett Swearengin was convicted, and appeals. Reversed and remanded for new trial.

Defendant was tried in the circuit court of Douglas county upon an information charging murder in the first degree, for that, as it was averred, he had shot and killed one Samuel O. Narramore. Having been found guilty by the jury of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for a term of ten years, he has, after the usual motions, appealed.

Such of the facts as may tend to make clear the points which we will find necessary to consider in our opinion run, briefly, thus: On the 4th of July, 1914, there was a picnic at a place in Douglas county known as Johns Mills. To this picnic came, among others, defendant, halting a moment on his journey thither, at a place called Abadale, where he purchased some cartridges for his revolver. Shortly after defendant arrived on the picnic ground, upon some provocation not disclosed (and not pertinent to this case if disclosed), defendant got into a quarrel with a young woman, who seems to have either slapped defendant or struck him with an umbrella. Defendant, in return for her blow, either slapped her or pushed her from him. This altercation with the young woman seems to have occurred some three hours before the time at which deceased was killed. At a time shortly after the altercation with the young woman, deceased met defendant, and after some words, seemingly growing out of defendant's altercation with the young wo-

man (though the record cannot be said to be clear upon this point), defendant applied to deceased an epithet a little more vulgar and obscene than is conventional, even in cases of homicide committed by drunken men at picnics. Thereafter defendant and deceased seem to have parted without any further hostilities occurring. After this initial altercation and some little time before the homicide, deceased, it is said, went to one John Hide, a witness in the case, and made inquiry of Hide where he could obtain a weapon. Hide directed him to the coat of the witness, which was either tied to or hanging upon a saddle, in the pocket of which there was a pair of metal knucks. Deceased seems to have gotten these knucks; at least, the witness testified that shortly afterward the knucks were gone from the pocket of the coat.

Subsequent to this, and apparently shortly after the noon hour, defendant and deceased met at the picnic grounds and the shooting occurred. The testimony is conflicting as to whether defendant on this occasion first accosted deceased, or deceased accosted the defendant. The testimony for the state leaves this matter in doubt; while the testimony for the defendant is that deceased came to defendant on the picnic grounds and inquired of him whether he meant what he had said to deceased in the previous encounter, above mentioned. Being advised by defendant that the latter did mean it, deceased, applying the conventional opprobrious epithet to defendant, struck at him with a pair of knucks, and instantly defendant drew his pistol and shot deceased.

Upon this phase of the case, and as to what happened at a time instantly before the shooting, the testimony of the state tends to show that defendant applied an opprobrious epithet to deceased, and the latter replied, "I will be damned if I will take it," and either struck defendant upon the head, or struck at him without hitting him, and defendant instantly shot deceased. The witnesses for the state say that the shooting by defendant and the striking of, or at, defendant by deceased, were simultaneous; that they could tell no difference between them; that "they were right together." Other evidence in the case on the part of the state shows that defendant partially drew his pistol from his pocket as he was entering into the last difficulty with deceased.

The defense is self-defense. Upon this phase there was some evidence to the effect that deceased, before he was shot by defendant, had, as stated above, armed himself with a pair of metal knucks, and that he struck defendant therewith, wounding him on the head and drawing blood, before defendant fired the fatal shot. Much conflict is to be found in the evidence touching whether the wound upon the defendant's head and the blood which flowed therefrom were caused by a blow from the deceased, or

whether they were caused by an attack made on defendant by the mother of deceased with an umbrella shortly after the shooting.

Much testimony came in as to the metal knucks. It was shown, without contradiction, that these knucks must have been gotten by deceased from the coat pocket of the witness Hide, and that they were found after the death of the deceased in the pocket of certain trousers which had belonged to the latter. That deceased either struck, or struck at, defendant with a pair of knucks, or with his fist just before, or simultaneous with, the shooting by defendant, is abundantly shown by the evidence. The sole conflict lies in the questions of: (a) Whether deceased used a pair of knucks in this striking; (b) whether he actually hit defendant, or not; and (c) whether at the time he struck defendant, or struck at the latter, defendant was not already engaged in drawing his pistol. In other words, the questions which are troublesome, and which were before the jury, are whether deceased acted, in doing what he did, to protect himself from a threatened assault by defendant with a pistol, or whether defendant, in doing what he did, acted to protect himself from a threatened assault by deceased with metal knucks. There is evidence on both sides of these questions. These were, of course, questions of fact for the jury. On them the jury has found against the defendant and in favor of the theory of the state. There is abundant evidence justifying this finding, and so we need only consider, in what we shall say, the alleged errors occurring upon the trial in the admission of testimony and in the giving of certain instructions which are challenged. These questions need not be set forth here, since we will sufficiently refer to them in connection with our discussion of them in the opinion.

Fred Stewart, of Ava, and G. Purd Hays, of Ozark, for appellant. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for the State.

FARIS, P. J. (after stating the facts as above). I. It is urged that the information herein is bad, for that the learned prosecuting attorney, seemingly by a mere clerical misprision, thrice out of the four times in which the term is found in the information, wrote that the assault, shooting, and striking were done of defendant's "malice of aforethought," instead of using the formal and time-tried expression "malice aforethought." While we are of the opinion that the unnecessary interpolation of the preposition "of" was mere nonhurtful surplusage (State v. Meyers, 99 Mo. 107, 12 S. W. 516) yet, since this case must on other grounds be reversed and remanded, the learned prosecuting attorney may (if he is so advised) amend the information by striking out the surplus preposition, lest the attempted innovation should

clutter up the law by becoming a precedent, and so invite carelessness.

[1] II. Complaint is made of the instruction given by the court on self-defense; which complaint, so far as we are able to understand its precise nature, is based upon the use by the learned trial court of the italicized words in the following clause:

"If at the time he (defendant) shot he had reasonable cause to believe and did believe, that it was necessary for him to shoot *and kill* to protect himself from such apprehended danger, you will acquit on the ground of self-defense."

A reference to the adjudged cases and a brief looking to the logic of the matter will conclusively show that this complaint is more specious than real. While we have repeatedly criticized the language of this instruction as being a departure from the approved and proper form, we have not said, of late at least, that the giving of it constitutes reversible error. *State v. Lewis*, 248 Mo. 498, 154 S. W. 716. In the case last cited, a circumlocution or periphrase is suggested in lieu of the alleged objectionable expression "that it was necessary for him to shoot *and kill* to protect himself." It is there said that it would be better to say "that it was necessary for him to *use his pistol in the way he did to protect himself*." *State v. Thomas*, 78 Mo. 339; *State v. Talmage*, 107 Mo. 557, 17 S. W. 990. Palpably, the point of defendant's objection is that the instruction as given requires that defendant believe the danger impending to be so great as that, to avert it, he must shoot *to kill* before he is allowed by law to shoot at all. In the absence of any evidence contradicting the intent to kill and in the light of the facts before us here as to the manner of the use by defendant of his pistol, that is, that defendant did with a deadly weapon shoot deceased in a vital spot and kill him, and of our holdings that a periphrase is preferable, it is difficult to conclude that the error here complained of is a reversible one. This very point has been made many times in this court in criticism of the precise language here complained of, and we have said that it was not reversible. *State v. Gee*, 85 Mo. 647; *State v. Parker*, 106 Mo. 217, 17 S. W. 180; *Pattison's Ins. in Crim. Cases*, 693.

In the light of our former rulings and of the reason of the thing, we are of opinion that, where a homicide is actually accomplished by the intentional use of a deadly weapon upon a vital spot, defendant ought not to be heard to bottom reversible error upon the employment by the trial court of a direct expression of the result of the use of such weapon rather than of its periphrastical equivalent. A little fairer, indeed, would it be to follow the form of the self-defense instruction set out in the case of *State v. Thomas*, 78 Mo. 339, which we command to the courts nisi.

[2] III. Defendant strenuously urges that it was error for the trial court to fail and

neglect to rule upon objections made by defendant to the admission of testimony. We need not consider whether this be so or not; or whether, if the court nisi fail to rule, and admit testimony objected to, we should resolve the matter upon the test of the mere fact of a single failure to rule or upon the question whether the initial objection thereto was well taken. Procedural difficulties in the path of enforcing any other rule would seem to call for this latter test of harmfulness. For who could in fairness say how many failures to rule should work reversible error? For the silence of the court might relate to a merely conventional objection, or the objection made might not in fact have been heard by the court. But be this as may be, we find but one exception taken specifically to the court's failure to rule, and the initial objection made to the question asked was not such as to make a ruling necessary on the part of the court. Certainly, however, it is the duty of the trial court to rule on every objection properly and courteously made upon the trial of a case. We have twice at least, in equity cases, severely criticized this practice and have intimated that in a flagrant case it ought to constitute reversible error. *Morrison v. Turnbaugh*, 192 Mo. 427, 91 S. W. 152; *Seafeld v. Bohne*, 169 Mo. 546, 69 S. W. 1051. But for lack of a proper preservation of the point we do not need to pass on it here.

[3, 4] IV. Upon the trial the state was permitted, over defendant's objection, to ask him in cross-examination whether he had not discharged his pistol at a point on the public road, and at a time some three hours before the shooting of deceased. Defendant, though he testified for himself, had not referred to the fact of shooting his pistol at this time or place. Since he was the defendant, it was an improper question, and the objection to it should have been sustained. *Section 5242, R. S. 1909*; *State v. Pfeifer*, 267 Mo. loc. cit. 30, 183 S. W. 337. Likewise, in our opinion, the learned trial court should have sustained the defendant's objection to the evidence offered by the state of defendant's altercation with the Fitzgerald girl. This occurred some three hours or more before the happening of the difficulty which culminated in the shooting of deceased. Upon no theory which occurs to us, nor upon any called to our attention, can the admission of testimony of this separate and disconnected difficulty be justified.

[5] V. Upon the trial, against defendant's exceptions, the court instructed the jury thus:

"If you find from the evidence that defendant intentionally killed Samuel O. Narramore by shooting him with a loaded pistol, and that such pistol was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless it is met or repelled by evidence introduced by the state."

While the presumption of law mentioned in the above instruction exists (State v. Taber, 95 Mo. 596, 8 S. W. 744), and in a proper case may, it is said, be invoked to eke out proof otherwise dark and lacking, this is not a proper case in which to fall back upon such a presumption; for it is a well-settled principle of law that presumptions are invoked only when evidence is lacking.

It may be that cases are to be found in which this instruction has been given, and wherein there was proof pro and con of facts from which the triers of fact could have found whether the homicide was murder in one or the other degree, or manslaughter of one degree or another, or whether it was done in self-defense. But it is clear to us that in all such cases a presumption is used in the face of proof of the fact presumed to batter down the evidence in the case. This is not permissible and constitutes an unwarranted use of presumptions; because, as forecast, there is no room or necessity for a presumption when there is proof for and against the very fact which is presumed. When proof comes in at the door, presumptions fly out at the window, as was said substantially in a happy figure by Lamm, J., in the case of *Mockowik v. Railroad*, 196 Mo. loc. cit. 571, 94 S. W. 256.

When, however, an intentional killing with a deadly weapon is shown, and there is no evidence upon the side of the state of any other fact, it has been said that this presumption arises to aid the state. *State v. Minor*, 193 Mo. loc. cit. 612, 92 S. W. 466; *State v. Evans*, 124 Mo. 397, 28 S. W. 8. The *Minor* Case was decided by this court, en banc in 1905, and all of the judges concurred, except Marshall, J., not sitting. The homicide there was committed by means of shooting with a pistol. There were no eyewitnesses. Immediately after the shooting the accused fled. Being apprehended and put upon his deliverance, he admitted the shooting, but averred that it was accidental and not intentional. Against the defendant's averment of accident, the state, lacking affirmative evidence, relied upon a presumption, and so relying the below instruction was given by the court nisi, and it would have been held good by us upon the facts therein held in judgment if the word "intentionally" had been used therein:

"If the jury believe and find from the evidence in the case that the defendant shot with a pistol, and by such shooting killed William Green, the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary, and in such case the burden of proof devolves upon the defendant to show to the reasonable satisfaction of the jury, from the evidence in the case, that he is guilty of a less crime than murder in the second degree, or that the homicide was excusable."

The only criticism of the above instruction in the case, supra, is this, to wit:

"Under the evidence in this case, the court was justified in submitting that question to the jury, and if the instruction numbered 5 had

contained the word 'intentionally' or its equivalent before the words 'shot with a pistol,' it would have been correct; but in the absence of the word 'intentionally,' or its equivalent, the instruction was erroneous."

Passing by the illogical reasoning arising from the necessity of inferring in the *Minor* Case an intentional killing from the fact of flight and then basing a presumption of law largely upon such inferred fact, we may concede for argument's sake (without again so holding) the correctness of the ruling therein; but the true facts therein were evidenced on the state's side solely by the dumb evidence of the circumstances, contradicted by the testimony of the defendant *Minor* only upon the single point of whether the killing was intentional or accidental.

The facts in the instant case are wholly different. All of the circumstances of the homicide here are known, and shown upon the record by the testimony of eyewitnesses. No earthly reason or necessity exists for indulging any presumption as to whether the killing was or was not murder in the second degree. The facts shown in evidence disclosed the grade of the offense. That these facts were disputed as to some vital phases by the witnesses for the state, and for the defendant, does not detract from the argument. It was for the jury as the triers of fact to resolve these contradictions, and when they resolved them they held inevitably that upon one side lay truth and upon the other falsehood, i. e. (not to put it so brutally), that the facts shown by the state are the veritable facts of the case. The actual facts being shown, or being by the finding of the jury made veritable, there is no place in this case for a presumption of law about the grade of the homicide. 2 *Chamberlayne*, Mod. Law of Ev. 1085; *Erhart v. Dietrich*, 118 Mo. loc. cit. 437, 24 S. W. 188; *Conway v. Supreme Council*, 137 Cal. loc. cit. 389, 70 Pac. 223; *Mockowik v. Railroad*, supra. There is, we repeat, no doubt of the existence in law of the presumption defined in the instruction under review; but such an instruction has no place in a case wherein the facts are known from eyewitnesses. Surely, it has no place except maybe in a case where there is an absence of evidence as to the facts of a homicide, save and except the fact of an intentional killing by the use of a deadly weapon upon a vital spot. To use it in a case like this is to assume the absolute truth of the state's side of hotly disputed facts, then to draw from the state's side of such facts a presumption of second degree murder, add that presumption to the facts on that side, and then demand of the defendant that he rebut the presumption so unwarrantably obtained.

We are not required to overrule the case of *State v. Minor*, supra, but content ourselves with distinguishing it upon the facts. We leave to subsequent determination, when we shall meet the point face to face, the

question whether the procedural necessity of indulging the presumption on the state's part, in order to make any case at all, should override what casually seems to be a plain case of bottoming a presumption upon an "inference" (said by many respectable courts and law-writers to be synonymous with "presumption"). But be all this as may be, for the reasons stated the effect here of giving the instruction was to put upon defendant an undue burden; in effect, to beg the identical questions submitted to the jury upon the proven facts, and so compel defendant to meet by his proof both the state's proven facts and the weight of an unwarranted presumption drawn from these facts. In the light of some of the holdings of ours, it is not strange that the learned trial court fell into error. We are constrained by the reason of the thing to say that upon the facts in this case the instruction ought not to have been given.

Other alleged errors will not likely occur upon a new trial.

It follows that, for the errors noted, this case should be reversed and remanded for a new trial. Let this be done.

STATE v. HARPER.

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

GAMING ~~§~~90(2) — INFORMATION — DESCRIPTION OF DEVICE.

An information for violating Rev. St. 1909, § 4750, which charges that defendant kept a gaming table, to wit, a poker table, commonly so called, upon which cards were used, and which table and gaming device were adapted for the purpose of playing games of chance for money thereon, is defective because it fails to describe a poker table, which is not one of the devices specifically named in the statute, with sufficient definiteness to show that it comes within the statute.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 251; Dec. Dig. ~~§~~90(2).]

Appeal from Circuit Court, St. Francois County; Peter H. Huck, Judge.

Fred Harper was convicted of keeping a gaming device, and he appeals. Reversed and remanded.

B. H. Boyer and F. A. Benham, both of Farmington, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen., for the State.

WILLIAMS, C. Upon an information attempting to charge a violation of section 4750, R. S. 1909, defendant was tried in the circuit court of St. Francois county, found guilty, and his punishment assessed at six months' imprisonment in the county jail. Defendant has duly appealed to this court.

The main point relied upon for a reversal by appellant is that the information is fatally defective. In the state's brief filed herein the learned Attorney General confess-

es said error. We have reached the conclusion that appellant's point is well taken, and it will therefore be sufficient to the proper disposal of the case to confine our discussion to the sufficiency of the information. The information, omitting formal parts, reads as follows:

"That one Fred Harper, on the — day of December, A. D. 1915, at and in the county of St. Francois and state of Missouri, did then and there unlawfully, willfully, and feloniously set up and keep a certain gaming table and gambling device, to wit, one poker table, commonly so called, upon which table cards were used, and which gaming table and gambling device were adapted, devised, and designed for the purpose of playing games of chance for money, property, and poker chips thereon, and * * * did then and there unlawfully and feloniously induce, entice, and permit * * * to bet and play at and upon and by means of said gaming table and gambling device."

It will be noted that section 4750, R. S. 1909, does not specifically mention "poker table." That being true, the table alleged to have been set up by defendant should be described in the information with sufficient definiteness to show that it comes within the purview of said statute. This the present information fails to do. *State v. Wade*, 183 S. W. 598, not yet officially reported.

The above case, recently decided by court in banc, fully discusses the question here presented, and it is therefore unnecessary to prolong the discussion here. For the reasons given in the *Wade Case*, supra, the judgment in the case at bar is reversed, and the cause is remanded.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

STATE v. MCENIRY. (No. 19720.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

STATUTES ~~§~~118(6) — TITLE AND SUBJECT-MATTER—REPEALING ACTS.

Act March 22, 1913 (Laws 1913, p. 222), which purports to repeal the section mentioned in its title and enact a new section in lieu thereof, and does not provide any penalty, is void because outside its title, which reads: "An act to repeal section 4868 of article 8, chapter 36, Revised Statutes of the State of Missouri, 1909, entitled 'Swine dying of disease to be burned—notice of possible contagious disease to be posted—other provisions.' Providing penalty for violation of this act."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 160; Dec. Dig. ~~§~~118(6).]

Appeal from Circuit Court, Pettis County; Hopkins R. Shain, Judge.

Charles McEniry was indicted for failure to burn the carcasses of swine owned by him which had died of cholera. From judgment sustaining motion to quash the State appeals. Affirmed.

D. E. Kennedy, of Sedalia, for appellant. John T. Barker, Atty. Gen., and W. T. Ruth-
erford, Asst. Atty. Gen., for the State.

ROY, C. The defendant was charged by information with a failure to burn the carcasses of swine owned by him which had died of cholera.

The court sustained a motion to quash the information on the ground that the act of March 22, 1913 (Laws 1913, p. 222) is void. That act is entitled as follows:

"An act to repeal section 4868 of article 8, chapter 36, Revised Statutes of the State of Missouri, 1909, entitled 'Swine dying of disease to be burned—notice of possible contagious disease to be posted—other provisions.' Providing penalty for violation of this act."

The body of that act purports to repeal the section mentioned in the title, and to enact a new section in lieu thereof, and it does not provide any penalty. The new section there attempted to be enacted is clearly outside the title of the act and void.

It is true that a section of the revised statutes may be amended by a bill the title of which gives notice that the bill is an amendment of such section, without other description of the subject-matter. *State ex rel. v. County Court*, 128 Mo. loc. cit. 440, 30 S. W. 103, 31 S. W. 23, and cases there cited. But the title of the bill here under discussion does not give notice that the section is to be amended, or that a new section is to be enacted in place of it. It merely says that it is to be repealed. The fact that such title contained the words, "Providing penalty for violation of this act," does not save the bill. Those words were misleading, as no penalty was mentioned in the bill. The amendment made by the bill was not in the title, and the penalty called for by the title was not in the bill. The title was misleading in both respects, and one of those errors does not heal the other.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

STATE v. WILD. (No. 19469.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

COURTS \Leftrightarrow 231(19) — JURISDICTION OF SUPREME COURT—CONSTITUTIONAL QUESTION—QUESTION ALREADY DECIDED.

Where the statute under which defendant was convicted had, before he took his appeal, been declared by the Supreme Court not to violate the only provision of the Constitution which he claimed it did violate, and there was no other question giving the Supreme Court jurisdiction, the Supreme Court will not assume juris-

isdiction of the appeal, but will transfer the case back to the Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. \Leftrightarrow 231(19).]

Appeal from St. Louis Court of Criminal Correction; V. H. Falkenhainer, Judge.

Franz Wild was convicted of treating a disease without a license, and appealed to the Court of Appeals, which transferred the case to the Supreme Court (179 S. W. 954). Case transferred to the Court of Appeals.

Charles J. Maurer and W. A. Carter, both of St. Louis, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

FARIS, P. J. Defendant was convicted in the St. Louis Court of Criminal Correction of an alleged violation of section 8315, R. S. 1909, for that, as it was alleged, he had treated and attempted to treat one Wetzel for the disease of rheumatism. The punishment of defendant was assessed by a jury at a fine of \$50. From the judgment and sentence of the Court of Criminal Correction fixing his punishment pursuant to verdict, defendant duly appealed to the St. Louis Court of Appeals. The latter court, by an order entered at the October term, 1915, transferred the cause to us, on the ground that the constitutionality of section 8315 was properly and timely raised by defendant, which fact, the learned Court of Appeals considered, ousted it of jurisdiction.

The only provision of the Constitution urged upon the trial of this case as being in question is section 28 of article 4 of the Constitution of Missouri, which, so far as pertinent, provides that:

"No bill shall contain more than one subject which shall be clearly expressed in its title."

No reference whatever is made in the motion for a new trial to the Constitution, or to any provision thereof. A very general allegation of unconstitutionality is contained in the motion in arrest of judgment, which is, to wit, that:

"The statutes relating to the practice of medicine, surgery and midwifery, under which the information was issued, are unconstitutional and void because they define three separate and distinct penalties for the same act and offense, particularly when committed by different persons."

From this state of facts we are required only to consider whether the title to the statutes relating to the practice of medicine and surgery violates the provisions of section 28 of article 4 of the Constitution, which we quote above, for this is the sole jurisdictional phase in anywise involved in this appeal. If this point be not involved, for that it was already settled prior to the taking of the appeal herein, the jurisdiction is not with us, but with the St. Louis Court of Appeals.

This appeal was taken on the 27th day of January, 1912. This court, in the case of

State v. Smith, 233 Mo. loc. cit. 255, 135 S. W. 467, 33 L. R. A. (N. S.) 179, on the 7th day of March, 1911, more than ten months before the taking of the appeal herein, on this identical point, ruled thus:

"The statute in question does not violate section 28 of article 4 of the Constitution. The act contains one subject, which is clearly expressed in the title. The title of the act is not 'Medicine and Surgery,' as defendant asserts it to be in his brief. The words 'Medicine and Surgery' are merely the caption. The title to the act is as follows: 'An act to regulate the practice of medicine, surgery and midwifery, and to prohibit treating the sick and afflicted without a license, and to provide penalties for the violation thereof.'" Laws 1901, p. 207.

As a rule of convenience at least (regardless of the technically correct logic thereof), and to prevent a sort of constructive fraud upon the courts, in that an appellant may not arbitrarily and for his own ends nicely pick and choose his forum, we have uniformly held since the case of Dickey v. Holmes, 208 Mo. 664, 106 S. W. 511, that when we have once determined the precise constitutional question raised in a matter in which any Court of Appeals would otherwise have jurisdiction, we will not thereafter assume jurisdiction of such matter on account of such precise constitutional question, provided such determination of the point was made before the date at which the appeal was taken in the case. State v. Campbell, 214 Mo. 362, 113 S. W. 1081; Bank v. Glass, 243 Mo. 409, 147 S. W. 1030; Richmond v. Creel, 253 Mo. 256, 161 S. W. 794; State v. Finley, 259 Mo. 414, 168 S. W. 921.

Since, therefore, the constitutionality of the identical section of the statute herein involved and upon the precise phase here presented was determined by this court on the 7th day of March, 1911, and since the appeal herein was not taken until the 27th day of January, 1912, the St. Louis Court of Appeals has plenary jurisdiction to determine all questions now left alive in the case.

It is therefore ordered that this case be transferred to the St. Louis Court of Appeals for determination. Let this be done. All concur.

STATE ex rel. MILES et al. v. ELLISON
et al., Judges. (No. 19638.)

(Supreme Court of Missouri. In Banc. Dec. 4, 1916.)

1. COURTS \S 231(1) — APPELLATE JURISDICTION — MISSOURI — DECISION OF COURT OF APPEALS — EXTENT OF REVIEW.

In cases in which the Supreme Court has no original appellate jurisdiction, its review is limited to the question whether the Court of Appeals decided contrary to the last previous rulings of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 644; Dec. Dig. \S 231(1); Appeal and Error, Cent. Dig. § 1773.]

2. COURTS \S 231(1) — APPELLATE JURISDICTION — MISSOURI — COURT OF APPEALS.

The Courts of Appeal when acting within their jurisdiction, and not in violation of the Supreme Court decisions, are courts of last resort, and their judgments cannot be interfered with by the Supreme Court, even if erroneous.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 644; Dec. Dig. \S 231(1); Appeal and Error, Cent. Dig. § 1773.]

3. COURTS \S 231(4) — APPELLATE JURISDICTION — MISSOURI — CONFLICTING DECISION.

Conducting a municipal local option election in total disregard of the provisions of the Australian Ballot Law to secure a secret ballot. Rev. St. 1909, §§ 5897, 5898, 5910, which are expressly made applicable to such elections by sections 7239, 9145 is not a mere irregularity; so that a decision of the Court of Appeals that such election was void is not in conflict with decisions of the Supreme Court that mere irregularities in the conduct of the election do not affect its validity unless the statute expressly so provides.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 847; Dec. Dig. \S 231(4); Appeal and Error, Cent. Dig. § 1773.]

4. COURTS \S 231(4) — APPELLATE JURISDICTION — MISSOURI — CONFLICTING DECISION.

A decision of the Court of Appeals that the public had an interest in an election contest so that the contestant of a local option election could not dismiss the contest after the expiration of the time for filing other contests does not conflict with prior decisions of the Supreme Court that a party has a right to dismiss his own action, that assignors cannot object to the dismissal of the action by the assignee, and that the contest of an election for such office abates on the death of the contestant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 847; Dec. Dig. \S 231(4).]

Woodson, J., dissenting.

Certiorari by the State, on the relation of Ed T. Miles and another, against James Ellison and others, as judges constituting the Kansas City Court of Appeals, to quash a judgment of that court which reversed a judgment rendered for the relator in an action in which he was plaintiff. Preliminary writ quashed.

Guthrie & Franklin, C. G. Buster, R. S. Matthews, Otho F. Matthews, W. B. Hagan, and Andrew Field, all of Macon, for relators. Charles P. Hess, of Macon, and Whitecotton & Wight, of Moberly, for respondents.

REVELLE, J. This is an original proceeding by certiorari to quash a judgment of the Kansas City Court of Appeals reversing a judgment of the circuit court of Macon county, Mo., which latter judgment was rendered on the pleadings in a certain case wherein one Ed T. Miles was seeking to contest a local option election held in the city of Macon on December 8, 1913. 186 S. W. 10. The notice of contest, which in such cases fills the office of a petition and to which contestee successfully demurred, attacked the election upon the ground, among others, that same was not held in compliance with the Australian Ballot Law, but in conformity to a city ordinance whose provisions are in con-

dikt with the election laws of the state. The requirements of the general law, not exacted by the ordinance, and which it is alleged were totally disregarded and violated in the election held, are those contained in sections 5897, 5898, and 5919, R. S. 1909. The specific complaint is that no booths or compartments or other conveniences to enable the voter to prepare and cast a secret ballot were furnished, no writing materials or other supplies and conveniences were provided with which the voters could erase the clause against which they desired to vote, and that no instructions for the guidance of electors were printed and posted, that many persons were in the polling places preparing ballots for the voters, and electioneering against the sale of liquor, and that by reason of all these matters the voters were deprived of a free and fair opportunity to cast a secret ballot and vote their real sentiments.

[1, 2] We have no original appellate jurisdiction of this cause, and our review is limited to the question of whether the Court of Appeals, in holding as it did, went contrary to the last previous rulings of this court. While this court has recently done considerable writing and its members expressed divergent views as to what constitutes our record in cases of this class, we all yield assent to the one proposition that the Courts of Appeal are courts of last resort, and when acting within their jurisdiction, and not in violation of our decisions, can decide cases as their judgment dictates, and in so doing can, without interference on our part, commit error and decide incorrectly, just as we can. *State ex rel. Delano v. Ellison et al.*, 181 S. W. 78; *State ex rel. Petigo v. Robertson*, 181 S. W. 987; *State ex rel. Iba v. Ellison*, 256 Mo. loc. cit. 666, 185 S. W. 369; *Majestic Mfg. Co. v. Reynolds*, 186 S. W. 1072; *Harrison v. Jackson County*, 187 S. W. 1183.

[3] If the Court of Appeals did not run afoul our decisions in holding that the election was invalid for the reasons heretofore stated and that the contestant should not be permitted to dismiss the action under the circumstances hereinafter stated, our writ must be quashed; for these are the only questions properly presented and legitimately involved. Concerning the first the Court of Appeals says:

"The general rule is that, if there is a substantial compliance with the law, a vote will not be invalidated or an election annulled, even if certain provisions regarding the manner of holding the election are violated, unless the statute itself provides that such violation shall have that effect; that, in the absence of such provision, a failure to follow some of the many provisions of the Australian Ballot Law, which failure does not violate the general spirit and controlling object of the law, will not, in the absence of fraud in perpetration and result, be held sufficient to invalidate the election, but will be regarded only as mere irregularities. On the other hand, if there is a total disregard of the law, or a willful violation of the general spirit and controlling purpose thereof, then this is sufficient to annul the election. *Hall v. Schoen-*

ecke, 128 Mo. 661 [31 S. W. 97]; *Gaston v. Lamkin*, 115 Mo. 20 [21 S. W. 1100]; *State ex rel. McMillan*, 108 Mo. 153 [18 S. W. 784]; *O'Laughlin v. City of Kirkwood*, 107 Mo. App. 302 [81 S. W. 512]; *State ex rel. v. Seibert*, 116 Mo. 415 [22 S. W. 732]; *Bowers v. Smith*, 111 Mo. 45 [20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491]; *Foster v. Scharff*, 15 Ohio St. 532; *Zeiler v. Chapman*, 54 Mo. 502. * * *

"Now, if the facts alleged are true—and for the purposes of the demurrer we must so accept them—then it would seem that, where an election was held in which no booths were provided, where no facilities were furnished to the voter for marking his ticket and doing so alone and free from observation or from coercion of any sort, where many persons were allowed to be in the polling places, electioneering with the voters and making out and furnishing to the voters ballots already prepared, and where the voters did not have a free and fair opportunity to cast a secret ballot and vote their real sentiments uninfluenced by those about them, the election cannot be said to have been held in substantial compliance with the Australian Ballot Law. We do not mean to say that a mere deviation from the methods marked out for the holding of an election would be sufficient to violate the spirit and general purpose of the law and invalidate the election, but certainly the failure to observe any of the above requirements would do so. Especially the fact that there was an entire absence of booths whereby no opportunity was afforded to preserve the secrecy of the ballot."

The court then proceeds to point out that the object of the Australian Ballot Law is to enable the voter to prepare and cast his ballot in secret and free from observation, coercion, intimidation, or corruption, and in support thereof cites *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97, *Woodward v. Pearsons*, L. R. 10 C. P. 733, and *Ledbetter v. Hall*, 62 Mo. 422. The court further says:

"To dispense with booths or compartments entirely is to ignore the very heart and vitals of this purpose of the Australian Law. If booths can be dispensed with, which enables the voter to prepare his vote in secret, then why cannot the ballot boxes and the ballots themselves be dispensed with? The truth of the matter is, an election held without booths of any sort is an election held with total disregard of the Australian Law. If the law's requirements as to booths and as to secrecy in the preparation and depositing of the ballot can be dispensed with without violating the whole object and spirit of the Australian Ballot Law, and disregarding it entirely, then we do not know what would violate or disregard it."

Relators here insist, as they did in the Court of Appeals, that the facts stated constitute mere irregularities which do not invalidate the election, and in support thereof cite *Skelton v. Ulen*, 217 Mo. 383, 117 S. W. 32. The Court of Appeals discusses that particular case and approves the doctrine and conclusion therein announced. In that case this court merely held that an election was not void merely because the booths provided were not screened and there was no guard rail. It clearly appears from the record of that case that the election was held in pursuance of the Australian Ballot Law and was strictly complied with in all respects, except that there was no guard rail and that the booths furnished were without screens. Such

matters clearly constitute a mere irregularity, but that is radically different from a case where no effort whatever has been made to conduct an election in pursuance of the law. This election was conducted as though the general election laws were not applicable, although sections 7239 and 9145, R. S. 1909, expressly make them so.

If the allegations of the notice are true, the whole spirit and purpose of the general law was completely ignored and violated, and if the matters complained of can be treated as but irregularities, it is difficult to conceive of a case which would not fall within that innocent class.

We have carefully reviewed the decisions of this court which relators cite as holding the contrary, but find that they not only do not sustain their contention, but are in spirit to the contrary.

[4] The facts material to the second contention are that after the cause was submitted on appeal, and after a decision had been rendered and an opinion handed down, and while a motion for rehearing was pending, Ed T. Miles, in whose name the contest was conducted, without the knowledge or consent of his attorneys, appeared through the attorneys for his adversary and asked that the motion for rehearing be sustained and the judgment of the circuit court be affirmed, assigning as reasons thereof that he had become a nonresident of the city, and had been criticized for his action in instituting and conducting the contest. The Court of Appeals denied his motion, holding that a local option election contest is not the private affair of the person in whose name it is instituted. The court says:

"He acts for the general public as well as himself. Having voluntarily assumed this public duty, he has not the right to withdraw from it at his caprice if in so doing he destroys the public right he set out to maintain."

The court then points out some of the far-reaching results which might follow in the event the contestant were allowed arbitrary control of such an action. It cites cases and authority holding that the action is one in which the public must be considered a party, and that, if its interests will be prejudiced or adversely affected by a dismissal, the same will not be permitted.

The present case itself argues well in support of the conclusion reached by the court. Law and orderly procedure demand that on all matters submitted to the public for decision a full and free opportunity for an expression of the public will be afforded. To assure this result provision is made for a contest, which must be instituted, if at all, within a specified period. In cases of this character any qualified voter is authorized to institute the contest within 20 days after the official count. It is not necessary that he be interested in the business of selling or suppressing the sale of intoxicating liquor.

It is not the policy of the law to encourage the institution of numerous suits having one and the same purpose. When a contest peculiarly affecting the public interest as local option contests do is instituted, the public is justified in assuming that it will be prosecuted to an end, and that the question of whether the election has been free and open and has reflected the public will will be finally determined and this, regardless of the results of such an election. Further indicating the public nature of such a contest is the section authorizing same and which provides that the public—that is, the municipal body or county holding the election—shall be made the contestee or party defendant. Laws 1909, p. 470.

The Court of Appeals has found that the election conducted in the instant case was invalid and did not afford an adequate opportunity for the expression of the public will, yet, notwithstanding this, if the contestant is now permitted to dismiss the contest (it being too late for the institution of another), the invalid election would have the effect of a legal one, and this is contrary to the lawful order of things. Or, as said by the Court of Appeals:

"The consequence of such a precedent would plague any good community which might find itself in the reverse situation to that said to be facing the welfare of the city here involved. See the result of permitting such action; the majority of the legal voters of a community or city may vote at an election against the sale of intoxicating liquors; corrupt, ignorant, or well-meaning, though mistaken, officers, through the aid of fraudulent or illegal votes, may certify the election as being in favor of the sale of such liquors. A contest cannot be had unless begun within 20 days. A voter (possibly an enemy to the cause in disguise) assumes the duty of contesting, begins the proceedings and then, a few days after the time limit has expired, dismisses the contest, leaving the community to be afflicted with the traffic it had voted against."

It is, however, unnecessary for us to determine the soundness or correctness of this ruling, since an investigation discloses that it is not in conflict with any previous holding of this court.

Without analyzing the cases cited by relators, it suffices to say that they involve altogether different questions and are in no manner controlling of the one herein presented. The authorities cited in this connection are *Hoover v. Railway*, 115 Mo. 77, 21 S. W. 1076, *Gay v. Orcutt*, 169 Mo. 400, 69 S. W. 295, and *Gantt v. Brown*, 244 Mo. 271, 149 S. W. 644, Ann. Cas. 1913D, 1283.

Finding no conflict between the decision in this case and the prior rulings of this court, the preliminary writ heretofore issued is quashed.

GRAVES, C. J., and WALKER, FARIS, and BLAIR, JJ., concur. BOND, J., concurs in result for want of jurisdiction. WOODSON, J., dissents.

STATE ex rel. STOKES et al. v. ROACH,
Secretary of State. (No. 19727.)
(Supreme Court of Missouri. In Banc. Oct.
11, 1916.)

MANDAMUS \Rightarrow 74(1)—INITIATIVE ELECTION.

In view of Const. art. 4, § 57, authorizing the initiative, where all the provisions of Rev. St. 1909, c. 59, as to the petition for an initiative vote and as to filing same, and as to its transmission to the Attorney General, and its requirements that the Attorney General prepare a title to be placed upon the ballot and return it to the Secretary of State, were complied with, save that the Secretary of State declined to certify copies to the county clerks of the several counties, peremptory writ of mandamus was ordered to issue to compel him to perform such ministerial duty.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150, 152, 156, 157; Dec. Dig. \Rightarrow 74(1).]

Woodson, O. J., and Graves and Revalle, JJ., dissenting.

Mandamus by the State, on the relation of Charles E. Stokes and others, against Cornelius Roach, Secretary of State. Permanent writ awarded.

L. A. Laughlin, Walsh, Aylward & Lee, and John H. Lucas, all of Kansas City, for relators. John T. Barker, Atty. Gen., and Morton Jourdan, of St. Louis, for respondent.

WALKER, J. The issue here submitted is whether our alternative writ of mandamus heretofore directed to the Secretary of State shall be made permanent, and as a consequence he be required to certify to the several county clerks the title and number of a proposed constitutional amendment to be voted upon at the coming general election, the purpose of which, if adopted, is to prohibit the giving, exchanging, bartering, selling, or disposing of intoxicating liquors in this state except wine for sacramental purposes.

With the merits of this proposed amendment we are not concerned, because if the writ be made permanent it will simply enable the people in their sovereign capacity, and as the source of all power, to express their will at the polls as to whether or not the organic law should be amended as proposed, while a refusal to grant the writ will deny them this right.

In 1908, a system of legislation, supplemental to that of the General Assembly, was inaugurated in this state under which the amendment of the Constitution and the amendment and enactment of statutes was authorized by what is termed the initiative. Section 57, art. 4, Con. Mo. The companion power of the referendum, or the right to review the acts of the General Assembly, was at the same time incorporated into the organic law. In a review of the matter, we are, under the facts, to consider only that portion of the power thus conferred in relation to the amendment of the Constitution.

Subsequent to the adoption of the amend-

ment to the Constitution providing for its change by the initiative, the General Assembly, under the express authority of this amendment, enacted a statute (now chapter 59, R. S. 1909) defining the procedure necessary to be pursued in exercising the power conferred.

The relators allege, and the respondent concedes, that all the formal requisites of the Constitution and statute have been complied with in the preparation, presentation, and submission to the Secretary of State of the petitions here under review. Further than this, it is alleged and admitted by respondent that the Secretary of State on the 29th day of June, 1916, in the presence of the Governor and the person offering said petitions, did file same, and in further conformity with the law (section 8748, R. S. 1909) the Secretary of State did forthwith transmit to the Attorney General a copy of the measure proposed by said initiative petitions that the latter official might prepare a ballot title of said measure; that within ten days thereafter, or not later than July 8, 1916, the Attorney General did prepare a ballot title to and number of said measure and return same to the Secretary of State, that copies thereof might be certified by him to the county clerks of the several counties to be voted on at the coming general election. The matter rested at this stage until September 20, 1916, or 2½ months after the acceptance and filing of said petitions by the Secretary of State, and the submission of the measure proposed to the Attorney General and his approval of same and its return to the office of the Secretary of State, when the latter official notified relators he would not furnish the ballot title of said measure proposed by said petitions to the county clerks to be voted on at the general election on November 7, 1916. The grounds alleged for this refusal were: (1) That the proposed amendment is unconstitutional; (2) that at least a part of same is legislative, as distinguished from constitutional in subject-matter; and (3) that it covers three subject-matters, and hence cannot be voted on as one amendment.

I. Before entering upon a discussion of the nature of the power of the Secretary of State in regard to the petitions in question to determine whether or not his duties are such as to authorize him to refuse to certify the measure out to the county clerks, it is pertinent, under the facts, to consider whether his objection to the petitions at the time when made may not properly be regarded as an attempt to exercise power already expended, and hence not entitled to serious consideration. However much the impartial mind may incline to the forcefulness and sufficiency of this conclusion, the complete discharge of a judicial duty requires us to review the facts and determine, in the furtherance of the enforcement of the law and the consequent pro-

tection of the rights of petitioners, whether the objections to the proceeding as made by the Secretary of State are from any point of view clothed with any color of authority. It will be recalled that, when the petitions in question were presented to him, he accepted and filed them in his office, submitted them to the Attorney General, and did every other act required of him by law, except to certify the measure as proposed to the county clerks to be placed upon the ballots. By this action the Secretary of State complied fully with all the requirements of the law save in the particular stated, and therefore is not within the provisions of the statute (section 6750, R. S. 1909) which prescribes the course to be pursued in the event he refuses to accept and file the petitions. Under the express terms of the statute, it is upon his failure to so accept and file them that the court is authorized to determine whether or not the petitions refused to be filed by him are legally sufficient. In this case he has, as we have shown, fully determined this matter by his acceptance and filing of such petitions, and any right he may have had was foreclosed by his own deliberate act. The right to raise his voice, therefore, against the attempted orderly exercise of the people's will in seeking to amend the Constitution, ceased to exist upon his acceptance and filing of the petitions, and he finds himself confronted with a mandatory statute requiring him to perform a clearly defined ministerial duty, viz. to furnish to each of the clerks of the county courts of the several counties his certified copy of the title and number of the measure to be voted on under the initiative statute. Section 6752, R. S. 1909. Any other construction of the law would present the anomaly of clothing a merely ministerial officer, which we will presently show him to be, with power to thwart the will of the people, after having complied with all the other requirements of the statute.

While the right of the Secretary of State to object to the acceptance and filing of petitions under the initiative and referendum statutes is limited as stated, it is not to be understood that the remedy of petitioners to compel his action, no matter at what stage of the proceedings his failure or refusal may occur, is to be subjected to a like limitation. A reading of section 6750, R. S. 1909, may so indicate if same is measured by the rule of *expressio unius*, etc.; but this statute does not create such a limitation and was not so intended. It is nothing more than a legislative declaration of a right to mandamus which may now and could have been before the enactment of the statute (section 6750) invoked by any one aggrieved on account of a failure of the Secretary of State to perform his defined duties. This court has original jurisdiction by mandamus in the absence of legislative action to compel administrative officers to perform ministerial acts, and a

statute to this effect adds nothing to this power. *State ex rel. v. Roach*, 230 Mo. 422, 130 S. W. 689, 139 Am. St. Rep. 639. The action herein is therefore authorized under the general power referred to regardless of the statute.

II. However, in a matter of the character of the one under review, which so vitally affects the rights of the people, the course pursued by the respondent of which complaint is made should receive the utmost consideration. Let it be assumed therefore that the objections made by him to the petitions were timely, and then let us determine what is the nature of the power conferred upon him in relation to what may be briefly termed initiative petitions. The nature of this power having been ascertained, it ought not to be difficult, under well-established principles of law, to determine its limit. The Constitution (section 57, art. 4) is mandatory that such petitions shall be filed with him, and in submitting the same to the people it requires that he and all other officers shall be guided by the general laws and the act submitting the amendment until legislation shall be specially provided therefor. Such legislation, as we have shown, has been provided, and its requirements have been fully followed. The duties of the Secretary of State thereunder, briefly recapitulated, are to accept or reject the petitions, and if accepted he is to file them in his office, etc. That he is an administrative officer, and that his acts are purely ministerial, is disclosed by the character of such acts as defined by the Constitution and the statute, because they consist of duties he is required to perform upon a given state of facts admitted to exist, and in a prescribed manner conceded to have been pursued, in obedience to a mandatory statute without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. *State ex rel. Railroad v. Meler*, 143 Mo. 439, 45 S. W. 306; *State ex rel. v. Adams*, 161 Mo. 349, 61 S. W. 894; *State ex rel. v. Williams*, 232 Mo. 56, 133 S. W. 1. But we are not left to an analysis of the duties he is required to perform herein, or to judicial definitions of the powers of ministerial officers generally, in determining the nature of his functions in the matter under discussion. This court has repeatedly declared that he is purely a ministerial officer and as such may be compelled by mandamus to do what he ought to do. *State ex rel. Railroad v. Johnston*, 234 Mo. 338, 137 S. W. 595.

The only case which contravenes this conclusion is that of *State ex rel. v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639, to which we will direct our attention. The principal opinion in the *Roach* Case holds that the Secretary of State, although vested with a discretion to determine from an inspection of the subject-matter whether a petition submitted to him for filing is for a constitutional amendment or the enactment

of a statute, is nevertheless an administrative officer, and his acts, within the purview of the law, are purely ministerial. The correctness of the court's conclusion as to the nature of the Secretary of State's duties is not, in the face of numerous precedents, open to criticism. These duties, as they are defined, render him, under the usual application of the rule regulating his conduct, subject to control by mandamus. The court, however, despite the admitted nature of his duties, excepted him from the operation of the rule on the ground that he was vested with such a discretionary power as to authorize him to analyze the tenor of the matter submitted to him under the initiative and determine whether it was an attempt to legislate, or, as contended by the petitioners, a proposed amendment to the Constitution. The Secretary of State had held that the measure submitted was an attempt to enact a statute, which the court decided was correct and refused the writ. The vice in the opinion becomes evident when we examine the nature of the discretion the court holds the Secretary of State was authorized to exercise in determining whether the measure was legislative or an attempt to change the organic law. Courts alone are empowered to determine the character of laws. No precedent can be found, except that in the Roach Case, in which it has been held that a purely ministerial officer is vested with the discretion here sought to be given him. That he is vested with such discretion as will enable him to intelligently discharge his duties as prescribed by law is not to be gainsaid. Such a discretion as this, we said in *State ex rel. v. Lesueur*, 103 Mo. 262, 15 S. W. 539, "inhere in the discharge of his official duties, requiring him to consider before acting, and to search and inquire before reaching * * * a conclusion. Any other theory would be * * * inconsistent with the proper and orderly discharge of his * * * duties." *State ex rel. v. Adcock*, 206 Mo. 557, 105 S. W. 270, 121 Am. St. Rep. 681, *State ex rel. v. Goodier*, 195 Mo. 560, 93 S. W. 928, and *State ex rel. v. Public Schools*, 184 Mo. 304, 35 S. W. 617, 56 Am. St. Rep. 503, afford examples of the court's recognition of the rule announced in the *Lesueur* Case. Such a discretion as this is necessarily exercised by every official charged with a public duty, but it does not from this fact rise to the height of what is known as a judicial power, which would render it uncontrollable by mandamus, concerning the propriety of which writ in the instant case the respondent raises no question.

The reasoning of the principal opinion in the Roach Case, in attempting to confer such discretionary power upon the Secretary of State as will in effect enable him to usurp a well-defined function of the courts, is error, and it is overruled. So far, however, as this case, not only in the principal opinion but in that of Graves, J., which was concurred in

by three other members of the court as then constituted, holds that the character of the duties of the Secretary of State are purely ministerial, it is in accord with the well-established rule on this subject, and hence immune from criticism.

After all that has been said, the sole matter to be determined in the case at bar is the nature of the discretion authorized to be exercised by the Secretary of State. If he is a ministerial officer, about which, in view of the numerous rulings on the subject, there can be no question, the scope of his inquiry when a matter is submitted to him under the initiative must be limited as we have indicated.

A brief review of some recent cases determined by this court, in which the matter here in issue was discussed and ruled upon, is not inappropriate in this connection.

In *State ex rel. v. Johnston*, 234 Mo. 338, 137 S. W. 595, this court, speaking through Valliant, J., in a most lucid opinion in which all concurred, held that a ministerial officer, in that case the Secretary of State, had no right to pronounce an act of the General Assembly unconstitutional and so disobey it. It is true in the Johnston Case that it was a law already enacted which the Secretary of State assumed the right to disobey on the ground of its unconstitutionality; but the principle announced in that case, upon which the ruling of the court was based, was that such official had no discretion in the face of a plain statute, and that the attempted exercise of discretion on his part involved a judicial determination which he had no power to make. So in the case at bar a mandatory constitutional and statutory provision required him to do certain things in carrying out the will of the people preliminary to the submission of the proposed amendment. Admitting as he does, and as the record discloses, that all of the formal requisites of the law had been complied with, his refusal to file said petitions when presented on the ground of constitutional invalidity of necessity involves the exercise of such a discretionary power as is possessed only by the judiciary, and of which, from the very nature of his office, he does not have a shred. Nowhere is this doctrine more clearly and affirmatively announced than in our recent ruling in *State ex rel. v. Carter*, 257 Mo. 79, 165 S. W. 773, in which Faris, J., speaking for the court, says in effect that:

Where all the facts required by law to be submitted appear, the Secretary of State "must file the petition [in that case a referendum one] as presented to him and leave to the courts the determination of questions of fraud, forgery and hermetic illegality; for which determination our statutes, it would seem, have provided full and ample machinery for every condition and contingency, and for the protection and safeguarding of both protagonists and antagonists of the act sought to be referred. Clearly the warning provided for by statute, which recites that a breach of the law as to a referendum petition constitutes a felony and the careful provisions for verification of the stated facts as to real-

dence, names, and qualifications of signers, indicate that these provisions were deemed such adequate safeguards against fraud and forgery as that compliance therewith showing prima facie sufficiency and regularity was intended to import such sufficient verity to the Secretary of State as to make it his duty to file petitions bearing such legal indicia when such were presented to him for filing."

Thus sustained by the rulings cited, the doctrine as to the absence of discretionary power on the part of a purely ministerial officer is shown to have been firmly planted in our jurisprudence. Occasional expressions to the contrary or in seeming modification of the doctrine may here and there appear, but the strong current of judicial reasoning upholds its integrity as announced.

This general deduction authorizes a specific application of the doctrine to the case at bar, in this, that when the petitions in question were submitted to the respondent and he ascertained, as he did, that all the formal statutory requirements had been observed, no other alternative was left him except to comply with the statute defining his duties in regard thereto. The uniformity of the application of this doctrine renders it of such binding force that it cannot be disregarded without doing violence to an unbroken line of precedents in full accord with the spirit of our institutions, and the aid of this doctrine in preserving the line of demarcation between the powers of the co-ordinate branches of government is of such importance that its attempted modification either by judicial construction or legislative enactment is a matter of the most serious consideration. The triune nature of our governments, whether state or national, is known not only to those familiar with statecraft, but to the plain citizen; and it is a fact proved by experience that free government may be best maintained and perpetuated by sedulously restricting the exercise of each of its co-ordinate powers to their respective spheres as defined by the Constitution and established by immemorial usage.

The initiative and referendum are nothing more than added powers of legislation under which the people themselves may enact laws without, as heretofore, resorting for this purpose to the legislative branch of the government, to wit, the General Assembly. We have frequently held, in conformity with the rule of noninterference of one co-ordinate branch of the government with another, that we will not in any manner or at any stage of the proceedings assume jurisdiction of a matter pending before the Legislature, and thus interfere with the exercise of its powers. This self-imposed limitation upon judicial power wisely established and rendered necessary for the preservation of representative government is succinctly declared in *Pitman v. Drabelle*, 183 S. W. 1057, in which Bond, J., speaking for the court, says:

"During the process of legislation in any mode the work of the lawmakers is not subject to * * * arrest or control, nor open to judi-

cial inquiry. (Citing Missouri cases.) But after the lawmaking department of the government in any of its forms or by any of its agencies has finished its work, and the act of legislation in which it was engaged has become fait accompli and is clothed with the outward forms of law, the question of the constitutionality of the completed bill or ordinance becomes one for ultimate determination by the judiciary."

Manifestly, the Secretary of State is pro hac vice but a legislative agency through which, from the absolute necessities of the situation, the people are engaged in legislating; as well undertake to prevent the clerk of the House of Representatives from filing a bill because such bill is unconstitutional.

A like reason exists to prevent our interference with the processes of legislation when inaugurated under the initiative and referendum except as otherwise provided by the statute which authorizes the circuit court, on the showing being made that any petition is not legally sufficient, to enjoin the Secretary of State and all other officers, inferably on the application of any citizen who is interested in the regularity of the proceedings, from certifying or printing on the official ballot for the ensuing election the ballot title and number of the proposed measure. Section 6750, R. S. 1909.

This exception, in order to preserve the harmony of the rule as to noninterference of the judicial with the legislative power, must be limited in its application, when the power of the court to stay action is invoked, under the statute, to an examination of the question as to the legal sufficiency of the form or express contents of the petitions submitted as required by statute, rather than extended to an analysis of their subject-matter and as a consequence a determination of their legal effect, which, as in proceedings before the Legislature, can be inquired into and determined only when they have become laws. Except incidentally, however, we are not concerned with a discussion of this question, because under the facts it is not involved in the determination of the matter before us.

Under our view of this case as above expressed, it is unnecessary to consider any other objections interposed by respondent to the performance of his duty in the matter under review.

From all of which it follows that our permanent writ of mandamus should issue herein, and it is so ordered.

BOND and FARIS, JJ., concur. BLAIR, J., concurs in result.

WOODSON, C. J. (dissenting). The question here presented for adjudication was in principle involved and decided by this court in the case of *State ex rel. v. Roach*, 230 Mo. 408, 180 S. W. 689, 139 Am. St. Rep. 639. That case clearly holds that Roach, the Secretary of State, had the discretionary authority to refuse to file the initiative petition where it

did not conform to the constitutional provisions governing the initiative. In that case I wrote a dissenting opinion, holding in effect that the Secretary of State had no such discretion, and that he must file the petition; but the majority of the court was of a contrary opinion, and held that he possessed that authority, and denied the writ. *State ex rel. v. Roach*, 230 Mo. loc. cit. 450, 130 S. W. 689, 130 Am. St. Rep. 639. Without the case just cited is to be overruled, clearly, to my mind, the peremptory writ in this case must be denied; but we are not asked to overrule that case, but, on the contrary, learned counsel for relators in this case, in open court, concede that the majority opinion in the *Roach Case* correctly declared the law, and by necessary implication insist that my dissenting opinion did not correctly state the law of that case. The law, having been thusly settled, should not at this late date be unsettled without good cause shown. I am therefore clearly of the opinion that the peremptory writ should be denied.

GRAVES, J. (dissenting). I dissent to the order and judgment made in this case for the reasons assigned below. They are hurriedly written, but I prefer that my views go down with the order, and for that reason write now rather than later.

This is an action in mandamus, by which relators seek to compel the Secretary of State to put upon the official ballot for the next general election an alleged amendment to the state Constitution. No question is raised as to relators' right to maintain the suit, nor as to the jurisdiction of this court. The issuance of the alternative writ of mandamus was waived, and the petition therefore stands as and for such alternative writ. This petition sets out in full the alleged proposed amendment, as well as the reasons assigned by the Secretary of State for not placing the same upon the official ballot. It is best to set out the proposed measure in full, including its title. It reads:

"Proposed Amendment to the Constitution of Missouri, to be submitted to the legal voters of the state of Missouri for their approval or rejection at the regular general election to be held on the seventh day of November, A. D. 1916, prohibiting the manufacture of, the introduction into, and the giving, exchanging, bartering, selling, or disposing of intoxicating liquors in the state of Missouri, except wine for sacramental purposes, prescribing a penalty for the violation thereof and repealing all parts of the state Constitution, state and municipal laws in conflict therewith.

"Be it enacted by the people of the state of Missouri:

"Section 1. From and after July first, 1917, no intoxicating liquor or liquors, except wine for sacramental purposes, shall be manufactured in or introduced into the state of Missouri under any pretense. Every person who sells, exchanges, gives, barter, or disposes of intoxicating liquor of any kind to any person in the state of Missouri, or who manufactures, or introduces into, or attempts to introduce into the state of Missouri, intoxicating liquor of any kind, except wine as aforesaid for the purposes afore-

said, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than three hundred dollars, or by imprisonment in the county jail not less than six months nor more than twelve months, or by both such fine and imprisonment.

"All parts of the state Constitution and laws of the state and municipalities therein conflicting with the provisions of this section are hereby repealed."

The return of respondent is as follows:

"Now comes Cornelius Roach, Secretary of State, respondent herein, after entering his appearance and waiving the issuance of the alternative writ, and, for answer and return to said petition standing for said alternative writ of mandamus, moves the court to quash the alternative writ herein, and for his answer thereto says:

"First. Said petition and alternative writ and the matters and things therein, as stated and set forth, are not sufficient in law or equity to entitle the relators to the relief asked for in said petition, or to authorize the issuing of said writ of mandamus.

"Second. For further answer said respondent states that he is the Secretary of State of the state of Missouri, and that as such Secretary of State he is vested with a certain discretion as to the receiving and filing of initiative petitions, and that he is vested with a certain discretion as to the submission of constitutional amendments, and that, being vested with such discretion, he did receive and file such initiative petition and did, in the exercise of said discretion, determine that such constitutional amendment should not be submitted to the people of Missouri to be voted on, and declined and refused to certify to the county clerks in the various counties such constitutional amendment, for the following reasons: (1) Because the proposed constitutional amendment covers a subject of which neither the state of Missouri nor its citizens have any control or power to act, in that such proposed constitutional amendment undertakes to regulate the introduction of intoxicating liquors into the state of Missouri from other states and countries, and is therefore in violation of clause 3, section 8, of article 1 of the Constitution of the United States. (2) Because said proposed constitutional amendment covers two or more distinct subjects, in that it is attempting, first, to prohibit the sale of liquor in the state of Missouri, second, to prohibit the manufacture of liquor in the state of Missouri, and, third, to prohibit the importation of liquor into the state of Missouri, and the attempt to submit such proposed constitutional amendment, embracing, as it does, two or more subjects, is in violation of section 2 of article 15 of the Constitution of Missouri. (3) Because the proposed constitutional amendment is legislative in its character and attempts to change the statutory law of the state of Missouri and is dealing with matters of legislation, rather than amendments to the Constitution. (4) Because upon the face of the proposed constitutional amendment it is not shown that it is and does not purport to be an amendment to the Constitution of Missouri, or a new section thereto.

"Third. Respondent for his further return says that relators are not entitled to maintain said action and are not entitled to the relief for which they pray.

"Wherefore, respondent prays, for the reasons set out and covered by this return, that relators' petition be dismissed, and that said writ of mandamus be denied, and the respondent be permitted to go hence without day, and for general relief."

The issues are finally made up and closed by a motion upon part of relators for a judgment and a peremptory writ, notwithstanding

ing the allegations of the return. The questions are ones purely of law.

I. In this case the Secretary of State is being mandamus'd to put the proposed measure upon the official ballot as an amendment to the state Constitution. Taking the proposed measure proper (that is, excluding the title to the measure and the enacting clause), it does not purport to be an amendment of the Constitution. Upon its face it cannot be told whether it is a proposed constitutional amendment or a proposed law. The initiative statutes and constitutional amendment providing for the initiative only give an additional method of amending the Constitution. They do not change the requisites as to what the instrument upon its face should be or should propose to be.

If the General Assembly was proposing an amendment to the state Constitution, would it not be required that the proposed instrument, exclusive of the title, show that it was an amendment to the Constitution? If it was intended to amend a particular section or article of the Constitution, should it not so state? If it was intended to add to the present Constitution an additional article or an additional section, should it not so state upon its face that it was sought to amend the Constitution of Missouri in a particular named, and further state the context of the proposed section or article to be added?

This has been the course of proposed amendments by the General Assembly, and the proposed amendment by the initiative should take the same course and form. Clip off the title to this proposed amendment (and the title is no part of the amendment), and no person can tell that it is an amendment to the Missouri Constitution. For this reason the respondent was justified in refusing to incur the ballot therewith. It is sought to have the Secretary put it on the ballot as an amendment to the Constitution, when on its face it does not purport to be such.

It was suggested in oral argument that the distinguished counsel who drew the measure now before us had before him a similar provision of another state, which similar provision had been approved by the courts of that state. An examination of all cases cited by relators' counsel in the original brief, and in the supplemental page handed around just before argument, leaves us to look to the cases from Arizona and Oklahoma alone. We take it that the reference was to the Arizona amendment, but for the purpose of this point it is immaterial, because both the amendment in Arizona and the one in Oklahoma emphasize the point we make here, i. e., that the proposed amendment should show upon its face that it is intended to amend the Constitution in some respect. The matter is best illustrated by quoting the material parts of the Arizona amendment to its Constitution. It reads:

"Proposed amendment of the Constitution of the state of Arizona. Prohibiting the introduction into, the manufacture of, and the giving, exchanging, bartering, selling or disposing of ardent spirits, ale, beer, wine or intoxicating liquors in the state of Arizona and prescribing a penalty for the violation thereof.

"Be it enacted by the people of the state of Arizona:

"That the Constitution of the state of Arizona be and is hereby amended by adding thereto another article the same to be numbered XXIII and to read as follows, to wit:

"Section 1. Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured or introduced into the state of Arizona under any pretense. Every person who sells, exchanges, gives, barter, or disposes of ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, or who manufactures, or introduces into, or attempts to introduce into, the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than twenty-five dollars and costs nor more than three hundred dollars and costs for each offense: Provided, that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol."

Note the difference between this instrument and the one we have before us. After the enacting clause in the Arizona amendment, we have this language as a part of the proposed measure:

"That the Constitution of the state of Arizona be and is hereby amended by adding thereto another article, the same to be numbered XXIII and to read as follows, to wit."

The instrument before us does not mention "the Constitution of Missouri." It is true in an unnecessary repealing clause (if it were an amendment to the Constitution of Missouri) the words "state Constitution" are used, but the point we here emphasize is that the body of the act does not purport to amend the Missouri Constitution in any particular, as does the Arizona amendment when it uses the words "that the Constitution of the state of Arizona be and is hereby amended." If the General Assembly of the state of Missouri were proposing an amendment to our Constitution, this would be required. Such proposed amendment would have to show upon its face what change was to be made in the particular section or article of the Constitution to be amended; or, if a new section or article was to be added, it would have to so state. In other words, the instrument upon its face exclusive of the title would have to show it to be an amendment to the Constitution. The initiative is but an additional method of proposing amendments to the Constitution, but it cannot be said that it does away with the necessity of having the proposed measure, exclusive of title, show that it is an amendment or a proposed amendment to the state Constitution. The books will be searched in vain for an instrument amending or proposing to amend the Constitution of the state,

without the body of such instrument shows that it was intended to amend an organic law. The instrument before us is a novelty in this respect. Respondent should not be required to place upon the ballot as a proposed amendment to the Constitution an instrument which itself does not purport so to be.

II. I dissent for the further reason that the peremptory writ of mandamus cannot be granted in this case without overruling the case of *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639. It cannot, upon principle, be distinguished from that case. We clearly held that the Secretary of State, whilst a ministerial officer, was, under the initiative amendment and the statute passed pursuant to its mandate, vested with some discretion as to the filing and acceptance of petitions. Writing at that time (*State ex rel. v. Roach*, 230 Mo. loc. cit. 446, 130 S. W. 689, 139 Am. St. Rep. 639, we said:

"Most ministerial and administrative officers are clothed with more or less discretion, but a wrongful exercise of that discretion may be reached by the courts. The Secretary of State is possessed with discretion. *State ex rel. v. Lesueur*, 108 Mo. loc. cit. 262 [15 S. W. 539]. That the courts will control such discretion under given conditions appears by the following among a dozen other cases: *State ex rel. v. Public Schools*, 134 Mo. loc. cit. 304-307 [35 S. W. 617, 56 Am. St. Rep. 503]; *State ex rel. v. Goodier*, 195 Mo. loc. cit. 560 [93 S. W. 928]; *State ex rel. v. Adcock*, 206 Mo. 560 [105 S. W. 270, 121 Am. St. Rep. 681]."

Further on, at page 447 of 230 Mo., at page 698 of 130 S. W. (139 Am. St. Rep. 639), it was further said:

"The act of 1909 (Laws 1909, p. 554) is a clear legislative declaration of the character of the duties of the Secretary of State under the initiative and referendum amendment. The amendment itself sufficiently declares the character of his duties. But take the legislative construction first. The constitutional amendment provides that the petition, both for the initiative and referendum, shall be filed with the Secretary of State. Section 4 of the act of 1909, carrying out this constitutional mandate, provides that, if the Secretary of State shall refuse to accept and file such petitions, 'any citizen may apply, within ten days after such refusal, to the circuit court for a writ of mandamus to compel him so to do.' This statutory provision, however, as indicated in the opinion on the motion to dismiss, does not deprive this court of its constitutional power to issue writs of mandamus in these cases. Such was conceded by leading counsel for Mr. Dickey. Further on it is provided that, if the court shall find 'that any petition filed is not legally sufficient, the court may enjoin the Secretary of State and all other officers' from placing the measure upon the official ballot. It thus appears that the Legislature never thought that the Secretary of State was beyond the reach of the courts. This act of 1909 very properly recognizes that the acts of the Secretary of State are ministerial, with some discretion to be exercised by him. The Legislature clearly had no idea that the Secretary of State was a part of the legislative department of government, and therefore above and beyond the courts. This section also says that, if the court decides that the petition is legally suffi-

cient,' then the Secretary of State shall be directed to file the same, but, if 'not legally sufficient,' the court shall enjoin the Secretary of State and all other officers from placing the same upon the official ballot. From this it is clear that there is a duty enjoined upon the Secretary of State to examine into the legal sufficiency of these petitions and to file or not file them as his discretion dictates. From his ruling or action redress is left to the courts. In this connection, it should also be remembered that under the Constitution the measure itself is a part of the petition. It says 'every such petition shall include the full text of the measure so proposed.' (The italics are ours.) So that in determining the sufficiency of the petition, both the courts and the Secretary of State have to consider, in a way, the proposed measure. This because it must be included in the petition. We do not mean to say that either the Secretary of State or the courts should hold the petition bad on the sole ground that the measure was unconstitutional, because it is not necessary to pass upon that question for a full determination of this case. Let the evils of the hour be determined during the hour. But this is adrift. Going back to the question as to the status of the Secretary of State in initiative and referendum proceedings, we find that the first lines of section 4 recognize that the Secretary of State, in the exercise of his discretion, might refuse to file some petitions, and throughout this entire section is strong legislative construction adverse to the contention of learned counsel for Mr. Dickey. Not only does the act of 1909 recognize that the Secretary of State is a ministerial officer, rather than a cogwheel in the legislative department, but the initiative and referendum amendment itself does not look upon him otherwise. As to an election upon referred laws, the election may be ordered in two ways: (1) By the Legislature itself; or (2) by the Secretary of State upon the receipt of proper petitions. The Constitution reads: 'The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by the petition signed by five per cent. of the legal voters in each of at least two-thirds of the congressional districts in the state, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded.'

"It is clear that the referendum power may be put in motion by either the Secretary of State or the Legislature, but it will be observed that certain kinds of laws cannot be referred. Does not this contemplate that the Secretary of State shall examine the petitions and see that the petition is sufficient under the Constitution and laws? Suppose a petition for a reference of the law making appropriation for the current expenses should be presented to the Secretary of State, is it to be said that he could not refuse to file such a petition? Is there not a power there for him to judge as to the sufficiency of the petitions under the exceptions in the Constitution itself? The same applies to laws as to the public peace, health, and public institutions. Are these laws to be suspended until action by the people, or has the Secretary of State some discretion? Clearly the latter. The legal sufficiency of the petition is determined from an examination of the petition and the attached measure, which is a part thereof. An examination of the law and the Constitution forces me to the conclusion that the functions of the Secretary are those of a ministerial officer, * * * and not those of a

cogwheel in the legislative department. As above stated, and as shown by the cases cited, the abuse of discretion can be reached by the courts."

I pause to remark that all of the distinguished jurists whose voice and vote added the real strength to the views so feebly expressed by the writer then and now have long since passed over the "Great Divide," but I cherish the recollection of their counsel and views upon this very important question, and I still adhere to those views.

Reverting to the opinion of Fox, C. J., in the same case, it is clearly held that, if the subject-matter of the proposed amendment is not a subject-matter for a constitutional amendment, this court will not, by the discretionary writ of mandamus, compel the Secretary of State to put such proposed amendment upon the ballot. It was found in that case that the subject-matter was legislative in character, and therefore not a fit subject-matter for the Constitution. We sustained the discretionary act of the Secretary of State in refusing to put it upon the ballot as a constitutional amendment. We held further that both the Secretary of State and the courts should, in determining the sufficiency of the petition, consider the subject-matter of the proposed amendment because the initiative amendment to the Constitution made such proposed measure a part of the petition. That we then held we would determine the character of the subject-matter of the proposed amendment, and, if it was not a subject-matter for the state Constitution, we would not compel the Secretary of State to put it upon the ballot, is unquestioned. We must recede from this position, or sustain the Secretary of State in the instant case. I do not recede from it. The proposed measure now before us contains a subject-matter that has been withdrawn absolutely from the control of the state. I am not saying that the people of Missouri, through the initiative, may not amend their Constitution so as to prohibit the manufacture and sale of intoxicating liquors. This they can do. But the proposed measure now before us undertakes to regulate interstate commerce so far as intoxicating liquors are concerned, and this is an attempt by the state to assume control of a subject of legislative action over which the state has no control or power to act. The federal Constitution has withdrawn from the state and the people of the state the power to legislate either through the Constitution or the laws upon the subject of interstate commerce.

In a very recent case (*Adams Express Co. v. Kentucky*, 238 U. S. loc. cit. 196, 35 Sup. Ct. 825, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167), Mr. Justice Day says:

"The Constitution of the United States grants to Congress authority to regulate commerce among the states, to the exclusion of state control over the subject. This power is comprehensive, and subject to no limitations, except

such as are found in the Constitution itself. This general principle runs through all the cases decided in this court considering the matter, and has never been questioned since Chief Justice Marshall, for the court, delivered the judgment in *Gibbons v. Ogden*, 9 Wheat. 1 [6 L. Ed. 23]."

The learned justice was, in the use of the foregoing language, discussing the recent Webb-Kenyon Act quite recently passed by Congress. 37 U. S. Stats. 699 (U. S. Comp. St. 1913, § 8739). He held that this act did not authorize the state of Kentucky to prohibit an express company, engaged in interstate commerce, from delivering a package of liquor coming from Tennessee to a party in Kentucky, where the liquor was for the individual use of the party ordering it from Tennessee.

The Secretary of State is not compelled to accept and place upon the ballot any proposition that may be petitioned for by the requisite number of voters. The proposition petitioned for must be a proper subject-matter of state legislation. If the subject-matter has been withdrawn from the legislative control of the state by the federal Constitution, then our initiative amendment and the statutes passed in pursuance thereof contemplate that the Secretary of State may refuse to act, and the question is then for the courts. Section 6750, R. S. 1909.

We must recollect that the rule which is established in this case not only applies to constitutional amendments proposed by the initiative, but also to laws so proposed.

Now, let us discuss the subject-matter of legislative acts proposed by the initiative. Section 26 of article 2 of our state Constitution says "that the privilege of the writ of habeas corpus shall never be suspended." In the face of the fact that the state Constitution has thus plainly withdrawn this subject-matter, i. e., the suspension of the right to this writ, from legislative control, can it be said that the Secretary of State must place upon the official ballot a proposed law which in effect said no court of Missouri shall ever grant a writ of habeas corpus, simply because such a proposed law was petitioned for by the requisite number of voters?

Section 31 of the same article says that:

"There cannot be in this state either slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted."

Now, must the Secretary of State place upon the ballot a proposed law establishing slavery in Missouri because petitioned so to do by the requisite number of voters? We say not, because the subject-matter has been withdrawn from legislative action by the Constitution. It is no longer a subject-matter of legislation in Missouri, and cannot be a subject-matter of legislation so long as the Constitution stands as it is.

One more illustration under our own Constitution, and we are through. Section 2 of article 10, of the Missouri Constitution says:

"The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly."

Here we have an express prohibition in the Constitution against this class of legislation. Now, suppose the requisite number of petitioners prayed the Secretary of State to place upon the ballot a law (not a constitutional amendment) exempting all corporations and corporate property from taxation, would it be said the Secretary of State must submit such a law by placing it upon the ballot? We say no, because the power to legislate upon this subject has been withdrawn from the people by the Constitution.

What the Constitution of Missouri can and has done as to proposed laws, the Constitution of the United States does as to any kind of action by the states, whether it be in the shape of laws or constitutional provisions. The federal Constitution has withdrawn certain matters from the state's control, and the state cannot legislate thereupon. We use the term "legislate" in its broad sense, which includes Constitution making by the state as well as lawmaking. Wherever the subject-matter is withdrawn from the control and action of the states by the federal Constitution, it is no longer a subject-matter for state legislation.

Suppose there was offered an amendment to the state Constitution fixing the value of foreign money or coins in Missouri. Must the Secretary of State submit the same simply because petitioned for by the requisite number of voters? We say no, because this subject-matter has been withdrawn from state legislative action by section 8 of article 1 of the federal Constitution—the same section which withdraws from state control the matter of interstate commerce. Further, upon the question of the discretionary power of the Secretary of State may be cited the case of *Hodges v. Dawdy*, 104 Ark. loc. cit. 589, 149 S. W. 658, whereat McCulloch, C. J., said:

"It is contended by learned counsel for plaintiffs that, aside from the main question as to the right of 8 per cent. of the voters of a county or municipality to initiate a local measure, the Secretary of State cannot refuse to certify out an initiated bill because, in his opinion, the same is not subject to the reserved power of the people with respect to initiating legislation; and that, regardless of the validity of a proposed law, the Secretary of State should be compelled to certify it out in accordance with the petition. The case of *Threadgill v. Cross*, 26 Okl. 403 [109 Pac. 558] 138 Am. St. Rep. 964, is cited in support of that contention. On the other hand, the Attorney General relies on the case of *State v. Roach*, 230 Mo. 408 [130 S. W. 689], 139 Am. St. Rep. 639, to sustain his contention on this point, and we think he is correct in his contention that the court should not compel the Secretary of State to certify out a proposed measure which is found not to be subject to the initiative power of the people."

Much was said in the argument of this case about the Secretary of State passing upon the constitutionality of a law. This he does not do for the good reason that no law

is before him to be passed upon. He only has before him a petition of voters asking that the proposed measure be placed upon the official ballot. It is far from being a law. The people do not legislate, under the initiative, until they cast their ballots. It is begging the question to say that the Secretary of State is passing upon the constitutionality of a law, because no law is before him to be passed upon. The case law (and the cases are hopelessly in conflict), which says that a ministerial officer cannot pass upon the constitutionality of a law, has no application in the case at bar, because, as before stated, the Secretary of State is not called upon to pass upon such a question. He has no law before him. What he does is to examine the petition, which must contain in it a copy of the proposed measure, and then say whether or not the subject of the proposed measure is a subject of legislation by the state.

The idea is well expressed by the Arkansas court in the *Hodges Case*, *supra* (104 Ark. loc. cit. 590, 149 S. W. 658), thus:

"It is not correct, however, to assume the position here that the Secretary of State has undertaken to declare the proposed measures unconstitutional. He has, upon the advice of the Attorney General, merely said that the bills were not of a character which fell within the terms of the recent amendment to the Constitution nor the Enabling Act. The Enabling Act itself prescribes the practice for the courts in determining whether a proposed measure shall or shall not be certified out by the Secretary of State. It provides, in express terms, that: 'If the Secretary of State shall refuse to accept and file any petition for the initiative or for the referendum, any citizen may apply within ten days to the circuit court or to the judge thereof in vacation for a writ of mandamus to compel him to do so. If it shall be decided by the court or judge that such petition is legally sufficient, the Secretary of State shall then file it.' * * * On a showing that any petition filed is not legally sufficient, the court or judge may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title of such measure."

"The act clearly makes it the duty of the court, on an application for mandamus, to inquire whether the proposed measure falls within the terms of the Constitution as amended, and, if it does, to compel submission to the people; otherwise to restrain the submission of it to the people. It follows therefore that, unless it be found that the measure proposed by the plaintiffs is subject to the initiative power of the people, and that the petition is legally sufficient, according to existing laws, the Secretary of State cannot be compelled to file it and certify the measure out for submission to the people."

This case should have much force because the initiative amendment and the laws afterward enacted thereunder are practically in words like ours.

III. We are cited to the case of *Pitman v. Drabelle*, 183 S. W. 1057, as announcing a different rule from that announced in *State ex rel. Halliburton v. Roach*. This is not true. Both the principal and the concurring opinions in the *Halliburton Case*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639, are planted upon the idea that the law, now

section 6750, R. S. 1909, provided for a review of the question prior to the vote thereon. The Pitman Case involved no such law. The law discussed in the Halliburton Case applies only to the Secretary of State. It does not apply to the election commissioners of St. Louis. In the Pitman Case it was sought to prohibit the election commissioners from putting an initiated proposed ordinance on the ballots. There was no provision of law authorizing that proceeding, but in the face of section 6750, R. S. 1909, it will not do to say that the court cannot prohibit the Secretary of State from putting a proposed measure upon the ballot. This section contemplates that the Secretary may refuse to accept some petitions on account of their legal insufficiency, and if he does the law provides for a court review of the discretion exercised by the Secretary of State. Not so in the Pitman Case. This law also contemplates that the Secretary of State, in the exercise of his discretion, might be willing to put a certain measure upon the ballot which should not be there, and it provides that if the court shall conclude that the petition, which under the Constitution must contain the text of the measure, is not legally sufficient, then it will enjoin the Secretary of State and all other officers from putting such measure upon the ballot. The law itself contemplates a court review for both purposes. No such law was involved in the Pitman Case. Had there been a state law requiring a court review of initiated proposed ordinances as well as initiated proposed laws, then the Pitman Case would have been a parallel to the case at bar; but such is not the fact. The distinction between the two cases is so well marked that further comment is unnecessary.

We are also cited to the case of State ex rel. v. Carter, 257 Mo. 52, at 77, 165 S. W. 773, at 780. There is language in that case to the effect "the duties of the Secretary of State as to filing a referendum petition and dealing therewith are, with us, purely ministerial," and further (257 Mo. loc. cit. 78, 165 S. W. at 781), "he has no discretion in the matter." But this language was not called for by the points raised for decision. The case, however, does recognize that the statutes provide for a court review of the Secretary's action whatever that action may be, and does recognize:

"That by statute legal inquiries may be speedily had in the court either to compel or restrain filing, wherein all legal questions of defaults or defects either forbidding or compelling filing, or forbidding or allowing a vote, may be fully thrashed out."

The rather uncalled for expressions in that case should not be and are not determinative of the question here, and the question clearly decided in the Halliburton Case. Whether or not there was a discretion lodged in the Secretary of State was not urged in the Carter Case. It was not in that case

for decision. The Secretary of State in that case had not refused to act. The language used was used arguendo upon other vital questions in the case, and not otherwise.

If it be held that the language supra, in the Carter Case, rules that there is absolutely no discretion in the Secretary of State, let us see what it leads to under the other rules in that case and the referendum law. We properly ruled in that case that the delay of the Secretary of State in actually casting up the signers should not defeat the right of the signers to have a reference of the measure. We properly ruled that the law is suspended when a petition for referendum, signed by the requisite number of voters, is filed by the Secretary of State. We might have added that if the petition, so signed, was presented to him for filing, within the proper time for filing, it would in law be filed, whether the Secretary of State actually filed it or not. But suppose the law which the petition proposed to refer was the law making an appropriation for the public schools of the state, and suppose the petition was absolutely unobjectionable as to form and as to the requisite number of signers; must the Secretary of State file and accept such petition, and by such filing and acceptance suspend the law until a vote was had thereon? If he has no discretion and must file every petition which contains the requisite number of signers, and which is in proper form irrespective of the subject-matter of the measures in the petition and cannot go to the organic law to see whether or not the subject-matter of the petition is a measure which can be referred, and if his filing and acceptance suspends the law passed by the Legislature, we are left in a precarious position unless some taxpayer watches the state's interest and takes steps to undo what the Secretary of State had to do. We think it the duty of the Secretary of State to watch the public interest, and not leave it to a taxpayer.

The reasonable rule is that the Secretary of State should examine the petition for referendum, which petition must disclose the law to be referred, and, if he sees that it is a law which cannot be referred under the provisions of the Constitution, he should decline to file and accept the same in the exercise of a wise discretion, and, if the interested parties think his discretion wrongly exercised, the court shall open to them for the correction of the Secretary's error of judgment.

IV. That this proposed measure covers at least two distinct subjects, which are not germane, is very clear. One portion of it deals with intrastate commerce in intoxicating liquors, a subject-matter within the legislative forum and lawmaking power of the people of this state. Another portion covers interstate commerce in intoxicating liquors, a subject-matter lodged by the federal Constitution in another and different legislative fo-

rum. Not only so, but a subject-matter expressly taken from the state and lodged with the federal government. The regulation of intrastate commerce and intrastate business is one subject, and the regulation of interstate commerce and interstate business is another and distinct subject. So distinct are they that the people of the United States in making their Constitution have seen fit to assign them to different forums for legislation.

Section 2 of article 15 of the Missouri Constitution says "proposed amendments shall be submitted to a vote of the people, each amendment separately." This provision of the Constitution of Missouri covers amendments by the initiative as well as others. In *Gabbert v. Railroad Co.*, 171 Mo. loc. cit. 105, 70 S. W. 897, Gantt, J., said:

"The foregoing cases are the only ones we have been able to find, and the only ones which the industry of counsel have pointed out. They all concede that the mode established by the Constitution for its amendment must be followed; that it is a limitation upon the power of the Legislature and people alike. To change the Constitution otherwise than by following the methods which the people in adopting it have prescribed is nothing less than revolution. The requirement that amendments shall be separately submitted is mandatory."

The two propositions involved in this proposed measure, i. e., intrastate and interstate commerce in intoxicating liquors, are different subjects. Their submission together is a wrongful act because forbidden by the Constitution, and no court will compel, by the discretionary writ of mandamus, an officer of this state to violate the Constitution and do a wrongful or unlawful act. That this measure is double is well indicated by the discussion of Gantt, J., in the case supra. He says we look to the rule with reference to the title of legislative acts to determine the doubleness of constitutional amendments, and to determine the question as to whether the subjects are so germane to each other as to make but one in fact and in law. If this be the rule, and it is the rule, we find that this court has held that a title to an act which covers only the manufacture of an article will not sustain a law which prevents and punishes the sale of such article. *State v. Great Western Coffee & Tea Co.*, 171 Mo. loc. cit. 639 et seq., 71 S. W. 1011, 94 Am. St. Rep. 802. The two subjects, manufacture and sale, are even held not to be germane. The cases are fully reviewed in that case. An inspection of them shows the doubleness of the measure proposed here.

But where the two subjects are so distinct and so separate as to be lodged in two separate legislative forums, it cannot be urged that they are so germane as to be legislated upon in a single act by either of the legislative forums. We therefore again repeat that no court has by mandamus compelled any officer of its state to violate the Constitution of the state.

To do so is the compelling of a wrongful and unlawful act. Courts never do this. If this proposed measure is double, then our Constitution forbids its submission in one single amendment. Under this phase of the case, it makes no difference whether the Secretary of State has a discretion or not. The court will not, by mandamus, make him become a party to the wrongful act of submitting a measure in violation of the organic law, which he has sworn to uphold and sustain.

For these reasons, among others, I dissent from the order and judgment granting the peremptory writ of mandamus.

REVELLE, J., concurs in these views.

STATE v. EVERTZ (two cases). (Nos. 19467, 19408.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. COURTS \Leftrightarrow 90(1)—STARE DECISIS—DECISIONS OF SUPREME COURT.

Where the Supreme Court had once carefully reviewed, in a proceeding similar in all material features, *Rev. St. 1909, § 8315*, making it a misdemeanor for one to hold himself out as a physician without a license, and ruled that the statute was a proper exercise of the police power, a like conclusion must follow in the instant case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 313-315; Dec. Dig. \Leftrightarrow 90(1).]

2. COURTS \Leftrightarrow 231(19)—RIGHT TO REVIEW.

Jurisdiction cannot be conferred upon the Supreme Court by the introduction into the proceedings and saving in the record of a constitutional question when the same has been determined in a former case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 658; Dec. Dig. \Leftrightarrow 231(19).]

Appeal from St. Louis Court of Criminal Correction; Calvin N. Miller, Judge.

Oscar Evertz was convicted of a misdemeanor, consisting of holding himself out as a physician and offering to treat the sick without a license, and he appeals. Transferred from the St. Louis Court of Appeals (181 S. W. 1055). Case ordered retransferred to the Court of Appeals.

Charles J. Maurer and W. A. Carter, both of St. Louis, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

WALKER, J. The information herein is drawn upon section 8315, R. S. 1909, which charges a misdemeanor in that defendant treated the sick, or held himself out as a physician and offered to treat the sick, without a license. The only ground upon which this court can exercise jurisdiction in this case is that preserved in the defendant's motion for a new trial to the effect that the statute upon which this proceeding is based is in conflict with the state and federal Constitutions, in that it deprives the defendant

of liberty, life, and property without due process of law.

[1] Prior to the rendition of the verdict and the filing of defendant's motion for a new trial in the instant case, section 8315, supra, was carefully reviewed by this court in *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179, in which it was held, in a proceeding similar in all of its material features to that of the case at bar, that the statute was a proper exercise of the state's police power in the regulation of the public health, and hence did not violate either the state or federal Constitution. A like conclusion must therefore follow in the instant case.

[2] Jurisdiction cannot be conferred upon this court by the introduction into the proceedings and saving in the record of a constitutional question when the same has heretofore been determined in a former case. *State v. Campbell*, 214 Mo. 362, 113 S. W. 1081; *Richmond v. Creel*, 253 Mo. 256, 161 S. W. 794; *State v. Finley*, 259 Mo. 422, 168 S. W. 921; *Schmidt v. United Order*, 259 Mo. 497, 168 S. W. 626.

From all of which it follows that this case must be transferred to the St. Louis Court of Appeals; and it is so ordered. All concur.

STATE v. SMITH. (No. 19613.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW §814(17)—CIRCUMSTANTIAL EVIDENCE—DUTY TO INSTRUCT.

Where the testimony for the prosecution is chiefly circumstantial in its nature, it is the duty of the court to properly instruct upon the nature of circumstantial evidence and the law regulating it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1979; Dec. Dig. §814(17).]

2. CRIMINAL LAW §1056(1)—APPEAL—REVIEW OF GROUNDS OF REVIEW.

To make failure of the court to instruct upon circumstantial evidence a legitimate subject of appellate review, the record must disclose that exceptions, general or special, to the giving of any instruction or failure to more fully instruct, were taken and saved during the progress of the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2068, 2670; Dec. Dig. §1056(1).]

3. HOMICIDE §169(4)—EVIDENCE—CONNECTION OF DEFENDANT WITH CONSPIRATORS.

In a prosecution for murder, evidence constituting a chain of incriminating circumstances showing defendant's connection with his alleged conspirators and the principal participants in the crime was competent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 344; Dec. Dig. §169(4).]

4. CRIMINAL LAW §693—TRIAL—OBJECTION TO EVIDENCE.

Where defendant's counsel desired that incidental items of evidence be eliminated which came out while the state was linking together its chain of incriminating circumstances, he should have made objection at that time, since it is de-

fendant's duty to object and inform the court why such evidence should not be received.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1630; Dec. Dig. §693.]

5. HOMICIDE §234(1)—GUILT—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence held sufficient to sustain verdict of guilty.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 482; Dec. Dig. §234(1).]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

George Smith, alias Singer, was convicted of murder, and he appeals. Judgment affirmed.

On September 22, 1914, the defendant, jointly with Charles Fromme and George Koenig, was charged by indictment with murder in the first degree for the killing of Frederick H. Soller, and was later convicted, his punishment being assessed at imprisonment in the penitentiary for his natural life.

The homicide for which defendant was indicted was the result of a daylight robbery which took place at Second and O'Fallon streets, in the city of St. Louis. At and prior to the time of his death the deceased was cashier for the St. Louis Refrigerating & Cold Storage Company, and, as such, it was one of his duties to go to the bank each Saturday morning and obtain money with which to discharge his employers' pay roll. On the morning of the 15th of August, between the hours of 9 and 10, and while returning from the bank in the possession of \$1,534.79, he was shot and killed. His assailants were four men, three of whom actually participated in the robbery and murder, while the other remained in an awaiting automobile in which all made their escape. The four men went north on Second street to Dixon street, and west on Dixon to Broadway, north on Broadway to Cass avenue, then west on Cass to Blair, north on Blair to North Market, west on North Market to 2317 North Market, where the automobile was abandoned and found a short time thereafter. Carl Caldwell, who drove the machine to the place where it was abandoned, and the defendant were arrested that afternoon, but Fromme and Koenig made their escape, and at the time of the defendant's trial had not been apprehended.

The defendant's relations with Fromme and Koenig began about a week prior to the homicide, at which time a chauffeur by the name of Murphy drove the defendant and his coindictes from a saloon at Twentieth and Franklin Streets, in St. Louis, to a roadhouse near East St. Louis. Murphy was a chauffeur in the employ of one Nicholas Rosselli, who was in the "saloon and hotel and automobile business" in East St. Louis. On the evening before the killing the defendant, with a woman, passed Rosselli's saloon in another automobile, at which time Fromme got in Murphy's car and directed him to fol-

low the car in which the defendant was riding. This car soon overtook the defendants, and after some conversation Fromme and the defendant agreed to meet the next morning between 5 and 6 o'clock. At about 11:30 that night the defendant, in pursuance of former arrangements made with Fromme, called Murphy and had him drive the defendant and a woman from a roadhouse to St. Louis. At Jefferson and Chouteau the woman left the car, and Murphy and the defendant then drove to Olive street, where they were joined by two other women, whom they took to the same roadhouse near East St. Louis. About an hour thereafter Murphy, the defendant, and the two women returned to Rossell's hotel, where they remained that night. At about 5:30 the next morning Murphy, the defendant, and two women, accompanied by two bartenders, drove across the river to St. Louis, and let the woman out on Olive street. The remainder of the party drove to a saloon at Fourteenth and Chouteau, and from there went, at the defendant's suggestion, to a saloon at Twenty-Second and Wash streets. Here they found Fromme and Koenig, and after having a few drinks Fromme directed Murphy to call Carl Caldwell at Rossell's hotel and tell him to wait until this party arrived, which Murphy immediately did. Thereupon Murphy, defendant, Fromme, Koenig, and the two bartenders departed and went to Rossell's hotel. As they passed Eighth and Wash streets on their way to East St. Louis, the attention of a police officer was directed to their car, and he took its number. It was then about 8:15 o'clock. At Rossell's hotel they found Caldwell waiting, and, after a conversation between Fromme and Caldwell, the party, including Caldwell, got into Murphy's car and were driven back to St. Louis. Upon arriving there they stopped at a saloon at Fourteenth and Pine streets, which the entire party entered. After having another drink, and while Murphy was in another room, the other four left the saloon, and departed in the machine which Murphy had been driving, Caldwell then acting as chauffeur. According to Murphy, it was then near 9 o'clock. Shortly thereafter persons answering the description of Fromme and Koenig were seen loitering around the southeast corner of Second and O'Fallon streets, the scene of the homicide, while another person was sitting on the curb near an automobile of the design and the description of the Murphy machine, and which was standing about 75 or 80 feet north of that corner. Immediately following the shooting three men were seen running from the place of the killing to this machine and upon reaching same entered it. As they started off a fourth man was seen in the machine. Immediately following this a machine answering the description of the one mentioned and containing four men almost collided with a car driven by one Fitzsimmons at a point about two blocks from the

scene of the homicide. The defendant was identified as one of these four parties. At another point in the course of this machine's travels the defendant was identified as one of the occupants.

The evidence also discloses that at the time of his arrest the defendant made certain statements as to his whereabouts at the time of the killing, which the evidence tends to disprove, and that, after a certain witness had given incriminating evidence against him, he made certain threats.

The defense was largely in the nature of an alibi, in support of which the testimony of several witnesses was offered.

Joseph G. Williams and I. A. Rollins, both of St. Louis, for appellant. John T. Barker, Atty. Gen. (Paul P. Prosser, of Fayette, of counsel), for the State.

REVELLE, J. (after stating the facts as above). [1, 2] I. Appellant urges as reversible error the action of the court in admitting certain evidence and its failure to instruct upon the nature of circumstantial evidence and the law regulating it. Where, as here, the testimony for the prosecution is chiefly circumstantial in its nature, it is the duty of the court to properly instruct upon that subject, just as it is incumbent on it to instruct upon all questions of law arising in a criminal case, but, in order to make its failure in this respect a legitimate subject of appellate review, the record must disclose that exceptions were taken and saved during the progress of the trial.

While there has been at times some difference of opinion as to whether the exception should be specific or is sufficient when general, there has been little, if any, lack of uniformity in holding that an exception of some kind must be taken. *State v. Pfeifer*, 267 Mo. 28, 188 S. W. loc. cit. 339, and cases cited; *State v. Isaacs*, 187 S. W. 21.

The record in the present case fails to anywhere disclose that an exception, either general or specific, was taken and saved to the giving of any instruction, or to the failure to more fully instruct, and under such a condition we are precluded from reviewing the assignment.

[3, 4] II. It is also insisted that error was committed in permitting the witness Murphy to state that he and the defendant had on the night previous to the killing accompanied two women to a resort in East St. Louis, and from there to a hotel, where they remained together during the night. There are certain rules of practice which have ripened into settled principles of law, and one among these is that, where improper evidence is offered, it is the duty of the party who might be injured thereby to object, and then and there inform the court why such evidence should not be received. When the evidence here complained of was introduced, there was not only no specific objection, but

not so much as the stereotyped one made, the only entry being, "Objected to," and even this does not appear in connection with the first references to the matter now objected to. These matters came out incidentally while the state was linking together its chain of incriminating circumstances, while showing the defendant's connection with his alleged conspirators and principal participants in the crime. The matters to which they were but incidents were clearly competent, and, had counsel desired such incidental items eliminated, an objection to that end should have been made. We can but presume that, had the objections here urged been made in the trial court, proper rulings thereon would have obtained.

[5] III. It is not seriously contended that the state's evidence, if believed, is not sufficient to sustain the verdict, and, if such contention were made, it could but be ruled adversely to the defendant. The preceding statement of facts sufficiently establishes his relations with the parties substantially identified as participants, his association with them immediately prior and subsequent to the killing, and his identification as one of the occupants of the automobile, which speedily left the scene of the homicide immediately following the killing.

Finding no reversible error in the record, the judgment is affirmed. All concur.

STATE v. DIXON. (No. 19883.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. HOMICIDE \S 158(3)—THREATS.

Evidence that accused shortly before the killing stated that two or three might get hurt, although he made no specific reference to deceased, was admissible; the question of how far the lack of specificity of such a statement affected its weight being for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 295; Dec. Dig. \S 158(3).]

2. CRIMINAL LAW \S 361(1)—RIGHT TO EXPLAIN STATEMENTS MADE.

Accused was entitled either to deny or to admit and explain a statement which it was proved he had made, that his drunkenness was reason for killing deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 802, 803; Dec. Dig. \S 361(1).]

3. CRIMINAL LAW \S 1120(6)—APPEAL—OFFER OF EVIDENCE.

Refusal to allow accused to explain inculpatory statement by him could not be reviewed, where there was no showing that the proposed statement would, if given, have been in fact an explanation or excuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2931; Dec. Dig. \S 1120(6).]

4. WITNESSES \S 274(2)—IMPEACHING.

Upon cross-examination of witnesses testifying to accused's general reputation for quietude and peacefulness, it was error for the state to show an old affray in which accused was cut and scarred; it appearing that defendant was not

prosecuted for his part therein, but his opponent was.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 966; Dec. Dig. \S 274(2).]

5. CRIMINAL LAW \S 1170½(5)—CROSS-EXAMINATION—HARMLESS ERROR.

In murder trial, cross-examination, outside the scope of accused's examination in chief, as to his friendliness or hostility to deceased, is not reversible error, under Rev. St. 1909, \S 5242, providing that any person testifying on his own behalf shall be liable to cross-examination as to any matter referred to in his examination in chief, etc., where accused merely answered that he had seen people he liked better.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8138; Dec. Dig. \S 1170½(5).]

6. HOMICIDE \S 163(2)—BOLSTERING OF DECEASED'S REPUTATION.

In murder trial, the rule excluding testimony by the state to bolster up the reputation of deceased for being a peaceable, quiet, and law-abiding citizen where that reputation has not been attacked by accused, is not rendered inapplicable by evidence by accused merely that deceased was drunk in the afternoon of the killing, and that he, perhaps with others, had been running his horse along the road and yelling, and that he had, upon some indefinite occasion, carried a pistol.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 312-317; Dec. Dig. \S 163(2).]

7. CRIMINAL LAW \S 666(3)—TRIAL—CALLING WITNESSES.

It is not error, in a criminal trial, for the state to fail to call a witness, even though in attendance in obedience to subpoena, and although accused expected the witness to perjure himself and then to impeach him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1569; Dec. Dig. \S 666(3).]

8. HOMICIDE \S 300(7)—INSTRUCTIONS—APPLICABILITY—IGNORING EVIDENCE.

In murder trial, an instruction on self-defense, mentioning as ground for self-defense only a blow struck by deceased, whereas there was evidence that deceased was reaching for his hip pocket when accused fired the fatal shot, was erroneous as not following the proof in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622; Dec. Dig. \S 300(7).]

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

Robert Dixon was convicted of second degree murder, and appeals. Reversed and remanded.

Defendant was convicted in the circuit court of Lincoln county for murder in the second degree. From a verdict and sentence fixing his punishment at ten years' imprisonment in the penitentiary, he has appealed, after the usual motions.

All of the parties, as well as all of the eye-witnesses, are members of the colored race. Jim Teague, the deceased, lived on a farm near Auburn in Lincoln county, while defendant likewise resided on a farm at a place called Scuffletown, some two miles and a half from New Hope, in Lincoln county. On the evening of the homicide there were some closing exercises of a colored school, which school was in the immediate vicinity of defendant's house, and about one-fourth to one-half a mile northeast thereof. Deceased and

some three or four other of these negro residents of Auburn had come into defendant's neighborhood, ostensibly at least to attend these school exercises. Taking advantage of the opportunity or the excuse thus afforded, a number of them, including deceased, had gathered at defendant's house about 5 o'clock on the afternoon of February 27, 1915, and engaged in drinking a beverage composed of diluted alcohol and sugar, and also, as may be readily surmised, in shooting craps for money.

Defendant seems to have been winning, until, as the inference seems to be, deceased became offended thereat and quit the game, with the expressed intention of leaving defendant's house and of going to the exercises at the school. Before deceased left, however, a quarrel arose between defendant and deceased. This quarrel was over some trivial matter in sequence disconnected from, but inferentially it was an aftermath of, defendant's success in the crap game. In the course of this altercation deceased said to defendant, "You ain't done a day's work in a year," to which defendant replied that deceased was a damned liar. Thereupon deceased and defendant started toward each other as if to fight, but one of the witnesses who was present interfered and came between and stopped them, apparently before they had come to blows. On this question, however, that is, as to whether any blows were struck at this juncture, the evidence is doubtful and dark. In fact, because possibly all of the eyewitnesses are negroes, we may say that the entire record of the happenings just before and at the time of and immediately after the shooting are likewise dark and uncertain, because of the contradictions between the witnesses and because of their unwillingness or inability to tell what they saw and heard, or because they failed to carefully note the things which they saw and heard.

After the initial altercation and after the threatened fight between deceased and defendant had been stopped by one Ben Powell, who was a witness in the case, defendant sat down on a bed on the north side of the room, which bed seems to have been near a gun rack, in which the shotgun used in the homicide was lying. The testimony on the part of the state tends to show that deceased put on his overcoat preparatory, as he stated, to going with one Arthur Reynolds, another witness in the case, to the schoolhouse to attend the exercises. While deceased was putting his overcoat on and while he was actually engaged in buttoning it, defendant, applying toward him an abusive epithet, seized a shotgun and shot deceased, who ran out of the door and fell, dying instantly.

Upon searching the body of the deceased at the coroner's inquest, which was held next day, no weapons were found thereon. Proof came in that a brother of deceased, in the

presence of at least two witnesses, searched the body on the evening of the killing and removed therefrom deceased's pocketbook, but found no weapon on him. To one Hammack, formerly collector of the county, defendant said, upon being apprehended, that "Bad whisky got me into trouble; I was crazy drunk and shot Jim Teague."

The defendant pleaded self-defense, and on his part the testimony tended to show that after the initial altercation between defendant and deceased, the latter who was drunk, or at least drinking heavily, left the room for a moment; returning he came toward defendant and struck defendant in the eye, and thereafter made a motion toward his hip pocket as if to draw a pistol, and thereupon defendant fired and killed him. This was substantially and in brief the testimony given by defendant in his own behalf. As to some of the facts recited by defendant, he was in a way corroborated by one Carter Moore, one of his witnesses. This witness says he saw some object in the hip pocket of the deceased, but he refused to commit himself to the fact that the thing which he saw was a pistol.

Upon the trial of the case the state drew from one of its witnesses the fact that deceased was the owner of a pistol; thereafter defendant inquired of one of the witnesses which he put on the stand whether this witness had ever seen deceased carry any weapon at any time. The witness replied that he had seen deceased with a gun on him several times and had heard other people say they had seen deceased with a gun on him. Neither time, place, nor the details of the carrying of this pistol by deceased were shown. That is to say, neither the manner in which deceased carried it, whether concealed or not, the capacity in which he carried it, nor the time at which he carried it, that is, whether it was sufficiently long before the homicide as to afford opportunity for reformation, was shown. There was some testimony in the case that deceased was drinking and noisy as he came with other negroes along the road from Auburn to the vicinity of defendant's house in the afternoon. Likewise counsel for defendant in his opening statement said that the defense would show that deceased was armed; that he had a pistol on him. As stated, there was no such proof in the case beyond the vague suggestion of the witness Moore.

The state in rebuttal was permitted to show, over the repeated objections and exceptions of defendant, that the general reputation of deceased for being a peaceable, quiet, industrious man was good in the neighborhood in which he lived.

Some hundreds of objections to the introduction of evidence on the part of the state are found lodged in the record. We have gone over this record with the utmost care and find but few of these entitled to consideration. Such of them as by reason of their

importance, are entitled to notice, will be dealt with in our opinion.

Joseph R. Palmer, of Elsberry, and Creech & Penn, of Troy, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

FARIS, P. J. (after stating the facts as above). As forecast, numerous objections and exceptions to the offering of testimony on the part of the state are lodged in the record. But after a painstaking examination we find but six of these entitled to consideration. These are, to wit: (a) That threats made by defendant, without specifically naming defendant as the object thereof, were permitted to be offered; (b) that the state was allowed to show in rebuttal of defendant's testimony of his own good reputation, a cutting affray in which defendant seemingly got the worst of it, without showing that defendant was the aggressor, or at fault, or that he had been convicted thereof; (c) that the state did not offer on its side one Richard or "Piddle" Moore, present, as the record shows, in the courtroom at the time of the trial; (d) that the court refused to permit defendant to explain the alleged statement made by him to the witness Hammack as to his reason for shooting deceased; (e) that the state traveled outside of the defendant's examination in chief and cross-examined him as to his prior condition of feeling or animosity toward deceased; and (f) that the state was permitted to offer testimony of the good reputation of deceased as a quiet, peaceable, and industrious citizen, before that reputation had been attacked by defendant.

The above references to the testimony attacked by defendant, together with an attack made by him on an instruction given by the court, are all the points we find urged by defendant for a reversal, or which we have ourselves been able to find in the record, and which merit any consideration.

[1] I. The assignment of error founded upon the alleged generality of the threat made is based upon the testimony of one Ben Powell, who stated that defendant told the witness shortly before the killing that two or three might get hurt. It is conceded that no specific reference was made to the deceased in this statement.

We need not go at length into a discussion of threats. The matter of the admissibility of prior and recent threats, even though they be general in their nature, was discussed by this court at great length in the comparatively recent case of *State v. Feeley*, 194 Mo. loc. cit. 314, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511. There the conclusion was reached that threats of the character here in question were admissible, when made recently before the homicide; the question of their weight, if they lacked specificity, being for the jury as the triers of fact.

Whatever the law on this subject may be in other jurisdictions (and it is conceded that some other states hold differently), we take it that since the *Feeley* Case the question of the admissibility of prior and recent threats, although such threats may be general in their character, is no longer an open question in this state. *State v. Brown*, 188 Mo. loc. cit. 465, 87 S. W. 519.

II. As forecast, the state showed by a Mr. Hammack, a witness of apparently high standing in the community, who had formerly been county collector, and who, it is needless to state, was a white man, a statement said to have been made by defendant, to the effect that his reason for killing deceased was that he (defendant) was drunk, or crazy from drink. The exact words of defendant we have set out in our statement. Upon the trial defendant was asked whether he had made this statement to Hammack, and if he had why he had made it. The court refused to permit him to do more than to deny that he had made the statement to Hammack. Defendant did not avail himself of the privilege of denying the making of the statement, but insisted that he ought to be permitted to explain why he had made the statement to Hammack. This the court refused. In this we think the learned trial court was in error.

[2, 3] We think that defendant was entitled either to deny or to admit that he made the statement proven against him. In the latter event he ought to have been permitted to explain, if he desired and could, or to state the circumstances under which the statement was made to Hammack. But the condition of the record is such that we are not able to review the alleged error. There is no showing, neither is there any offer to show, whether the explanation which the record foreshadows might have been given, would have been if given, any explanation or excuse or not. In short, the condition presented is one wherein the refusal of the court might have been error or not, according as the explanation or excuse given by the defendant might or might not have explained or excused the statement made by him to Hammack. While there are cases wherein the questions themselves so far show the pertinency of the evidence sought to be elicited as that we are able to say that the refusal to permit an answer is error; but this is not that sort of condition. Here the conditions and facts were such as that the answer made by defendant might or might not have aided his case. Under such circumstances it was his duty to make an offer of proof so that we might here see whether the answer which he was not allowed to make would or would not have aided him. *Holzemer v. Met. St. Ry. Co.*, 261 Mo. 379, 169 S. W. 102; *Shelby Co. R. R. Co. v. Crawford*, 235 Mo. 489, 139 S. W. 115; *Copper & Iron Mfg. Co. v. Manufacturer's Ry. Co.*, 230 Mo. 59, 180 S. W. 238.

[4] III. The defendant in the course of the trial put in much testimony of his general reputation for quietude and peacefulness. In cross-examination of the witnesses offered by defendant in this behalf the state was allowed to show an ancient affray in which defendant was cut by his opponent and scarred about the face, and which scars were called to the attention of the jury. It is shown by the record that defendant was not prosecuted for this affray, but that his opponent was so prosecuted, and the inference is that defendant was not at fault; that is, that he was not the aggressor, but that he was in this ancient altercation the one imposed on.

While we recognize the great latitude permitted in cross-examination in order to test the memory and truthfulness of witnesses offered to prove good reputation, we yet think that the matters inquired about in such a cross-examination should not be merely chimerical, or drawn from the vivid imagination of opposing counsel, or manufactured at the instant for the purpose of producing an erroneous impression, but they ought to have reference to some actual criminality, or breach of the peace, or ill conduct of the party inquired about which would go to hurt reputation. The nature of the things which may form the subject of proper inquiry are fairly foreshadowed in the case of *State v. Beckner*, 194 Mo. loc. cit. 296, 91 S. W. 896, 3 L. R. A. (N. S.) 535, wherein Gantt, J., said:

"We do not desire to be misunderstood on this point: if the defendant had, in the first instance, tendered his character for peace and quiet, it would have been competent for the prosecuting attorney to have tested the credibility of the defendant's character witnesses, by inquiring of them if they did not know or had not heard of the various breaches of the peace and criminal conduct on the part of the defendant, as he did, but until the defendant had made his character in this respect an issue in the case, it was clearly improper to have admitted evidence of his bad character, which did not tend to affect his credibility."

Clearly the mere misfortunes of one whose good reputation is under inquiry and in the balance ought not to be urged against him. For aught that appears the defendant in the prior altercation, wherein he was stabbed and scarred, was not at fault. If he was not, then the misfortune inquired about, wherein he was wholly innocent, ought not to be urged as hurting his reputation, or come into the case for the purpose of darkening or obscuring the real issues which were before the triers of fact. Upon a retrial we do not think that inquiry into matters of this sort, unless turpitude on defendant's part appears therein, ought to be permitted. *State v. Beckner*, supra.

[5] IV. During the trial the state, over the objections of defendant, inquired as to whether defendant had anything against deceased. Defendant answered that he "did not hate" deceased. Being further asked

whether "he loved him" or not, he replied that he had seen people that he liked better than he liked deceased.

This cross-examination is palpably outside of defendant's examination in chief, and if his answers had been such as to hurt his case before the jury we should have no hesitancy in reversing it by reason of this departure. But we cannot say that his answers could possibly have hurt him, as those answers appear in the record. If his answer had been that he did hate deceased, or if he had otherwise by his answer been compelled to admit a motive for the killing founded upon prior anger, or upon an old grudge, we should reverse for this.

The Legislature in its wisdom has seen fit not to permit the cross-examination of a defendant who takes the stand, to travel so far afield from his examination in chief as to hurt his case. Section 5242, R. S. 1909. This legislative inhibition we are compelled to enforce wherever the abuse of it so trenches upon the statutory rights of an accused as apparently to be hurtful. *State v. Pfeifer*, 267 Mo. 23, 183 S. W. 337.

[6] V. Strenuous complaint is made that the state was permitted to bolster up the reputation of deceased for being a peaceable, quiet, and law-abiding citizen before that reputation had been attacked by defendant.

Learned counsel for the state seem to have been of the view that there had been such prior attack made by defendant in a collateral sort of way, that is, that the evidence that deceased was drunk in the afternoon and that he perhaps, with others, had been engaged in running his horse along the road and yelling, and the further fact that he had upon some indefinite occasion carried a pistol, gave warrant for this bolstering up of his reputation on the part of the state in the absence of an attack thereon made by defendant by offering character witnesses.

We do not agree with this contention. An examination of the facts elicited as to the carrying by deceased of a pistol, as we set them out in the statement, discloses that neither the time of deceased's carrying this pistol nor the manner in which he carried it is shown by the witnesses. Such carrying may or may not have been an offense against the criminal law, because it is not shown that the pistol carried by deceased was carried concealed by him; nor is the time at which he carried the alleged pistol shown, even if the same when carried was concealed. So far as appears the carrying thereof in whatever manner borne may have been at a time so far prior to the homicide as that deceased had given to him full opportunity for reformation and in fact may have reformed. This is so palpably an error as that we need not discuss it further. The mere statement of it shows the fact of its erroneousness. *State v. Reed*, 250 Mo. 379, 157 S. W. 317, and cases cited. An error of this sort, unless warranted by

something defendant himself did (*State v. Corrigan*, 262 Mo. loc. cit. 210, 171 S. W. 51), has always been held to be reversible, and while the admission of this testimony may not have hurt defendant, who on the whole, the record considered, apparently fared as well as he deserved, yet we cannot at this distance say what effect this error might have had upon the triers of fact. Neither, we may say in passing, did the other facts shown in evidence warrant the state in bolstering up the reputation of deceased in the behalves in which it was done. For deceased may have been drunk, and he may have run his horse along the public road and yelled while doing so, and yet in respect to that phase of peaceableness here involved have been a model citizen. The phase of character here bolstered up by witnesses to reputation was one which tended to show a man, who by reason of his peaceful disposition, would be unlikely to assault defendant in the way in which defendant swore he was assaulted. This, the pugnacious phase or antithesis of peaceableness, and the one here intimately involved, defendant had in our view of the case, in no wise attacked. A wide distinction is observable between the facts in the case of *State v. Corrigan*, supra, relied on by the state, and those in the instant case.

[7] VI. Much complaint is made of the fact that the state did not put one Richard or "Piddle" Moore on the stand as a witness. This potential witness was, it is to be inferred from the record, present in the courtroom in obedience to a subpoena issued by the state. The force of defendant's contention is difficult to appreciate. It is apparently his theory, however, that Moore, who watched the body of deceased, took a pistol therefrom, and that if Moore had been put on the witness stand by the state an opportunity to cross-examine him as to this fact would have been afforded to defendant, and if the witness had denied the fact an opportunity to impeach him would have been afforded.

The record nowhere discloses any bias, or any reason for bias in the attitude of this negro Moore. He was in attendance at the trial, and though subpoenaed for the state, no reason is shown, or to be conceived why, if his testimony was of value to the defense — i. e., if he in fact had taken a pistol off the body of deceased — defendant could not himself have called him as a witness and elicited such fact from him. Defendant's position here is seemingly bottomed upon the presumption that the witness would have perjured himself, a presumption that we cannot for a moment entertain. If there be any presumption at all in the matter it is that this man would have told the truth if defendant had seen fit to call him as a witness. Turning to the other phase, we cannot of course upon the facts here bottom error upon the failure of the state to call a witness merely

in order that the defense may have an opportunity to impeach such witness. The proposition is wholly untenable, and needs only to be stated in order for this to be apparent.

[8] VII. Defendant also complains for that the learned trial court gave this instruction, to wit:

"To excuse homicide by the plea of self-defense, it must appear that the act of the slayer was apparently necessary to protect himself from death or great bodily harm; and if he used a deadly weapon, and under such circumstances as that he must be aware that death will be likely to ensue, the necessity must be apparently great, and must arise from imminent peril of life or great bodily harm.

"And in this case although you may find from the evidence that the deceased, James Teague, assaulted the defendant Robert Dixon and struck him a severe blow about the face, still if there was no apparent necessity for killing Teague to prevent further injury to the defendant Dixon, and he (Dixon) might have easily protected himself from all injury from Teague without taking his life, then there is no self-defense in the case."

We need not nicely weigh whether this instruction is correct as an abstract proposition or not. It was, we think, error to give it in this case in the form in which it appears. This for the reason that it does not as to the facts recited follow the proof in the case. It mentions only a blow in the face, whereas the further testimony of defendant is that deceased was reaching for his hip pocket when he fired the fatal shot. The witness Carter Moore says that he saw something (he steers clear of actually committing himself to the statement that it was a pistol) in the pocket of deceased. So, if for no other reason, this instruction is bad because it singles out a part only of the facts going to make up defendant's theory of self-defense, and says of this part that it is not of itself sufficient to excuse. So, however proper such an instruction may be as an abstract statement of the law (of which we are not called on to give an opinion), it was not proper here, and upon a retrial it should not be given.

Other complaints are made, but we have examined them and find no merit in them. For the reasons set forth, this case will be reversed and remanded for a new trial. Let this be done. All concur.

STATE v. STOKER. (No. 19395.)
(Supreme Court of Missouri. Division No. 2
Dec. 6, 1916.)

1. CRIMINAL LAW §150—STATUTE OF LIMITATIONS — RUNNING FROM INITIAL ACT — REFORMATION.

The three-year statute of limitations as to the offense of seduction runs from the date of the first intercourse, and subsequent acts cannot be relied upon to avoid the bar of the statute, unless the woman has after the first act duly reformed to come again within the protection of the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.]

2 SEDUCTION \Leftrightarrow 45—REFORMATION—SUFFICIENCY OF EVIDENCE.

In prosecution for seduction, evidence held insufficient to show that the woman, after the first act of intercourse and during the statutory period, had reformed and been again seduced.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 80-82; Dec. Dig. \Leftrightarrow 45.]

3 SEDUCTION \Leftrightarrow 46—CORROBORATION OF INJURED PERSON.

To sustain the charge of seduction, testimony of the injured person as to the promise of marriage must be corroborated.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. \Leftrightarrow 46.]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Albert Stoker was convicted of seduction, and he appeals. Judgment reversed, and defendant discharged.

Bradley & Bradley and C. P. Hawkins, all of Kennett, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

REVELLE, J. [1] The appellant moors his barque with many anchors, assigning 76 judgment infirmities, 75 of which we shall not consider, due in part to our views on the remaining one. The record is voluminous, but the facts pertinent to our review are few, being: On June 24, 1909, the prosecutrix was 14 years of age; on July 4th next following she formed the acquaintance of the appellant; a month later, and at his solicitation, she agreed that at some subsequent period she would become his wife, and still a month later, she, relying upon their mutual promises of marriage, consented to her deflowerment, which was promptly accomplished. Acts of sexual intercourse followed at such intervals and times as opportunities afforded, these being numerous, but less so because of parental and other family interference. On two or three occasions slight misunderstandings arose, and these caused each, for a period of a few weeks at a time, to become nonattentive one to the other, but were then followed by reconciliations and a resumption of all former relations. Whether during any of the time heretofore mentioned the prosecutrix was guilty of acts of sexual intercourse with men other than the appellant, as his evidence tends to show, but which she denies, need not be considered, since we are determining this case wholly upon the evidence adduced by the state. Certain it is from the testimony of the prosecutrix that in September, 1909, she had sexual intercourse with the defendant, and this act was repeated during the next five years as often as opportunity afforded, and they were "on good terms." Since the act which deflowered her occurred in September, 1909, and the prosecution was not begun until more than four years thereafter, it becomes necessary to first determine when the statute of limita-

tion began to operate. The authorities are quite uniform in holding that in such cases the statute runs from the date of the first sexual intercourse, and subsequent acts cannot be relied upon to avoid the bar of the statute, for, after the first act, the woman is no longer regarded as an object of this law's protection, unless she has, perchance, after such act, duly reformed. Cyc. vol. 35, p. 1340; *Hatton v. State*, 92 Miss. 651, 46 South. 708; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

This becomes self-evident when we consider the purpose of the statute and the thing against which it is levelled. It was not intended by this benign law to punish illicit cohabitation, there being other laws on that subject, but to give protection to unmarried and chaste females against the wiles and seductive promises of the man who would deceive and betray and make her a prey to his lust. The forbidden act is that of diverting the woman from the course of virtue and rectitude, and when this is done the state can immediately proceed, and from the date of such act the statute of limitation must necessarily begin to run.

It is, however, equally well settled in this and other jurisdictions that the law under consideration is not restricted in its application to females who have never done wrong, but includes those who have yielded to temptation and have afterwards repented and reformed. The law, humanely recognizing that virtue sometimes trips and falls, but is naturally an amaranthine flower, which should not be soon forsaken, places within the pale of its protection the woman whose glory is that of having risen, as well as the one who has never fallen.

Applying these principles, and considering what has heretofore been said, it becomes evident that if the judgment in the instant case can be upheld, it is because the record discloses that the prosecutrix, after the first acts of intercourse, and during the statutory period, had reformed and was again seduced.

[2, 3] We have scrutinized her own testimony and the rather lengthy record before us, and find nothing to indicate that during the period between the first and last acts of intercourse there was such reformation on her part as to save her from the law's condemnation or place her within its protection. She frankly admits that during this whole period there was but one thing which she considered in determining whether to yield to these acts, and that was appellant's promise to marry her, and this was the same inducement which caused her to first yield. There is not the slightest intimation that she was not willing at all times to thus submit when she regarded herself as engaged. In other words, there is nothing from which we can conclude that so far as her relations with appellant were concerned, she had in any

sense morally reformed. It must be borne in mind that to sustain this charge the testimony of the prosecutrix as to the promise of marriage must be corroborated. The state contends that it has successfully borne this burden by showing that appellant was as constantly attentive to the prosecutrix as opportunities permitted. Her evidence, however, shows that at all times when he was thus attentive she was yielding to illicit relations, and it is evident that the same proof which corroborates the promise of marriage emphasize her failure to have reformed.

This record cannot be read with fairness and justice to all and avoid the conclusion that although this woman was betrayed in 1909 and this defendant was guilty of a crime for which he might have been prosecuted in due time, or later proceeded against under a more serious criminal charge, yet, since the Legislature of the state has written that the crime of seduction must be prosecuted, if prosecuted at all, within three years, this court can but respect such decree, and declare that regardless of the color of appellant's sins, punishment cannot now in this case be inflicted, because of the declarations of the lawmaking power to the contrary.

In view of the prosecutrix's own testimony it would serve no useful cause to remand this case for another trial. The judgment is therefore reversed, and the defendant discharged. All concur.

STATE v. SAAK. (No. 19481.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. INDICTMENT AND INFORMATION \S 111(2)— PRACTISING MEDICINE WITHOUT LICENSE— NEGATIVE EXCEPTIONS.

Rev. St. 1909, \S 8315, declares that any person practicing medicine or surgery without a license from the state board of health, or after revocation of such license, shall be deemed guilty of a misdemeanor, provided that physicians registered on or prior to March 12, 1901, shall be regarded for every purpose as licentiates and registered physicians. An information charging accused with practicing without a license did not negative the exception. Held that, as the exception was not contained in that portion of the statute defining the offense, it was not necessary to negative it in the information; it being matter of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 296; Dec. Dig. \S 111(2).]

2. CRIMINAL LAW \S 1090(5) — APPEAL — OB- JECTION.

Error in denying motion to quash indictment for duplicity is reviewable only when preserved by bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2808-2810, 3204; Dec. Dig. \S 1090(5).]

Appeal from Circuit Court, Warren County; Jas. D. Barnett, Judge.

Henry Saak was convicted of practicing medicine without a license, and appeals. Af-

firmed, and transferred from St. Louis Court of Appeals. 182 S. W. 1074. Affirmed.

Upon an information charging him with a violation of section 8315, R. S. 1909 (practicing medicine, etc., without a license), defendant was tried in the circuit court of Warren county, found guilty, and his punishment assessed at a fine of \$50. From that judgment defendant duly appealed to the St. Louis Court of Appeals, where the judgment was affirmed. The case was duly certified and transferred here by order of the St. Louis Court of Appeals because one of the judges thereof deemed the decision to be contrary to the decision in State v. Carson, 231 Mo. 1, 132 S. W. 587. Because of the absence of a bill of exceptions, our review is confined to the record proper.

T. W. Hukriede, of Warrenton, E. Rosenberger & Son, of Montgomery, and Morris & Hartwell, of La Crosse, Wis., for appellant. John T. Barker, Atty. Gen., W. T. Rutherford, Asst. Atty. Gen., and Emil Roehrig, Pros. Atty., of Warrenton, for the State.

WILLIAMS, C. (after stating the facts as above). [1] I. Section 8315, R. S. 1909, is as follows:

"Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense. Any person filing, or attempting to file as his own a license of another, or a forged affidavit of identification, shall be guilty of a felony, and, upon conviction thereof, shall be subject to such fine and imprisonment as are made and provided by statutes of this state for the crime of forgery in the second degree. Said fines to be turned into the state treasury when collected: Provided, that physicians registered on or prior to March 12th, 1901, shall be regarded for every purpose herein as licentiates and registered physicians under the provisions of this article."

The information does not charge that defendant was "not a physician registered on or prior to March 12, 1901," and appellant contends that by reason of this omission the information is fatally defective.

We are unable to agree with this contention. The rule of law here applicable is correctly quoted and fully discussed in State v. Smith, 238 Mo. 242, loc. cit. 254, 135 S. W. 465, 467 (33 L. R. A. [N. S.] 179), as follows:

"When an exception is contained in a statute defining an offense, and constitutes a part of the offense, an indictment for such offense must negative the exception; but when the statute contains a proviso exempting a class therein referred to from the operation of the statute, an indictment need not negative the proviso. The accused must make the exemption a ground of defense"—citing State v. O'Brien, 74 Mo. 549.

The proviso in the case at bar merely exempted a class from the operation of the statute and falls clearly within the above announced rule.

We do not deem that anything herein stated conflicts in any manner with the holding in State v. Carson, 231 Mo. 1, 132 S. W. 587. The sufficiency of the information was not involved nor discussed in that case, and the argumentative reference therein to the holding in the case of State v. Hellscher, 150 Mo. App. 230, 129 S. W. 1035, on a point not involved in the Carson Case should be treated as obiter dictum.

[2] II. It is further contended by appellant that the information is duplicitious. In the recent case of State v. Flynn, 258 Mo. 211, 167 S. W. 516, Faris, J., speaking for the court, said:

"The general rule is that duplicity in an information or an indictment is cured by verdict (State v. Nienhaus, 217 Mo. 332 [117 S. W. 73]; State v. Davis, 237 Mo. 237 [140 S. W. 902]); but that it is error to refuse to sustain a demurrer or a motion to quash a duplicitious indictment or information *when the attack is timely made and the error properly preserved for review.*" (Italics ours).

In the case at bar, error, if any in this regard was not properly preserved for appellate review. A bill of exceptions was not filed by appellant. The motion to quash and the alleged erroneous action of the court with reference thereto should have been preserved in a proper manner by bill of exceptions. State v. Humfeld, 253 Mo. 340, 161 S. W. 735, and cases therein cited.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the Court. All of the Judges concur.

STATE v. DAVIS. (No. 19686.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. RAPE §55—CONDUCT OF TRIAL—NATURE OF CHARGE.

Where the charge is one which produces prejudice, the prosecution must be conducted with scrupulous fairness to avoid the possibility of adding other prejudice.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 85; Dec. Dig. §55.]

2. CRIMINAL LAW §722(2)—MISCONDUCT OF PROSECUTOR—ARGUMENT.

In a prosecution for rape, reference by the prosecuting attorney in his argument to the appearance and demeanor of defendant during

the trial but not while he was on the witness stand, is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. §722(2).]

3. WITNESSES §347—CREDIBILITY—RAPE—EVIDENCE—COMPLAINT.

While the fact that a girl under 14 years of age made no outcry or complaint, is no defense in a prosecution for rape, it is admissible as affecting her credibility where she testified that defendant used force.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1134; Dec. Dig. §347.]

4. RAPE §59(12)—INSTRUCTIONS—OUTCRY AND COMPLAINT.

In a prosecution for rape, an instruction declaring that it is no defense that prosecutrix made no outcry at the time or complaint thereafter, should be accompanied by an instruction that evidence of the failure to complain or outcry is material as affecting her credibility.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 89; Dec. Dig. §59(12).]

5. RAPE §59(1)—INSTRUCTIONS—BURDEN OF PROOF.

An instruction that the charge of rape is easy to make and hard to disprove is objectionable as apt to mislead the jury as to the burden of proof which rests on the state throughout the whole case.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 88; Dec. Dig. §59(1).]

Appeal from Circuit Court, St. Louis County; Gustavus A. Wurdeman, Judge.

Will Davis was convicted of rape, and he appeals. Reversed and remanded.

On October 5, 1915, the prosecuting attorney of St. Louis county, Mo., filed in the circuit court an information charging appellant with the crime of rape upon Mary Ruth Pritchard, a girl under the age of 15 years. Upon trial appellant was convicted and sentenced to 8 years' service in the penitentiary, and from the judgment so rendered, prosecutes his appeal. The evidence is substantially as follows:

The immediate parties to the transaction are colored, and at the time of the alleged assault the prosecutrix was 8 years of age and resided with her mother in Webster Groves, Mo. On the occasion in question she went to the home of the defendant's grandmother, where defendant was living, for the purpose of assisting in housecleaning. She testifies that after cleaning the room of the defendant's grandmother, she, in accordance with directions from the grandmother, went into the next adjoining room, which was occupied by the defendant, and where she found him with his person exposed. Notwithstanding this, she cleaned his room, after which he forcibly placed her upon the bed, removed a portion of her clothing, and had sexual intercourse with her. Immediately thereafter she went into the room of defendant's grandmother and there complained of the defendant's action. In this she is contradicted by the grandmother. Several days subsequent thereto, and upon statements made by the prosecutrix to her mother, the mother took her to a physician who subjected

her to a physical examination, and this disclosed a rupture of the hymen and inflammation of her parts.

The defense was largely in the nature of an alibi, several witnesses, including the grandmother, testifying that at the time of the alleged assault the defendant was not present. Testimony tending to establish defendant's good reputation for veracity and morality was also offered.

Artee Fleming, of St. Louis, for appellant. John T. Barker, Atty. Gen. (Lewis H. Cook, Asst. Atty. Gen., of counsel), for the State.

REVELLE, J. (after stating the facts as above). [1] I. Aside from evidence of her physical condition several days subsequent to the alleged assault, the testimony of the prosecutrix is uncorroborated. In material respects she is contradicted, but notwithstanding this, and that the state's evidence is not as satisfactory as it seems it should be, we are not inclined to interfere with the jury's finding upon this ground. We have, however, said and now repeat:

"That while corroboration in certain cases may not be legally required, prosecutions upon a charge for which there is a human abhorrence must be conducted with scrupulous fairness so as to avoid adding other prejudice than that which the charge itself frequently produces. The trained legal mind owes this not only to the accused and to society as a whole, but as well to the honest juror, who sometimes, by reason of human sentiment, is led amiss."

[2] The record discloses that during the course of the prosecuting attorney's argument, he made the following remarks:

"If your daughter—and I expect all of you have them—if your daughter were taken and placed upon a bed in the manner that that little child said she was, and that big stalwart young man who can bring—"

And then the following statement:

"Does he seem to think that you 12 men are about now to pass upon his guilt or innocence? Does he seem to be at all annoyed with the situation? Has he shed a tear? Has he been anxious? Has he counseled his attorneys? Has he done a thing but to sit there in that stolid way of his without a change of expression? Gentlemen of the jury, I want to tell you something. If you or I were charged with this crime and were sitting here to-night and await our punishment, can you imagine that we would sit like he sits?"

In these statements counsel went clearly beyond the bounds of legitimate argument. The defendant's demeanor while testifying was a proper subject of comment, the same as that of any other witness, but of this counsel was not speaking. By express statutes state's counsel is precluded from making reference to any failure on the part of any defendant to testify, and to this extent he is clothed with privileges and protection even greater than that of the ordinary witness. If such be the policy of the law, his actions, physical expressions, etc., during his forced presence in the courtroom and at times other than when testifying, should not be commented upon. Such matters are outside of the record and

such argument smacks too much of an appeal to prejudice, and whether made for such purpose or not is clearly calculated to engender it. If this practice were permissible a defendant would be in an ill position to protect himself unless perchance he possessed the attainments of a stage dignitary. If at an unpsychological moment he smiled, or shed a tear, or refrained from so doing, or, if at a given time, bore one instead of another facial expression; or if, as state's counsel charged in this case, he left his defense to his counsel, instead of conducting it himself, he would suffer. It is not by these standards that innocence or guilt is determined.

[3, 4] II. Instruction No. 1, which purports to define the offense with which defendant is charged, declares that in a case of this type it is no defense that the female made no outcry at the time, or complaint thereafter. Literally, this is true, but in our opinion, when the facts are as this case discloses, such instruction should not be given unless the court goes further and directs the jury the purpose for which evidence of failure to complain or outcry is material. While it was unnecessary in order to sustain this charge to show that the assault was accomplished with force, nevertheless the prosecuting witness, upon whose testimony the state almost wholly relies, testified that the act was accomplished with force and violence. The record further shows that the defendant's grandmother was in an adjoining room at the time of the alleged assault, and there is evidence that with a female of the size and age of the prosecutrix, such an assault as she describes, would be accompanied by pain and suffering to her. Under these circumstances, the fact that the prosecutrix made no outcry or complaint and did nothing else tending to attract the attention of those in immediate proximity was important in determining the reasonableness of the girl's statement and her credibility as a witness.

The instant instruction, without qualifying declarations, is calculated to minimize, if not destroy, the effect of such evidence. We have heretofore pointed out the vice of specially calling the attention of the jury to isolated facts, or otherwise giving prominence to the facts of the case favorable to one side, while measurably retiring the view of the other side by ignoring it or presenting it only in general terms.

[5] This instruction also tells the jury that the charge of rape is easy to make and hard to disprove. It is never incumbent upon a defendant in a criminal case to disprove a charge against him—the burden of proof resting throughout upon the state. Instructions which may mislead as to this burden should not be given.

For the errors heretofore mentioned, the judgment is reversed, and the case remanded. All concur.

STATE v. LOEB et al. (No. 19721.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW § 700—TRIAL—OPENING STATEMENT—STATUTE.

The requirement of Rev. St. 1909, § 5231, that in the trial of criminal cases, after the impaneling and swearing of the jury, the prosecuting attorney must state the case, is mandatory, not only because of its form, but to effectuate its purpose to inform the defendant of the facts relied on by the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 700.]

2. CRIMINAL LAW § 422(9), 427(2) — EVIDENCE—ADMISSIONS.

In a prosecution against two defendants, admissions by one of them are admissible against him, but not against the other defendant unless there was proof of a conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984, 1012; Dec. Dig. § 422(9), 427(2).]

3. CRIMINAL LAW § 419, 420(1)—EVIDENCE—HEARSAY.

Evidence of statements heard by the witness outside of court is hearsay and generally inadmissible in a criminal prosecution unless it comes within the well-defined exceptions to the rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973, 975, 976, 980-983; Dec. Dig. § 419, 420(1).]

4. CRIMINAL LAW § 427(4) — EVIDENCE — STATEMENTS OF CONSPIRATOR — PROOF OF CONSPIRACY.

A conspiracy between two defendants to commit the crime with which they are charged, so as to render the statements of one admissible against the other, may be shown by circumstances, but cannot be established by the testimony or statements of one defendant alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1014-1016; Dec. Dig. § 427(4).]

5. CRIMINAL LAW § 752—DEMURRER TO EVIDENCE—JOINT DEFENDANTS.

Where there was sufficient evidence to sustain the conviction of one of two joint defendants, a general demurrer by both defendants to the testimony was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1725, 1726; Dec. Dig. § 752.]

6. LARCENY § 62(1). — SUFFICIENCY OF EVIDENCE—CONNECTION OF DEFENDANTS WITH CRIME.

In a prosecution of two convicts for larceny of goods from a prison contractor, evidence held not sufficient to connect the defendants with shipments made from the prison to one who received the stolen goods outside the prison.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 162; Dec. Dig. § 62(1).]

7. LARCENY § 13—CONSENT OF OWNER.

Where a prison contractor, after learning that some of his goods had been fraudulently billed out by the convict employes, permitted them to be shipped for the purpose of apprehending the one who was receiving them, they thereby consented to the taking, and no conviction for larceny can be predicated on such taking.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 32, 33; Dec. Dig. § 13.]

8. CRIMINAL LAW § 878(2)—VERDICT—GENERAL VERDICT—SEPARATE OFFENSES.

Where the information charges four separate offenses, not the same offense in different ways, a general verdict is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. § 878(2).]

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Henry Loeb and E. Doss were convicted of larceny, and they appeal. Reversed and remanded.

Fenton E. Lockett and James H. Lay, both of Jefferson City, for appellants. John T. Barker, Atty. Gen., and Thos. J. Higgs, Asst. Atty. Gen., for the State.

WALKER, J. Defendants, convicts in the Missouri penitentiary, are charged, in an information filed by the prosecuting attorney of Cole county in four counts, with having at different times and in different quantities stolen men's pants from the shipping room of the Obermann Manufacturing Company engaged at the time in the manufacture of pants and overalls within the walls of the penitentiary. On a trial in the circuit court of Cole county in April, 1916, defendants were convicted and sentenced to two years in the penitentiary; their sentences to commence at the expiration of their present terms of imprisonment.

Frank Beckett, a witness for the state, who had pleaded guilty to a charge of receiving goods stolen from the penitentiary, stated that in October and November, 1915, he lived in Granite City, Ill., and was a brother of Bert Beckett, who had been an inmate of the Missouri penitentiary but had been discharged therefrom in January, 1916. In October, 1915, the witness visited his brother Bert Beckett at the penitentiary, but did not know or meet either of the defendants and had never met them until the preliminary examination preceding the trial. Upon witness' return to his home in Granite City, he says he received a letter from Jefferson City, signed "E. Doss," written on the stationery of the King Brand Manufacturing Company, a trade-name used by the Obermann Manufacturing Company in its shipments to retailers. Witness could not produce the letter, but was allowed to state its contents, to the effect that "they would ship some goods to him if he could sell them." To whom the "they" referred is not shown. Inclosed in this letter was an envelope addressed in typewriting to J. B. Baird, Jefferson City, Mo. Witness answered that he would sell the goods. Soon thereafter he received two shipments. The first contained two dozen pairs of pants. These he sold for about \$25, put \$19 of same in an envelope, and mailed it to J. B. Baird, as per the addressed envelope. The second shipment reached him about October 15, 1915. He

sold the goods and kept the money received therefor. A third shipment arrived some time thereafter, but being sent C. O. D., and the charge thereon being \$67.50, he could not pay it and did not get the goods. He wrote "them" to send the next package to 7209 Lindenwood Place, St. Louis. His sister owned this place, but no one lived there. Thereafter he received notice of the shipment to him at the freight office in St. Louis. He went to get it and was arrested. There was no signature to any of the letters he received, except the first, other than possibly the name "Joe." None of the letters were produced, the witness stating that he had burned them or they had mysteriously disappeared. He was shown envelopes of the Obermann Manufacturing Company and permitted to state that the printing thereon was the same as on the envelopes which inclosed the letters to him in regard to the goods. He does not know who shipped the goods or received the profits for same. He made a statement to police officers in the city of St. Louis when arrested that the goods had been shipped to him from Jefferson City by a man named Baird. Witness was permitted to state, in addition, that his brother Bert Beckett had told him that Doss, the defendant, was the man who had shipped the goods. Doss was not present at the time of this conversation. He denied having framed up this matter against defendants in a conversation with his brother. On cross-examination witness stated that he did not know by whom the first or any of the other letters received by him in regard to the goods was written; that the charge he had pleaded guilty to was a conspiracy in having received stolen goods; that he received the goods in Granite City, Ill.; does not know who shipped them, nor to whom the money went arising from their sale; all he knows is the part he performed in receiving and selling the goods and in forwarding part of the money to Baird; so far as he knows Baird may have shipped them; that his only knowledge as to their shipment by Doss was from the statement made to him by his brother; that the witness has had several conversations with his brother and with the prosecuting attorney in regard to the matter.

Bert Beckett, a witness for the state, testified that he had been an inmate of the Missouri penitentiary from January, 1913, to January, 1916. In October, 1915, his brother Frank Beckett visited him in the penitentiary. There was no conversation between them about handling goods to be taken out of the penitentiary. After the brother had gone, Henry Loeb, a convict, one of the defendants here, asked him if his brother Frank would handle goods stolen out of the penitentiary. Witness says he did not reply, but that Loeb knew where his brother was; that he and Loeb had worked side by side

in the State Clothing Factory, and in this way Loeb had learned the brother's address; that Loeb told him others were interested in getting goods out of the penitentiary; that a party wanted to ship some goods out to witness' brother in St. Louis, or some party there that would receive them and send part of the proceeds back to him. During this time, Doss, the other defendant, was employed as a convict stenographer for the Obermann Manufacturing Company. Witness never talked to Loeb in Doss' presence. He was permitted to state that Loeb told him that Doss had told Loeb that he (Doss) was going to ship some goods to the witness' brother Frank with the understanding that Doss was to receive half of the proceeds of the sale; that Doss was to do the writing, and other convicts, shipping clerks, would attend to the balance of the undertaking; that Loeb said he received \$4.75 as the proceeds of the sale of the goods and that Doss and two other convicts received equal amounts. Witness says he only knew of his brother's connection with the matter from Loeb's statement; neither he nor Loeb had ever worked for the Obermann Manufacturing Company, and that he had never had any conversation with Doss concerning this or any other matter; that he had never communicated with his brother nor received any money for goods shipped out of the Obermann factory; he did not know who Baird was, but that Loeb told him Doss was signing the name of J. Baird to letters; that Loeb told witness Doss got part of the proceeds for the goods that Doss and others shipped out of the penitentiary; that the money was received in an envelope signed J. Baird; that Doss had a way of getting mail before any one else got it. The court refused to exclude or strike out any of the testimony heretofore objected to in regard to the statement alleged to have been made concerning Doss's connection with this matter outside of his presence.

On cross-examination witness stated he had served three years in the Missouri penitentiary and a term in the Illinois penitentiary. He had been given to understand by the prosecuting attorney of Cole county that the proceeding against him in this case would be dropped. He had agreed to tell all he knew about it. Witness never had any conversation with Doss about this or any other case, and does not know that the goods referred to were shipped out of the penitentiary. When in the penitentiary he worked for the State Clothing Company, but had no connection with the Obermann Manufacturing Company. Loeb worked by witness' side. He never saw Loeb or Doss in possession of any of the goods of the Obermann Manufacturing Company.

E. H. Dulle testified for the state. He was employed in October and November, 1915, as credit man for the Obermann Manu-

facturing Company. He O. K.'d orders before they went to the shipping room for packing and shipment. His duty was to pass on credits and determine whether orders were to be executed. All orders were O. K.'d by him before shipments were made. The company had no account at that time with Frank Beckett nor with E. Mills. Doss, the defendant, was employed as a stenographer by the Obermann Manufacturing Company during the months mentioned. Henry Loeb, the other defendant, was not. Doss had a desk near Mr. Watts, the sales manager, in the general office. Goods sold were packed and shipped from the same floor as that of the general offices. Doss had access to the office stationery. Order blanks used by the Obermann Manufacturing Company were introduced in evidence. Witness explained that orders from retailers were shipped under the name of the King Brand Manufacturing Company, and orders from jobbers in the name of the Obermann Manufacturing Company. A blank order of the King Brand Manufacturing Company was admitted in evidence. It described the goods sent out on what witness denominated a bogus order to E. Mills, 7209 Lindenwood Place, St. Louis, and included eight dozen pairs of pants, valued in the order at \$161.50. A Mr. Heck, employed by the Obermann Manufacturing Company, brought the order to witness and asked him if the O. K. thereon was correct. Witness said it was not, that his signature thereon was a forgery, and that the order number was wrong. Orders from salesmen came to witness first unless Obermann was present, in which event the latter would open them. The company had a salesman named Baird. He traveled in Illinois. His name was John A. Mail addressed to salesmen would be handed over generally to Mr. Watts to be forwarded. He would turn it over to his stenographer, usually Doss. If a letter was addressed to J. B. Baird, it would ordinarily be turned over by Mr. Watts to Doss to be forwarded, as in the case of any other letter. After orders were opened by witness, they went to Mr. Watts, and he entered them showing that they were to go to the packing room foreman, who had several convicts attending to the packing. After this they would go to Mr. Heck, the shipping clerk. Convicts packing and shipping goods would get their orders from Mr. Heck. After this work was done, the order would usually go to Mr. Heck, and he would, in the ordinary course of business, send it to the office to be billed. Phelan, a convict, was the billing clerk in November, 1915. When the bill was made out it would go to Mr. Watts. The witness designates the order introduced in evidence as bogus because it does not have the witness' genuine signature thereon and the order number is not correct. It called for eight dozen pairs of pants, valued at \$161.50. The envelope used to inclose this order is similar to those used by the company. Who

mailed it witness does not know. The envelope was offered in evidence.

Ledger sheets of the Obermann Manufacturing Company showing shipments to Frank Beckett and E. Mills were identified. Witness did not at the time detect any error in the shipment to E. Mills for \$161.50. He did in the other to Frank Beckett for \$87.50. The ledger sheets were admitted in evidence. They are not preserved in the record. Witness says that the order for \$87.50 was sent collect, and, not being paid, was held subject to the order of the company, and upon notice that the goods had not been paid for they were returned. Upon the discovery that the second order was bogus, it was found that the order for the goods amounting to \$161.50 to be shipped to E. Mills, Lindenwood Place, St. Louis, was also bogus. These goods were still in the factory at the time, but were permitted to be shipped as billed, and policemen in St. Louis were notified of the facts, and upon Frank Beckett calling for the goods he was arrested. Neither Doss nor Loeb, so far as witness knows, had anything to do with the filling of the orders for either of these shipments. The ledger accounts are the extent of his knowledge on the subject.

H. M. Watts, employed by the Obermann Manufacturing Company, testified for the state. In October and November, 1915, Doss was employed by the company as a stenographer. Loeb was not employed in any capacity. Witness knew Doss, but only knew Loeb by sight. Doss wrote letters, took dictation, and occasionally acknowledged the receipt of orders and sent out cards. He had access to the stationery of the company. Sometimes witness would get a letter for a salesman through the mail and would hand it to Doss to forward because he had the salesmen's weekly addresses. Doss had no opportunity of going through the incoming mail before it passed through witness' hands. If a letter came addressed to J. B. Baird, care of the King Brand Manufacturing Company, he would have given it to Doss to forward. Witness is shown a letter and identifies it as one that was heretofore returned to the company. He did not open the letter when it was returned, this being done by Mr. Dulle. The order contained in the envelope has the witness' initials indorsed thereon. They are his correct initials, but he did not write them. The order in which they appear is bogus. This fact was discovered when the goods were ready to be shipped on November 9, 1915. Witness' attention was first called to the false order by Mr. Dulle on the afternoon of November 9th. The goods described therein were at the time packed and ready for shipment. \$161.50 was the reasonable price of the goods described in the order. The shipment of these goods was permitted to go forward because the company had had other shipments improperly sent out and it was desired to apprehend the parties receiv-

ing this shipment. The railroad agent in Jefferson City and detectives in St. Louis were notified as to the facts of this shipment. The man Frank Beckett was arrested for receiving stolen goods shipped from the Obermann Manufacturing Company and was sent to the penitentiary in February, 1916. Witness testifies in a general way as to three other shipments made on bogus orders not discovered until the witness Beckett had testified in regard to same. The third shipment, in which the value of the property was stated to be \$67.50 was located after the arrest of Frank Beckett. The goods were discovered at the freight office in Granite City, Ill., and were returned to the Obermann Manufacturing Company. Witness identifies the wrapper on the goods shipped to Frank Beckett at Granite City. The employees of the company did not know at the time of this shipment that the order on which it was made was bogus. After the arrest of Frank Beckett, the witness made an examination of the desk used by or at the disposal of Doss. He found therein a blank order book such as are furnished to salesmen on the road. The book was identified and offered in evidence. The proper place for books of this character is in the vault of the company. This order book was prepared for the use of the King Brand Manufacturing Company. Such order books were not necessary in the usual performance of the duties of Doss as stenographer. On cross-examination witness says he does not know that either Doss or Loeb had anything to do with the order offered in evidence or with the packing or shipment of the goods described in the order. Convicts working in the shipping room of the Obermann Manufacturing Company have better opportunities for shipping out goods than Doss. He could not have made this shipment by himself. The goods shipped to Granite City, Ill., on the bogus order, constituted a C. O. D. shipment and were in the possession of the Obermann Manufacturing Company until they were to be delivered to the consignee. They so remained until they were returned by the express company to the Obermann Company at Jefferson City. The shipment to E. Mills in St. Louis was permitted to go out in accordance with the billing, although at the time the company knew that the order under which it was shipped was a bogus one. Witness knows nothing about Doss having any connection with this order. Mr. Heck, the shipping clerk, O. K.'d the shipment of the eight dozen pairs of pants as a genuine order. That other shipments than the two referred to had been fraudulently made, but were not discovered until Frank Beckett testified to having received them. Witness was permitted to state that in the ordinary course of business the defendant Doss could have prepared the order and started it on its way. On further examination witness stated that others in the office could have done the same

thing. No effort was made to discover whether the order or any part of same was in the handwriting of the defendant Doss. Witness says he does not know that any of the handwriting of Doss is in said order.

The defendants offered the following testimony: Defendant Doss denies that he had any knowledge of the shipments charged to have been made by him in the information until he saw an account of it in the St. Louis Republic about the 14th of November, 1915. He had no acquaintance with the Beckett brothers. The first time he saw them was at the preliminary examination. He never had any conversation with them. He had nothing to do with the making up of the orders introduced in evidence; never saw them until they were produced at the preliminary examination. In the discharge of his duties he had nothing to do with any orders that came or went out of the factory. Once in a while he had helped make out the ledger leaves, samples of which were introduced in evidence, and had put the names and addresses on them. This he had done as Mr. Dulle's assistant and at his request. Dulle was acting as credit man for the Obermann Manufacturing Company. The only thing witness ever had to do with sending any goods out of the factory was to send samples to salesmen under the direction of Mr. Watts. He never entered into any agreement with Loeb or anybody else to ship goods out of the Obermann factory, and none of the handwriting in the order is his. Witness never received any mail to be forwarded to Baird, nor did he receive from Illinois or elsewhere any letters addressed to Baird which he opened and took money therefrom and divided it with any one. He never told Loeb that he had done this. He knows nothing about what Loeb received from any one else, but nothing was paid to him by Beckett or any one else. He denies that he placed the order book in his desk. That he had used this desk but two days before the order book was found therein. That the original location of the desks had been changed a day or two before the book was found, and he had never made an examination of the desk. He knows Loeb, the other defendant; but his acquaintance only extends to the purchase of newspapers from him. Never received any letter addressed to a salesman named Blair which he opened, found money therein, and divided it with others. He did not know that there was a salesman named J. B. Baird. He did not receive any letters for him or for John A. Beard which he opened, found money therein, and divided with any one. He has forwarded letters to salesmen in the ordinary discharge of his duties when directed so to do by Mr. Watts. On re-examination witness says he never wrote a letter to Frank Beckett, typewritten or in longhand, signed, "E. Doss"; that he did not know there was such a man as Beckett until he read of his arrest in St. Louis;

that he bought the newspaper from Loeb containing the account; that he never saw the blank order book said to have been found in his desk until it was produced at the preliminary examination. He denies that he is guilty of the offense charged in the information. His name, and he is so recorded in the penitentiary records, is J. P. Doss; that he has never at any time signed his name E. Doss.

Henry Loeb, one of the defendants, denies that he knows the Becketts. Says he knows a convict named Bert, but did not know his name was Beckett until the preliminary examination; that he never had any conversation with this man about shipping goods out of the penitentiary; that at the time Beckett stated this conversation occurred witness was employed by the State Clothing Company and had never been employed by the Obermann Manufacturing Company; that he never at any time was in any way connected with the shipment of any goods from that company; that he never heard about the shipment of the eight dozen pairs of pants to E. Mills in St. Louis until it was testified to at the preliminary examination; that he never stated to Beckett that he was going to ship goods to his brother, or that Doss was and never had any conversation with Beckett or any one else concerning the division of money arising from the sale of goods. Witness did not know that Frank Beckett was in Granite City, Illinois. He denies having anything to do with the making out of the orders offered in evidence and says he has no knowledge of them.

Defendants' assignments of error are: (1) The failure of the prosecuting attorney to make an opening statement of the case to the jury; (2) that the court erred in overruling defendants' general demurrer to the evidence at the close of the plaintiff's case and at the close of the entire case; (3) that the court interjected remarks and commented on the testimony during the trial to the defendants' prejudice; (4) that the court admitted improper testimony; (5) that no asportation of the goods charged to have been stolen was shown; and (6) that the verdict was insufficient to sustain the judgment.

[1] I. In so far as defendants' first assignment is concerned, it is provided in substance in section 5231, R. S. 1909:

"That in the trial of criminal cases, after the impaneling and swearing of the jury, the prosecuting attorney must state the case and offer evidence in support of the prosecution"—we quote only so much of the section as is applicable to the question here involved.

The mandatory nature of this provision is not only evident from its form, but from its purpose. It was intended, while affording the state ample opportunity to vigorously prosecute criminals, to inform them of the course contemplated and the facts relied on by the prosecution, to enable them to fairly meet the charges preferred against them.

A species of lying in ambush to secure convictions was not favored by the framers of our criminal code. That "a fair field and no favor" was the purpose of the statute is not only evident from its terms, but from other well-defined statutory safeguards required to be observed by the state in the prosecution of criminal cases. It is well, therefore, not only in the interest of the successful prosecution of crime, but to enable the accused persons to have the advantage of every defense they are entitled to under the law, that this provision be observed. The reasoning in support of the mandatory character of the statute in question has been well stated in *State v. Honig*, 78 Mo. 249, by Phillips, Commissioner, to which reference may be had for an elaborate discussion of this question. However, the point there, although important in the practice, was held not to be necessary in the determination of the appeal, and hence the conclusion reached was obiter rather than ruling. In the case at bar a like condition exists, because the error assigned was not preserved in such a manner as to entitle it to our consideration.

[2] II. The defendants contend that the trial court should have sustained their demurrers to the evidence. A recapitulation of the testimony introduced to sustain the prosecution, put as strongly as the facts will warrant, as becomes our duty in passing on evidence held sufficient by a jury, is that the defendant Loeb made inquiry of Bert Beckett to ascertain if the latter's brother Frank, then at Granite City, Ill., could be depended upon as a fit fence for the disposal of stolen property, or, put more plainly, if goods were stolen from the Obermann Manufacturing Company would the brother receive and dispose of them and divide the proceeds with those by whom the shipments had been fraudulently made. Further than this Bert Beckett says Loeb told him that Doss, the other defendant, who was not present at any of these conversations, had said he was going to ship some goods to Frank Beckett for which he (Doss) was to receive half of the proceeds upon their sale; that Doss was to do the writing, and the shipping clerks were to attend to the other part; that Doss had told him (Loeb) that he had gotten \$19, together with money for others interested in the fraudulent disposal of the goods, in an envelope addressed to J. Baird in the Obermann Manufacturing Company; that Doss had also told him that one shipment was made C. O. D. by mistake, and that they were going to send eight dozen pairs of pants to E. Mills, 7209 Lindenwood Place, St. Louis.

The brother of Bert Beckett, named Frank, testified: He had received a letter signed by E. Doss on the paper of the King Brand Manufacturing Company; he could not produce the letter, but testified as to its con-

tents; it said they would ship some goods to him if he would sell them; the letter inclosed envelopes addressed in typewriting to J. A. Baird; in one of these he answered saying he would sell the goods; thereafter he received two shipments of goods; one of these he sold, received the money therefor, \$25, and sent \$19 to J. A. Baird; the second shipment, in October, 1915, he received and sold but did not send any of the proceeds to Jefferson City; a third \$67.50 C. O. D. shipment came shortly after, but he did not obtain the goods because of inability to pay the charges; after this he wrote to them to send the next shipment to E. Mills, Lindenwood Place, City of St. Louis; he afterwards had a notice that a shipment awaited him at the freight depot in St. Louis; he went to get it and was arrested; he could produce none of the letters, but said they had been destroyed or had disappeared.

[3] The alleged statement of the accused Loeb to Bert Beckett constitutes the only testimony connecting defendants with the crime charged. Upon the admissibility of this statement in evidence is the correctness of the trial court's ruling in refusing to sustain the demurrer to the evidence to be determined. Generally, statements of the character of these under consideration may be classified as mere hearsay, because, as tersely put by Mr. Starkie (1 Starkie, Ev. 229), "they are nothing more than what the witness says he heard some one else say." This character of testimony derives no credit from the witness himself, but rests for its credibility upon the competency and veracity of another. Recognizing this fact, such testimony is, except in certain well-defined cases, held to be incompetent to establish any specific fact in its nature susceptible of being proved by witnesses who speak from their own knowledge. The extrinsic weakness of hearsay testimony to prove any specific fact, and the frauds that may be perpetrated under cover of its admission, afford reasons why it is generally held inadmissible. *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Queen v. Hepburn*, 7 Cranch, 293, 3 L. Ed. 348; *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092.

[4, 5] Loeb's statement as detailed to the court through the conduit of Bert Beckett's testimony is to the effect that Loeb knew of the plan by which the goods were to be shipped out of the factory, and that he received \$4.75 of the proceeds of their sale. There was therefore, so far as he was concerned, an active rather than a passive cognizance of the crime, or, in other words, such a participation in same by reason of his acceptance of a part of the proceeds as to render him guilty of the offense charged, if other elements necessary to constitute the crime were shown to exist, which we will consider later. It remains to be determined, however, whether Loeb's statement was ad-

missible against his codefendant, Doss. To render it so it is necessary that there be evidence tending to show a conspiracy to commit the crime. This may consist either of facts or circumstances indicative of the criminal relation of the parties. *State v. Vaughan*, 203 Mo. 663, 102 S. W. 644; *State v. Roberts*, 201 Mo. 702, 100 S. W. 484; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133. No testimony was offered either before or after the admission of the statement to show the existence of a conspiracy other than that which may be deduced from the statement itself. A conspiracy cannot be established by the testimony of a conspirator alone, but must be shown by other facts or circumstances independent of his statements. *State v. Gilmore*, 151 Iowa, 618, 132 N. W. 53, 35 L. R. A. (N. S.) 1084; *People v. Parker*, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. loc. cit. 580. In the absence therefore of proof, regardless of the time of its admission, of a conspiracy, the acts or declarations of one in the absence of the others cannot be adduced to establish the criminal relation and hence render testimony in regard thereto admissible. *State v. Faulkner*, 175 Mo. loc. cit. 591, 75 S. W. 116. As a result of this rule the testimony as to Loeb's statement concerning his connection with the crime was admissible, but as to Doss' participation in same it was not. Under this state of facts, the trial court did not err in refusing to sustain defendants' general demurrer to the testimony.

III. We have carefully examined the record to determine the character and deduce therefrom the reasonable effect of the remarks of the trial judge and his alleged comments on the testimony. While somewhat brusque at times and manifesting a proper impatience at the prolix examination of witnesses by counsel, we find nothing therein warranting the conclusion that they were prejudicial to the defendants. The only feature of the trial, viewed as a formal proceeding, was the wide latitude accorded the prosecuting attorney in the examination of the witnesses. Little or no heed was paid to the elementary rules of evidence, not only as to the form of the questions, frequently baldly leading, but to their relevancy to the matter at issue. The inquiry on the part of the prosecutor proceeded at will, and the objections of counsel for defendant went for naught. Defendants do not, however, preserve this as a ground of error, and we refer to it only in passing that perchance it may not occur in the future.

IV. In the view we take of the entire evidence, as will hereafter be disclosed, it is not necessary to discuss defendants' contention as to the improper admission of testimony further than we have indicated in paragraph II of this opinion.

[6] V. Defendants contend that the elements necessary to constitute larceny are ab-

sent from the evidence. Aside from the general statement alleged to have been made by the defendant Loeb, the only evidence of the taking of the goods constituting the first and the second shipments is confined to the testimony of Frank Beckett. He states that he received these shipments from J. B. Baird of Jefferson City. Of these the Obermann Manufacturing Company had no knowledge until the false billing of the order for the eight dozen pairs of pants was discovered, when the books were examined, and it was found that fraudulent shipments of goods had theretofore been made from the factory. When, of what character, in what amount, and by whom they were made, the record does not disclose. Unless we piece out this general showing with presumptions, we cannot reach the conclusion that the particular shipments referred to by Frank Beckett were made up of the goods shown by the company's books to have been fraudulently sent out. We may therefore properly dismiss the first and second shipments from consideration.

The third, or C. O. D., shipment was billed to Frank Beckett presumably from the Obermann factory, although there is no direct evidence of this fact. Upon Beckett's inability to pay the charges thereon the goods were returned to the factory. Even if it be admitted that the evidence establishes such a constructive fraudulent taking or asportation of these goods as to constitute larceny, there is an absence of any facts of sufficient probative force to connect the defendants therewith. The billing of the fourth shipment of the eight dozen pairs of pants was known by the representative of the Obermann Company to be false after the goods had been billed, baled, and labeled, and the shipment was permitted to be made with a view to the apprehension of the fraudulent consignee. Upon his calling at the freight office for the goods he was arrested.

[7] Leaving out of consideration for the moment whatever evidence there may be as to defendants' connection with this shipment, we are confronted with this query: Do the facts disclose such a trespass as will constitute larceny? If it be conceded that the false billing and labeling of the goods have been sufficiently shown to constitute a constructive asportation (*State v. Rozeboom*, 145 Iowa, 620, 124 N. W. 783, 29 L. R. A. (N. S.) 37; *Comm. v. Barry*, 125 Mass. 390; *Coward v. State*, 24 Tex. App. 590, 7 S. W. 332; *Conner v. State*, 24 Tex. App. 245, 6 S. W. 138), we find that the owner, or its representatives, which is the same thing, upon discovery of this fraud, directed that the goods be shipped as labeled, thereby sanctioning the theretofore unlawful taking. The shipment thus directed, so far as the evidence discloses, was a general consignment or one without reservations, and the technical title to the goods was in the consignee from the time of their delivery to the carrier. *Scharff v. Meyer*,

133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Carder v. Railroad*, 170 Mo. App. 698, 158 S. W. 517. But we need not resort to technical titles to determine this question. In *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, this court held if the owner of goods consents to their taking by another, though only for the purpose of entrapping and prosecuting the intended thief, the owner's consent divests the transaction of the elements necessary to constitute larceny. A casual reading of the opinion in *State v. West*, 157 Mo. 309, 57 S. W. 1071, might lead to the conclusion that the court had therein held differently from the ruling in the *Waghalter Case*; but it will be found that the facts in the *West Case* disclose that the owner had not consented to the crime, and hence there was no ground there for the application of the rule. The doctrine declared in the *Waghalter Case* is subject to modification dependent upon the facts in each particular case, but under a similar state of facts the rule there announced is applicable to the effect that, if an owner voluntarily delivers his property to one who wishes to steal it, there is no trespass and hence no larceny. *Topolewski v. State*, 180 Wis. 244, 109 N. W. 1087, 7 L. R. A. (N. S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627; *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; *Regina v. Schmidt*, 14 W. R. 286; *Regina v. Villen-ski*, 41 W. R. 160. But aside from the absence of the elements necessary to a larceny there are no facts connecting the defendants with this shipment.

[8] VI. Defendants contend that the verdict is not sufficient to sustain the judgment. It is in this form:

"We, the jury, find the defendants guilty as charged in the information and assess their punishment in the penitentiary for a term of two years."

The information charges four separate larcenies. The goods described to have been stolen are different in each, as well as the dates of the commission of the offenses. It is not material that this objection is not formally preserved. A verdict is a part of the record proper (*State v. Standley*, 232 Mo. loc. cit. 25, 132 S. W. 1122), and it is incumbent upon us to determine whether it is certain, positive, and free from such ambiguity as will uphold the judgment. The following rule has so frequently been declared by this court that its statement will suffice to settle this contention, viz.: If different counts charge different offenses and not the same offense in different forms, a general verdict will not be sufficient. *State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561; *State v. Standley*, 232 Mo. 23, 132 S. W. 1122; *State v. Conway*, 241 Mo. 271, 145 S. W. 441; *State v. Washington*, 242 Mo. 401, 146 S. W. 1164. The verdict does not conform to the requirements of this rule, and we sustain the defendants' contention.

From the foregoing it follows that the

judgment of the trial court must be reversed, and the cause will be remanded, that the court may take such action in the premises as to it may seem proper. A retrial of the defendants upon the evidence adduced will be a useless formality. All concur.

STATE v. KINNEY, (No. 19710.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

WITNESSES §277(5) — CROSS-EXAMINATION OF DEFENDANT—SCOPE.

Defendant's statement, in answer to the question whether he was guilty, that he had never committed a crime, which was nothing more than the law presumed, did not authorize asking him on cross-examination as to having issued bad checks; his statement constituting no reference to the subject of bad checks, evidence of issuance of bad checks not being competent on the prosecution for burglary, and impeachment by evidence of commission of a crime without conviction thereof not being permitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979, 980; Dec. Dig. §277(5).]

Appeal from Criminal Court, Jackson County; E. E. Porterfield, Judge.

David Kinney was convicted, and appeals. Reversed and remanded.

Defendant was convicted of burglary and larceny, and his punishment was assessed by the jury at five years in the penitentiary. He has appealed.

There was evidence on the part of the state tending to show that on the night of March 22, 1915, the defendant burglarized the store of the Boley Clothing Company, and stole three overcoats of the value of \$55. The defendant became a witness in his own behalf. On his direct examination the following occurred:

"Q. And are you guilty, then, Mr. Kinney? A. No, sir; I am not guilty. Q. Of the burglary of this store? A. I have never committed a crime in my life."

During his cross-examination he was asked as to certain checks he had given to persons without having any money in the bank to meet such checks, and the following occurred:

"Mr. Garnett: Hold on a minute. That is objected to as highly improper, incompetent, irrelevant, and immaterial; was not gone into on direct examination. The Court: He said he never committed a crime, and he can cross-examine about that. Mr. Curtin: He said he never committed a crime in his life. The Court: Objection overruled. (To which ruling and action of the court the defendant then and there at the time duly excepted and still excepts.)"

Whereupon the defendant admitted that he did give certain checks without any money in the bank to meet them.

Garnett & Garnett and Denny Simrall, all of Kansas City, for appellant. John T. Barker, Atty. Gen., and Shrader P. Howell, Asst. Atty. Gen., for the State.

ROY, C. (after stating the facts as above). Appellant claims that the examination of defendant as to the worthless checks given by him was error. The Attorney General insists that the statement of the defendant in his direct examination that he had never committed a crime in his life makes such cross-examination competent.

In the absence of evidence, the law never presumes, even in a civil case, that a crime has been committed. *Capp v. St. Louis*, 251 Mo. loc. cit. 373, 158 S. W. 616, 46 L. R. A. (N. S.) 731, Ann. Cas. 1915C, 245; *Hendricks v. Calloway*, 211 Mo. loc. cit. 500, 111 S. W. 60. On the trial of this case there was, until the contrary was shown, a presumption that the defendant was innocent of any crime, the one charged, or any other. So far as any crime other than the one charged in the information is concerned, the statement of the defendant that he had never committed a crime in his life was no more than a statement of what the law presumed, and, for that reason, was as to such other crimes of no importance.

There are three circumstances under which, in the trial of one charged with crime, evidence as to another crime committed by him may be admitted:

1. When it tends to establish: (1) Motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial. *Wharton on Crim. Ev.* (9th Ed.) § 48; *State v. Bailey*, 190 Mo. loc. cit. 280, 88 S. W. 733; *State v. Hyde*, 234 Mo. loc. cit. 228, 136 S. W. 316, Ann. Cas. 1912D, 191.

2. Where a witness testifies to the defendant's good character, it seems that he may be cross-examined as to what he has heard about other crimes committed by defendant. *State v. Burgess*, 259 Mo. 383, 168 S. W. 740.

3. Under the statute, when the defendant becomes a witness, his conviction of another offense may be put in evidence. R. S. 1909, § 6383.

It was said in the *Hyde Case*, supra:

"One who commits one crime may be more likely to commit another; yet, logically, one crime does not prove another, unless there is such a relation between them that proof of one tends to prove the other."

We thus see that the evidence as to the bad checks was irrelevant and had no tendency to prove or disprove the charge which was being tried. It was not competent as evidence under either of the three subdivisions above mentioned. It was not proper to impeach defendant as a witness by proving that he committed other crimes of which he was never convicted. *State v. Banks*, 258 Mo. loc. cit. 493, 167 S. W. 505.

We have not overlooked the fact that, in the cross-examination of the ordinary witness, counsel is not limited strictly to relevant matters. *Wendling v. Bowden*, 252 Mo. loc. cit. 695, 161 S. W. 774. He may go into matters of misconduct on the part of the witness tending to discredit him. But in the case of one on trial for an offense the cross-examination of the defendant is limited to matters to which reference was made in the direct examination.

We take into consideration the following facts: (1) The statement by defendant that he had never committed a crime in his life was made without the suggestion of his counsel. (2) It was not a statement of anything more than the law presumed. (3) Evidence as to the bad checks was irrelevant and collateral as to the offense charged in the information. (4) That statement did not mention checks or any other special transaction. And we hold that under those facts the statement by defendant did not constitute a reference to the subject of the bad checks in the sense contemplated by the statute, and that the cross-examination of defendant in the respect complained of was improper.

Other points are discussed in appellant's brief, but they were not properly saved in the bill of exceptions.

The judgment is reversed, and the cause remanded.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

STATE v. VOLZ. (No. 19714.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. RAPE § 51(1) — EVIDENCE — AGE OF DEFENDANT — DECLARATION.

Testimony by the prosecuting witness that defendant stated he was 21 years old, is sufficient to justify the jury in finding that he was more than 17 years, so that he might be convicted of the offense defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 71; Dec. Dig. § 51(1).]

2. RAPE § 6, 13 — ELEMENTS OF OFFENSE — FORCE.

The offense of carnally knowing a previously chaste girl between 14 and 18 years old, defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218, may be committed with or without force or the consent of the girl.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 6, 12; Dec. Dig. § 6, 13.]

3. CRIMINAL LAW § 1172(1) — HARMLESS ERROR — INSTRUCTIONS — AGE OF DEFENDANT.

In a prosecution for carnally knowing a chaste girl, defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218, which requires defendant to be 17 years of age, the giving of an instruction that defendant must be 16 years

of age was harmless where the uncontradicted evidence fixed his age at 21.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154; Dec. Dig. § 1172(1).]

4. CRIMINAL LAW § 1172(9) — HARMLESS ERROR — INSTRUCTIONS — PUNISHMENT.

The giving of an instruction which erroneously states the punishment is harmless where the statute makes it the court's duty to fix the punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3162; Dec. Dig. § 1172(9).]

5. CRIMINAL LAW § 1172(7) — HARMLESS ERROR — INSTRUCTIONS — PUNISHMENT — ERROR FAVORABLE TO DEFENDANT.

Accused cannot complain of error in an instruction fixing the maximum punishment at only one-half that fixed by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3160; Dec. Dig. § 1172(7).]

6. CRIMINAL LAW § 814(1) — INSTRUCTIONS — CONVICTION FOR DIFFERENT ACT.

Where the evidence showed two acts of intercourse with a girl between 14 and 18 years old, the second of which was at a time when she was no longer chaste, an instruction that if the jury should find that the defendant committed the act within the period of limitations they should convict, but which included in the elements of the offense a statement that they could not convict unless she was chaste when the act was committed, was not erroneous as permitting the jury to convict for the second act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1980; Dec. Dig. § 814(1).]

7. CRIMINAL LAW § 1172(1) — HARMLESS ERROR — INSTRUCTIONS — GRAMMATICAL ERROR.

A grammatical error in an instruction which could not mislead the jury does not require reversal of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154; Dec. Dig. § 1172(1).]

8. CRIMINAL LAW § 814(17) — REQUESTED INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

It was not error to refuse a requested charge that the chastity of prosecutrix could be proved by circumstantial evidence, where there was no circumstantial evidence to that effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1979; Dec. Dig. § 814(17).]

9. CRIMINAL LAW § 809 — INSTRUCTIONS — CONSENT.

In a prosecution for carnally knowing a chaste girl, an instruction that it was immaterial whether the prosecutrix did or did not consent, that consent was no defense, could not have misled the jury into thinking that the consent could not be considered by them in determining the previous chastity of prosecutrix, though the use of the word "immaterial" therein was unfortunate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.]

10. RAPE § 36 — PRESUMPTIONS.

In a prosecution for carnally knowing a chaste girl, there is no presumption that the prosecuting witness is chaste.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 46, 47; Dec. Dig. § 36.]

11. CRIMINAL LAW § 823(9) — REQUESTED INSTRUCTIONS — REPETITION OF CHARGE.

In a prosecution for carnally knowing a chaste girl, where the jury were instructed that

the law presumed defendant's innocence, and that the state must prove his guilt beyond a reasonable doubt, and that the fact of prosecutrix's chastity must be found by the jury before finding a verdict of guilty, the refusal of a requested instruction that there was no presumption the prosecutrix was chaste, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. ☞823(9).]

12. CRIMINAL LAW ☞809 — REQUESTED INSTRUCTIONS—MISLEADING INSTRUCTION.

In a prosecution for carnally knowing a chaste girl, a requested instruction that there was no presumption of prosecutrix's chastity was properly refused as likely to mislead the jury into believing that there was a presumption the other way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. ☞809.]

13. CRIMINAL LAW ☞721(1)—MISCONDUCT OF PROSECUTOR — REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY.

It is highly improper for a special prosecutor in his closing argument to refer to the failure of accused to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. ☞721(1).]

14. CRIMINAL LAW ☞1171(5) — MISCONDUCT OF PROSECUTOR—ACTION BY COURT.

In a prosecution for carnally knowing a chaste girl, where the special prosecutor had, without rebuke by the court, referred to defendant's refusal to marry prosecutrix, which was not shown by the evidence and sought to induce the jury to convict to protect their own daughters, the action of the court in severely rebuking him for referring to defendant's failure to testify does not cure the error, though it might have been sufficient if his only misconduct were the reference to the failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. ☞1171(5).]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Arthur Volz was convicted of carnally knowing a girl between the ages of 14 and 18, who was of previous chaste character, and he appeals. Reversed and remanded.

Upon an information charging him with having carnal knowledge of an unmarried female of previous chaste character, between the ages of 15 and 18 years, defendant was tried in the circuit court of the city of St. Louis, found guilty, and his punishment assessed at a fine of \$500 and 6 months' imprisonment in the city jail. Defendant duly appealed. The prosecutrix on May 1, 1914, the date of the alleged offense, was 16 years, 1 month and 4 days old, and resided, with her parents, in the city of St. Louis. About 7 p. m. of that day, the defendant, a young man about 21 years old, living with his parents just across the street, asked the prosecutrix to take a walk with him. She had known the defendant about 10 years, and accepted the invitation. The two proceeded about six blocks from the prosecutrix's home

out into O'Fallon Park, and when they reached a dark, grassy place in the park, prosecutrix said that defendant asked to have intercourse with her, and that "I refused, but I was forced to." That the defendant threw her down and had intercourse with her, and said that "if anything happened to me, he would get me out of it." She testified that this was the first time that she had ever engaged in an act of sexual intercourse. The following February a girl baby was born. On cross-examination, prosecutrix admitted that a short time after this occurred she again had intercourse with the defendant, defendant, telling her that if anything happened from the first act he would not get her out of it unless she again submitted to his lust. The mother of prosecutrix testified as to the age of prosecutrix, and that her daughter had always been a good girl; had never worked out anywhere, but had assisted about the home, doing household duties. The mother noticed that the daughter was "getting large" and interrogated the daughter. Shortly after that the mother met the defendant on the street and told him about the situation, and the defendant told her he would come over and see them, but that he would not do it while the witness' husband was at home. Defendant failed to come to the prosecutrix's home, and the mother went to defendant's home and talked to defendant's mother about the matter. Shortly after this defendant, accompanied by his brother, went to the home of prosecutrix and told prosecutrix's mother that they should have an abortion performed, and that he would pay for it. He there admitted that he was the father of the unborn child. On cross-examination the mother of prosecutrix admitted that she employed an attorney to see if arrangements could not be made for defendant to marry her daughter, but denied that she had ever attempted to accept money in lieu of a prosecution. The mother of prosecutrix also wrote a letter to the father of defendant, informing him of the trouble. In response to this letter the defendant and a Mr. Frank came over to the house and stated that the father of the defendant would pay for the confinement, but the mother of prosecutrix refused to accept this, stating that, "It was not treating my girl just or doing anything for her baby."

Five witnesses testified that, prior to this occurrence, the reputation of prosecutrix for virtue and chastity in that community was good.

The defendant produced as a witness one Mr. Chas. Hade, who testified that prior to May 1, 1914, he had had sexual intercourse with the prosecutrix 15 or 18 times, but he was not very definite in fixing the place and time of the different occurrences, and on cross-examination admitted that he was related by marriage to the defendant on trial. Two other young men were placed on the

stand by the defendant to testify that they each had had sexual intercourse with the prosecutrix, but they were unable to fix the date prior to May 1, 1914. Three police officers testified that they had seen the prosecutrix out late at night on different occasions and as late as 1 o'clock a. m. one morning in July, 1914, with a young boy named Uncer. On cross-examination circumstances were brought out to show the existence of a friendly relationship between defendant's father and these policemen.

In rebuttal the prosecutrix testified that she was not out at 1 a. m. in July, 1914, with the Uncer boy, and her mother testified that the prosecutrix was never out late at night unless some elderly person or her brother or sister were with her. The state then called young Uncer, who denied that he was out at 1 o'clock a. m. with the prosecutrix in July, 1914.

The defendant did not testify in his own behalf.

Bass & Bass, of St. Louis, for appellant. John T. Barker, Atty. Gen., and S. P. Howell, Asst. Atty. Gen., for the State.

WILLIAMS, C. (after stating the facts as above). [1, 2] I. It is contended that the evidence was insufficient to support the verdict; (1) Because there was no legal proof that defendant was over 17 years of age; and (2) because the evidence proved a case of forcible ravishment only, and therefore not such a case as could come within the meaning of section 4472, R. S. 1909, as amended in the Session Acts of 1913 at page 218.

Each of said points must be ruled against appellant. Prosecutrix testified that defendant told her he was 21 years old. That was sufficient evidence to justify the jury in so finding. As to the second point it is sufficient to say that the sexual act denounced by the above section of the statute constitutes a crime when committed under the conditions detailed in the statute, whether accomplished with or without force, or with or without the consent of the female. *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

[3] II. The first paragraph of instruction No. 1 is attacked. Said paragraph reads as follows:

"If in consideration of all the testimony in the case, in the light of the court's instructions, you find and believe from the evidence that at the city of St. Louis and state of Missouri, on or about the 1st day of May, A. D. 1914, or at any time within three years next before the filing of the information herein the defendant Arthur Volz was then and there a male person over the age of sixteen years, and that he did then and there intentionally, unlawfully and feloniously have carnal knowledge of the body of one, * * * and that at the time he had such carnal knowledge of the said * * * she was an unmarried female of previously chaste character between the ages of fifteen and eighteen years, you will find the defendant guilty as charged in the information and assess his punishment at imprisonment in the penitentiary for a term of two years, or by a fine of not less than

one hundred dollars nor more than five hundred dollars, or by imprisonment in the city jail not less than one month nor more than six months or by both such fine and imprisonment; and unless you so find the facts to be, you will find the defendant not guilty."

Section 4472, *supra*, before being amended in 1913 (see Session Acts of 1913, p. 218), did fix the minimum age of the male at 16 years and the maximum punishment at 2 years in the penitentiary. By said amendment the minimum age of the male was changed to 17 years and the maximum punishment was changed to 5 years' imprisonment in the penitentiary. Said instruction was therefore erroneous in the matters above indicated, but we do not consider either of said errors to be prejudicial for the following reasons: Concerning the first point the uncontradicted evidence fixed defendant's age at 21. If there had been an actually contested issue concerning defendant's age—some evidence fixing it below 17—then quite a different situation would be confronted and no doubt the error would be prejudicial. But under the present state of the record it clearly appears that defendant could not have been harmed by the error.

[4] Concerning the second point it is sufficient to say that it was the court's duty under said statute to fix the amount of punishment. *State v. Hamey, supra*; *State v. Reed*, 237 Mo. 224, 140 S. W. 909.

[5] But even though it had been the province of the jury to assess the punishment, it would be difficult to conceive how defendant could be injured by having the maximum punishment reduced from 5 to 2 years.

[6] It is further contended that the evidence showed two acts of intercourse, the second act a short time after the act of May 1st, and that the instruction therefore permitted the jury to find him guilty of the second act which according to her own testimony occurred at a time when she was unchaste.

We are unable to agree with appellant's contention. The jury were not permitted by said instruction to find defendant guilty if they found that he merely had sexual intercourse with the prosecutrix, but the instruction clearly requires the jury to find that at the time of the commission of the act the prosecutrix was of previous chaste character. Said instruction also requires the jury to consider all the testimony in the "light of the court's instructions."

By the third paragraph of said instruction the court defined the words "of previously chaste character" to mean that prosecutrix "had never had sexual intercourse with any male person." Whether or not this would be a proper definition of this phrase in a case where the question of reformation was involved we need not stop to discuss, but we think it clearly appears that the jury could not have been misled by the instructions in this case to believe that they could find defendant

gulty of the second recent act of sexual intercourse.

In support of his contention appellant cites *State v. Schenk*, 238 Mo. 429, loc. cit. 458, 142 S. W. 263. We are unable to find anything stated in the opinion in the *Schenk* Case which conflicts with our holding in the case at bar. The instruction in the *Schenk* Case is not copied into the opinion. The opinion states that by it "the jury were instructed in effect that they might convict if they found that the defendant committed either act." The same can certainly not be said of the instruction in the case at bar, and for that reason what was said in the *Schenk* Case cannot be accepted as an authority in point in the present case.

[7] The term "carnal knowing," instead of the conventional expression "carnal knowledge," is also defined in the third paragraph of said instruction. This at most was but a grammatical error, and could not have misled the jury.

[8] The court did not err in refusing to instruct the jury in effect that unchastity could be proven by circumstantial as well as direct evidence—this because there was no evidence of a circumstantial character concerning prosecutrix's conduct prior to the alleged offense, sufficient to warrant an inference of unchastity upon her part.

[9] III. The second instruction told the jury that it was "immaterial" whether the prosecutrix did or did not consent to the act and that consent, if any, "is no defense in this case."

Counsel for appellant object to the use of the word "immaterial" in the instruction, and in support of that contention insist that consent of the prosecutrix would be a material circumstance tending to show lack of previous chaste character. The use of the word "immaterial" is, in a sense, unfortunate and should be omitted from the instruction; yet we think the instruction, when read as a whole, leaves the meaning clear that the jury were merely informed that they were not to consider the matter of consent as a defense to the act.

[10, 11] IV. The court refused to give defendant's instruction to the effect that there is no presumption that prosecutrix was of chaste character prior to the date of the alleged offense. This is assigned as error.

In the case of *State v. Kelly*, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476, it was held to be error to instruct the jury, in a case of this character, that the law presumes that every woman is of chaste character until the contrary appears. This upon the theory, not that such a presumption did not in fact ordinarily exist, but upon the theory that the chastity of the prosecutrix was, under the statute, a fact to be both charged and proved, and that such an instruction would therefore relieve the state of its duty to "bring forward in the first instance evi-

dence of the previously chaste character of the prosecutrix."

[12] The instruction offered in the case at bar was correct as a purely abstract principle of law, so far as it has to do with the question of the burden of proof in the case, but yet we do not think the court erred in refusing to give the same, but, on the other hand, think it very properly refused to so instruct—this because: (1) The jury were clearly told by other instructions that the law presumed defendant's innocence, and that the burden was upon the state to prove defendant's guilt beyond a reasonable doubt, and the fact of previous chaste character was specifically mentioned as one of the facts to be found by the jury before finding a verdict of guilty; (2) the giving of such an instruction on a purely technical phase of the case would have a tendency to mislead the jury into believing that there would likely be a presumption that the prosecutrix was unchaste prior to the alleged offense.

[13, 14] V. The most serious assignment of error has to do with the remarks made by special counsel for the state in his closing argument to the jury.

During the closing argument special counsel for the state made the following remarks:

"It was only for the purpose of procuring a marriage between the outraged and defiled little girl and this defendant, that is what I was retained for, and when they wouldn't do that, I considered it my whole duty to the people of the state of Missouri and to my client to come here and prosecute this man as vigorously as the law would allow and permit me to do. I have children; I have two daughters, gentlemen of the jury, and you have daughters, among the many daughters throughout our land, and this law was passed to protect the public morals, as stated to you by the state's attorney in his opening statement, and we must protect our daughters, and we must protect the females of our families."

Defendant's counsel objected to these remarks and asked the court to rebuke counsel for going outside the record. The court said, "Confine yourself to the evidence," and again defendant's counsel asked the court to rebuke counsel, but the court failed to rebuke counsel saying, "I have ruled on the matter and directed counsel to confine himself to the evidence." Defendant saved an exception to the failure of the court to rebuke counsel.

A little later in the argument the following occurred:

"Special Counsel: You saw the prosecuting witness on the stand. Will you believe her or will you believe Hade? Compare the two. Gentlemen of the jury, Volz [defendant] didn't go on the witness stand. The defendant didn't go on the witness stand. Think of it."

"The Court: One moment."

"Defendant's Attorney: He knows better than that. He knows it can't be referred to and I will lay the foundation now for a new trial and except to it. That is absolutely out of order."

"Special Counsel: I merely commented on it. I said he didn't go on the stand."

"The Court: You ought to know and you do know, that there is a rule against referring to that fact."

"Special Counsel: I will withdraw the remark.

"Defendant's Counsel: He withdraws it after the injury is done and he has got it before the jury.

"The Court: Do not refer to that fact again, directly or indirectly. You are not allowed to do it, and you ought to know that and not put the state in that position.

"Special Counsel: In the heat of the argument I lost control of my better judgment.

"The Court: Counsel has made the statement, and it has been objected to which he ought not to have made, and for which the court reprimands him, because if he undertakes to prosecute in this court he ought to know something about the rules and practice of the law, and you, the jury, will utterly disregard that statement and let it have no weight with you at all in deciding this case.

"Special Counsel: I desire to apologize. I didn't mean to do anything improper."

There can be no question but that the remarks were highly improper. If the reference made to the defendant's failure to take the stand was the only improper remark made we would be inclined, under the rulings in *State v. Taylor*, 134 Mo. 109, loc. cit. 158, 35 S. W. 92, and *State v. Kelleher*, 201 Mo. 614, loc. cit. 627, 100 S. W. 470, to say that the prejudice was likely cured by the severe reprimand made by the court. But the preceding remark of the special counsel in effect that defendant had refused to marry the prosecutrix which went unrebuked by the court was unsupported by the evidence. It would appear that counsel was in this manner trying to get before the jury facts which would not have been proper evidence had they been offered upon the stand, and which were of such a character as would inject prejudice into the case. It also appears that the counsel in further attempting to work poison into the case referred to the daughters of the jurors and appealed for a conviction not alone upon the legitimate ground of defendant's guilt, but also upon the ground that their daughters might thereby be protected.

It is a well-known fact that jurors are easily prejudiced in this character of case and for that reason, as was well said by Brown, P. J., in the case of *State v. Horton*, 247 Mo. 637, loc. cit. 666, 153 S. W. 1051, 1054:

"Officers should conduct prosecutions of this character with scrupulous fairness and avoid injecting into the minds of the jury any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds."

We are of the opinion that, all the remarks considered, sufficient poison and prejudice was improperly injected to warrant a reversal of the judgment.

The judgment is reversed, and the cause remanded.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

STATE v. HAYDEN. (No. 19692.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. INDICTMENT AND INFORMATION \S 86(8) — REQUISITES—VENUE.

Under Rev. St. 1909, \S 5107, providing that it should not be necessary to state any venue in the body of an indictment, but that the county or other jurisdiction named in the margin thereof shall be taken as the venue, and section 5115, providing that want of a proper or perfect venue shall not invalidate an indictment, an indictment, not alleging that the person charged to have been assaulted with intent to kill was present at the time and place of the assault, was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 243; Dec. Dig. \S 86(8).]

2. CRIMINAL LAW \S 958(3) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where the facts stated by defendant in his affidavit for a new trial on the ground of newly discovered evidence negated the assertion of his diligence and of lack of knowledge of the existence of the evidence, the denial of a new trial was proper, since, if he had previous knowledge of such evidence and made no effort to procure it, he was not entitled to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2399, 2400; Dec. Dig. \S 958(3).]

3. CRIMINAL LAW \S 939(1) — NEW TRIAL — DISCRETION OF TRIAL COURT—NEWLY DISCOVERED EVIDENCE.

The question of diligence, on the granting of a new trial on the ground of newly discovered evidence, rests to an extent in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2318, 2321-2323; Dec. Dig. \S 939(1).]

4. HOMICIDE \S 812—ASSAULT WITH INTENT TO KILL—VERDICT.

In a trial upon an indictment for an assault charging that defendant, with malice aforethought, assaulted a named person with a pistol with intent to kill, a verdict, "We, the jury, find the defendant guilty of assault with intent to kill, with malice aforethought, and assess his punishment at imprisonment in the penitentiary," which, apart from the surplusage, and so far as it went, was responsive to the charge, was a general verdict and sufficient as against the objection that it was indefinite.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 664-670; Dec. Dig. \S 312.]

5. CRIMINAL LAW \S 1116—APPEAL — BILL OF EXCEPTIONS.

A plea in abatement can be properly preserved for review only when included in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2924; Dec. Dig. \S 1116.]

6. HOMICIDE \S 257(1) — ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for an assault with intent to kill held to sustain a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 543, 544, 552; Dec. Dig. \S 257(1).]

Appeal from St. Louis Circuit Court; G. A. Wurdeman, Judge.

Frank Hayden, alias James Blair, alias John Blair, was convicted of an assault with intent to kill, and he appeals. Affirmed.

Defendant was convicted in the circuit court of St. Louis county of an assault with intent to kill one Julius Schoenbein, and his punishment assessed at imprisonment in the penitentiary for a term of five years. From this verdict and the judgment founded thereon he has taken, and after the usual motions now prosecutes, this appeal.

The assault in question occurred in the town of Wellston, St. Louis county, Mo., on the night of the 27th of February, 1913. Schoenbein, the prosecuting witness (and whom we shall so designate hereafter for convenience), was a deputy sheriff of St. Louis county, and he and three other officers were engaged in watching the office of the St. Louis Lumber Company; two of the officers having concealed themselves in the adjacent lumber yard, while the other two, one of whom was the prosecuting witness, watched the front of the lumber company office from the opposite side of the street. The night was dark, misty, and foggy. Shortly after the beginning of the vigil of the prosecuting witness and his brother officers, defendant and another approached the office of the lumber company. The companion of the defendant, spoken of in the testimony as the "short man," stopped at the office door, while defendant passed on, and, having apparently heard a noise in the lumber yard, began peering through the picket fence which inclosed this yard. In the meantime Officer Robert Kaiser, a detective sergeant of the city of St. Louis, and one of the officers who had gone into the lumber yard, approached the picket fence inclosing the lumber yard (having heard the noise of the defendant's approach), and also looked through this fence. In doing so he shoved his face almost against that of defendant. Defendant immediately presented his pistol at Kaiser, thrust it against the latter's stomach, and instantly fired; but Kaiser turned aside quickly, and defendant missed him. Defendant then ran across the street and halted. Thereupon the prosecuting witness approached defendant and said to him: "We are officers. Halt!" Instantly defendant and his companion opened fire with pistols on the prosecuting witness and his brother officers, discharging at them a fusillade of shots, but without hitting either of them.

Both defendant and his companion escaped after the shooting, but some time afterward defendant was captured in the city of Omaha by Officer Kaiser, who identified him and brought him back for trial.

Defendant upon the trial put in no evidence and offered no witnesses whatever in his behalf. His theory seems to have been an alibi, though he was positively identified by Officer Kaiser as the man who confronted him at the picket fence. He was further identified by his height and size and by the clothes that he wore on the evening preceding the night of the assault; the evidence showing that the man who actually made this as-

sault was at the time thereof clothed as was the defendant on the evening preceding said assault.

In passing, and in order that we need not take up time in discussing them in the opinion, we may say that certain questions as to the lack of allocution, the alleged insufficiency of the judgment, and the alleged fact that the bill of exceptions shows that the trial was had on the 19th of October, while the verdict was rendered on the 18th of October, are not borne out by the record. Whether, as averred, these infirmities appear in the bill of exceptions, we need not consider; for, what has for convenience been called the "record proper," properly shows them to be sufficiently regular. Other things, shown by the record and necessary to be stated in order to make clear the points urged for reversal, will be found set out in our discussion of the case in connection therewith.

Schooley & Mooney, of St. Louis, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

FARIS, P. J. (after stating the facts as above). Defendant urges upon us a number of contentions. Some of these are not such as to challenge our very serious consideration, and these will be dealt with somewhat summarily. Those of pith and moment and those most strenuously urged upon us are: (a) That the indictment is defective for that it fails to aver that the person alleged to have been assaulted was present at the time and place of the assault; (b) that defendant discovered after the trial, but before the filing of his motion for a new trial, new evidence; (c) that the verdict is too indefinite to support a judgment; and (d) that "the indictment was filed contrary to the provisions of section 5055 of our statutes." Other alleged errors are urged in the brief of defendant's learned counsel; but, since these are not noticed by him in his motion for a new trial, we are not called on to notice them here.

[1] 1. The indictment is, we take it, admitted by defendant to be good, except in respect of the specific objection which he makes to it, that is, that it fails to specifically aver that the person alleged to have been assaulted, to wit, Julius Schoenbein, was present at the time and place of the assault; in short, that it does not use, following the name of the prosecuting witness, the term "then and there being." Omitting caption, venue (correctly laid in the margin in St. Louis county), and merely formal parts, this indictment reads thus:

"The grand jurors for the state of Missouri, now here in court, duly impaneled, sworn and charged to inquire within and for the body of the county of St. Louis, and state aforesaid, upon their oath present and charge that Frank Hayden, alias James Blair, on the 27th day of February, A. D. nineteen hundred and thirteen,

at said county of St. Louis and state of Missouri, in and upon one Julius Schoenbein, feloniously, on purpose and of his malice aforethought, did make an assault, and did then and there on purpose and of his malice aforethought, unlawfully and feloniously shoot at him the said Julius Schoenbein with a certain deadly and dangerous weapon, to wit, a revolving pistol then and there loaded with gunpowder and leaden ball, which he, the said Frank Hayden, alias James Blair, then and there in his hand had and held, with the intent then and there, him, the said Julius Schoenbein, on purpose and of his malice aforethought then and there feloniously to kill and murder, against the peace and dignity of the state."

When all is said, the omission complained of goes merely to the venue of the act of assaulting Schoenbein. Indeed, this is putting the case too strongly by half against the state. For the place of the assault, at least the place or "venue of the defendant," is succinctly stated to be "at the county of St. Louis and state of Missouri." But at the risk of persiflage the complaint of defendant may be said to be that the venue of Schoenbein is not averred in specific terms. This court was confronted with a similar situation in the case of *State v. McDonough*, 232 Mo. loc. cit. 227, 134 S. W. loc. cit. 546, where it was said:

"Appellant assails the indictment as insufficient on the ground that, while the venue of the assault is properly laid and is also stated in the margin, there is no venue laid as to the averment of carnal knowledge.

"It is provided by section 5107, Revised Statutes 1909, that: 'It shall not be necessary to state any venue in the body of any indictment or information; but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same.' And section 5115 provides: 'No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected * * * for want of a proper or perfect venue; nor for want of any venue at all.' Under these statutes, as construed in the following decisions, we hold the indictment sufficient against the attack made upon it, and that this point in appellant's brief is without merit. *State v. Simon*, 50 Mo. 370; *State v. Dawson*, 90 Mo. 149 [1 S. W. 827]; *State v. Brown*, 159 Mo. 646 [60 S. W. 1064]; *State v. Hughes*, 82 Mo. 86."

[2, 3] II. The complaint of error arising from the court's refusal to grant a new trial on the ground of newly discovered evidence is thus set forth in defendant's affidavit appended to his motion for a new trial:

"Comes now defendant in his own proper person, and says that his proper name is John Blair, and as such he makes this affidavit and states that since the trial in the above-entitled cause he has newly discovered evidence; that it came to his knowledge since the trial; that it was not for lack of due diligence that it did not come sooner; that it is so material that it would probably produce a different result if a new trial were granted; that it is not cumulative; and that the witnesses are most all in another state by which such evidence would be given so that defendant cannot obtain their affidavits at this time.

"Defendant further states that Sam Sherman, of Stansbury, Mo., a conductor on the Wabash Railroad, John Beck, Thomas Nesbit, Frank McGinty, Charley Martin, and John Lewis, of Shenandoah, Iowa, and James Benson, of

Mound City, Mo., are material witnesses in this case, and know, with many other persons in Shenandoah, Iowa, that this defendant was in Shenandoah, Iowa, on the night of the alleged assault, and many days and nights before and after, and that defendant could not possibly be guilty of the crime alleged."

As a general premise, if we should need to rely on it, we may say that to an extent, upon the phase of diligence vel non, the granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. *Nugent v. Armour Packing Co.*, 208 Mo. loc. cit. 500, 106 S. W. 648.

Turning to the affidavit set out supra, we note but a mere lip-service of allegation of diligence, to wit: "That it was not for lack of due diligence that it did not come [to his knowledge] sooner." The facts he states clearly negative diligence. Defendant put in no evidence whatever upon the trial. He relied upon the potential weakness of the state's case. This, of course, would not on the ground urged preclude him from a new trial of itself, but to an extent may explain his attitude. It he had an alibi; if he was in fact in Shenandoah, Iowa, at the time of the shooting; if the witnesses whom he mentions knew this fact—defendant must himself have known it also, and so far as appears must all the while have known that these witnesses knew it. So, not only do the facts stated by defendant themselves negative the assertion of his diligence in the premises, but likewise these facts negative his assertion of lack of knowledge of the existence of this evidence. If he had knowledge beforehand of this evidence and made no effort to procure it, he was not entitled to a new trial on this account, and the court's ruling was correct. *State v. Rippey*, 228 Mo. loc. cit. 350, 128 S. W. 726.

[4] III. The verdict, of which defendant complains for that it is indefinite, signature of foreman omitted, reads thus:

"We, the jury, find the defendant guilty of assault with intent to kill, with malice aforethought, and assess his punishment at imprisonment in the penitentiary for a term of five (5) years."

The verdict here reads practically verbatim with that in the case of *State v. Bishop*, 231 Mo. 411, 133 S. W. 33, which was held good. Here in the instant case, as in the *Bishop Case*, supra, the jury had in mind the finding of a general verdict of guilty, and not a special verdict. Stripped of its surplusage, the verdict reads:

"We, the jury, find the defendant guilty and assess his punishment at imprisonment in the penitentiary for a term of five years."

Guilty of what? Clearly of the sole and only charge set out in the single count of the indictment, that of intentionally and of his malice aforethought shooting with a pistol at one, the said Julius Schoenbein, with the felonious intent him, the said Julius Schoenbein, then and there to kill and murder. This was the only charge for which defend-

ant was then upon trial. Will it be doubted that he cannot again be convicted for shooting at said Schoenbein at the time and place charged in the instant indictment? If the verdict had been, "We, the jury, find the defendant not guilty," would there be any doubt of its sufficiency as a foundation for a judgment that defendant forever go acquit of the charge in the indictment? We think not. Robbed of its surplusage, the verdict is good. It does not run foul of any of the tests of goodness which we set out in *State v. Miller*, 235 Mo. loc. cit. 231, 164 S. W. 482, because, absent surplusage, it is a general verdict. This surplusage is not inherently contradictory of the charge. but, on the contrary, is wholly responsive thereto so far as it goes. So, the instant case is to be distinguished clearly from the facts in the cases of *State v. De Witt*, 186 Mo. 61, 84 S. W. 956, *State v. Miller*, supra, *State v. Grossman*, 214 Mo. 233, 113 S. W. 1074, *State v. Rowe*, 142 Mo. 439, 44 S. W. 266, and others wherein general verdicts were found in cases where the indictments contained more than one count, or where the matter, which could otherwise have been discarded as mere innocuous surplusage, was not responsive to the issues, or was contradictory of the issues. No such condition confronts us here. The surplus matter is wholly responsive to the charge and to the issues—so far as it goes. *State v. Miller*, supra. The verdict is sufficient to forever preclude another trial of defendant upon the charge in the indictment (*State v. Rowe*, supra), and, rejecting the nonhurtful surplusage thereof, we have left a sufficient general verdict (*State v. Modlin*, 197 Mo. loc. cit. 379, 95 S. W. 345; *State v. Cronin*, 189 Mo. 663, 88 S. W. 604). We feel constrained therefore, both on authority and in the interest of justice unhampered by bald technicality, to disallow this contention.

[5, 6] IV. Defendant, by his plea in abatement, called to the attention of the court nisi the alleged fact that section 5055 of the Revised Statutes of 1909 was disregarded, in this, that the learned prosecuting attorney first filed an information against defendant; later caused him to be indicted, and still later, and as we gather, after both the information and the first indictment were dismissed, caused the indictment here before us to be preferred by a grand jury.

Whether the information filed herein (as appears solely from defendant's said plea in abatement and not elsewhere), and dismissed on the 2d day of July, 1915, was so far pending as to prevent, under the provisions of said section 5055, prosecution under the instant indictment which was found against defendant on the 16th day of September, 1916, we need not inquire. This for the reason that the record does not disclose any of the facts on which defendant relies to sus-

tain the point of law he makes and urges in his plea in abatement. Moreover (and this point alone is sufficient), defendant's plea in abatement is not to be found in his bill of exceptions, where alone he could properly preserve it for review here. *State v. Little*, 228 Mo. 273, 128 S. W. 971.

We have gone carefully over the record, and find that the facts sustain the verdict, and while other matters of minor importance are mentioned in the brief of counsel for defendant, after careful consideration, we find either that they are not borne out by the record, or that there is no merit in them. It results that the case should be affirmed. Let this be done. All concur.

CITIZENS' BANK OF HAYTI v. WELLS et al. (No. 17396.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. BANKS AND BANKING —51—CASHIER—REMOVAL—STATUTE.

Rev. St. 1909, § 1112, providing that the directors of a bank may appoint and remove any cashier at pleasure, prevents the employment of a cashier under a contract putting it beyond the power of the board to remove him at any time.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 82-89; Dec. Dig. —51.]

2. BANKS AND BANKING —3—REGULATION—POWER OF STATE.

The state has the right to prescribe the general policies which shall be observed in the conduct of a banking institution.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 9; Dec. Dig. —3.]

3. CONSTITUTIONAL LAW —190—EX POST FACTO LAW.

Rev. St. 1909, § 1112, providing that directors may appoint and remove any bank cashier at pleasure, does not violate Const. art. 2, § 15, denouncing ex post facto laws, where it was in existence when one was employed as such cashier.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 531-533; Dec. Dig. —190.]

4. CONSTITUTIONAL LAW —146—OBLIGATION OF CONTRACT.

Such statute does not violate Const. art. 2, § 15, denouncing laws impairing the obligation of contracts, where it was in existence when one was employed as such cashier.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 456, 457, 495; Dec. Dig. —146.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by the Citizens' Bank of Hayti against Charles Peter Wells, Jr., and the National Surety Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Defendants have appealed from a judgment against them on the bond of defendant Wells given by him with his codefendant as his surety to secure the bank against any failure of Wells to properly discharge his duties as

cashier of said bank. No point is made on the pleadings.

The evidence shows that on February 7, 1911, the board of directors of the plaintiff bank held a meeting, and the record of their proceedings at that meeting shows the following:

"The members of the board elect of the Citizens' Bank of Hayti, Hayti, Missouri, met at its banking house in Hayti, Missouri, for the purpose of organization and the selection of officers for the ensuing year."

Also the following:

"The organization was then perfected by the election of the following permanent officers, viz. Fred Morgan, president, F. M. Perkins, vice president, Chas. Peter Wells, Jr., cashier and sec't, Leo Greenwell, asst. cashier."

And this:

"On motion of Mr. Perkins duly seconded and carried the salary of the cashier and asst. cashier were fixed at \$75.00 and \$25.00 respectively."

Thereupon the defendants executed the bond sued upon herein in the sum of \$10,000 to secure the faithful execution of the duties of Wells as such cashier. The record of the proceedings of said board of directors thereafter shows the following:

"Hayti, Mo., 4/10/11. Upon motion of Mr. Perkins, seconded by Mr. Sturm, and duly carried, Mr. Wells was asked to place his resignation in the hands of the directors, such resignation to take effect not later than May 1st."

Also the following:

"Hayti, Mo., April 12, 1911. Minutes of the last meeting read with the following amendment by Mr. Ray, and were then approved. Following the words, 'such resignation to take effect not later than May 1st,' to insert the following words: 'Mr. Wells refused to tender his resignation, saying that he had been retained for the year and was willing to continue his duties, thereby carrying out his part of the contract.'"

"Motion by Mr. Sturm seconded by Mr. Perkins that the president inform Mr. Wells that his services as cashier would be no longer needed after the 3d of May, 1911."

On May 8, 1911, Wells owed the plaintiff on an overdraft \$11.92, and on that day he drew a cashier's check on plaintiff bank for \$588.08, took that check over to the bank of Hayti, and "cleared" the two banks, in which clearing that check was placed to his credit in the other bank, and the plaintiff's account in that clearing was reduced by the amount of the check. Defendant quit the service as such cashier under protest on his part and only because of such discharge. He testified that he considered himself engaged as such cashier for a year, and that he took the money as he did to pay himself for the unexpired portion of that year. Defendant offered to prove that during the remainder of such year he tried but failed to find any similar employment, and that he was during that time able to earn only a small amount of money by working out of doors in bad weather. The court excluded that evidence, and gave a peremptory instruction to the jury to find for the plaintiff for \$588.08, and the verdict was returned accordingly.

Shepard, Reeves & McKay, of Caruthersville, for appellants. A. Sloan Oliver, of Caruthersville, and Arthur L. Oliver, of St. Louis, for respondent.

ROY, C. (after stating the facts as above).

[1] Appellants contend that the facts in evidence show an employment of Wells for one year, and they cite *Davis v. Insurance Co.*, 181 Mo. App. 353, 172 S. W. 67, as authority for the proposition that under such employment for a definite term the employé cannot be rightfully discharged during such term. It is sufficient to say that there was no special statute applicable in that case as in this. It may be conceded that the general rule was there well stated. But section 1112, R. S. 1909, provides:

"The directors may appoint and remove any cashier or other officer or employé at pleasure."

The evident purpose of that statute was to prevent the employment of such bank officers under a contract which should put it beyond the power of the board to remove at any time.

[2] The state has the right to prescribe the general policies which shall be observed in the conduct of such institutions; and, as was well said in *Wells v. National Surety Co.* (App.) 184 S. W. 474, Wells entered into his employment as such cashier with knowledge of that statute.

[3, 4] Appellants say that the statute contravenes section 15, art. 2, of our state Constitution, which denounces *ex post facto* laws and laws impairing the obligation of contracts. As our statute was in existence when Wells was employed as such cashier, the statute is not subject to such objection.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the Court.

WALKER and REVELLE, JJ., concur. FARIS, P. J., not sitting.

LONGWORTH v. KAVANAUGH.
(No. 17848.)

(Supreme Court of Missouri, Division No. 1.
Dec. 20, 1916.)

PLEADING ~~248~~(17) — PETITION — AMENDMENT—DEPARTURE.

The petition alleging that plaintiff, defendant, and others associated to procure from a county a franchise for right to construct a railroad, plaintiff to have a sixteenth interest therein, that it was sold, and defendant received the price, plaintiff's proportion of which is sought to be recovered, and the amended petition seeking the same recovery, but setting forth the roundabout way in which defendant sold the franchise and received the price, by the organi-

sation of another corporation, there is not a departure; the same cause of action being included in the amended petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 697; Dec. Dig. § 248(17).]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by James Longworth against William K. Kavanaugh. From an adverse judgment, plaintiff appeals. Reversed and remanded.

Robert E. Collins, of St. Louis, for appellant. A. & J. F. Lee and T. S. McPheeters, Jr., all of St. Louis, for respondent.

BROWN, C. The judgment appealed from was rendered upon the defendant's motion to strike out the plaintiff's fourth amended petition on the ground:

"That the cause of action therein sought to be enforced is an entirely different cause of action from that sought to be asserted by plaintiff in the original petition."

The motion was sustained, and the plaintiff declining to plead further, judgment was rendered for the defendant. The only question presented by the record is therefore the question of departure, and we will only make such a statement of the record as is necessary to present it. The original petition was against the respondent and two other defendants who have been dropped from the suit. It states that they and the plaintiff associated themselves together "for the purpose of procuring a franchise from the county of St. Louis in the state of Missouri for the right to construct, own, and operate a belt line of railroad in said St. Louis county," connecting the lines of the Burlington and St. Louis & San Francisco Railroads; and that the plaintiff was, by agreement with the defendants, to have and own one-sixteenth part of said franchise or right. That afterward the defendants procured and sold the same for \$200,000, which they received and have refused to pay over any part thereof to the defendant, for which judgment is asked in the sum of \$12,500.

The fourth amended petition states that on the date mentioned the plaintiff and defendant and other parties, four of whom are named and the others alleged to be unknown to plaintiff, but were represented by defendant, associated themselves together for the purpose of building, constructing, maintaining, and operating a railroad through St. Louis county and of obtaining from said county a right or franchise for that purpose, by an agreement by which the plaintiff should have one-sixteenth of whatever rights, property, or interests said association should thereafter acquire, the remainder to be distributed among the other parties to the association in proportions unknown to the plaintiff. That in pursuance of said agreement the association afterward acquired the stock of the Central Belt Railway Company, a corporation organized under the laws of this

state, with authority to construct, maintain, and operate a railroad through said county, and which thereupon obtained from the county the right or franchise to construct, maintain, and operate its railway. That thereafter the owners of the capital stock of said Central Belt Railway Company caused another railway corporation to be formed for the same purpose under the name of St. Louis Belt & Terminal Railway Company, thirteen-sixteenths of the capital stock of which was owned by the plaintiff and defendant and those associated with them in said enterprise, to which the said franchise was transferred. That all the interests of plaintiff under said agreement in the stock of both said railroad companies was held by defendant in his own name for the use of plaintiff. That afterward the defendant, acting for both said corporations and the said association of individuals, sold all the stock of the St. Louis Belt & Terminal Railroad Company to the Terminal Railway Association of St. Louis, receiving in payment therefor the sum of \$160,000, one-sixteenth of which was the property of plaintiff, and all of which was paid to the defendant, whereby he became indebted to plaintiff in the sum of \$10,000, which he has failed and refused to pay, and for which judgment is asked.

1. In the foregoing statement we have only included those features of the petition necessary to the consideration of the single point involved; that is to say, whether or not the cause of action attempted to be set out in the fourth amended petition is a departure from the cause of action which the plaintiff attempted to state in the original petition, leaving all other questions with reference to the form or sufficiency of the pleading to be raised if the parties shall be so advised, by demurrer, as provided in the Code of Civil Procedure. Section 1800, R. S. 1909.

2. The arguments of the parties, both oral and printed, disclose little difference between them as to the principle governing the question they present, but the standpoints from which they present the facts differ widely. It is admitted by both that the failure of the original petition to state a cause of action does not preclude the plaintiff from stating a cause of action growing out of the same facts by amendment. This was recognized by the Legislature in the enactment of that provision of the Code concerning the right to amend after demurrer sustained. Section 1803, R. S. 1909. In the light of this self-evident proposition we will examine the statement of facts in the original petition.

It states that the plaintiff and defendant and others "associated themselves for the purpose of procuring a franchise from the county of St. Louis, * * * for the right to construct, own, maintain, and operate a belt line of railroad" in said county, connecting what we know to be two great lines of railway entering that county. The right to

construct, maintain, and operate such a line of railroad proceeds, not from the county, but from the state. *State ex rel. v. Williams*, 227 Mo. 32, 127 S. W. 52; *Kansas & Texas Ry. v. Northwestern Coal & Mining Company*, 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717. It is granted by the terms of section 3049, Revised Statutes 1909, for public purposes. By the same section a corporation formed under the article in which it occurs is given power to construct its railroad along or upon any street or highway upon condition that it obtain the assent of the corporate authorities of the city, or the county court of the county, as the case may be. This authority is not given to private persons or for private purposes, but can only be exercised for public use by the quasi public corporations in which it is vested by the Legislature. In this connection the county can give no other right than its assent, under this statute, to a corporation so organized to construct the road upon and across public streets and highways which the law has intrusted to its control, and this assent is the right to which the clause of the petition we have quoted evidently refers. Its acquisition involves the organization of a corporation with the requisite capital stock for the purpose of locating and constructing the road, and its actual location so far as is necessary to determine the franchise required. The only interest which any private individual can obtain in such property is through the capital stock of the corporation.

3. The fourth amended petition sets out that this county franchise was acquired through the Central Belt Railway Company, organized under the laws of this state, with authority to construct, maintain, and operate a railway in said county, the capital stock of which had been acquired by the defendant in pursuance of the agreement with plaintiff set out in the original petition. The original petition states that the franchise was sold and transferred by defendant for a sum therein named, his proportion of which the plaintiff is seeking to recover; while the fourth amended petition sets forth the round-about way in which this was accomplished by the organization of an intermediary corporation by the stockholders of the Central Belt Railway Company with authority to construct, maintain, and operate the same railroad, and the transfer of the entire capital stock of the latter for the sum of \$160,000, one-sixth part of which is claimed by the plaintiff under the arrangement mentioned in the original petition. It does not appear that at the time of the transfer of the stock, the St. Louis Belt & Terminal Railway Company had any other property than this county franchise. It was for the value of this, as demonstrated by the sale of the Terminal Railway Association, that the suit appears from the original petition to have

been brought, and this same cause of action, stated, perhaps with greater particularity, is included in the last petition, which we do not think constitutes a departure from the original claim.

For the reasons stated, the judgment of the circuit court is reversed, and the cause remanded for further proceedings.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

STATE v. FLETCHER. (No. 19707.)
(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW §1169(9)—APPEAL—HARMLESS ERROR—EVIDENCE.

In a prosecution for murder, where the principal fact that defendant struck the fatal blow was established and no longer subject to controversy, the admission of testimony how far in the witness' opinion he could have heard the blow defendant struck in assaulting deceased was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137, 3138; Dec. Dig. § 1169(9).]

2. HOMICIDE §175—EVIDENCE.

The question to a medical witness who examined deceased as to which side of the head deceased was struck on was proper as simply seeking to more definitely locate the wound, which the physician's testimony and that of other witnesses located generally on the head.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 375-378; Dec. Dig. § 175.]

3. HOMICIDE §338(4)—APPEAL—HARMLESS ERROR.

Error committed in admitting testimony as to defendant's conduct and imprecations, hurled at a nephew of deceased a short time after defendant struck the latter, was cured by the court's ordering it to be stricken from the record.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 712; Dec. Dig. § 338(4).]

4. HOMICIDE §169(3)—EVIDENCE.

The court properly excluded testimony sought to be elicited by defendant from the state's witnesses as to the difficulty in which deceased had been engaged with a third person before deceased was struck by defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 343; Dec. Dig. § 169(3).]

5. CRIMINAL LAW §368(3)—EVIDENCE—RES GESTÆ—EXCLAMATION BY BYSTANDER.

The admission in evidence of an exclamation by a bystander, immediately following the striking of the fatal blow by defendant and as deceased fell, that, "There is a dead man," was proper, since the declarations of a bystander, made under such circumstances as to render them otherwise admissible, are not to be excluded because made by one not an actual participant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 821; Dec. Dig. § 368(3).]

6. HOMICIDE §158(3)—EVIDENCE—GENERAL EXPRESSIONS OF ILL WILL.

Testimony that a witness heard defendant say, while at the scene of the killing on the day when it took place, "I am going to get him some day," mentioning no name, was compe-

tent to show defendant's general malicious purpose to kill or injure some one; the remoteness of the threat not affecting its competency as evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 295; Dec. Dig. ¶158(3).]

7. CRIMINAL LAW ¶390—EVIDENCE—INTENTION OF DEFENDANT IN STRIKING FATAL BLOW.

The court erred in sustaining the state's objection to the question to defendant on the witness stand whether he intended to kill deceased when he struck him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. ¶890.]

8. HOMICIDE ¶339—APPEAL—HARMLESS ERROR—RULING ON EVIDENCE.

The trial court's ruling sustaining the state's objection to the question to defendant whether he intended to kill deceased when he struck him was harmless, where defendant answered no, where no attempt was made to have the question and answer stricken out, and the testimony of many witnesses and the physical facts were against defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. ¶339.]

9. WITNESSES ¶274(1) — CROSS-EXAMINATION—WITNESS AS TO CHARACTER OF DECEASED.

Witnesses who had testified that deceased was of a rash and violent disposition were properly permitted, on cross-examination, to state that so far as they personally knew him he was a quiet and peaceable man.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 965; Dec. Dig. ¶274(1).]

10. HOMICIDE ¶3—"DEADLY WEAPON"—"DANGEROUS WEAPON."

A club or stick of wood, 3 feet long and 2½ inches wide, with which defendant struck and killed deceased, was a dangerous and deadly weapon per se.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 5; Dec. Dig. ¶3.]

For other definitions, see Words and Phrases, First and Second Series, Dangerous Weapon; Deadly Weapon.]

11. CRIMINAL LAW ¶823(2)—TRIAL—INSTRUCTION—CURE.

An instruction was not erroneous because assuming that the club or stick of wood, 3 feet long and 2½ inches wide, with which defendant struck and killed deceased, was a deadly weapon, where another instruction expressly required the jury to find whether or not the club was a deadly weapon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. ¶823(2).]

12. CRIMINAL LAW ¶761(12)—TRIAL—INSTRUCTIONS—ASSUMING FACTS.

The instruction that if the jury found defendant willfully, premeditatedly, and with malice aforethought, but not deliberately, struck deceased with a wooden club, and that deceased, within a year and a day after such striking, died from the effects of such striking and beating and wounding done by defendant, they should find defendant guilty of murder in the second degree was not erroneous as assuming that the state had established the beating and wounding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1757; Dec. Dig. ¶761(12).]

13. HOMICIDE ¶285—"BEATING"—"WOUNDING."

Where defendant struck deceased but one blow with a club, fracturing his skull, there was

nevertheless a "beating" or "wounding," justifying the use of the terms in an instruction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 585; Dec. Dig. ¶285.]

For other definitions, see Words and Phrases, First and Second Series, Beat; Wound.]

14. HOMICIDE ¶300(3)—INSTRUCTION—SELF-DEFENSE.

The instruction on self-defense, containing all the material elements necessary to properly present the doctrine under which self-defense is applicable to a case of the character involved, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. ¶300(3).]

15. HOMICIDE ¶800(7)—INSTRUCTION—SELF-DEFENSE—"RASH"—"TURBULENT"—"QUARRELSOME"—"VIOLENT"—"DANGEROUS."

The instruction that if the jury found that deceased was of a rash, turbulent, and violent disposition and the defendant knew of such disposition, it was a circumstance for consideration in considering the reasonable cause for defendant's apprehension of great physical injury to himself was not erroneous as requiring the jury to find that deceased was of a rash, turbulent, and violent disposition, instead of a man of turbulent, quarrelsome, and dangerous disposition, as stated in the testimony of some of the witnesses, there being no substantial difference in the meanings of the two expressions "rash," meaning hasty, a "turbulent" man, being one given to contention or of a boisterous nature, conveying the same meaning to the ordinary mind as "quarrelsome," though not technically synonymous therewith, while a "violent" man is necessarily a "dangerous" one.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. ¶300(7).]

For other definitions, see Words and Phrases, First and Second Series, Dangerous; Rash; Violent.]

16. HOMICIDE ¶79—"MANSLAUGHTER IN FOURTH DEGREE."

"Manslaughter in the fourth degree" is the intentional killing of a human being in the heat of passion on reasonable provocation, without malice or premeditation, and under such circumstances as will not render the killing justifiable or excusable homicide, and the provocation required to reduce a killing to manslaughter in the fourth degree must consist of personal violence, at common law and under the statute. Rev. St. 1909, § 4468.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 105; Dec. Dig. ¶79.]

For other definitions, see Words and Phrases, First and Second Series, Manslaughter In Fourth Degree.]

17. HOMICIDE ¶45—MANSLAUGHTER—PROVOCATION—THREAT.

Words of reproach, however grievous, are not sufficient to free a defendant in a case of homicide from the guilt of murder, nor will contemptuous or insulting actions or gestures, unaccompanied by an assault, reduce the killing to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 69; Dec. Dig. ¶45.]

18. HOMICIDE ¶309(6) — INSTRUCTIONS — MANSLAUGHTER.

Where there is no evidence of physical violence toward defendant by deceased, an instruction on manslaughter in the fourth degree was not authorized.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. ¶309(6).]

19. HOMICIDE \S 190(3)—EVIDENCE—UNCOMMUNICATED THREATS.

Testimony as to deceased's uncommunicated threats is admissible, where there is a doubt as to who was the aggressor in the fatal affray.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 401; Dec. Dig. \S 190(3).]

20. CRIMINAL LAW \S 824(4)—INSTRUCTION—UNCOMMUNICATED THREATS—NECESSITY OF REQUEST.

Where a correct instruction was given on the issue of self-defense and the jury told that, in passing on the question whether defendant had reasonable grounds to believe it was necessary to strike deceased to protect his life, they should consider all the facts and circumstances in the case, and defendant failed to request additional instructions, he could not complain that an instruction was not given, calling the jury's attention to uncommunicated threats by deceased, of which there was testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1998; Dec. Dig. \S 824(4).]

21. CRIMINAL LAW \S 655(1)—TRIAL—CONDUCT OF COURT—MANIFESTATION OF DESIRE TO EXPEDITE TRIAL.

The remarks and conduct of the trial judge, manifesting his desire to expeditiously hear the case, without denying defendant any right to which he was legally entitled, were not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 1520, 1537; Dec. Dig. \S 655(1).]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Dutch Fletcher was convicted of murder, and he appeals. Judgment affirmed.

In July, 1915, an information was filed by the prosecuting attorney of New Madrid county, charging defendant with murder in the first degree in having struck with a club and killed one Jack Walker. On a trial defendant was convicted of murder in the second degree, and sentenced to 25 years' imprisonment in the penitentiary. From this judgment he appeals.

On July 14, 1915, a barbecue was held at Higerson Landing in New Madrid county. The festivities continued during the day and until the succeeding morning. There was dancing and considerable drinking. Defendant and the deceased were in attendance. In the early morning of the second day the deceased had a difficulty with one Craig Nelson. After they were separated the defendant, who had not participated in the affray, said that the assault of the deceased upon Nelson was a "d—d cowardly act." The deceased, after the difficulty with Nelson, walked across the dancing platform and, placing one foot on a bench near the edge of the platform, leaned his head on his hand and stood looking out over the river. The defendant walked rapidly into the circle of five or six persons standing around deceased, and, approaching the latter from the rear, struck him on the head with a club 3 feet in length and 2½ inches in diameter, and felled him to the floor. Not a word was exchanged between the parties before the blow was struck. Defendant struck the deceased

one more blow while he was lying on the floor. Defendant then ran back into the crowd near at hand, and as some one exclaimed, "Who hit Jack Walker?" defendant said, "I'm the man; I'm the guy that hit him." This he repeated three or four times. Deceased at the time of this occurrence had no weapons on his person. Many of the men at this barbecue were in a drunken condition at the time of this affray, and a number of other difficulties had occurred during the day; but, as they have no connection with the affray which resulted in the killing, it is unnecessary to burden this statement with a recital of them as they appear in the transcript. The deceased was rendered insensible by the blow, and never regained consciousness, but died at his home the succeeding day. The wound inflicted and which caused his death was a fracture of the skull a little to the left of the median line. In August, 1914, the defendant having abruptly left a task he had engaged to perform for the deceased, some sharp words ensued between them. The details of this controversy are not material, except as showing the probable cause of certain threats made prior to the killing by the defendant against the deceased of which there was testimony.

There were witnesses who testified that they heard deceased make threats against the defendant a short time before the latter struck him. Others stated that they had seen the deceased have a pair of brass knucks the day of the difficulty, and that the deceased was a violent man of turbulent disposition. The defendant's account of the affray is as follows: Immediately after the fight between Craig Nelson and the deceased the latter turned to the defendant and said, "You s— of a b—, I am in this, and I'll get you;" that deceased had knucks under his hand at the time he made this threat; that defendant said nothing to him, and when the deceased came towards him he retreated and picked up a stick; that deceased put his hand in his pocket, and defendant thought he was going to hit him with the knucks or shoot him, and that is why he knocked him down; that he did not hit deceased after he fell. Witnesses in rebuttal testified that deceased had no knucks or other weapons of any kind, and was inoffensively standing looking out over the river when he was assaulted by the defendant.

R. L. Ward, of Caruthersville, and Thos. Gallivan, of New Madrid, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1, 2] I. *Rulings on Testimony*. It is contended that the trial court erred in its rulings on the testimony. Defendant's first assignment in this regard is that a witness was permitted to state how far, in

his opinion, he could have heard the blow the defendant struck in assaulting the deceased. When the inquiry was made which elicited this statement the fact had been established that the defendant had struck the deceased, and that the latter's death was due to the blow. As a general rule, a witness can only state facts and circumstances concerning a matter under investigation, and not his inferences or opinions, which are nothing more than conjectures and their admission error. While error is presumptively prejudicial (*State v. Taylor*, 118 Mo. loc. cit. 161, 24 S. W. 449), an analysis of the facts in a given case will enable it to be determined whether the presumption is to be confirmed or eliminated. In the instant case the principal fact, or that which constituted the gravamen of the offense, viz., that the defendant struck the fatal blow, had been established and was no longer a subject of controversy. Under this state of facts the defense was limited to testimony tending to palliate or excuse the offense. What effect, therefore, did the witness' statement have on the case? It neither intimated nor expressed a conclusion as to the principal fact or the effect of defendant's act, nor did it have a tendency to lessen the force of his defense; it had reference to an immaterial matter, viz. the volume of the sound produced by defendant's blow; it was irrelevant, it is true, but free from prejudicial effect, and the presumption that arose from its admission is eliminated. The inquiry made of the physician who examined the deceased after he was struck was in regard to a fact which the former must necessarily have been in possession of after his examination of the deceased, viz. on which side of the head was the deceased struck? Not only the physician's testimony but that of other witnesses had established the fact that the defendant's blow produced a wound about the size of a dollar on defendant's head, and that the table of his skull was fractured. The inquiry simply sought to more definitely locate the wound, and was not error.

[3] If error was committed in admitting testimony of a witness as to defendant's conduct and imprecations hurled at a nephew of the deceased a short time after he struck the latter, it was cured by the court ordering it to be stricken from the record. This gave the jury to understand they were not to consider it. The brief of counsel for defendant does not fairly state the facts as to the court's action in regard to this alleged error.

[4] The court properly excluded the testimony sought to be elicited by the defendant from the state's witnesses as to the difficulty which the deceased had been engaged in with Craig Nelson before deceased was struck by defendant. *State v. Hanson*, 231 Mo. 14, 132 S. W. 245. The alleged pur-

pose of this testimony, said counsel for defense, was to show that the deceased was mad. Of what avail would this have been to defendant if admitted? The attitude of the deceased when felled by the defendant was, not only noncombative, but positively passive. If mad, it was a most delightful form of frenzy, because many witnesses say he was "looking out over the river." Thus occupied, if in anger, it was not directed toward the defendant, because the latter approached the deceased from the rear, according to the state's witnesses, and inflicted the blow without his victim knowing of his presence. The trial court, therefore, ruled rightly in excluding this testimony.

[5] Defendant complains of the admission in evidence of an exclamation made by one of the bystanders immediately following the striking of the blow by defendant and as deceased fell, to the effect that, "There's a dead man." The exclamation was contemporaneous with the principal act. The circumstances under which it was made indicate that it was voluntary, spontaneous, and not due to any deliberate design. While there is some conflict in the authorities in other jurisdictions as to whether the declarations of a bystander are admissible as a part of the *res gestæ*, the better reasoned opinions hold that if the declarations are made under such circumstances as to render them otherwise admissible, they are not to be excluded because made by one who was not an actual participant in the transaction, but a mere looker-on. See cases under section 162, 10 R. C. L. In Missouri the exclamation of a bystander under the facts here in evidence has, in conformity with the rule above stated, been held admissible. *State v. Elkins*, 101 Mo. loc. cit. 351, 14 S. W. 116. The trial court did not err, therefore, in admitting testimony as to the exclamation.

[6] A witness, testifying for the state, said that he had heard the defendant say, while at the barbecue the day of the homicide, "I am going to get him some day." No name was mentioned. The offer of this testimony was subsequent to the introduction of evidence on the part of the state, showing that the defendant had expressed ill will towards the deceased, on account of the latter having discharged defendant from his service during the preceding summer. The witness' testimony as to the defendant's statement was objected to by the defense: First, because it was too remote; and, second, because no name was mentioned. The remoteness of the statement or threat will not affect its competency as evidence. *State v. Hyder*, 258 Mo. 225, 167 S. W. 524; *State v. Wilson*, 250 Mo. 323, 157 S. W. 813. While testimony of this character is not admissible as a part of the *res gestæ*, the fact that the deceased during the same day became the victim of defendant's ill will renders the

statement competent to show his general malice and purpose to kill or injure some one. *State v. Feeley*, 194 Mo. loc. cit. 313, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511; *State v. Sharp*, 283 Mo. loc. cit. 287, 135 S. W. 488.

[7.] Counsel for defendant asked him on the witness stand whether he intended to kill the deceased when he struck him. Defendant answered, "No." Counsel for the state thereupon interposed an objection to the question, which the trial court sustained, but no attempt was made to have the question and answer stricken out. Under our holdings in *State v. Palmer*, 88 Mo. 568, and *State v. Banks*, 73 Mo. 592, this ruling was error; but in what respect was the defendant thereby injured? He had answered the question, and the influence or effect of his answer upon the triers of the fact had been accomplished. *Olfermann v. U. D. Ry. Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; *Brown v. Railroad*, 127 Mo. App. 614, 106 S. W. 551; *State v. Curtner*, 262 Mo. 214, 170 S. W. 1141. Following this inquiry, his counsel asked him, "Why did you hit him?" referring to the deceased, to which defendant replied, "Because I thought he would either shoot me or knock me in the head with knucks." To this testimony no objection was interposed, and the purpose sought to be accomplished by the proof of intent in the first inquiry was supplemented by the last, in which the defendant sought to establish the fact that, while he had not intended to kill the deceased, he did intend to use such force as would be necessary to repel the assault of the latter. Therefore, despite the error of the trial court in the sustaining of the objection to the inquiry made of the defendant, we will not, in a case of this character, where the defendant has had the full benefit of his own evidence, has suffered no injury, and the testimony of many witnesses and the physical facts are against him, reverse the judgment. A right of review in a criminal case is accorded to a defendant that it may be determined whether or not he has had a fair trial, i. e., a hearing under the forms of our procedure on the charge preferred against him, free from any prejudicial incidents connected therewith. We find this to be true in the instant case so far as concerns the error here assigned, and a reversal is not justified on this account.

[8.] The defense introduced testimony to show that the deceased was of a rash and violent disposition. On cross-examination witnesses who had so testified were permitted to state that, so far as they personally knew the deceased, he was a quiet and peaceable man. To this testimony the defendant objected on the ground that it was not permissible to show particular traits to sustain or attack character. There is no merit in this contention. On cross-examination

witnesses who have testified as to character may be subjected to every reasonable test, limited only by the discretion of the court, to determine the extent of their knowledge and their disposition to speak truthfully concerning the matter under investigation. *State v. Harris*, 209 Mo. loc. cit. 441, 108 S. W. 28; *State v. Phillips*, 233 Mo. loc. cit. 305, 135 S. W. 4.

[10, 11] II. *Instructions*.—It is contended that instruction numbered 1 is erroneous in assuming that the club or stick of wood 3 feet long and 2½ inches wide, with which the defendant struck and killed the deceased, was a deadly weapon. This was not error. In *State v. Dunn*, 221 Mo. loc. cit. 530, 120 S. W. 1179, we held, approving the language of a well-considered case in the Supreme Court of Illinois (*Hamilton v. People*, 113 Ill. loc. cit. 38, 55 Am. Rep. 396), that:

"No one of ordinary intelligence would hesitate for a moment in concluding that the club in question [of like size with the one in the instant case] in the manner in which it was used upon the deceased, was a dangerous and deadly weapon. * * * 'Such things, as all persons of ordinary intelligence are presumed to know, are not required to be proven'" (citing cases).

The trial court, therefore, "did not err in assuming that the club * * * was a dangerous and deadly weapon. Moreover, we are of the opinion that the club * * * described in the indictment * * * was a dangerous and deadly weapon per se." The language here employed is singularly appropriate to the case at bar, and we apply it thereto in overruling this contention of the defendant. If this ruling did not suffice, the contention is summarily disposed of by instruction numbered 13, given by the court, which expressly requires the jury to find whether or not the club was a deadly weapon.

[12, 13] The third paragraph of said instruction numbered 1 is as follows:

"If you find, etc., that the defendant did willfully, premeditatedly, and with malice aforethought, but not deliberately, strike with a wooden club one Jack Walker, and further find that within a year and day after such striking, to wit, on or about 15th day of July, the said Jack Walker died from the effects of such striking and beating and wounding, done by the defendant as aforesaid, you will find the defendant guilty of murder in the second degree; and, unless you find the facts so to be, you will acquit," etc.

Defendant contends that this is error: First, in that it assumes that the state has established the beating and wounding; and, second, that there was no evidence of beating or wounding, the defendant having struck the deceased but one lick. A reading of the paragraph will show that the first contention is unfounded, and the second is utterly devoid of merit. A beating or wounding does not mean, under any intelligent interpretation of the words, a succession of blows. One may beat or wound another in one stroke. *State v. Harrigan*, 4 Pennewill (Del.) 129, 55 Atl. 5; *Lowry v. State*, 8 Ga. App. 379, 69 S. E.

34. To contend that a blow inflicted which fractured the victim's skull is not a beating or wounding is to trifle with the meaning of words.

[14] The instruction for self-defense given by the court is not subject to valid criticism. Its prototypes may be found in homicide cases from *State v. Miller*, 264 Mo. loc. cit. 406, 175 S. W. 187, to *State v. Shultz*, 25 Mo. 128, covering a period of almost three score years. While not identical in phraseology with similar approved instructions in former cases, it contains all the material elements necessary to properly present the doctrine under which self-defense is applicable to a case of this character, and we overrule defendant's objections thereto.

[15] Objection is made to the following instruction:

"The court instructs the jury that if you believe and find from the evidence that the deceased was of a rash, turbulent, and violent disposition, and that the defendant had knowledge of such disposition, then such disposition is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself."

The burden of defendant's plaint in regard to this instruction is that it required the jury to find that deceased was of a rash, turbulent, and violent disposition instead of requiring them to find that he was a man of turbulent, quarrelsome, and dangerous disposition, as stated in the testimony of some of the witnesses. There is no substantial difference in the meanings of the two phrases. The added word "rash" in the first means simply hasty; the words "turbulent" and "violent" are as expressive and forceful as "turbulent," "quarrelsome," and "dangerous." A turbulent man is one given to contention or of a boisterous nature. While the word "turbulent" is not technically synonymous with "quarrelsome," it conveys the same meaning to the ordinary mind. To say, therefore, that a man is turbulent and quarrelsome is simply a redundancy, because one of the words is sufficient to convey the meaning intended to be expressed. A violent man is necessarily a dangerous one, because violence cannot be exerted without danger to the person upon whom it is inflicted. These refinements of the meanings of these phrases may be well enough in conjuring with words, a practice much in evidence in the controversies of the schoolmen, but they have no place in determining the plain practical meaning of the two phrases which are in effect the same. If one or the other were employed in the instruction, the rights of the defendant would not have been prejudiced, and his complaint must go for naught.

Instruction numbered 9, defining the jury's duty in regard to the threats of the deceased, is in the form approved in *State v. Glahn*, 97 Mo. 690, 11 S. W. 260, and *State v. Rider*, 95 Mo. loc. cit. 482, 8 S. W. 723. It is therefore not subject to criticism.

[16-18] Defendant complains of the action of the court in refusing to give an instruction for manslaughter in the fourth degree. The evidence for the state shows a premeditated killing; that of the defense, justifiable homicide. Upon these theories the court instructed the jury. The killing having been intentional, to authorize the instruction asked, these facts must have appeared in the evidence: That the offense was committed in a transport of passion aroused by a reasonable provocation without malice or in sudden combat. There could have been no such dethronement of reason as to authorize the instruction under defendant's testimony. He states that the deceased was approaching him in a menacing attitude, and from his actions he believed that the deceased was about to hit him with a pair of knuckles or shoot him, and, moved by the instinct of self-preservation, under which he was authorized to act if his statements are to be taken as true, he picked up the club and struck the defendant on the head. In the face of this state of facts the case becomes one of justifiable homicide, and it was so contended by the defendant during the trial. This being true, it cannot be classified as manslaughter in the fourth degree. This grade of homicide is defined to be the intentional killing of a human being in a heat of passion on reasonable provocation, without malice or premeditation, and under such circumstances as will not render the killing justifiable or excusable homicide. *State v. Sebastian*, 215 Mo. loc. cit. 58, 114 S. W. 522. The Sebastian Case is only one of the many cases in this jurisdiction announcing this doctrine, one of the latest being that of *State v. Shuster*, 183 S. W. 296. Nor was there any evidence of such a sudden combat as is contemplated by law to authorize the requested instruction. The reason urged by the defendant why the instruction should be given is the testimony of the threats made by the deceased against the defendant. We have repeatedly held that words of reproach, however grievous, are not sufficient to free a defendant in a case of homicide from the guilt of murder; nor will contemptuous or insulting actions or gestures, unaccompanied by an assault, reduce the killing to manslaughter. *State v. Conley*, 255 Mo. loc. cit. 198, 164 S. W. 193; *State v. Myers*, 221 Mo. loc. cit. 620, 121 S. W. 131; *State v. Edwards*, 203 Mo. loc. cit. 543, 102 S. W. 520; *State v. West*, 202 Mo. loc. cit. 141, 100 S. W. 478; *State v. Gordon*, 191 Mo. 125, 89 S. W. 1025, 109 Am. St. Rep. 790. In the Edwards Case we held that it was error to instruct the jury that threats constituted an element of provocation which would reduce the homicide from murder to manslaughter. The doctrine is well established that the provocation required to reduce a killing to manslaughter in the fourth degree must consist of personal violence. This was the rule at the common

law. 1 East. Pl. Cr. 233. It is alike applicable in a case under our statute (section 468, R. S. 1909), which by its express terms relegates us to the common law to determine whether the circumstances in a given case authorize the giving of an instruction defining the lower grade of homicide. In the case at bar there was no evidence of personal violence by the deceased, and hence no authority for the giving of the instruction asked. *State v. Barrett*, 240 Mo. 161, 144 S. W. loc. cit. 487; *State v. McKenzie*, 228 Mo. loc. cit. 402, 128 S. W. 948; *State v. Sharp*, 233 Mo. loc. cit. 290, 135 S. W. 488.

[19, 20] Defendant contends that an instruction should have been given calling the jury's attention to the uncommunicated threats of the deceased of which there was testimony. In other jurisdictions testimony as to such threats is not admissible; here it is admitted, where there is a doubt as to who was the aggressor, for the alleged reason that it may aid in determining whether the defendant had any reasonable cause to apprehend danger from the deceased when the difficulty began, but for no other purpose. *State v. Hale*, 238 Mo. loc. cit. 512, 141 S. W. 1125; *State v. Birks*, 199 Mo. 276, 97 S. W. 578. In the case at bar no specific instruction was asked by defendant on the subject of uncommunicated threats. A correct instruction was given on the issue of self-defense, and the jury was told that in passing on the question whether the defendant had reasonable grounds to believe it was necessary to strike the deceased to protect his life, they should consider "all the facts and circumstances in the case." In the *Hale* Case the above-mentioned instructions were held sufficient, and an instruction in regard to uncommunicated threats was refused. In *State v. Greaves*, 243 Mo. 540, 147 S. W. 973, this court, following the rule announced in the *Hale* Case, and in accordance with the course pursued in the case at bar, held that in a prosecution for homicide, where correct instructions were given on the issue of self-defense and the accused had failed to request additional instructions, he could not complain that the instructions did not sufficiently show his right to act on appearances; that under such a state of facts, where self-defense is set up, only those threats which were shown to have been communicated to the accused before the killing can be considered on the question whether the accused was justified in acting on appearances and in killing the deceased. In the case at bar there is no evidence that any of the threats alleged to have been made by the deceased were communicated to the defendant. The instructions given were therefore all that the defendant was entitled to, and he will not be heard to complain on this account.

[21] III. *Conduct of Trial Judge*.—Lastly, the remarks and conduct of the trial judge

are complained of. A careful examination of the record of the trial does not sustain this contention; the utmost that can be said in regard thereto is that the judge manifested by word and act a desire to expeditiously hear the case without denying the defendant any right to which he was entitled under the law. This course is to be commended, not criticized. The law's delay has been a hackneyed phrase in literature at least ever since the bard put the words in the mouth of the Melancholy Dane, and the judge who strives to render it a mere expression, instead of a fact, should be regarded as a benefactor. This judgment should be affirmed; and it is so ordered.

FARIS, P. J., and REVELLE, J., concur in result.

SHAVER v. SHAVER. (No. 17965.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. DEEDS ⇐155—RESCISSION BY PARTIES—CONDITION SUBSEQUENT.

Where a deed is given in consideration of an agreement to support the grantor, and other personal promises, the presence of a condition subsequent is a prerequisite to the granting of relief to the grantor by setting aside and canceling the deed for breach.

[Ed. Note.—For other cases, see Deeds, Cent. §§ 488-495; Dec. Dig. ⇐155.]

2. DEEDS ⇐160—CONDITION SUBSEQUENT—FORFEITURE.

The effect of the breach of a condition subsequent is the forfeiture of a vested estate, and hence not to be favored.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 505-517; Dec. Dig. ⇐160.]

3. CANCELLATION OF INSTRUMENTS ⇐1—GROUNDS—IN GENERAL.

Where a deed contains neither an express provision creating a condition subsequent nor a mutually dependent contract nor a reverter, the court, in a suit to set aside and cancel it, is left to a review of the entire testimony to determine whether in equity and good conscience plaintiff is entitled to recover, and usually an equitable intervention occurs only where accident, mistake, surprise, or fraud is shown, and where there is a supplementary showing that by reason of the breach there has been a complete failure of consideration.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 1195-1201; Dec. Dig. ⇐1.]

4. DEEDS ⇐211(3)—FRAUD—EVIDENCE.

In a mother's suit in equity to set aside and cancel her warranty deed to her son, evidence held not to show any fraud in procuring the conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645; Dec. Dig. ⇐211(3).]

5. DEEDS ⇐19—RESCISSION—FAILURE OF CONSIDERATION.

A warranty deed from a mother to her son in consideration that he would reform his life and habits, provide her with a home and maintenance, and keep the premises in repair did not rest upon promises so mutually dependent that the failure to comply with the first promise would destroy or render impossible the performance of either of the others, so that there re-

mained sufficient consideration to sustain the deed, under the general rule that the equitable doctrine of rescission will not be applied unless there is an entire failure of consideration equivalent to an abandonment and the consequent release of the other party.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. ¶19.]

6. DEEDS ¶17(1)—RESCISSION—CONSIDERATION.

Where a mother executed a warranty deed to her son in part consideration of personal promises made by him, and he gave a note secured by a mortgage on the property which the mother recognized as valid, a purpose is evidenced, as declared in the deed, to transfer the legal title to the son and to secure a lien for the remainder of the purchase money by the mortgage thereon.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 31, 32; Dec. Dig. ¶17(1).]

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Suit in equity by Jennie B. Shafer against Fred L. Shafer to set aside and cancel a warranty deed executed by plaintiff to defendant. Finding for defendant dismissing the petition, and plaintiff appeals. Findings affirmed, and relief denied.

Thos. T. Railey and H. H. Larimore, both of St. Louis, Neal & Newman, and Edw. J. White, of St. Louis, for appellant. McNatt & McNatt, of Aurora, for respondent.

WALKER, J. This is a suit in equity brought by a mother against a son to set aside and cancel a warranty deed executed by the former to the latter. Upon a trial before the court the issues were found for the defendant, and the petition was dismissed. From this finding an appeal was perfected to this court.

The plaintiff alleged in her petition that in June, 1910, plaintiff, for a consideration named in the deed of \$3,000, executed and delivered to defendant a warranty deed conveying the property described therein, consisting of a dwelling house and lot in the town of Greenfield; that no sum whatever was paid by defendant to plaintiff for said property, and that the deed was voluntary and without consideration, and was made upon the promise of defendant that he would maintain and support plaintiff and provide her with a suitable home during her natural life; that he would keep the property in repair and refrain from the use of intoxicating liquors and reform his personal habits; that there was no other consideration for the deed; that, instead of maintaining, supporting, and providing a comfortable home for the plaintiff and refraining from the use of intoxicating liquors and keeping the property in repair, the defendant has wholly failed to comply with such agreements and promises; and that the legal title to the property in equity and good conscience ought to be divested out of the defendant and vested in the plaintiff.

The plaintiff further alleged that the defendant was an attorney at law and obtained the deed from plaintiff by reason of undue influence exerted by him; that the plaintiff was a confirmed invalid, and was weak and sick in body and mind, and the deed was executed by reason of such undue influence and because of the moral suasion exerted by the defendant upon the plaintiff; that such promises constituted a condition upon which the deed was executed; and that same have wholly failed, and the deed constitutes a cloud upon plaintiff's title which should be removed. This is followed by the usual prayer in pleadings of this character.

Defendant's answer denied that he had exerted any undue influence upon plaintiff to induce her to execute the deed, but that the same was executed by plaintiff of her own free will, after having advised and consulted with other persons in regard thereto; that the deed was made upon the consideration and agreement that the defendant and his wife would break up housekeeping and live with plaintiff the rest of her days, and as an additional consideration that the defendant would make, execute, and deliver to plaintiff his note for \$1,200 and secure same by a deed of trust on the property reserving a life estate for plaintiff therein, and that the plaintiff consummated said agreement and executed said deed and that the defendant made and executed said note for \$1,200 and a mortgage on said property to secure said note and deliver same to plaintiff; that defendant and his wife took possession of the property and lived with and cared for plaintiff and provided for all of her wants for a period of about 27 months, during which, under his claim of title to said property, he made lasting and permanent improvements on same and continued to reside thereon until the conduct of the plaintiff towards defendant and his wife became intolerable, and they were compelled to vacate said premises, which they did, and that plaintiff is now in possession of same; that defendant and his wife have stood ready at all times, and are now ready, to live with and care for plaintiff; but that she has thus far rendered it impossible for them to do so by directing and ordering them to vacate said premises.

The reply was a general denial.

The plaintiff testified that the defendant was her only son; that the \$1,200 note and mortgage executed by him to her were in liquidation of several other notes he owed her which were surrendered to him when the \$1,200 note and mortgage were executed; that she had turned all the business and all of her notes over to defendant at the time of her husband's death, which occurred in May, 1906, including some bank stock and various other representatives of value, and a half interest in an abstract business, and had loaned him \$200 in money in the fall of 1908, and that the \$1,200 note was for these

various debts he owed her; that he himself made out the \$1,200 note and mortgage and delivered them to her when she surrendered the notes to him.

Plaintiff further testified as to defendant's excessive use of intoxicants from his college days in 1892 and 1893; that he frequently had delirium tremens; that her reasons for conveying the property to him was that she thought it would prevent him from drinking; that at one time his addiction to drink rendered him insane, and she placed him in the Nevada insane asylum; that after his release therefrom the execution of the deed to the property was mentioned several times, and whenever mentioned plaintiff remarked to the defendant that if he took the deed he would be assuming an additional burden; that he was taking on himself plaintiff's support and the care of the old place and must mend his habits; that defendant replied, "All right;" that he would take the deed, and he wrote it, and plaintiff signed it; that defendant has failed to refrain from the use of intoxicants, and has been drunk for weeks at a time since the making of the deed, and has rendered the life of the plaintiff intolerable; that she has repeatedly requested him to reconvey the property to her, and he has refused to do so; that the improvements made by the defendant on the property are inconsiderable, and will not amount to more than \$200 in value; that she has offered to give him back the note and mortgage if he would reconvey the property to her.

There was much testimony as to defendant's drunkenness and his inability to attend to his business on account of same. The market value of the property conveyed was shown to be between \$4,000 and \$5,000. There was testimony that plaintiff had been afflicted with rheumatism and had been treated for bronchitis, but there was no substantial testimony as to any impairment in her intellect; on the contrary, notwithstanding she was a woman 71 years of age, she was shown to have a clear judgment and more than ordinary general intelligence. A circumstance illustrative of her capacity to transact business was that at the time of making the deed she testified that she did not and would not take the defendant's judgment alone, either as to the making of the instrument or the terms therein contained, and that she refused to accept the deed of trust securing the \$1,200 unless his wife would also sign it, which was done over the objections of the defendant.

Defendant admitted his drunkenness, and that he had been in the asylum, and that he might have made the promises in regard to reformation to which she had testified, but that never at any time had he made these promises with a view to securing the conveyance of the property to him; that the deed made by the plaintiff to the defendant

reserved a life estate in her favor, and that she had never said anything about the life estate at the time the deed was made, but it was nevertheless inserted in the deed, and that he gave her the note and told her he intended making the amount of the notes up to her when he was able, and that he would secure these notes with a mortgage on the property, and she said that was all right, and that the total amount should be \$800, but that it was placed at \$1,200; that he rented his own home, moved into plaintiff's, and gave her all the attention she needed, and remained there about 27 months, until compelled to remove under the order of plaintiff. He detailed the improvements made by him on the property; admitted he had refused to reconvey the property to her, and that she may have told him he must change his habits and quit his fast life, but that she never said this as a part of any contract made with him or as an inducement thereto. He also denied that he had ever agreed to keep his mother any definite time, but that he had always given her the privilege to live with him, and would continue to support her and was willing to do so now if she would permit him; that long subsequent to the making of the deed by plaintiff and the making of the note and mortgage to her by defendant she demanded the making to her of a new note and a mortgage on the property for \$1,200; and that defendant in 1913 made and executed such a note and mortgage to plaintiff.

[1, 2] As a general rule the presence of a condition subsequent expressed in the deed is a prerequisite to the granting of such relief as is prayed for in this proceeding. The reason for this rule, oft repeated, is that the purpose of the parties should appear beyond a peradventure, because the effect of the breach of a condition subsequent is the forfeiture of a vested estate, and hence not to be favored. If, therefore, plaintiff's rights herein are to be measured by the provisions of the deed alone, the relief she seeks must be denied. *Catron v. Scarritt*, 264 Mo. 713, 175 S. W. 571; *Lackland v. Hadley*, 260 Mo. 539, 169 S. W. 275; *Haydon v. Railroad*, 222 Mo. 126, 121 S. W. 15.

But the petition does not count on any express provision in the deed but pleads, and plaintiff testifies, that in the making of the instrument she was moved wholly by defendant's promises: (1) To reform his life and habits; (2) to provide her with a home and maintain her; and (3) to keep the premises in repair. Compliance by him with the second and third alleged promises having been shown so far as plaintiff permitted, the effect of their existence on the contract need not be further considered. Nor need we concern ourselves with the contention made by the plaintiff that the contract was wholly of defendant's doing, on account of the plaintiff's age and mental infirmity.

The continuity of her thought and the clearness of her conception as evidenced by her answers to the questions propounded to her on the witness stand refute any imputation that may be made concerning her inability to intelligently enter into a contract.

[3] There remains therefore for our consideration the obligation of the defendant first enumerated. Where, as is the case here, there is in the deed neither an express provision creating a condition subsequent nor a mutually dependent contract nor a reverter, we are left to a review of the entire testimony to determine whether in equity and good conscience the plaintiff is entitled to recover. Usually an equitable intervention under such circumstances occurs only where accident, mistake, surprise, or fraud is shown. Supplemental to this showing it should be made to appear that there is by reason of the breach alleged a complete failure of consideration. It must be admitted that the relationship of the parties, the depraved habits of the defendant, and the consequent solicitude of the plaintiff for his welfare lend strong color to her contention that his promises formed the consideration underlying the contract.

[4] Accident, mistake, and surprise may reasonably be eliminated, because there is nothing in the record showing the existence of either. Was there fraud? Plaintiff contends, more by innuendo in her petition than in her testimony, that the deed was not procured by fair means. Let us concede that the facts are as the petition states—that defendant was a lawyer; that he prepared the deed and brought it to the plaintiff ready for her signature and acknowledgment. She does not intimate, nor is there any fact in the case to indicate, that he in any way misrepresented the nature of the instrument to her, but, on the contrary, inserted therein the reservation of a life estate which she had not demanded, and placed the amount of the note he gave her, secured by a mortgage on the property, at the sum of \$1,200, when she only required that the amount of same be \$800. Further than this, she testifies that she did not rely upon the judgment of the defendant as to the nature of this instrument, but consulted with others, and was evidently guided by their judgment rather than that of the defendant in her actions in the premises. A complete transfer of the title must have been contemplated when she entered into the contract, and nothing more was accomplished by the execution of the deed, and, instead of the transaction savoring of fraud, there is every evidence of fair dealing.

[5] It remains to be determined whether the absence of consideration is such as to enable the plaintiff to recover. If the personal promises alleged to have been made by the defendant constitute, as plaintiff contends, the entire consideration for the mak-

ing of the deed, we find that defendant has failed in the performance of one of these promises, but has complied, so far as plaintiff has rendered it possible, with the other two. These promises are not so mutually dependent that the failure to comply with one will destroy or render impossible of performance either of the others, and hence there remains sufficient consideration to sustain the contract. The general rule is that the equitable doctrine of rescission will not be applied unless there is an entire failure of consideration equivalent to an abandonment and the consequent release of the other party. *Haydon v. Railroad*, 222 Mo. 126, 121 S. W. 15.

[6] However, the evidence discloses another consideration, supplemental, it may be, to the personal promises made by the defendant, but nevertheless a valid consideration, which constitutes a part of same and hence cannot be ignored in this transaction. We refer to the mortgage on the property given by defendant to the plaintiff to secure the payment of the \$1,200 note. Whether the note itself was given as a part of the purchase price of the property or in renewal and in liquidation of a former indebtedness of the defendant to the plaintiff is not material. The security given for the payment of the note created a lien on the property, the title of which had been transferred to the defendant by the plaintiff. If the transaction had been limited, as plaintiff now contends, to a transfer by plaintiff of the property to the defendant for the sole consideration of his promises, the supplementing of these promises by the mortgage on the property would not have been made, because entirely foreign to the original transaction; but if the transaction was, as a reasonable construction of the facts indicates, for a valid consideration, and it was intended that the legal title of the property was to be in the defendant, then the giving of the mortgage by the defendant and its acceptance by the plaintiff was an appropriate and reasonable part of the transaction. The subsequent conduct of the plaintiff in regard to this mortgage is proof of the correctness of the latter conclusion. After her acceptance of the mortgage she held the same for three years, and then required the defendant to renew same, thereby recognizing it as the valid and subsisting claim she held against the property. Under this state of facts we hold that it was the purpose of the plaintiff, so declared in her deed, to transfer the legal title of the property to the defendant and to secure her lien for whatever remained unpaid of the purchase money by accepting a mortgage thereon. This conclusion is justified by what we deem to be a fair interpretation of all of the facts. In any view of the case the plaintiff is not left without relief. That she has a life estate in the property and the possession of same, which she now enjoys, and a right to a foreclosure of

the mortgage upon a default in the payment of the note, cannot be questioned.

In view of all of which we hold that the findings of the trial court herein should be affirmed, and the relief asked by the plaintiff denied.

It is so ordered. All concur.

McNIELL v. CITY OF CAPE GIRARDEAU. (No. 17398.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. MUNICIPAL CORPORATIONS — §819(6)—DEFECTIVE SIDEWALKS — INJURIES TO PEDESTRIANS—KNOWLEDGE OF CITY—EVIDENCE.

Evidence held to warrant inference that the city knew of the defective condition of the sidewalk by which a pedestrian was injured.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1741; Dec. Dig. § 819(6).]

2. MUNICIPAL CORPORATIONS — §806(2)—DEFECTIVE SIDEWALKS—CARE OF PEDESTRIAN.

A pedestrian, in walking over a board sidewalk in which the boards were laid transversely over stringers so that one stepping on the end of a loosened board would lift the other end, could presume that the walk was reasonably safe for ordinary travel, and need not look for such hidden danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1678; Dec. Dig. § 806(2).]

3. TRIAL — §253(4)—INSTRUCTIONS.

In such case, it was error to instruct that if there were loose boards in the walk and the pedestrian knew of them, or by exercising ordinary care could have known of them, it was her duty to take such care to avoid being injured as a reasonably careful person would have taken; such instruction ignoring the pedestrian's right to presume that the sidewalk was reasonably safe for travel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253(4).]

Appeal from Cape Girardeau Court of Common Pleas; R. G. Raney, Judge.

Action by Nannie McNell against the City of Cape Girardeau. From an order granting new trial after judgment for defendant, defendant appeals. Affirmed and remanded.

This suit seeks to recover the sum of \$10,000 for personal injuries received by plaintiff as a result of being tripped and thrown by a defective board sidewalk in the city of Cape Girardeau. Trial was had in the Cape Girardeau court of common pleas, resulting in a verdict for the defendant. The trial court granted a new trial on the ground that it had committed error in giving defendant's instructions 1 and 2. Thereupon defendant duly perfected an appeal to this court. This is the second appeal. The first appeal will be found reported in 160 Mo. App. 620, 140 S. W. 1196. The evidence tends to show that, as the plaintiff and her husband were walking along a board sidewalk on one of the main residence streets in the city of Cape

Girardeau, her husband stepped on the end of a loose board in the walk, causing the other end of the board to fly up and catch plaintiff's foot. This caused plaintiff to trip and fall. As a result of the fall her arm was broken, the side of her body bruised, and her nerves shocked. It appears that the board walk was constructed of 1-inch boards, 10 inches wide and 3 feet long, laid across two parallel wooden girders, to which the boards had originally been nailed; that for two or three months prior to this accident some of the boards were loose. The ends of the boards projected out over the girders, about 8 inches. Plaintiff was 33 years old, and frequently used this sidewalk in going to and from her meals at a nearby boarding house. She testified that Dr. Patton, the mayor of Cape Girardeau at the time of the accident, was called to give her medical treatment. On their way to the hospital, shortly after the accident, Dr. Patton told her that:

"He knew it was a bad walk, and that he was very sorry that it occurred, and said if he had been in the city, he would have attended to it, but was out of the city."

On cross-examination, plaintiff testified:

"I know there were lots of loose boards there. I went over the same board going to dinner, and went over the same board going to breakfast and going back the same morning. I don't just remember whether I passed over the same board the day before or not; possibly I did. I didn't consider or think about the condition of the walk until I was hurt."

She further testified that at the time of the injury, she and her husband were engaged in conversation, and that they were troubled about plaintiff's husband having lost his position with the gas company. Plaintiff offered in evidence the testimony of Dr. Patton, the mayor, which was given at a former trial. The mayor testified that the street and wharf committee and the street commissioner usually made reports to the city council as to the condition of the different sidewalks in town. The mayor was on the streets nearly all the time, day and night, and looked after the condition of the sidewalks a great deal of the time himself, and whenever he would find a bad condition he would have the street commissioner repair the same at once. He further said:

"I don't think I ever ordered the street commissioner to repair that particular part of the sidewalk. I don't remember that I did. I won't say positively."

On cross-examination, in answer to the question as to whether or not he had said to the plaintiff on the way to the hospital that he had been out of the city for some time and had not given the matter his attention, and that otherwise he would have compelled the street commissioner to keep the sidewalk in better condition, said:

"No, sir; I don't remember anything of the kind. Don't know that I knew the sidewalk was out of condition. I might have said so. * * * I might have said it if I had known it, and might have said I was sorry, but never said

or indicated that I knew the sidewalk was out of condition."

The evidence upon the part of the defendant tended to show that this portion of the sidewalk had been fully repaired about a year before the accident, and that the same was in sound condition at the time of the accident. Defendant's instructions, numbered 1 and 2, were as follows:

"(1) The court instructs the jury in this cause that there is no evidence that the city had any actual knowledge of the board which tripped the plaintiff being loose, rotten, and unfastened to the girders, even if you find that it was in that condition.

"(2) The court instructs the jury that the city is not an insurer of the safety of its sidewalks, and that it is not required to make them absolutely safe, but that it is only required to furnish a reasonably safe sidewalk for a person to walk along and upon when using ordinary care in their walking, and if you believe the walk was reasonably safe for a person to walk upon when using such care, then your verdict will be for the defendant. And you are also instructed that, even if you believe and find there were loose boards in the walk, and that plaintiff knew of them and knew of the general condition of the walk, or by exercising ordinary care could have known of it, then it became and was her duty to take such care to avoid being injured while using the walk as a reasonably careful person would take under like conditions and circumstances."

Thos. F. Lane, of Cape Girardeau, for appellant. John J. O'Connor, of St. Louis, for respondent.

WILLIAMS, C. (after stating the facts as above). [1] Defendant's instruction No. 1 was erroneously given. The city's actual knowledge of the defective condition of one of its sidewalks may be shown by circumstantial as well as by direct evidence. The facts disclosed by the foregoing statement were sufficient, we think, to justify the inference that the city had actual knowledge of the defective condition which caused the injury. *Clark v. City of Brookfield*, 97 Mo. App. 16, 70 S. W. 934.

[2, 3] We are also of the opinion that defendant's instruction No. 2 was erroneous under the facts of the present case. The instruction infers that there was sufficient evidence to justify the jury in finding that plaintiff could have discovered and avoided the danger by the exercise of ordinary care, and ignores the plaintiff's right, under the facts in the present case, to presume that the sidewalk was reasonably safe for travel. The defective situation which brought about plaintiff's injury in the case at bar was a hidden or concealed one as contradistinguished from a defect which would be visible to the ordinarily observing pedestrian. From aught that appears from the present record, the pedestrian would not discover the hidden danger by merely looking. Even though plaintiff may have known that there were loose boards in the walk, yet unless she further knew (concerning which the evidence is

silent) that the underneath construction of the walk was such that the ends of the loose boards projected beyond the supporting girders, she would still be entirely unaware of the danger in using the walk, side by side with a companion. Ordinary care did not require that she carefully inspect the construction of the walk to discover hidden dangers of this kind.

Whether or not the pedestrian (absent a knowledge of the defect) has the right to presume that a sidewalk is free from defects which may be easily discovered by casual observation, we need not here determine, because not called for by the facts. That question remains somewhat unsettled in this state, as will appear by reference to the two last cases on the subject, to wit, *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Smith v. Kansas City*, 184 S. W. 82, not yet officially reported.

But we have no difficulty in saying that a pedestrian has the right to presume that at least the sidewalk is free from hidden or concealed dangers such as the present facts disclose. Furthermore, there was no evidence of plaintiff's failure to exercise due care in the present case (*Howard v. New Madrid*, 148 Mo. App. 57, loc. cit. 67, 127 S. W. 630), and the instruction as given probably misled the jury into believing that there was evidence which would warrant the inference that plaintiff's injury was brought about by her own negligence in failing to foresee and avoid the danger.

It, therefore, follows that the action of the trial court in granting the plaintiff a new trial was proper.

The order is affirmed, and the cause remanded.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of **WILLIAMS, C.**, is adopted as the opinion of the court. All of the Judges concur.

PAXTON et al. v. FIX et al. (No. 17925.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. **TAXATION** — 728 — **TAX SALE** — **INTEREST OF CESTUI.**

Where land was sold on judgment for taxes in a suit to which the cestui que trust in a deed of trust on the land was not a party, but in which all other persons concerned in the land, including the trustee in the deed of trust, were made defendants, the purchaser at such sale acquired a legal title superior to that of the cestui que trust, and the cestui's only remedy was a suit to redeem from such title acquired by the purchaser under the execution.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1457-1461; Dec. Dig. — 728.]

2. **TAXATION** — 693 — **TAX SALE** — **REDEMPTION** — **CESTUI QUE TRUST.**

The application of a cestui que trust to redeem from a tax sale of land the legal title to

which was in his trustee, is an application for equitable relief, to which laches is a good plea.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1401; Dec. Dig. ¶ 698.]

3. TAXATION ¶ 698—TAX SALE—REDEMPTION—LACHES.

Where land in the name of a trustee under a deed of trust to secure a note was sold for taxes and the cestui delayed for nine years before suing to redeem, during which time the purchaser paid taxes of \$753.44, and the value of the land increased from \$275 an acre to \$7,000 an acre at the time of trial, the cestui's suit was barred by laches.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1401; Dec. Dig. ¶ 698.]

4. EQUITY ¶ 67—LACHES.

Laches not amounting to an estoppel is a defense only to equitable causes of action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. ¶ 67.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Suit by John G. Paxton and another against Lewis R. Fix and others. From judgment for defendants, plaintiffs appeal. Affirmed.

This is a suit to foreclose the lien of a deed of trust. The petition incidentally asks that plaintiff be permitted to redeem the land from a sale under execution for taxes if the court should hold that it is necessary for him to so redeem. The decree was for the defendants, and the plaintiffs have appealed.

On July 3, 1889, James E. Gregg owned ten acres of land in or near Kansas City. It was not subdivided, nor did it have any improvements on it of any special value. He, on that day, executed to one Painter as trustee a deed of trust on the land to secure the payment of a note to Swope for \$11,268, due three years after that date, with interest at 8 per cent. per annum due and payable annually. Immediately thereafter Gregg filed a plat of such land in which he subdivided it into blocks and lots, except that two small tracts therein were not numbered.

On September 27, 1890, the trustee, in pursuance of his power as such, sold six of the lots and one of the small unnumbered tracts above mentioned to Swope for \$1,001; and on January 11, 1893, the trustee as such sold all the other lots numbered on said plat to Swope for \$1,615, leaving a small tract containing fifty-six hundredths of an acre unsold. That tract was one of those which had no number on said plat, and is the land involved in this suit.

On August 3, 1898, the land in controversy here was sold under a judgment for taxes and was purchased by B. Howard Smith, one of the defendants herein. Said judgment was rendered in a suit in which all parties interested in the land were defendants except Swope. The trustee was a party defendant. Smith paid at that sale for the land \$130.97.

This suit was begun December 17, 1907. Prior to that date and after his purchase at the tax sale, Smith paid taxes general and

special against the land in controversy, including sewer and street improvement taxes, amounting to \$753.44. One bill of \$271.85 for sewers and street improvements was paid August 14, 1903. The evidence shows that the land in controversy was worth about \$4,000 at the time of the trial on September 23, 1912. There is no direct evidence as to its value when this suit was brought.

The answer pleads laches on the part of the plaintiff.

J. H. Hawthorne, of Kansas City, for appellants. E. S. Herlder, of Kansas City, for respondents.

ROY, C. (after stating the facts as above).

[1] I. When land is sold under an execution on a judgment for taxes rendered in a suit to which the cestui que trust in a deed of trust on the land was not a party, but in which all other persons concerned in the land, including the trustee in the deed of trust, were made defendants, the purchaser at such sale acquires a legal title superior to that of such cestui que trust, and the latter is driven to a suit to redeem from such title acquired by the purchaser under the execution. *Stafford v. Fizer*, 82 Mo. 393; *Cowell v. Gray*, 85 Mo. 169. Those cases are cited with at least implied approval in *Keokuk Railroad v. Scotland County*, 152 U. S. 318, 14 Sup. Ct. 606, 38 L. Ed. 457, in *Keaton v. Jorndt*, 259 Mo. 179, 168 S. W. 734, and in many other cases.

[2] The plaintiff, when this suit was begun, was aware of such rule, and in his petition prayed to be allowed to redeem if the court should adjudge that such redemption was necessary. That prayer to be allowed to redeem is an application for equitable relief, and is met by a plea of laches. We think that such plea is supported by the facts.

In *Troll v. St. Louis*, 257 Mo. 626, 168 S. W. 167, it was held that a party will not be allowed to wait for a rise in the value of land before asking to redeem, and that he will not be allowed to sleep on his rights so as to create in others the belief that he had abandoned such rights.

[3] At the time of the sale of the land by the sheriff under the tax judgment on August 3, 1898, the deed of trust was over nine years old; there had been two sales of real estate by the trustee therein, the last of which was more than five years before the sale to Smith by the sheriff. It is very unusual, to say the least, for a trustee to sell a part of the land leaving the remainder unsold while any part of the debt is due and unpaid.

The facts as to whether the debt was paid and as to whether Swope had abandoned the small unsold tract were not in the knowledge of Smith, but Swope had the means of such knowledge in his possession. More than nine years elapsed after the sale to Smith before the institution of this suit, during which

time Smith paid the taxes general and special amounting to \$753.44 over and above what he paid for the land. The holder of the secured note was certainly aware that this land was within a modern city, and that liens for general and special taxes were constantly attaching to the land. The land sold at the trustee's sales for about \$275 an acre. At the time of the trial the fifty-six hundredths of an acre in controversy was worth \$4,000, or at the rate of about \$7,000 an acre.

We conclude that Swope was waiting for a rise in value before electing to redeem, or else he was asleep on his rights. In either case his estate is barred by laches.

II. We have examined *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760, in which it was held that laches does not bar the owner who has paid no taxes for 30 years if the land has never been in the possession of any one and the only title of the other party is a sheriff's deed under execution in a void judgment for taxes, and the payment of taxes for 20 years. See, also, *Weir v. Lumber Co.*, 186 Mo. 388, 85 S. W. 341, *Manwaring v. Lumber & Mining Co.*, 200 Mo. 713, 98 S. W. 762, and *Lumber Co. v. McCabe*, 220 Mo. 154, 119 S. W. 357.

[4] Though those cases were brought under our statute to quiet title, the issues therein joined were purely at law, and no equitable relief was prayed for by the parties claiming against the sale under judgments for taxes. The sheriff's deeds in those cases were void. The owners of the land were not driven into a court of equity either to set aside those deeds or to redeem from them. Laches not amounting to an estoppel is a defense only to equitable causes of action. *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 498; *Loomis v. Railroad*, 165 Mo. loc. cit. 495, 65 S. W. 962; *Hayes v. Schall*, 229 Mo. 114, 129 S. W. 222; *Chilton v. Nickey*, 261 Mo. 232, 169 S. W. 978.

In *Doyle v. Burns*, 123 Iowa, loc. cit. 509, 99 N. W. 203, it was well said:

"In equity, laches and acquiescence may bar plaintiff of recovery, although the delay and acquiescence have not been for such a length of time as that the action would be barred by the ordinary statute of limitations. Where the action is at law, mere delay or acquiescence will not bar the action, unless prolonged for the statutory period, save where there is present the elements of an estoppel. These being present, laches and acquiescence may constitute a bar to a law action. In this case there were no elements of estoppel present, and the trial court did not err in refusing to submit that question to the jury. These doctrines are fundamental, and we need only cite in their support 2 *Pomeroy's Equity*, § 817; 1 *Pomeroy, Equity*, § 618; *Long v. Valleau*, 87 Iowa, 675 [55 N. W. 31, 56 N. W. 748]; *Wehrman v. Conklin*, 155 U. S. 327, 15 Sup. Ct. 129, 39 L. Ed. 167."

In the *Haarstick Case*, supra, it was said:

"The doctrine of laches as a bar to an asserted right is a creation of equity jurisprudence, and though it has some analogy, in its application, to the statute of limitations, yet it differs from that and rests on its own equitable

grounds; like all purely equitable doctrines it is applied only when the equity of the case demands it. We do not think the circumstances of this case demand its application."

In that case the claimant under the sheriff's deed had no title to the land, and therefore he had no more right than any one else to pay the subsequent taxes on the land, nor was he under any duty to do so. In this case Smith had a title to the land in controversy, though subject to the equity of redemption. He had the right for his own protection to pay subsequent taxes. The plaintiff's only remedy was an equitable one, and laches bars him from that.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

STATE v. TAYLOR. (No. 19719.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

1. CRIMINAL LAW §576(9)—TRIAL—DELAY IN PROSECUTION.

Under Rev. St. 1909, § 5426, requiring trial before the end of the second term after the filing of the information, the term at which the information was filed is not to be counted, and accused is not entitled to be discharged where he was tried at the second term thereafter, though at the beginning of that term the cause was continued to a particular day later in the term.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1304; Dec. Dig. §576(9).]

2. HOMICIDE §127—INFORMATION—PREMEDITATION—"THEN AND THERE."

An information, which charged that defendants "deliberately, premeditatedly, and of malice aforethought" administered poison to deceased, and "did then and there contrive and intend" that it be taken into the body of deceased, is not defective for failing to repeat the allegations of premeditation and malice in connection with the latter averment, since the use of the words "then and there" connect the two averments so as to make the qualifying words in the former apply to the latter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 192-194; Dec. Dig. §127.

For other definitions, see *Words and Phrases*, First and Second Series, *Then and There*.]

3. HOMICIDE §135(5)—INFORMATION—POISON.

Where one allegation of an information charged defendants with administering strychnine and bichloride of mercury, the information is not defective because in a later paragraph it used the phrase "other deadly drugs and poisonous substances" in place of the words "bichloride of mercury."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 223; Dec. Dig. §135(5).]

4. HOMICIDE §135(5)—INFORMATION—POISON.

An information for a murder by poison need not specify the particular kind or quantity of poison used.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 223; Dec. Dig. §135(5).]

5. HOMICIDE \S 228(2), 250—EVIDENCE—CORPUS DELICTI.

In a prosecution of defendant for poisoning his wife, evidence held sufficient, though circumstantial, to establish the corpus delicti and sustain a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 472, 515-517; Dec. Dig. \S 228(2), 250.]

Appeal from Circuit Court, Pemiscot County; W. S. C. Walker, Judge.

Sam Taylor was convicted of murder, and he appeals. Affirmed.

R. L. Ward, of Caruthersville, and Val Perkins, of Lillbourn, for appellant. John T. Barker, Atty. Gen., and Shrader P. Howell, Asst. Atty. Gen., for the State.

WALKER, J. The defendant, in an information filed by the prosecuting attorney of Pemiscot county, was charged jointly with a woman named Iva Bumpass with murder in the first degree in having killed the defendant's wife by administering poison to her on December 11, 1914. There was a severance, and upon a trial of the defendant, he was convicted as charged and sentenced to imprisonment in the penitentiary for life. From that judgment he appeals.

The evidence is largely circumstantial. The defendant was a common laborer living on a farm with his wife and two children near Portageville in Pemiscot county. With them lived the young woman Iva Bumpass, the codefendant. The nature of the latter's relations with the defendant excited the suspicions of the wife to such an extent that she spoke about it to persons living in the vicinity and the matter was a subject of scandal in the neighborhood. This only in passing, as presenting a cause deducible from the evidence of the crime. It was the custom of the defendant, the young woman, and others to pick cotton in its season for neighboring planters. While thus engaged about two weeks before the wife's death, the young woman was heard to say to the defendant, "You have got to get rid of your wife or of me." To which defendant replied, "I will do whatever you say."

The wife's illness began on Sunday, December 6, 1914. The next day the father of the defendant called in a Dr. Phillips to prescribe for her. The doctor pronounced her illness follicular tonsillitis and pneumonia, gave her some medicine, and directed the defendant to call at his office the next day and report the condition of the patient. The defendant did not do this, and the physician did not again see the woman. The day the doctor called, a witness named Pavy met defendant in Portageville, and the latter spoke to him about some poison, said he wanted some to kill a dog, and asked what was good, arsenic or strychnine. The witness told him either would kill, but ad-

vised him to get a gun and shoot the dog. Defendant said a dog had jumped into his back window and had taken some meat, but he did not want to shoot him because that would get blood on the floor and he did not want it known that he had killed it. Defendant left the witness and went into a drug store owned by a Dr. Hollenbeck in Portageville. Homer Hollenbeck, the doctor's son, testified that he saw his father sell some strychnine to the defendant on December 9th, which defendant said he wanted for the purpose of killing a dog. Witness further testified that on December 12th, the day the defendant's wife died, but prior to that occurrence, defendant came to the drug store and said, "Doc, the poison I got here the other day did not kill that dog at all." To which the doctor replied, "The wrong dog must have gotten it." Defendant then bought 20 grains of bichloride of mercury. A boy named Helton was present when this took place, saw the defendant, and heard the conversation, which he details substantially as testified to by Homer Hollenbeck. Dr. Hollenbeck's testimony corroborates that of his son. He stated that when defendant came to his drug store on December 9th he sold him two dozen strychnine tablets. Later, on December 12th, the day the defendant's wife died, defendant again came to the store and said he wanted a stronger poison, that the other had failed, and witness then sold him 20 grains of bichloride of mercury. This was some time before the noon hour. The wife died at 5 o'clock that evening.

Three neighbor women nursed the wife from the beginning of her illness on December 6th to her death on the 12th, relieving each other at intervals. They testify that she said she believed she was going to die; that the medicine given to her by her husband was going to kill her. They described her condition, as shown by observation and from her statements and expressions of pain. She complained of her mouth and throat burning and of internal agony. These conditions continued to increase in intensity from the beginning of her attack until she died. The Bumpass girl did not testify. Defendant on the stand denied that he talked to the witness Pavy about poisoning a dog and that he bought no poison from Dr. Hollenbeck on either of the occasions stated by that witness and his son; that he never had any conversation in the cotton field with the Bumpass girl testified to by witnesses.

A witness named Ellis testified in rebuttal that he heard defendant's father say to the latter in the witness' presence at the coroner's inquest that he (the father) was going to send for Dr. Rhodes. The defendant asked him, "Why?" to which the father replied:

"You know why. You have poisoned this woman, and I am going to spend every cent I have to convict you for it."

To this statement it does not appear that witness made any reply.

[1] I. *Timely Trial*.—Defendant moved to be discharged because he was not brought to trial before the end of the second term after the filing of the information against him, as provided in section 5246, R. S. 1909. At the time of the filing of this information, Pemiscot county had three regular terms of circuit court during each year, viz. in the months of February, July, and November. Laws Mo. 1913, p. 215. The defendant was informed against on January 20, 1915, or during the November term, 1914, of the Pemiscot circuit court. The case was continued on the state's application at this term and at the succeeding February term. At the July term the case was continued on the court's own motion until August 16, 1915, which was a part of the July term, when it was tried. In construing the statute, the term at which the indictment is found or the information filed is not to be included. *State v. Riddle*, 179 Mo. 287, 78 S. W. 606. There was, it is true, two subsequent continuances, one at the February term and another at the July term; but the latter was not a continuance beyond the second term, but to a day certain within same, when the trial was had. Defendant therefore was not authorized to invoke the statute, and his motion was properly overruled.

[2] II. *Information*.—It is contended that the information is defective in failing to allege "that the defendant deliberately, premeditatedly, and of malice aforethought contrived and intended that the said poison should be taken and received into the body of the said Victola Taylor." The language of the information indicated by the matter quoted, so far as same relates to the objection made, is as follows:

First. That the defendant "then and there wickedly contriving and intending one Victola Taylor to deprive her of her life, and then and there feloniously contriving and intending her, the said Victola Taylor, willfully, feloniously, deliberately, premeditatedly, on purpose, and of their malice aforethought, to kill and murder."

Second. "Did then and there willfully, feloniously, deliberately, premeditatedly, on purpose, and of their malice aforethought, administer and give to, and cause to be administered and given to her, the said Victola Taylor, certain deadly drugs and poisonous substances, etc."

Third. "The said Sam Taylor and Iva Bumpass then and there wickedly, willfully, and feloniously contriving and intending the said strychnine and bichloride of mercury and other deadly drugs and poisonous substances, then and there to be taken and received into her body, the said Victola Taylor."

Fourth. "And she, the said Victola Taylor * * * did then and there actually take and receive into her body the said strychnine and other deadly drugs and poisonous substances, so willfully, feloniously, deliberately, premeditatedly, on purpose, and of their malice aforethought, administered and given by them, the said Sam Taylor and Iva Bumpass."

The language employed shows that the information charges the defendant with the administration of the poison in the precise words appellant contends were omitted therefrom. However, if the validity of the information be tested by the third paragraph alone above quoted, it is not subject to the objection urged by appellant. The doctrine has frequently been announced by this court that in determining the validity of informations where it had been previously charged that the act or the giving of the poison was done "feloniously, deliberately, etc.," it is unnecessary to repeat these words in each subsequent averment, but that the rules of pleading are satisfied if subsequent averments are connected with the words "feloniously and deliberately" by the phrase "then and there." In this case the particular clause in question is introduced by the phrase "then and there," and the technical words "feloniously and deliberately" are as a consequence carried over into the subsequent charge, rendering the information immune from criticism in this respect. In *State v. Davis*, 29 Mo. loc. cit. 396, we said:

"Every felonious act must be charged to have been done feloniously, and the crime here charged is a felony; but this requirement is satisfied by the averment that the assault was made, and that the striking, cutting, and thrusting was feloniously done. If the blow which causes a wounding is inflicted feloniously, the wound, the consequence of the blow, must have been made with felonious intent. *Chitty (3 Chit. Cr. L. 738)* says it is not necessary to repeat the words 'feloniously and of malice aforethought' to every allegation; for if the assault be stated to have been thus made, and the indictment proceed to aver that the defendant then and there struck, etc., it will be good without repeating them, because the acts are sufficiently connected."

A like doctrine is announced in the later case of *State v. Rice*, 149 Mo. 461, 51 S. W. 78, in which it was held:

"It would perhaps have been better had the word 'feloniously' been repeated next after the words 'then and there' when used the second time in the indictment so that it would read, 'then and there feloniously' giving to her the said Mary C. Rice with one of the leaden bullets, etc., one mortal wound but as the words 'feloniously,' etc., as first alleged, are connected with the mortal shot by the words 'and then and there,' the words 'feloniously,' etc., become component parts of the subsequent allegations, and connect them with the mortal shot, which is all that was necessary in order to make the indictment good."

In the late case of *State v. Conley*, 255 Mo. 196, 164 S. W. 196, in which the sufficiency of the information was attacked on the ground urged in the case at bar, *Faris, J.*, speaking for the court, said:

"For, if it be averred in an information that deceased was feloniously, etc., shot and struck or hit in the head or body with a leaden ball fired from a gun or pistol, and thereafter and immediately following such averment it be further charged substantially thus, 'Then and there giving to (deceased) * * * with the pistol (or gun) and the leaden ball aforesaid * * * mortal wounds,' it is extremely difficult for the finite mind to avoid the irresistible conclusion that the infliction of the lethal wound was in some intimate constitutional way connected with

the shooting and striking of deceased by the accused. Having in this behalf naught to avoid except the constitutional Charybdis, *supra*, we deem it sufficient in grammar and language and diction, ergo, in law.

With these authorities as precedents, the sufficiency of the information here under consideration follows as a reasonable conclusion, because the similarity of the language employed therein is not only evident, but it is in many respects identical with that employed in the cases cited.

[3] It is further urged that the information is insufficient on account of the omission from one of the paragraphs of the words "bichloride of mercury." In lieu of these words, there appears the phrase "other deadly drugs and poisonous substances." After having in a former paragraph designated the particular poisons alleged to have been used, the employment of the general words was sufficient to inform the defendant of the nature of the charge against him; the conclusion being inevitable from a reading of the paragraph that the general words included not only strychnine but bichloride of mercury.

[4] However, the use of the particular words in the first instance was not necessary to conform to the rule regulating the framing of informations or indictments of this nature. The specification of a particular kind or quantity of poison used in effecting a homicide is not required. If the evidence produced at the trial discloses that any poison was administered with the required criminal intent, it is sufficient to support a finding of guilt. *State v. Hyde*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; *State v. Van Houten*, 37 Mo. 357.

[5] III. *Corpus Delicti*.—It is contended that there was no sufficient proof of the corpus delicti. Direct evidence of the administration of the poison does not seem to have been obtainable. Notwithstanding the absence of this character of proof, there was evidence of a succession of facts which when considered in the order of their occurrence are of strong probative force.

Motive for the commission of the crime is shown in the willingness expressed by the defendant to his coindictor to get rid of his wife. Preparations to effect this purpose are evidenced by his procuring the poisons. A circumstance indicative of his guilt, subordinate it is true, but nevertheless cogent, is his denial of the procuring of the poisons, although this fact was sworn to by three witnesses. That he consummated his purpose in poisoning his wife is sustained by the evidence of her symptoms in her last illness indicating that she had been poisoned. Confirmatory of this fact is the wife's declarations made in extremis to the effect that her suffering was due to the medicine administered to her by her husband from the effects of which she stated that she was

going to die. In further support of the conclusion as to defendant's guilt is the testimony of the witness who heard the father of the defendant at the coroner's inquest charge the latter with having poisoned his wife, to which accusation defendant made no reply. This testimony forms a chain of circumstances ample to establish the body of the crime and hence to sustain the verdict of guilt. Where there is any substantial evidence adduced to sustain a charge and the jury upon a consideration of same finds the defendant guilty, we will not interfere with the verdict. *State v. Martin*, 230 Mo. loc. cit. 700, 132 S. W. 595; *State v. Gow*, 235 Mo. loc. cit. 829, 138 S. W. 648; *State v. Sharp*, 233 Mo. loc. cit. 298, 135 S. W. 488; *State v. Concella*, 250 Mo. loc. cit. 424, 157 S. W. 778.

IV. *Instructions*.—The court instructed the jury on the elements of the crime charged and the punishment prescribed therefor; murder in the first degree and the factors necessary to create this crime were defined; the formal nature of the information was stated, and the presumption of innocence and reasonable doubt explained; the jury was told that a conviction might be had upon direct or circumstantial evidence accompanied by an explanatory instruction as to the circumstances under which a conviction upon circumstantial evidence could be sustained; the credibility of witnesses and the weight to be attached to their testimony was explained, and an acquittal directed unless it was found that the death of the deceased had been brought about by the means charged in the information.

The opinion need not be lengthened by the citation of authorities sustaining the correctness of the instructions. They were, in substance, the same as those approved in the *Hyde Case*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191, and are consequently not subject to criticism.

Prejudicial error was not present in the trial of this case, and the judgment should be affirmed. It is so ordered. All concur.

CORNET et al. v. CORNET et al.
(Nos. 18971, 18973.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Rehearing Denied
Dec. 20, 1916.)

1. TRUSTS §167 — REMOVAL OF TRUSTEE — COSTS AND EXPENSES.

The unsuccessful defendant in a suit against a testamentary trustee to set aside for fraud a deed obtained by him from the cestui que trust, and to remove him on account of the fraud, cannot have the costs and expense of suit charged against the trust, though for determination of the questions involved examination and construction of the will was necessary.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 219, 220; Dec. Dig. §167.]

2. TRUSTS \hookrightarrow 330—ACCOUNTING—COSTS.

A trustee removed for fraud is not entitled to have the costs incident to the accounting taxed against the trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 491-493; Dec. Dig. \hookrightarrow 330.]

3. APPEAL AND ERROR \hookrightarrow 1078(1)—REVIEW—WAIVER.

Correctness of action assigned as error will be treated as conceded; the point not being urged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. \hookrightarrow 1078(1).]

4. TRUSTS \hookrightarrow 217(3)—INVESTMENTS BY TRUSTEE—DIRECTION IN WILL.

Direction in will that the trustee manage the trust fund, and make it productive in such manner as he may deem most safe and advantageous, does authorize him to invest in securities other than are approved by the rules of equity for investment of trust funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 306; Dec. Dig. \hookrightarrow 217(3).]

5. TRUSTS \hookrightarrow 217(3)—INVESTMENT BY TRUSTEE—CLASSES OF SECURITY.

The rule that a trustee is bound only to exercise such prudence and diligence in conducting the affairs of the trust as men of average prudence and discretion would employ in their own affairs, does not apply to classes of security in which they may invest.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 306; Dec. Dig. \hookrightarrow 217(3).]

6. TRUSTS \hookrightarrow 217(3)—INVESTMENT BY TRUSTEES—MEXICAN BONDS.

The bonds of a state of Mexico were not a proper investment for trust funds at any time between 1900 and 1906 or during those years.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 306; Dec. Dig. \hookrightarrow 217(3).]

7. TRUSTS \hookrightarrow 243—IMPROVIDENT INVESTMENTS—REJECTION BY SUCCESSOR.

The successor of a trustee who has been removed is not required to accept an improvident investment made by the removed trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 350; Dec. Dig. \hookrightarrow 243.]

8. TRUSTS \hookrightarrow 217(1)—INVESTMENTS—PERSONAL LIABILITY OF TRUSTEE.

A trustee who invests trust funds in his own name becomes personally liable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-303, 309; Dec. Dig. \hookrightarrow 217(1).]

9. TRUSTS \hookrightarrow 231(2)—TRUSTEE—PURCHASE OF OWN PROPERTY.

A trustee cannot buy his individual property for purpose of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 331; Dec. Dig. \hookrightarrow 231(2).]

10. TRUSTS \hookrightarrow 217(3)—INVESTMENTS—PERSONAL SECURITY.

It is not sound discretion for a trustee to invest trust funds in mere personal security.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 306; Dec. Dig. \hookrightarrow 217(3).]

11. TRUSTS \hookrightarrow 217(3)—INVESTMENTS—NEW ENTERPRISE.

For a trustee to invest trust funds in a new enterprise the results of which are necessarily experimental, as a company to construct an independent railroad bridge, is not sound discretion.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 306; Dec. Dig. \hookrightarrow 217(3).]

12. TRUSTS \hookrightarrow 316(1)—TRUSTEE—COMMISSION ON CORPUS.

The only provision of a will for compensation of trustee being in the direction to manage the trust fund and after deducting necessary expenses and a reasonable compensation, to pay over the income quarterly to C. and after death of C. the trust fund to go to his heirs, the trustee removed for fraud, after long litigation, is not entitled to a commission on the corpus of the fund, for its care and preservation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 445-454; Dec. Dig. \hookrightarrow 316(1).]

13. TRUSTS \hookrightarrow 316(2)—REMOVAL OF TRUSTEE—COMMISSION ON INCOME.

The trustee, though removed for fraud, may, with the trust fund restored to a productive condition, be allowed a commission on the gross amount of income during his administration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 455-459; Dec. Dig. \hookrightarrow 316(2).]

14. TRUSTS \hookrightarrow 219(2)—INTEREST ON FUNDS—DEPOSIT IN FIRM NAME.

Though the uninvested funds of a trust were deposited in bank in the general checking account of a firm of which the trustee was a member, yet the trustee having used reasonable care to keep the fund invested, and having violated the rule against mingling of trust and personal funds, only in ignorance of its existence, he should be charged only with the 2 per cent. interest thereon which the firm was allowed by the bank on monthly balances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 315-317; Dec. Dig. \hookrightarrow 219(2).]

15. TRUSTS \hookrightarrow 219(2)—LOAN TO TRUSTEE'S CORPORATION—COMPOUND INTEREST.

A loan by a trustee on proper security and at a satisfactory interest rate, will not be considered use of the money by him in his own business, so as to make him liable for compound interest, in the absence of a showing of profits derived, because made to a corporation the stock of which was owned by him and his partner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 315-317; Dec. Dig. \hookrightarrow 219(2).]

16. TRUSTS \hookrightarrow 231(1)—LOAN—LIABILITY FOR COMMISSIONS.

A trustee will not be charged with commissions on a loan which he made of trust funds, none having been paid, though the loan was entered on the books of a brokerage firm of which he was a member, where all the accounts relating to the trust fund were kept, and was made to a corporation, the stock of which was owned by him and his partner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330, 335; Dec. Dig. \hookrightarrow 231(1).]

17. TRUSTS \hookrightarrow 231(1)—LOAN—LIABILITY FOR COMMISSIONS.

Though a loan of trust funds is made through a brokerage firm of which the trustee is a member, he will be charged not only with his own share but the partner's share of the commission received from the borrower; the will creating the trust providing for his receiving only actual expenses and reasonable compensation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330, 335; Dec. Dig. \hookrightarrow 231(1).]

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Suit by George A. Cornet and others against Henry L. Cornet and others. From the judgment on accounting, all parties appeal. Reversed and remanded, with directions.

Ryan & Thompson, of St. Louis, for plaintiffs. Smith & Percy, of St. Louis, for defendants.

BROWN, C. This suit was instituted in said circuit court on the 13th day of June, 1908, by a petition in equity filed by George A. Cornet and Tillie Cornet, his wife, against Henry L. Cornet as trustee under the last will of Francis Cornet, deceased, and in his individual capacity. The relief asked was that the court decree that plaintiff George A. Cornet was entitled to appoint and dispose of the estate devised and bequeathed to him in said will by his father, the testator therein; that a certain deed executed by the said George A. Cornet to the defendant, his brother, dated January 14, 1892, be canceled and declared void for fraud; that the defendant be removed as trustee under said will; that an accounting be taken of the trust estate; and that the defendant pay over to the said George A. Cornet what shall appear to be due to him upon such accounting.

The answer put in issue the fraud charged in the petition, and averred that the instrument of January 14th was made in full recognition of the terms and provisions of said will as giving to the said George A. Cornet only the net income from the share of the testator's estate left to defendant in trust for him during his life, and that defendant accepted said trust and ever since continued to discharge his duties thereunder.

The cause having been put at issue by replication, was tried and the bill dismissed upon the merits. An appeal was taken by the plaintiffs to this court, where, upon hearing, the judgment dismissing the bill was reversed and the cause remanded to the St. Louis circuit court, with directions that the said deed of January 14, 1892, be set aside; that the defendant be removed as trustee; that a successor be appointed to administer the trust according to the provisions of the will; and that an accounting be had as prayed.

The opinion of this court, with its directions, setting forth the issues and findings in detail, is published in volume 248 of our Reports at pages 184 to 243, inclusive, 154 S. W. 121. This renders it not only unnecessary, but improper, that we should incur our records with a restatement of the same matters to which we shall refer in this opinion.

Upon the return of the cause and on June 20, 1913, the circuit court entered its decree in accordance with the directions of this court canceling the deed of January 14, 1892, removing the defendant as trustee under the will of Francis Cornet, appointing the St. Louis Union Trust Company successor to the trust, and appointing B. D. Kribben, Esq., special master to settle the accounts of the removed trustee and determine all issues relating thereto. Thereupon the new trustee

entered its appearance, accepted the appointment, and is appellant and respondent in connection with the original plaintiffs. This court directed, and it was, in pursuance of such direction, ordered, among other things:

"That said Henry L. Cornet be allowed the legitimate expenses paid or incurred by him as such trustee on account of said trust property, including reasonable compensation for whatever services he has performed for the trust estate under the direction of said will, and be allowed credit for all proper disbursements from said property made by him to the said George A. Cornet or for the latter's benefit."

The concluding paragraph of said interlocutory decree is as follows:

"It is further ordered by the court that all of the costs of this proceeding as well as the cost of said accounting herein ordered and taken be taxed against and paid by the said Henry L. Cornet."

The will of Francis Cornet was executed January 31, 1891, and the testator died December 20th of the same year in his seventy-second year, leaving surviving him his widow and six children, including the plaintiff George A. Cornet and the defendant Henry L. Cornet.

The defendant took possession of his estate, both real and personal, of which the share of George A. Cornet was one-seventh. Upon the division of the personal estate the defendant, as his trustee, received Leavenworth bonds of the par value of \$14,000, with accrued interest amounting to \$303.33, Ray county bonds of the par value of \$2,500, with \$140 interest accrued, and \$135.97 in cash, aggregating \$17,079.30. After the execution of the deed of January 14, 1892, he proceeded from time to time to sell real estate devised by the will, realizing for the share of George A. Cornet \$7,629.20. These amounts, aggregating \$24,708.50, constitute the investment fund in the hands of the defendant trustee which, with the income of real estate unsold (some of which still remains undisposed of), constitute the subject of the accounting to which all the errors assigned by parties to this appeal are directed.

The defendant testified in his own behalf in the hearing before the master. He said, in substance, that he was, during the time covered by the trust, a member of the firm of Cornet & Zeibig, a partnership engaged in the real estate and loan business, composed of himself and Mr. F. G. Zeibig, having equal interests. The Standard Realty Company was a corporation organized by them and of which they owned the stock in equal proportions. It was engaged in the real estate business. Cornet & Zeibig kept a single bank account, in which all the trust funds held by defendant, of which there were others than the fund in controversy, were deposited, and paid out on the checks of the partnership and loans of such funds by defendant were charged to his account on the partnership books, while loans made by the firm went to the account of bills receivable. Sometimes

Mr. Cornet would purchase a number of bonds in a single transaction and then distribute them among the funds he had on hand for investment. He bought 15 or 20 of the Jalisco bonds, which we shall have further occasion to mention, distributing them among these funds. For several years Cornet & Zeibig had received interest from its bankers on average monthly balances at the rate of 2 per cent. credited to the account monthly. At all times during these transactions there was sufficient funds of the partnership account to make good the trust funds in defendant's hands for investment. It was contended by the defendant upon the hearing that the amount paid by him for attorney's fees and expenses of this entire litigation, amounting, with interest, to \$1,128.57, together with the costs of the accounting, amounting to \$1,326.50, and all taxable costs of this proceeding should be adjudged and taxed against the trust estate. These contentions were disallowed by the master, and all taxable costs were adjudged against the defendant.

Certain loans were made through the office of Cornet & Zeibig for which commissions were charged by that firm against the trust fund amounting to \$298.75. This was disposed of by the special master in his report as follows:

"Your special commissioner finds that the trustee received one half of these commissions in the distribution of the profits of the firm of Cornet & Zeibig, and that he is not entitled thereto and should be excluded therefrom, but that he is entitled to credit in his accounting to the other half thereof which Zeibig received for his services, amounting to \$149.38."

The plaintiff contends that the trustee should not only be charged with interest at the rate of 6 per cent. per annum compounded annually on the loans made to the Standard Realty Company, but he should also be charged with the further sum of \$260.50 which seems to be admitted as the amount of the usual commissions charged to borrowers by loan brokers for obtaining such loans, and renewals thereof. This was disallowed by the special master in his report.

The special master charged the trustee with the amount of interest received by Cornet & Zeibig on the amount of the trust fund included in their average monthly bank balances, but refused to charge interest at the legal rate either simple or compound for which the plaintiff contended. He allowed the trustee commission at the rate of 5 per cent. on the income from investments of the personal property received by him under the will, amounting to \$899.08, and also commission at the rate of 2½ per cent. on the corpus of the personal estate turned over to the new trustee, amounting to \$426.18.

Among the investments made by the trustee were certain bonds called the Alton Bridge bonds; being two bonds, each of the par value of \$1,000, bearing interest at 5 per

cent. purchased by him in 1894 for \$1,840, making an income rate of 5.28 per cent. These were a part of an authorized issue of \$1,000,000, of which \$600,000 at least were sold, and were secured by first mortgage on a railway bridge with its terminal, under construction across the Mississippi river at Alton, Ill. Its prospect of earnings consisted of what is called in the record a "contract" with the Chicago, Burlington & Quincy Railroad Company to use it, which was expected to yield a gross income of \$80,000 per year. The bridge was completed and was used for about three years when the Burlington refused to further carry out the arrangement, and the property went into the hands of a receiver. It was reorganized in 1901 with an issue of 4 per cent. bonds which were substituted for the original bonds and accrued interest. At the time of the hearing these bonds were worth about 75 per cent. of their face.

The plaintiff insisted that the trustee be required to take these bonds from the estate, at cost and interest. The special master thought differently, and reported that they be allowed the trustee as an investment.

Another investment for which the defendant trustee sought credit consisted of nine bonds of \$1,000 each, bearing interest at 6 per cent., purchased by him for \$9,555. These bonds were purchased at various times between March 1, 1900, and November 27, 1906, inclusive. They were a part of an issue of \$1,500,000 by the state of Jalisco, Mexico, to aid the city of Guadalajara in that state, in the construction of a municipal water plant, and seemed to have been founded upon bonds of the city in an equal amount. Interest payment had been stopped on these bonds under circumstances which are lightly touched upon in the testimony, but enough is disclosed to indicate that it was payable in gold in New York City, and that some law had been enacted in Mexico discouraging the exportation of gold which rendered the rate of exchange so high that the state refused to transfer it. The special master found that these bonds were not a proper investment and ought not to be charged against the trust estate, but that their cost with unpaid interest should be charged to the trustee, who would thereby become entitled to the securities. The court sustained an exception of the defendant to this recommendation, and allowed them as a credit to the trustee. It sustained the findings and recommendations of the special master in all other respects.

The defendant in his appeal assigned as error the action of the court: (1) In refusing to allow him credit as against the trust fund for the costs and expenses of this litigation as already stated. (2) In not allowing him credit for all sums received by Cornet & Zeibig for making loans for the trustee. (3) In refusing to allow him compensation for the sale of real estate. (4) In refusing to

allow him commission upon the corpus of the fund derived from the sale of real estate.

The errors assigned by the plaintiffs, including the St. Louis Union Trust Company, are: (1) In refusing to charge the trustee with either compound or simple interest on the uninvested assets of the trust estate remaining in his hands from time to time as we have stated. (2) In refusing to charge the trustee with compound interest on the Standard Realty Company loans. (3) In refusing to charge the trustee with commissions of 2½ per cent. on loans and 1 per cent. on renewals made by him to the Standard Realty Company. (4) In refusing to charge the trustee with the entire commissions received by Cornet & Zeibig for making the loans to which we have already referred. (5) In allowing the trustee compensation by way of commissions amounting to \$898 on income from his investments of the personality and \$416.18 by way of commission on the corpus of the personal estate turned over to the new trustee. (6) The refusal of the court to order that the trustee makes good the investment in the Alton Bridge bonds. (7) The refusal of the court to require the trustee to make good the Jalisco bonds.

[1] 1. The defendant insists that the nature of this suit requires that not only its taxable costs, but all the legitimate expenses incurred in his resistance to the relief sought by the plaintiffs should be charged against and paid out of the trust fund in his hands. This is true if those costs and expenses were incurred by him for the benefit or protection of the fund, and this depends upon the nature of the suit, the object of the parties to its prosecution and defense, and their respective rights as they may be determined by the court.

The defendant says that this is essentially a suit to secure a construction of the Francis Cornet will for his guidance in the administration of the trust. Every suit at law or in equity, involving a title or right depending upon the meaning of a will involves also its construction; yet such a suit does not involve the special jurisdiction of a court of equity in construing wills. If it did, the unsuccessful defendant in ejectment or a suit to quiet title would often be entitled to have his costs taxed against the property involved. The construction of the will in such cases is simply in the redress of the wrong charged, whether the suit be at law or in equity. It has been truly said "that the special equity jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts," and that the courts exercise such jurisdiction when it is moved on behalf of an executor, trustee, or cestui que trust, to insure a correct administration of the power conferred by a will. *Pomeroy's Equity Jurisprudence* (3d Ed.) § 1155, and cases cited.

The twofold purpose of this suit was to

set aside a deed obtained by the defendant trustee from his brother, for alleged fraud in securing its execution, and to remove the trustee on account of the fraud. An accounting by the trustee to his successor or his beneficiary was a necessary incident of this latter remedy. There is nothing in it calling for the exercise of the special jurisdiction of the court to construe wills. It required only the exercise of the general jurisdiction of courts of equity over trusts and trustees by removing a trustee for misconduct and fraud in connection with his trust.

It is not necessary that we go into the details of the fraud, for all questions as to that have been put at rest by the former judgment of this court. *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121. The only feature of the will which concerns us is the attempt of an affectionate father to protect a son who was subject to the alcoholic mania to such an extent that he would periodically unfit himself for the transaction of business, and, like most other people similarly afflicted, become improvident and rash in his expenditures. There is nothing in the evidence which seems to indicate that he had become a helpless inebriate, or that his father, at any time while living, despaired of his reformation. He had another son, the defendant, whose habits seem to have been unexceptionable, and who had for more than ten years been engaged in the loan and real estate business, and was intelligent and active. Under these circumstances the father made the will in question, and his policy toward his less fortunate son, plainly expressed in that instrument, was to confide to the care of the more fortunate and capable one the possession and management of the equal share of his property he desired to leave to the other, so that he would, neither by neglect or improvidence, be without some means of support during his life. The father evidently contemplated that he might marry and have children and issue of his own and used, in providing for the succession, the broad words of inheritance prescribed by the common law for the creation of a fee. The use of any words conferring a title upon the trustee, or power of disposition over the realty, was carefully avoided, and the door of opportunity for a normal life was left carefully open.

The principal fraud charged in this case was, in substance, that the defendant, in procuring the deed of January 14, 1892, had fraudulently taken advantage of the fiduciary relation to his brother George created by the will, to secure from the latter the legal title in fee together with the absolute power of disposition over the estate left him by his father as well as that which he might thereafter receive through his brothers and sisters, and to reinvest the proceeds in real or personal property as he should see fit subject to the same trusts, and at his death to be equally divided among his heirs at law

per stirpes; none of which rights or powers were conferred by the will. We held that independently of the presumption arising from the fiduciary relation, the record showed actual fraud in procuring that deed for which it must be set aside, and the defendant removed from the trust. The deed itself was replete with untrue statements with reference to the rights both of the beneficiary and the trustee under the will, while the testimony exhibited circumstances of advantage taken of the weakness and dependence of the beneficiary which appealed strongly to this court.

These questions could not be determined without examining and construing the will for the purpose of determining to what extent the defendant had violated the trust with which it had clothed him. He had absorbed the title to all the property both real and personal, leaving his beneficiary with no interest whatever except the bare right to receive such portion of the income as he should see fit to pay him instead of investing it otherwise, as permitted by the fifth clause of the will. It put his nose to the grindstone, if we may be allowed so homely an expression, and enabled his trustee to keep it there until the time when he himself would perhaps participate as heir in what was left. If the will itself did all these things then the deed was harmless and the construction of the will constituted the principal task of the court in this case, and the disposition to be made of the deed itself the principal duty.

The defendant, so far from joining in a request for such construction and showing a disposition to regulate his administration of the trust accordingly, repudiated the trust by the fraudulent deed under which he proceeded to sell the real estate and defended his action to the last ditch in this court, insisting in his answer that he was acting under both the deed and the will, and is now seeking to make his beneficiary pay the costs which he incurred and the attorney's fees which he paid in making the fight against his own removal for misconduct. It is unnecessary to give further reasons for the conclusion that he will not be permitted to do this. The action of the circuit court in confirming the report of the special master in this respect is approved.

[2] 2. The question whether the defendant is entitled to have the costs incident to the accounting taxed against the trust fund deserves a word of special mention. As we have already said, and as his answer states, he assumed the duties of trustee both under the will and the fraudulent deed, the latter constituting his only authority for the sale and conveyance of the real estate, and having no excuse for its existence other than to obtain a stronger hold upon the fund, that it might result in some personal benefit to himself should his more unfortunate brother die without issue. He contended for the success of his plan in this suit to the end. It ap-

pealed to him so strongly that he even concluded, as he states in his answer, to administer the self-created fund without compensation, and continued to do so until the court decreed his removal. It was only then that he reached back to reclaim, in his accounting, the price he had been willing to pay for the acquiescence in the violation of his trust. His removal brought upon him the burden of accounting to his successor; a burden which he now seeks to impose upon his brother, through the trust fund, on the ground that his removal involved the construction of the will which he had already construed against himself by obtaining the deed necessary to conform it to his own plan. We find no authority for taxing upon a trust fund the expense incurred solely by the violation of the trust under which it is held. The circuit court was clearly right in its disposition of this question.

[3] 3. The trial court properly held, and the decree was framed upon the theory, that the sale of the real estate derived through the will of Francis Cornet for the aggregate sum of \$7,529.20 was a violation of the terms of that instrument for which the trustee was entitled to no compensation. The instrument had been made by the father, and his will clearly required, so far as the trustee was concerned, that it should be continued in the same form. So far as the title had been conveyed under the fraudulent deed it was the duty of the trustee to make it good in money without deduction, and this he seems to have done with the proceeds, which seems satisfactory to all parties. This was the natural and necessary result of our former decision, and, although error was assigned by defendant, the point has not been pressed here, and we therefore take for granted that the correctness of this action is conceded, and will so assume.

4. The amount of the personal estate distributed to defendant as trustee for George under the will and to which this accounting particularly relates was \$17,079.30, consisting of Leavenworth bonds and bonds of Ray county, Mo., and \$135.97 in cash. The bonds, with interest, were all called and paid in due time so that the entire trust fund was equivalent in value to cash, and bore interest from the date of the settlement of the estate, December 6, 1892. The master's report, which exhibited the final condition of the trust fund, includes a period of about 20 years of its administration. The income of the fund had, in the meantime, amounted to \$17,981.78, and the corpus of the estate consisted at the end of that time of one real estate mortgage of \$2,500, and certain bonds, making an aggregate of \$16,947.72. This income was slightly in excess of 5 per cent. per annum.

If the amount of the corpus of the fund now on hand is as well invested as was the fund received by the trustee in 1892, his administration has been creditable, the amount

of loss of capital negligible, and reasonable claims for compensation for services in producing such a satisfactory condition would be founded in substantial equities.

It is said, however, that the present condition of the fund is unsatisfactory, and that an amount equal to more than 76 per cent. of this entire personal estate is invested in securities which have ceased to be productive and are now in great jeopardy. This complaint refers to the "Jalisco" bonds, representing an investment of \$9,555, and the "Alton Bridge" bonds, representing an investment of \$1,840. Both the plaintiffs and the appellant trustee contend that neither of these investments is such as a court of equity will approve for trust funds of this character, and that the defendant should be required to take them for his own account, and to reimburse the fund with cash. In determining this question we should proceed with the utmost care, for whatever we may say will, no doubt, be invoked for the guidance and protection of other trustees or their beneficiaries, not only in this jurisdiction, but wherever our utterances receive consideration.

[4] The will contained no special direction with respect to investments. It simply directed the trustee "to manage such trust fund, and to make the same productive in such manner as he may deem most safe and advantageous." It is not nor can it be said that this conferred any other or different power than to use his best judgment in investing in such securities as are approved by the rules of equity as investments for trust funds, and the testator carefully recognized one of those rules by prescribing safety as the first element to be considered.

[5] The defendant says that the rule governing the conduct of the trustee in that respect, as he understands it, "is that he must exercise such prudence and diligence in conducting the affairs of the trust as men of average prudence and discretion would employ in their own affairs." This is true so far as it goes, but it refers to such investments only as trustees may make of the funds of others. In dealing with his own the most prudent of men may grow rich by the process of discounting personal notes or commercial paper, but, as was said by Lord Kenyon in *Holmes v. Dring*, 2 Cox, 1:

"It was never heard of that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a court of equity is so well established as this."

And this is the rule, enforced with the same uniformity, in this country. Perry on Trusts (6th Ed.) § 453. It has also been laid down as a rule that voluntary investments must not be made by a trustee beyond the jurisdiction of the court having charge of the trust except in cases of necessity for the

saving of the fund. Perry on Trusts (6th Ed.) § 452. The same author says (section 460):

"If there is a direction (in the trust instrument) to invest trust funds in real securities in a foreign jurisdiction, the court will allow the investment, but if no such power is given, such investment will not be allowed."

And McKinney in his recent work entitled *Liability of Trustees for Investments* (section 6) says:

"The general rule is that a trustee must invest in securities which are located in the state where the trust is being administered."

After stating that some of the states allow the practice in particular cases this author says:

"In the absence, therefore, of specific authority, either in the trust instrument or by statute, a trustee would not be safe in placing the trust funds in securities which are beyond the jurisdiction of the court."

We do not express any opinion as to the rule applicable in this state to the investment of trust funds in landed securities of other states of our Union. The United States is one country, in which the inviolability of contracts is protected by one Constitution and in which resort may be had to its own courts in proper cases.

We have selected the foregoing instances of well-established rules governing the investment of trust funds from many we might mention, to illustrate the application of the definition of "diligence and prudence" given us by defendant as applicable to these investments. It is tersely stated by the Supreme Court of Pennsylvania as follows (*Hart's Estate*, 203 Pa. loc. cit. 486, 53 Atl. 366):

"Common skill and common prudence, as is said in the many cases cited, are all that the law demands of a trustee; that is, the common skill and prudence of an investor of money to be safely kept with such reasonable income as is commensurate with safety of the principal."

It means the skill and prudence of the investor of money to be safely kept and invested for others. In *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004, the Supreme Court of that state expressed the same idea as follows:

"True, she left the investment of the trust estate to his judgment, but it was to his judgment as trustee, enlightened and guided by the approved rules applicable to the investment of trust funds, not to his uninformed, personal judgment exercised without reference to legal rules and principles."

It goes without saying that in making these investments the first element to be considered is safety. This does not mean simply that in the honest course of events the security will be paid. It means that its payment may be enforced through the operation of governmental power to which the trustee has rightful access, and without recourse to the laws and governmental machinery of foreign nations. Without this element of value the subordinate one of income becomes uncertain.

[§] 5. Without determining or intimating whether the obligations of a foreign govern-

ment or its subordinate subdivisions or municipal agencies may or may not, under possible circumstances, be a proper investment for more than one-half of a small trust fund like the one in question, we will apply the principles we have stated to the investment in Jalisco bonds. That the defendant has failed or neglected to direct our attention to any instance in this country where an investment of that character for trust funds under a similar power has met with judicial approval, impresses us with the conviction that the general rule forbidding such investments has met with general acquiescence. The legislative policy of our state, under which trust companies have been established with power to execute similar trusts, seems also to have been to confine the investment of the trust funds in their charge in such securities in our own country. Section 1132 of the Revised Statutes of 1909, which covers this question, provides that:

The directors of all such corporations "shall have power of investing the moneys placed in their charge in loans secured by real estate or other sufficient collateral security, in public bonds of the United States, or of this state, or in the bonds or stock of any incorporated city or county in this state."

It will not be contended for a moment that the fact that the credit of our sister Republic of Mexico, or of the states which composed that federation, was such that they were compelled to pay a higher rate of interest than that prevailing in our own country would be a good reason for a trustee to seek investments there. The record is meager with respect to other reasons. It seems that Little & Hays, brokers of St. Louis, had \$300,000 of these bonds for sale and recommended them highly both by word of mouth and in a circular; that the Mississippi Valley Trust Company was interested as an equal partner in the profit of these sales and also recommended them, and placed one or more of them in one of its trust funds; that the Franklin Bank was also a purchaser from Little and Hays, but whether or not it was also interested in their sale does not appear. The evidence shows that one or two other persons said to have good business ability were purchasers on their own account, but to what extent does not appear. It is fair to say that the evidence was slight as to the reputation of these securities, and there is nothing to show a necessity for making the investment.

The defendant does say, however, in praise of the securities, that at the time they were bought "President Diaz was in undisputed command of the situation in Mexico, and in so far as the most prudent investors could see, bonds of the rich state of Jalisco were as safe an investment as bonds of any American state." We understand from this, his contention to be that President Diaz in the saddle so seasoned the credit of that country that it justified him in going thousands of

miles into a foreign country and among a strange people to obtain for his brother an investment in 6 per cent. bonds at a premium of six points. This justifies a word as to the attractive financial conditions involved in the supremacy of the distinguished president in control.

The repudiation by Mexico of interest on its public debt in 1861 is remembered by some of us. More of us remember the train of woes more direful and numerous than those that the elopement of the fair and fickle Helen brought upon her own unfortunate country, which followed. Maximilian came and went. The interest was paid in the blood of the people, and Diaz came into politics as opponent of Juarez, his chief, in the election for president and was defeated. When Juarez died and his successor had been fairly elected Diaz took the field against him at the head of a great army, driving him from the country, and making himself provisional president; and in that capacity, in 1877, elected himself president under a constitutional provision which limited him to one consecutive term. This he obeyed, retiring until the next election, was then re-elected, and from that time for about 30 years, by amendments to the Constitution and elections held under military supervision maintained himself in that office, in command of the situation. At the time these bonds were issued mutterings of discontent filled the country. From that time until this defendant made his last purchase of these bonds in 1906, the people, wherever they dared to speak, were complaining of the rapacity of the officials; of the farcical character of his elections; of the gathering into great estates, some of which consisted of millions of acres, of lands which they said should be available as homes for the people, who were reduced to a condition of peonage; and in 1904, two years before defendant's last purchase, they complained that Ramon Corral, who was then elected vice president, had been selected by the president to perpetuate the autocracy. As soon afterward as 1908 young Madero issued his book on the Presidential Succession, and the people were rapidly gathered into the impending revolution. Deserted by Limantour, the minister who founded and bullded the financial structure with which we are dealing, Diaz and Corral were both driven from the country, while the life of Madero was sacrificed to his sentimental enthusiasm for reform. The autocrat "in undisputed command of the situation in Mexico," the dreamer, the butcher, rapidly succeeded each other, and now the adventurer and the bandit are treading the wine press together. We may take these matters into consideration because they are matters of world history, and many Americans, looking for speculative investment in Mexico during the last 15 or 20 years have seen and felt these forces at

work. Such conditions do not appeal strangely to Americans, who are in the habit of assuming, without question, that the stability of republican government rests in the loyalty and co-operation of a people accustomed to political liberty.

There is no doubt that the defendant was perfectly honest in his faith in the Diaz régime when making this investment, but the evidence shows that he was not addicted to taking the advice of his beneficiary in such matters, and we see no reason to depart, for his benefit, from those general rules which the law has prescribed for the protection of those not in a position to protect themselves. It is no hardship for him to take these securities on his own account. If Mexico should become tranquil, and the investment should turn out a good one, the beneficiary, by his course in this suit, has shown that he is perfectly willing that his trustee should reap the benefit. We therefore hold that the finding and recommendation of the special master that he should replace these bonds with cash should have been confirmed.

[7-9] 6. In the matter of the Alton Bridge bonds we are forced to the same conclusion. It is a just and healthy rule that defendant's successor ought not to be compelled to accept an improvident investment (Matter of Craven, 43 N. J. Eq. 416, 5 Atl. 816); and that, having been removed and the propriety of the investment questioned, the burden is upon him to show that it is a proper one, or that he exercised proper care and prudence in making it (Hart's Estate, 203 Pa. 480, 486, 53 Atl. 364). In making this investment the defendant violated various rules by which equity seeks to secure trust funds from mismanagement and waste. One of these rules is that the trustee who invests such funds in his own name becomes personally responsible. This is only a corollary of the rule that if he deals with the estate on his own account it must be at his own risk. Were he permitted to do otherwise it would place before him the constant temptation to make the trust fund a dumping ground for his own unsatisfactory ventures. In this case the defendant testifies that it was his habit to purchase securities in his own name, checking for payment on the bank account of his own firm, and afterwards to distribute them to various estates held by him in trust or to his own account as might be indicated by the condition of the various funds. In this case he purchased, on December 7, 1894, five of these 5 per cent. Alton Bridge bonds, each of the par value of \$1,000, at 92 cents, two of which, being the same now in question, were afterwards assigned to the George A. Cornet trust fund. When this was done is not clear, and we have not considered it necessary to scrutinize the complicated analytical statement of the condition of this fund presented by the master, which might give us light on this subject. It is not

denied that the purchase of the five bonds was a single transaction for the personal account of the defendant and that the two bonds in question were at some subsequent time distributed to this fund. They belonged in the meantime to the trustee, who might at any time have disposed of them to the best advantage for his own personal account. The rule is imperative that a trustee cannot buy his own property from himself for the purpose of the trust. It makes no difference that the sale is intrinsically a fair one and for a full consideration. The policy of equity is to remove every possible temptation from the trustee. Pomeroy's Equity Jurisprudence, (3d Ed.) § 958.

[10, 11] We have already said that it is not a sound discretion for trustees to invest the trust fund in mere personal securities. Nor is it a sound discretion to subscribe trust funds to new enterprises of which the results are necessarily experimental. 1 Perry on Trusts (6th Ed.) § 459. This investment violated both these rules. The corporation issuing the bonds was organized for the purpose of constructing an independent railway bridge across the Mississippi river at Alton, Ill. It was purely experimental. The bonds were a part of the original capitalization to provide money for the erection, and the bridge was still incomplete. Whitaker & Co. were the financial promoters of the scheme. According to the testimony of one of the members of that company the bonds were "predicated" upon a supposed unsecured personal contract with the Chicago, Burlington & Quincy Railway Company to use the bridge for crossing trains at that point when it should be completed. Irrespective of its use by some railway corporation or corporations the material of which it was composed would be a mere mass of stone and steel rendered valueless in its erection. The refusal of the railroad company to use it, which occurred three or four years after its completion, wiped out the income and placed it in the hands of a receiver. No attempt was made to enforce the Burlington contract so far as is shown by the record. Six hundred of these bonds were outstanding, with interest due and unpaid to January 2, 1901, amounting, including interest on unpaid coupons, to \$148,317.78, or \$247.20 on each bond. During that year a reorganization was effected under a plan by which \$800,000 of new 4 per cent. bonds were to be issued, \$750,000 of which were to be used to take up the \$600,000 of fives outstanding, at the rate of \$1,250 of the new bonds for each \$1,000 bond of the old issue with all unpaid interest coupons attached. The defendant joined, surrendering his original bonds and taking 4 per cent. bonds in their place. Two of these 4 per cent. bonds, of \$1,000 each, are the present investment.

The fate of the additional \$500 of new bonds, issued, apparently, to equalize the in-

terest of the fours and fives, was explained by the special master at the trial, as follows:

"There evidently was a reorganization of the concern in June, 1901, and on January 2, 1903, Mr. Cornet received \$400 and \$12.50 interest upon interest, which is accounted for down to the reorganization of the company, and there was substituted for those bonds other bonds at 4 per cent., which continued down to the present time. There were bonds issued in lieu of interest January 2, 1903; it must have been at the time of the reorganization, interest on the 5 per cent. bonds and interest on delinquent interest was all accounted for."

Thus the trustee paid himself the interest out of the principal of his security, and the two bonds now in the corpus of the fund represent what is left after the performance of this financial feat.

The defendant does not explain why he took his little trust fund into this reorganization, nor intimate that he made any attempt to have the investment in the insolvent corporation taken off his hands by the reorganization committee. It does not appear that the bridge was ever used or was available to any other railway company than the Burlington, which was using it at the time of the master's hearing under a temporary contract favorable to itself, which it had forced by the threat to build a bridge of its own at that point. It was the only railway having physical connection with the bridge. The bonds were then worth 70 or 75 per cent. of their face; Mr. Costigan, of Whitaker & Co., giving both figures in his testimony. The gross revenue of the bridge had been \$205,689 during the year ending June 30, 1911, and had declined to \$154,136 in the year ending June 30, 1913.

In making the original investment the defendant took no advice other than that of the promoting brokers. He did not consult his beneficiary—in fact he testifies that he never consulted him, because he did not think he was obliged to under his trusteeship. He chose arbitrarily to assume the entire responsibility.

While an independent bridge, founded upon the general traffic of a great commercial city like St. Louis, may be immensely profitable, the only evidence in the record upon that question applicable to this transaction is to the effect that such a project is uncertain and speculative; and when it is "predicated" on the promise of a single railway company to use it, we wonder why that company did not build it. It is unnecessary for us to enter this field of speculation. It is only necessary to say that we see no reason why the defendant's successor should be required or permitted to accept these bonds for his beneficiary, and we hold that the defendant must replate the money so invested with interest at the rate of 5 per cent. per annum on the face of the original bonds.

[12] 7. The disposition of the foregoing questions enables us to consider the claim of the trustee for reasonable compensation for his services from the more favorable stand-

point of a stable and substantial fund from which just claims of that character may be paid.

The first of these questions in natural order arises upon the assignment of error in the ruling of the trial court allowing compensation at the rate of 2½ per cent. on the amount of the corpus of the fund remaining on hand, for its care and preservation. For guidance in this respect, we must look to the provisions of the will which created the trust, appointed the trustee, and provided, in general terms, the rule for his compensation.

The trial court following, in its interlocutory decree, the ruling of this court upon the former appeal, directed that the defendant "be allowed the legitimate expenses paid or incurred by him as such trustee on account of such trust property, including reasonable compensation for whatever services he has performed for the trust estate under the direction of said will." Going to the will itself for information on this point we find that it appointed the testator's widow and the defendant joint executors, and that the defendant qualified and made final settlement, but we do not find that his coexecutor joined with him in the execution of the will and while the special master states in his report that he had examined the settlement we are not favored with any statement as to what it contains. We will assume therefore that they received the compensation allowed by statute for the administration of the entire personal estate.

The will, a copy of which is included in the report of this case upon the former appeal, to which we have already referred, contains two provisions on the subject of compensation. The first, in item 3, refers only to the management of the real estate prior to its division among the devisees, and affords little light upon the question we are now considering. Item 4 provides, in substance, that the personal estate should be divided as soon as convenient among the testator's wife and children in kind, and that until such division should be made the defendant, as trustee, should account for the income. Item 5 provides that the share going to George A. Cornet, both of real and personal property, shall be placed in the hands of defendant, in trust for the benefit of said George A. Cornet, "to manage such trust fund, and to make the same productive in such manner as he may deem most safe and advantageous, and the income thereof, after deducting the necessary expenses and a reasonable compensation for his services, to either pay over to the said George A. Cornet in quarterly installments, or at his, said trustee's, option, to lay it out in such manner as he deem most beneficial to said George A. Cornet, and after the decease of George A. Cornet, said trust fund shall go to his heirs in law and thereupon the trust shall cease."

This last item, it will be seen, covers the entire subject of the compensation of the trustee for the management of both real and personal property. The testator was careful to provide that both his expenses and compensation were to be deducted from each quarterly installment of the income as it should be paid, and was equally careful to omit that requirement in providing that upon the decease of the beneficiary the corpus of the estate should go to his heirs. It was his evident intention plainly expressed, that all expenses of administration of the trust should be paid from the income as it proceeded, and that the body of the fund should be kept intact. The same language refers as well to the real as to the personal, and leaves no room to doubt the intention of the testator to apply the same rule of compensation to both. We must assume that the testator was aware of the legal right of the executors to a commission on the amount of the entire personal estate that went into their hands, and in the light of such knowledge the scheme of compensation which he provided seems to us to have been an intelligent and practical one; but should we construe the will to permit us to allow the trustee, under proper circumstances, a commission upon and to be paid out of the body of the estate, we would still have to consider the right of defendant, under the circumstances of this case, to appeal to our discretion for that purpose. We have held, and the trial court has adjudged at our direction, that the defendant has been guilty of misconduct in relation to his trust. This misconduct has not been of the kind which proceeds from honest ignorance, and manifests itself in an endeavor to protect the interest of his beneficiary. It proceeded rather from a desire to use the influence of his fiduciary relation that he himself might ultimately profit by the wrong. Instead of welcoming the interposition of a court of equity to guide him in his duty, he actively and vigorously opposed the interest of his beneficiary by asserting an adverse claim of his own, and sought vigorously to impose the expenses of the litigation which ensued wholly upon his beneficiary. The court, under such circumstances, could not rest upon a mere direction as to his future course, or stop at a mere rebuke, but removed him from his trust for a wrong already done, and placed in the hands of a disinterested trustee the fund he is now asking to deplete to the extent of a sum for compensation which he could only have earned by fidelity to his trust. The true rule in such cases is stated by Perry as follows:

"If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold compensation, or they can allow such compensation as will pay for the value of their services so far as they have been beneficial to the estate." Perry on Trusts (6th Ed.) § 919.

The same rule is expressed by Beach in his Commentaries on the Law of Trusts and Trustees (section 737) as follows:

"It is well established that a trustee is entitled to compensation only as he has faithfully discharged the duties of his trust. Where there has been a partial performance of duty that has been of value to the estate and a partial failure to execute the trust in a bona fide manner, he may be allowed a partial compensation. The court will decree such compensation as, in view of all the circumstances, it shall deem just and proper."

This is unquestionably the law of this state.

In this case a long and arduous litigation has been necessary to preserve and protect the rights of the beneficiary with reference to the matters involved in the trust, and we can do no less than to see that the corpus of the fund remains intact as the foundation of a more satisfactory administration. The item of compensation at the rate of 2½ per cent. on the corpus of the estate, amounting to \$426.18, will therefore be disallowed.

[13] 8. With the fund restored to a productive condition as we have indicated, we see no reason why the defendant should not be allowed compensation at the rate of 5 per cent. on the gross amount of the income during the period of his administration, and the action of the trial court in the allowance of this item amounting to \$773.56 is approved.

[14] 9. During the entire time the defendant acted as trustee of this fund he was the senior member of the firm of Cornet & Zeibig, real estate dealers and loan brokers, and the uninvested funds of this estate were deposited in bank in the general checking account of the firm. The undisputed evidence shows that the credit balance of this account was always in excess of the amount of uninvested funds of the estate. During the last five years of the administration the bank paid the firm 2 per cent. interest on its monthly balances. The plaintiff contends that this amounted to a conversion of the trust fund, and that the trustee should be charged compound or at least simple interest at the rate of 6 per cent. per annum on these balances. This contention was disallowed, and the court allowed the interest actually received. ✓

This question should be considered in connection with the finding of the referee, in which, after a careful examination of the evidence, we concur, that the trustee used reasonable care to keep the fund invested, and that it had not been used by the firm for its own profit otherwise than by the payment of interest on bank balances as above stated. We do not see how the trust fund lost anything by this practice. We are satisfied that the trustee was not guilty of the willful violation of the general rule forbidding the mingling of the trust funds with his own. He was, we believe, simply ignorant that such rule existed. The imposition of a pen-

alty on that account would necessarily be purely punitive and not in any sense compensatory. This would be no less true because the penalty would inure to the beneficiary. While it would be our duty not only to compel the restoration of anything that might appear to have been lost by this practice, but also to protect the beneficiary against possible wrong which might have been concealed by it, yet when punishment alone is involved our discretion should be used to avoid unnecessary hardship. The master was correct in his recommendation in this respect, and the action of the court in confirming it is approved.

[15] 10. Cornet & Zeibig for the convenience of their business organized a corporation called the Standard Realty Company of which they were the stockholders, having equal interests, for the purpose of dealing in real estate. The defendant made three loans to this concern, aggregating in amount \$8,300, at 5½ and 6 per cent. interest. These were renewed from time to time and were finally paid off and the money otherwise invested. We assume that the interest was paid regularly and distributed as other income. No commission was paid to defendant or to Cornet & Zeibig on these loans, although it was usual for brokers placing the money of their customers in that class of securities to charge and receive a commission for their services of 2½ per cent. for original loans and 1 per cent. for renewals, from the borrower. This, however, was not a fixed rate, for, when the borrower refused to pay it, the broker would take what he could get, sometimes as little as 1 per cent. This commission was not, of course, a necessary appendage to loans made without the intervention of a broker. That real estate loans form the most unquestionable of investments for trust funds is vigorously asserted by the plaintiffs throughout their brief. That these loans were perfectly secured and bore the highest rate of interest ordinarily obtainable for money in like amounts similarly secured is not denied. The plaintiff insists, however, that the transactions were equivalent to the use of the money by the trustee in his own business which is contrary to the policy of the law, and ought never to be permitted with impunity; that if he does so he is accountable for any profits he may make, however great they may be; and that if he does not show the profit derived from such use, compound interest will be charged against him in order that it may be certain that the cestui que trust loses none of the profits of the transaction which the law can give him. *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. 511.

As an abstract proposition this is a fair statement of the law, but it needs much trimming to fit it accurately to the proposition before us. The money was not used by the defendant, but was loaned to a corpora-

tion having a distinct entity both in fact and in law. Were the rule inflexibly applicable to such a case the loaning of trust money to a corporation in which the trustee owned a single share of stock would, however profitable and advantageous to the estate, subject him to all the pains and penalties attached to a willful breach of trust. The personal credit of the trustee has nothing to do with the security, for the corporate entity is hedged about by the law of its creation with a credit founded upon its own capital, and the landed security is all that would be exacted from a stranger. Although the situation might, like most other innocent circumstances, be used to cloak a fraud, it does not intrinsically differ from the purchase of the bond of a railway company in which the trustee is a stockholder. If there is fraud it is in the substance of the transaction rather than in its form. There is nothing in this record tending to show that this corporation was not honestly organized for the transaction of general business under its charter, and without reference to the use of this fund. Taking this view of it we find that the investments were good ones, founded upon the very class of security that the plaintiff prefers, and bearing interest at a rate satisfactory to all. We see no reason why it should be disturbed.

[16] The plaintiff also contends that the trustee should be charged with a reasonable commission upon each of these loans and its renewals. We see no reason why this should be done that does not inhere in every transaction in which the trustee goes directly to the borrower to make a loan without the intervention of a broker. No broker seems to have intervened in this case, although the transaction, like all other transactions involving the trust fund, was entered upon the books of Cornet & Zeibig, where all accounts relating to the fund were kept. The point is a shadowy one and, in our opinion, without merit.

[17] 11. Cornet & Zeibig made certain other real estate loans from this fund for which they received commissions amounting to \$298.75. The plaintiff contends that these commissions should be charged to the trustee on the theory that he is bound to account for all profit realized from the trust estate. On the other hand the defendant contends that these commissions were legitimate expenses incurred in the administration of the estate, for which the trustee should have credit. The master found as follows:

"Your special commissioner finds that the trustee received one half of these commissions in the distribution of the profits of the firm of Cornet & Zeibig, and that he is not entitled thereto and should be excluded therefrom, but that he is entitled to credit in his accounting to the other half thereof which Zeibig received for his services, amounting to \$149.38."

Both parties have assigned error upon the confirmation of this item in the master's re-

port. While the amount involved might, in comparison with other issues, be characterized as insignificant, yet the question is an important one and deserves careful treatment.

The special master bases his action upon the case of *Gamble v. Gibson*, 59 Mo. 585, 583, from which he quotes as follows:

"He [an executor] may employ the services of an agent or attorney, if necessary, and pay for them out of the estate, but if he undertakes to act in such capacities himself for the estate, he can receive no compensation. The rule is so strict that it has been held that if the trustee has a partner and employs such partner, no charge can be made by the firm (authority cited page 594). But if the trustee is excluded from all participation in the compensation, then his partner may be paid for services like any other person."

We are unable to concur in the reasoning by which the learned master arrives at his conclusion. Without questioning the statement quoted from *Gamble v. Gibson*, supra, intimating that if the trustee has a partner he may be employed for compensation to render services included in the duties of the trustee, we merely suggest that the question was not then before the court as it was in *Condict v. Flower*, 47 Mo. App. 514, in which a different conclusion seems to have been stated. This case must, however, stand upon its own facts. Cornet & Zeibig were loan brokers. These services were performed in the regular course of its business. It does not appear that Zeibig had any personal connection with the transaction, while it did come directly within the duty of Mr. Cornet as trustee. It does not matter what settlement they made as to the division of the amount received from the trust fund in payments of this commission. We have no power to so revise the partnership contract between them that when one-half this fee must be refunded one of the partners must be excluded from participation in the remainder.

This view does not, however, reach the real questions at issue, which is whether or not under the will which provides only for the payment of actual expenses and reasonable compensation, the trustee is entitled to this or any other sum in addition to the commission of 5 per cent. upon the gross income, which should include these commissions, for making and renewing these particular loans. The value of the services has been fixed by contract as between the trustee and the borrower, but not as between him and his beneficiary, and we see no reason why these particular investments should be made the basis for special compensation to the trustee in addition to the 5 per cent. allowed upon the gross income. It stands upon the same footing, in that respect, as all other loans.

For the reasons stated, the judgment of the circuit court is reversed, and the cause remanded, with directions to proceed to final

judgment in accordance with the conclusions stated in this opinion.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

ETCHISON v. LUSK et al. (No. 1750.)
(Springfield Court of Appeals. Missouri.
Dec. 18, 1916.)

1. NEGLIGENCE ↔ 2—DUTY OF CARE—RELATIONSHIP OF PARTIES.

Plaintiff, injured by the manner in which defendant handled cars, to establish actionable negligence, must show a relationship out of which arose a duty of defendant to her not to so handle them; and it is not enough that it owed such duty to some of its employes.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 3, 4; Dec. Dig. ↔ 2.]

2. RAILROADS ↔ 275(2)—DUTY OF CARE—RELATIONSHIP OF PARTIES—TRESPASSERS.

Plaintiff, injured while assisting her son in the work he was employed to do on defendant's boarding train for a bridge crew, was not a trespasser, as regards defendant's duty to her, merely because she had not executed a release required by a rule of defendant of women on such cars, she not knowing of the rule, and the foreman of the bridge crew, in charge of such train, who knew what she was doing, having no reason to believe that she knew of the rule.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 874; Dec. Dig. ↔ 275(2).]

3. RAILROADS ↔ 275(2)—DUTY OF CARE—RELATIONSHIP OF PARTIES—LICENSEE WITH INTEREST.

Plaintiff, who, as a member of the family of her son, employed with his wife by the foreman of one of defendants' bridge crew to do the cooking on the boarding train for such crew, was, with the knowledge of such foreman, assisting in the cooking, was, if not an invitee by implication, at least a licensee with an interest, doing work resulting in a benefit to the foreman's men and employers, and so sustained a relationship towards defendants, which, as regards liability for her injury from bumping of the train, required reasonable care by defendants.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 874; Dec. Dig. ↔ 275(2).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Catherine Etchison against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. R. L. Ward, of Caruthersville, for respondent.

FARRINGTON, J. The plaintiff, Catherine Etchison, recovered a judgment for \$1,500 on account of personal injuries sustained by reason of the alleged negligence of defendants' employes operating a switch engine which jammed certain cars into a railroad car in which the plaintiff was standing. From

this judgment the defendants appealed, assigning several errors all of which center about and are determined by a disposition of the question raised by defendants' refused instruction in the nature of a demurrer to the evidence, which will result in a determination of the question of the liability of the defendants under the undisputed facts.

The plaintiff is the mother of William Etchison, whose wife is Effie Etchison. William, some nine years prior to April, 1915, had resided in Blytheville, Ark., and maintained a home there, the family consisting of himself, his wife, his daughter (who at the time of the trial was 13 years of age), and his mother, the plaintiff. Some time in April or May, 1915, William and his wife entered the employment of the defendants, whereby they were running the boarding outfit of one of defendants' bridge gangs. William and his wife were employed to do this work by one H. H. Sayles, who was foreman in charge of the bridge gang. Defendants furnished four or five cars with sleeping quarters for their laborers and a car in which they ate and in which the cooking was done. This constituted an ordinary boarding train for a bridge gang. The employment required William and his wife to cook and make up the bunks and do all the necessary things in this regard toward feeding and lodging the laborers.

Plaintiff, who had been living with her son at his home in Blytheville, had gone to Illinois for a several months' visit, and on returning to what she terms "her home," which was the home of her son, she found that William had leased his house and taken the family and was living on this boarding train at Puxico, in this state, where the bridge gang was doing work. William went to Blytheville and took his mother to Puxico, where she resumed her place in his family as a member thereof. She reached Puxico, and first went on the boarding cars where William and his wife and daughter were then living on June 20, 1915. She remained there constantly until about the 6th day of July, when she was injured in the manner herein-after described. During this interval of about 16 days she helped her son and daughter-in-law carry on the work of running the boarding train. Her testimony in this connection is as follows:

"I stayed there after I got there; that was my home. I was helping my daughter cook when I got hurt. I didn't wait on the table, just helped cook; peeled potatoes, stringed beans, and put on the beans and potatoes to cook and watched them, and swept, and made up the beds. I did that every day; we were busy; had lots to do. At the time the accident occurred me and my daughter were in the dining car about to begin supper, and I was standing up."

During this interval Sayles, defendants' foreman of the bridge gang, and the man in charge of the cars, and the one who, according to his testimony, had supervision of the cooking and employed those who were to

cook and who made the arrangement with William and his wife, saw the plaintiff on the cars every day and saw her doing the very things which she testified to having done. There is no doubt under the facts of this record that Sayles was in supreme command of the bridge gang and of those doing work on the boarding cars, and that he during all this interval that plaintiff was on the cars before she was injured saw her engaged in the work of helping her son and daughter-in-law do what they were employed to do.

This work train on the 6th of July was on a side track at Puxico. An engine of another train operated by defendants' servants in doing some switching, backed some cars into the work train in such a violent manner as to knock the plaintiff down, thereby breaking her hip and right arm. The manner in which the switching crew hit the work train is described by one of the witnesses in such language as this: "A hard knock;" "a terrible force;" "with such force that it knocked the bean pot off the stove, turned it upside down, and knocked the teakettle, and the cars were hit with such force that it threw the water out of the bottom of the water keg."

The evidence amply warrants the finding that the switching crew with the engine and cars jammed into this work train in an unusual manner causing the cars of the work train to receive an extraordinary and unusual jar, and that it was this jar that knocked plaintiff down, to her injury.

The railroad had the following rule governing these boarding cars and the foreman of extra gangs which was introduced in evidence by the defendants:

"Rule 157. Foreman of extra gangs will not be permitted to keep children in their boarding cars, unless the cars are spurred out and entirely disconnected from the main line or sidings, and when their equipment is moved over the road, women and children must travel on regular passenger trains. They must keep their camp in a clean, sanitary condition, and see that they are at all times safe for transportation over the road. Camp cars should be spurred out whenever possible to do so. Women are not permitted on camp cars unless they have executed the required release."

Defendants also introduced in evidence releases which had been signed by William and his wife in compliance with this rule. It is not contended that the plaintiff had ever been informed of this rule or knew anything about it.

On this state of facts the plaintiff contends that defendants are liable to her for the negligent manner in which their servants bumped into the work train on which she was living, and that they owed her a duty to exercise ordinary care not to injure her by the operation of their equipment.

Defendants contend that, regardless of the manner in which the car on which plaintiff was living at the time of the accident was handled, they owed plaintiff no duty other

than the duty they would owe a trespasser, volunteer, or at most a bare licensee. A determination of this question solves this case. It therefore becomes important to ascertain what relationship existed between the plaintiff and the defendants in order to declare the duty, if any, which defendants owed the plaintiff under the facts.

It is admitted that at the time the boarding cars were struck the servants of the defendants operating the switch engine could not see the plaintiff, because she was in one of the cars, and therefore, if the plaintiff sustained no relation to the defendants other than that of a trespasser, volunteer, or mere licensee, there is no proven liability in this case, because she was not seen by the servants to whom the negligence is attributed in time to have averted the accident; that is, as the cars were about to be jammed together the defendants' servants did not and could not see the impending danger to which they were subjecting this plaintiff.

[1] It is not the law that merely because the defendants owed to some of their employes a duty of handling the boarding cars with ordinary care they will thereby be held liable for an injury to one to whom they owed no duty with reference to the handling of the cars save the duty they owed to trespassers, volunteers, and bare licensees. In order to establish actionable negligence, the manner in which the cars were handled is of little moment, unless the injured party can show a relationship existing out of which arose a duty to that party not to handle the cars as they were handled. This question has been considered in a learned opinion written by Peaslee, J., in the case of *Garland v. Boston & Maine Railroad*, 76 N. H. 558, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924. See, also, *Youmans v. Wabash R. Co.*, 143 Mo. App. 393, loc. cit. 399, 400, 127 S. W. 595; *Hall v. Mo. Pac. Ry. Co.*, 219 Mo. 553, 118 S. W. 56.

[2, 3] Appellants, contending that plaintiff was a mere trespasser, and therefore entitled to the exercise by the railroad of only reasonable care to avoid injuring her after she was known to be in a position of impending danger, cite the following cases: *Youmans v. Wabash R. Co.*, 143 Mo. App. 393, 127 S. W. 595; *O'Donnell v. K. C., St. L. & C. R. Co.*, 197 Mo. 110, 122, 95 S. W. 196, 114 Am. St. Rep. 753; *Hall v. Mo. Pac. Ry. Co.*, 219 Mo. 553, 118 S. W. 56; *Whitehead v. St. L., I. M. & S. Ry. Co.*, 99 Mo. loc. cit. 269, 11 S. W. 751, 6 L. R. A. 409; *Farber v. Mo. Pac. Ry. Co.*, 116 Mo. loc. cit. 91, 22 S. W. 631, 20 L. R. A. 350; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223, 25 S. W. 229; *Feeback v. Mo. Pac. Ry. Co.*, 167 Mo. loc. cit. 216, 66 S. W. 965; and *Earl v. C., R. I. & P. Ry. Co.*, 109 Iowa, 14, 79 N. W. 381, 77 Am. St. Rep. 516. In each of those cases there is some feature distinguishing it from the case at bar in a vital way—the person attempting to hold the railroad company was on the train without the

knowledge of those in charge of it, or as a violator of the law, or in perpetrating a fraud on the railroad, or on the train with the knowledge of his presence by the conductor or employé in charge of the train, such person knowing that the conductor or other employé was violating a rule of the company in permitting him to remain. In the case at bar Sayles was the foreman in charge of this work train. He knew that, if he complied with the rule of the defendants, the plaintiff, to remain and work thereon, must sign the release called for in the rule, whereas the plaintiff did not know of such a rule, and Sayles had no reason to believe that she knew of it. She was on the car, not for the purpose of perpetrating a fraud on the railroad, nor was she in collusion with Sayles, who was in charge, and she was not violating any law of the land by being there. All of the above cases turn on the fact that one of these conditions existed from which it was concluded that such plaintiffs were either trespassers or bare licensees.

The strongest case in their favor presented by appellants is that of *Wencker v. M., K. & T. Ry. Co.*, 169 Mo. 592, 70 S. W. 145. There the plaintiff's 11 year old boy was sent to the railroad depot to carry food to the conductor and crew of a freight train under an arrangement which plaintiff had, not with the railroad company, but with the individual members of the crew working for the railroad. It was held in that case that the boy in going on the caboose under the direction from the conductor of the train was so far as the railroad was concerned, a mere licensee or trespasser, and the plaintiff was denied a recovery for the boy's death. The distinguishing feature between that case and cases which we will refer to presently is this: That there was no community of interest existing which arose out of the work the boy was doing between the plaintiff, his mother, and the defendant, the railroad company. In our case the defendants through their foreman undertook to and did supply boarding and sleeping cars for their employes to live in, empowered this foreman to hire the help necessary to carry on this phase of the work, and thereby had an interest in the work which was being done.

On the other hand, William Etchison and his wife were interested in carrying on this work of feeding and lodging defendants' employes, and William's mother, a member of his family, was for two weeks under the eye of the foreman of the defendants in the car doing the very thing that William and his wife were employed to do and doing the very thing that defendants had undertaken to do and contracted to have done for their employes; that is, to prepare and serve their meals and to prepare their sleeping places. The plaintiff was living with her son, and it is true she received no wages either from defendants or from her son; yet, as a mem-

ber of that family, she had a right to feel that she had an interest in carrying on the purpose so long as she was receiving her sustenance from one of the parties to the contract. She was engaged in the business adopted by the head of her family, and that business was a matter that the railroad was engaged in and undertaking to carry out, and we think that her action and her conduct, known all the time to the man who had a right to say who should be in those cars to carry on that work, established the relation of an invitee of defendants' foreman to stay there and do what he knew she was doing. She had no knowledge of the rule, and would have no cause to believe otherwise.

However, we are not compelled to place liability on the ground that she was an invitee, but place it upon the principle of law which controls and governs those who in their conduct and actions are carrying on a common purpose or a business in which they are mutually benefited. The principle which we hold controls this case is announced in the case of *Ryan v. John O'Brien Boiler Works*, 68 Mo. App. 148. In that case the servant of one company, being sent to load a railroad car, on arriving at the car found it yet loaded with merchandise belonging to another company which had to be unloaded before his task could be commenced. He voluntarily aided the servants of the defendant company in that case in unloading the car, and was injured by reason of the negligence of one of defendant's servants. It was held that he was not a trespasser, because he had a right to be there, that he was not a fellow servant of the servant he was assisting, because that servant had no power to employ him, that he was not a mere licensee because of the fact that he was doing a thing which he had an interest in, that is, to get the car unloaded so that his work of loading might begin, and the court characterized his relationship as that of a licensee with an interest, and held that such a relationship entitled him to the exercise of ordinary care from the servants of that company that injured him.

In the case of *Pugnire v. Oregon Short Line R. Co.*, 33 Utah, 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565, 126 Am. St. Rep. 805, 14 Ann. Cas. 384, cited with approval in *Tinkle v. St. L. & S. F. R. Co.*, 212 Mo. loc. cit. 469, 110 S. W. 1086, a woman who was held out to the defendant as the wife of a keeper of a boarding car was injured. She was seen by the foreman of that boarding outfit to be cooking for the defendant's employes and acting as a substitute for the man with whom defendant had contracted to furnish the board, and what she did was with the knowledge and approval of the defendant, which received the benefit of her labor. It was held that she was not a trespasser or mere licensee, that she was rightfully in the car doing the work for the defendant as stat-

ed with its knowledge and acquiescence, and that she was entitled to the exercise of ordinary care on the part of defendant's servants in handling these cars.

It is held in the case of *Welch v. Maine Cent. R. Co.*, 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658, that one who has an interest in the work to be performed, either as consignee or servant of a consignee, or in any other capacity, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.

In Ohio it is held that a passenger on defendant's street railway whose only interest was in being transported on the car on which he was riding had such a mutual interest with the defendant company as to make him more than a mere volunteer when he undertook to and did help the defendant's servants in pushing the street car back to a siding that another car coming from the other direction might pass it and thereby let his car proceed. The defendant was held liable for its servant's failure to exercise ordinary care toward him while performing this task, in which they were mutually interested. The court in passing on that case used the following language:

"The plaintiff in the court of common pleas was not a mere volunteer, within the meaning of the rule of law contended for by plaintiff in error, but, as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent and reasonable act, justified by the circumstances of the case; not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant or any of its servants." *McIntire Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333.

In the case of *Wright v. London & North Western Ry. Co.* [1878], 1 Q. B. Div. Law Reports, 252, a plaintiff who had shipped a heifer assisted two porters in removing the box containing the heifer from the train and was injured by a negligent handling of the train. It was held that the company was liable for failure to use ordinary care toward him and a judgment was upheld on the ground that both the plaintiff and the defendant had a mutual interest in the transportation and delivery of the heifer.

In the case of *Eason v. S. & M. T. Ry. Co.*, 65 Tex. 577, 57 Am. Rep. 606, it is held that one who has no interest in the performance of certain work for a railroad, but volunteers to assist in such work, assumes all the risks incident to his position, but that, if he is not a volunteer, but engaged at the request or with the permission of the railroad's agent in a transaction of interest as well to

himself or his master as to the railroad company, he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs.

In the case of *Moore v. Wabash, St. L. & P. Ry. Co.*, 84 Mo. 481, loc. cit. 487, we find the court in dealing with this question using this language:

"These facts would seem to bring this case within the rule founded in justice and necessity, and illustrated in many adjudged cases, that where one is not a mere licensee, but engaged with the consent of the railway company in a transaction of common interest to both, and is injured by a failure of the company to maintain its grounds and crossings and depot in a reasonably safe condition, the railway would be liable."

And that case is of further interest in that it holds that, where by means of an inducement or invitation, express or implied, held out to the public by it, a railroad leads the public to use a crossing or way over its track in passing to and from its depot grounds, it is bound to keep such crossing or way reasonably safe for travel.

In our case can it not be said that the plaintiff was by implication induced or invited by Sayles, the foreman in charge of this work train, to remain there, and that her presence there and doing what he saw her do was satisfactory to him and to his master, and that the work she was doing was for the benefit of the men the defendants had undertaken to provide for? It is true that a mere passive acquiescence by an owner in a certain use of his land by others involves no liability, but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in safe condition. *Sweeny v. Old Colony & Newport R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644. The work the plaintiff was doing was in accordance with the intention and design that had been adopted and prepared and allowed to be used by the defendants; that is, she was helping to cook in a car which defendants had prepared for cooking purposes, helping to cook for the men defendants were undertaking to feed. See *Carr v. Mo. Pac. Ry. Co.*, 195 Mo. loc. cit. 227, 92 S. W. 874; *Bennett v. L. & N. R. Co.*, 102 U. S. 577, 26 L. Ed. 235; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; 3 *Elliott on Railroads* (2d Ed.) § 1249.

The rule announced in *Moore v. Wabash, St. L. & P. Ry. Co.*, 84 Mo. 481, that one is not a mere licensee when engaged with the consent of a railroad company in a transaction of common interest to both and is entitled to the exercise of reasonable care, has been followed in these cases: *Lowenstein v. Mo. Pac. Ry. Co.*, 134 Mo. App. loc. cit. 34, 119 S. W. 430; *Nelson v. Wabash R. Co.*, 132 Mo. App. loc. cit. 693, 694, 112 S. W. 1017; and *Ransom v. Union Depot Co.* et

al., 142 Mo. App. loc. cit. 371, 372, 126 S. W. 785.

The rule we invoke is closely related to that which holds a railroad company liable to the servant of one of its consignees, or to the servant of one to whom it furnishes cars knowing that such person's servants will use the cars in loading and the like, although there is no contractual relation existing between the injured servant and the railroad company. Such a case is that of *Roddy v. Mo. Pac. Ry. Co.*, 104 Mo. 234, loc. cit. 237, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, wherein it is held that the work of loading the stone and of hauling it to the stone company's customers was of mutual interest and profit to the defendant railroad company and the plaintiff, who was a servant of the stone company, and that the plaintiff was entitled to the exercise of ordinary care on the part of the railroad company in furnishing reasonably safe cars with which plaintiff was to do his work. See, also, *Rice v. Smith*, 171 Mo. 331, 71 S. W. 123; *Sykes v. St. L. & S. F. R. Co.*, 178 Mo. 693, 77 S. W. 723; *Fassbinder v. Mo. Pac. Ry. Co.*, 126 Mo. App. 563, 104 S. W. 1154; and *Hawkins v. Mo. Pac. Ry. Co.*, 182 Mo. App. 323, 170 S. W. 459.

In the case of *Tinkle v. St. L. & S. F. R. Co.*, 212 Mo. 445, 110 S. W. 1086, which was a boarding car case, the facts being somewhat similar to those in the case at bar, it was contended that plaintiff, although not an employé, was more than a mere licensee, and the court held that, whether plaintiff was the servant of the defendant or a licensee, she was at the time of the injury rendering services for the defendant's benefit, though it may not be directly with its knowledge and consent, and that it owed her the same duty it would an employé not engaged in operating the train, but riding thereon on business of the company. That opinion cites the cases of *Roddy v. Mo. Pac. Ry. Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, and *Pugmire v. Oregon Short Line R. Co.*, 33 Utah, 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565, 126 Am. St. Rep. 805, 14 Ann. Cas. 384, both cited supra.

We therefore hold that the plaintiff in this case, under the evidence, if not an invitee by implication, was certainly a licensee with an interest doing work under the very eye of the foreman which resulted in a benefit to his men and his employers, and that, as such, she sustained a relationship toward the defendants which required on their part the exercise of reasonable care in handling the cars in which they knew—or their foreman knew, whose business it was to know—that she was doing work which was directly for the benefit of the railroad.

For the reasons herein appearing, the trial court properly overruled defendants' demur-

rer to the evidence, and the judgment is affirmed.

ROBERTSON, P. J., concurs.

STURGIS, J., concurs, expressing these additional views: Defendants were clearly guilty of negligence in backing other cars violently against this work train. This negligence arose from a violation of their duty to the occupants of that car. Defendants' negligence would have existed had plaintiff not been in the car or injured thereby, and in order to hold the defendants liable no new or different burden of watchfulness or care is imposed. While it is true that plaintiff, if a mere licensee, was injured by a neglect of duty which defendants owed to others rather than plaintiff, yet the duty was there and was violated; and, while the duty to protect this car and its occupants did not and perhaps could not primarily arise because of plaintiff's presence in the car, yet such duty, being present and arising primarily toward the other occupants of the car, is not wholly to be ignored in fixing liability for a neglect of such duty resulting in injury to a licensee.

MOORE et al. v. McCUTCHEN et al
(No. 1695.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. APPEAL AND ERROR — 248 — ASSIGNMENTS OF ERROR — PRESENTATION BELOW.

Assignments of error referring to matters concerning which no exceptions were saved below cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. — 248.]

2. WITNESSES — 159(8) — COMPETENCY OF TESTIMONY — TRANSACTIONS WITH PERSONS SINCE DECEASED.

Under the express provisions of Rev. St. 1909, § 6354, the testimony of a defendant relative to an agreement made by him with a person since deceased was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 875; Dec. Dig. — 159(8).]

3. APPEAL AND ERROR — 1048(6) — HARMLESS ERROR — EVIDENCE.

The admission of certain testimony on cross-examination, if error, was harmless, where the same testimony had already been brought out, without objection or exception, on cross-examination of another witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4145, 4153, 4159; Dec. Dig. — 1048(6).]

4. EVIDENCE — 543(2) — COMPETENCY OF WITNESSES.

A witness shown to be a carpenter of 30 years' experience and to have worked on the building in question was competent to testify to the cost of repairing the plastering, though it was not shown that he was an experienced and expert plasterer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2356½; Dec. Dig. — 543(2).]

5. CONTRACTS — 349(4) — BUILDING CONTRACT — EVIDENCE — SPECIFICATIONS.

In an action on a contract not making any plans and specifications a part thereof, but only requiring that the building be constructed according to plans and specifications furnished by the owners, testimony concerning sheets of paper constituting specifications showing the alterations made after the contract was signed was competent for the consideration of the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1791, 1812-1814; Dec. Dig. — 349(4).]

6. TRIAL — 296(2) — INSTRUCTIONS — DEFENSES.

In an action for the balance due on a building contract, an instruction which, after stating the facts necessary to be found in order to authorize a finding for plaintiffs, added "unless you find against plaintiffs on the defenses," was not erroneous for failure to state what the defenses were or what facts would sustain them, where defendants' instructions clearly set forth their defenses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. — 296(2).]

7. CONTRACTS — 353(8) — BUILDING CONTRACT — INSTRUCTIONS.

In an action for the balance due on a building contract, an instruction that the jury could not find against plaintiffs for any delay caused by defendants was not erroneous for failure to set out the character of the acts of defendants which would excuse delay, where defendants, in the specifications relied on by them as part of the contract, reserved the right to modify the specifications without invalidating the contract, and also provided for increasing or decreasing the sum to be paid to plaintiffs.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1837-1840; Dec. Dig. — 353(8).]

8. CONTRACTS — 300(2) — BUILDING CONTRACTOR'S BOND — LIABILITY FOR DELAY.

In an action for a balance due on a building contract, defendants could not hold plaintiffs on their bond for a delay caused by the acts of defendants in making alterations as the contract authorized them to do.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1376, 1380-1382; Dec. Dig. — 300(2).]

9. TRIAL — 219 — BUILDING CONTRACT — INSTRUCTIONS — DEFINITIONS.

In an action for the balance due on a building contract, an instruction to find for plaintiffs if they had "substantially" performed their contract without a "material omission or defect" was not misleading for failure to define the words quoted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. — 219.]

10. APPEAL AND ERROR — 1004(1) — VERDICT — EVIDENCE.

The verdict in an action for the balance due on a building contract could not be disturbed on appeal for failure to allow more damages to defendants on their claim for defective construction, though the evidence would have justified a greater allowance, where the allowance made was in accordance with substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944, 3946; Dec. Dig. — 1004(1).]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Idella Moore, executrix of the estate of W. E. Moore, deceased, and another, against Louis McCutchen and another.

from judgment for plaintiffs, defendants appeal. Affirmed conditionally.

J. P. Tribble and Orville Zimmerman, both of Kennett, for appellants. Bradley & Bradley, of Kennett, and R. J. Smith, of Campbell, for respondents.

FARRINGTON, J. The amended petition on which this case was tried was filed by Idella Moore, as executrix of the estate of W. E. Moore, deceased, and W. D. Beasley, against the defendants, to recover the balance claimed to be due on a building contract. It alleged that on August 11, 1911, W. E. Moore, the husband of Idella Moore, and W. D. Beasley, entered into a contract with defendants to construct a two-story brick hotel building in Campbell, Mo., for a consideration of \$12,000. Plaintiffs also asked a recovery of an additional sum which they claimed they were entitled to by reason of certain changes that were made in the construction of the building at the instance of the defendants.

The defendants answered, admitting that the sum of \$12,000 had not been paid in full, but alleging that the changes made from the original plans and specifications reduced the amount coming to the plaintiffs under the contract rather than increased it. They alleged that the work was not done according to the plans and specifications, and that by reason thereof they were damaged. They also charge that the contract was not completed within the time specified, and claimed \$5 per day for 150 days; a bond having been given by the contractors wherein that amount was fixed as liquidated damages in case of delay.

The cause was tried before a jury. The verdict on the first count of plaintiffs' petition was in their favor in the sum of \$1,901.67, the amount prayed for with interest to the date of the trial. The verdict on the second count of the petition (which contained a charge for some brick taken by the defendants belonging to plaintiffs) was for plaintiffs in the sum of \$52.66, the amount prayed for, with interest to the date of the trial. On defendants' answer and counterclaim the jury allowed the sum of \$142.78. From the judgment rendered thereon defendants have appealed to this court, assigning thirty-two alleged errors, one of which covers six instructions.

[1, 2] Some six or seven of the assignments are shown by respondents' additional abstract to have no place in this appeal, as they refer to matters concerning which there were no exceptions saved in the trial court. A great number of the assignments go to the admission and exclusion of testimony, and many of these relating to the evidence are entirely devoid of merit. For example, it is contended that the court erred in rejecting the testimony of McCutchen as to the difference the defendants were to pay between the pressed brick contracted for and the buff

brick used in the building. It was admitted that Moore, one of the contracting parties, was dead, and McCutchen was attempting to testify to an agreement which he said was made between himself and Moore. The citation of section 6354, R. S. 1909, is a sufficient answer to this contention.

[3] Again, it is charged that there was error committed in permitting plaintiffs to prove by witness McCutchen on cross-examination the rental value of the hotel. This evidence had already been brought out on the cross-examination of Mrs. Belle Dixon, who was the lessee to whom McCutchen had rented the hotel, and defendants had permitted this witness to testify to this fact without any objection or exception. The evidence was already before the jury, unexcepted to, and the alleged error was self-evidently harmless.

[4] It is further charged that the court erred in permitting S. H. Corter to testify to the cost of repairing some plastering. It is true, as contended by appellants, that Corter is not shown to be an experienced and expert plasterer; yet it is shown that he is a carpenter of 30 years' experience, and that he worked on this building. The objection that he was not qualified to testify to the cost of plastering is without substance.

We will not discuss the other assignments as to the admission and exclusion of evidence; however, we have examined and considered each one, and find that none answers the test for reversible error.

[5] Plaintiffs' instructions put their theory of the case before the jury, and the defendants' instructions clearly presented the defenses relied upon. The court gave seven instructions for the defendants; indeed, all the defendants asked, save one, which was properly refused because it required the jury to disregard all the testimony concerning certain sheets of paper called specifications used by the plaintiffs in examining witnesses. The sheets of paper referred to were specifications showing the changes and alterations made after the contract was signed. It was also shown that the person who drew the specifications stated that there were changes made by interlineation and otherwise, and the contract itself does not make any particular plans and specifications a part thereof; it only required that the hotel be built according to plans and specifications furnished by the owners.

[6] It is charged that plaintiffs' instruction No. 1 is erroneous in that after stating the facts necessary to be found in order to find for the plaintiffs the court added, "unless you find against the plaintiffs on the defenses set up against them by the defendants, McCutchen and Pollock." It is claimed that this in no way advised the jury what the defenses were or what facts would sustain them. The defendants' instructions clearly set forth what their defenses were, and this

was merely a reference to those defenses as outlined in the instructions to which the jury would look, so that, when plaintiffs' instructions and defendants' instructions are read together, it is apparent that there could be no misinterpretation to the prejudice of the defendants.

[7, 8] It is contended that plaintiffs' instruction No. 4 is erroneous, in that it told the jury that, if the delay in constructing the building was caused by any acts of McCutchen and Pollock, and not by any acts of plaintiffs Moore and Beasley, they could not find against plaintiffs for any delay so caused. The objection is that it does not set out the nature and character of the acts of the defendants which would excuse delay, and defendants cite the case of *Beggs v. Shelton*, 173 Mo. App. 127, 155 S. W. 885. In the specifications relied upon by the defendants as a part of the contract we find that the owners reserve the right to alter or modify the plans and specifications without invalidating or rendering the contract void, and also providing for the increasing or decreasing of the sum to be paid by the owners to the contractors. We fail to see the application of the case above cited to the case at bar. It was not necessary to set out in the instruction the acts of delay mentioned in the testimony, as that would have been a comment on the evidence. And certainly the defendants could not hold plaintiffs on their bond for a delay which was caused by the acts of the defendants in making certain changes and alterations in the plans which they had a right to do under the contract. *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465, 97 S. W. 188.

[9] It is contended that the following instruction given for the plaintiffs is erroneous:

"(5) The court instructs the jury that, as a matter of law, in suits on building contracts, a literal compliance with plans, specifications, and drawings by the contractor is not necessary to recover; and if you find from the evidence that the said W. E. Moore and W. D. Beasley, in good faith, performed the contract on which recovery in this suit is sought, *substantially* and in all particulars, according to the terms and the plans, specifications, and drawings without a *material omission or defect* in such performance, that is sufficient to constitute compliance with the contract." (Italics are ours.)

We are not of the opinion that the failure of the court to define "substantially" and "material omission or defect" misled the jury. This was not reversible error, and was not held to be such in the case of *Beggs v. Shelton*, supra.

[10] It is argued that the verdict is excessive. It is true that under all the evidence submitted there is just cause to question the failure of the jury to give more damages to the defendants on their claim for defective construction of the roof and the consequence thereof than was given. However, there is substantial evidence to support a finding

against the defendants, especially the testimony which tended to show that the cause of the damage was occasioned by defendants' selection of material. On all the principal items this case presents a square conflict in the evidence. Plaintiffs' counsel, however, in the brief concede that there is a credit due on the judgment of \$4.50 on account of the installation of some framework and a credit of \$4.25, an overcharge on some brick. In addition, we think the evidence of plaintiffs clearly shows that there was an overcharge of \$50 on account of the pressed brick, and that the judgment should likewise be credited with that amount.

The judgment will therefore be affirmed on condition that the respondents within ten days from the date on which this opinion is handed down enter a remittitur in this court of \$58.75 of the judgment; otherwise the same will be reversed, and the cause remanded.

ROBERTSON, P. J., and STURGIS, J., concur.

JOHNSON v. ST. LOUIS & S. F. R. CO.
(No. 1833.)

(Springfield Court of Appeals. Missouri.
Dec. 16, 1916.)

1. CARRIERS ⇨315(4) — PASSENGERS — INJURIES—VARIANCE.

Allegations that plaintiff, a passenger, was injured because defendant railway company took the forward part of the train some distance from plaintiff's coach and negligently backed it into said coach are supported by proof of a sudden jerk, although the front part of the car may not have been moved forward.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1281; Dec. Dig. ⇨315(4).]

2. CARRIERS ⇨318(4) — PASSENGERS — INJURIES—SUFFICIENCY OF EVIDENCE.

Where a passenger coach was severely jerked soon after the train was stopped, the jury would have been justified in finding that it was caused by the backing of the front part of the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307, 1308; Dec. Dig. ⇨318(4).]

3. APPEAL AND ERROR ⇨1033(5) — HARMLESS ERROR—PASSENGERS—INJURIES.

Under allegations that train was negligently jerked backwards, defendant railway company cannot object because the jury was required to find that no warning of the lurch was given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4056; Dec. Dig. ⇨1033(5).]

4. APPEAL AND ERROR ⇨882(12) — INVITED ERROR—INSTRUCTIONS.

Defendant railway company cannot object because the court, after correctly instructing the jury that it was liable if it negligently jerked a passenger coach, at defendant's request gave an erroneous instruction, requiring the jury to find that the forward part of the train was run forward before backing into the coach.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. ⇨882(12).]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Sam Johnson against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellant. Bradley & McKay, of Kennett, for respondent.

ROBERTSON, P. J. This action has been to the St. Louis Court of Appeals (192 Mo. App. 1, 178 S. W. 239), where a judgment for \$5,000 in favor of plaintiff was reversed and the cause remanded. A retrial resulted in another verdict and judgment for plaintiff for the same amount, and defendant has again appealed.

When the case reached the circuit court after having been remanded, the plaintiff filed an amended petition, alleging that the train was stopped at the depot of Kennett for the purpose of permitting passengers to alight; that the forward part of the train was cut loose from the coach in which plaintiff was riding and run north some distance therefrom; that while plaintiff was proceeding to pass out of said coach the defendant "negligently and carelessly backed the forward part of said train immediately in front of said passenger coach violently back and against the said passenger coach," thus causing plaintiff to fall and receive his injuries. Further, it is alleged that defendant violated its duty to safely carry him, in that it "carelessly and negligently backed the forward part of said train against the coach from which plaintiff was alighting. * * *

The plaintiff offered testimony to the same effect as in the former trial, for a statement of which reference is made to the opinion of the St. Louis Court of Appeals. The defendant offered no testimony.

For plaintiff the court instructed the jury that if plaintiff's injuries "were due to the negligence and carelessness of the defendant company in suddenly, carelessly, and negligently moving its train back without any warning whatever to the plaintiff after said train had been stopped at the station of Kennett, and the passengers had been notified in the usual way by the conductor in charge of said train that the station had been reached, if you find such facts to have been proven, then your verdict will be for the plaintiff." Defendant requested and was refused an instruction directing a verdict in its favor. At its request the court instructed the jury concerning the acts of negligence charged by plaintiff, giving the exact language thereof, and told the jury "that the burden rests on the plaintiff to prove that the forward part of the train, after being cut off of and uncoupled from said coach and moved north up the track, was negligently

and carelessly backed against said coach while plaintiff was in the act of getting off of same. * * * It is not sufficient that you may believe from the evidence that defendant may have been guilty of some other act of negligence in stopping or handling the train on the occasion in question, but plaintiff must prove the exact negligence charged against defendant. * * *

The defendant complains that its peremptory instruction was refused; that there was no showing that the movement of the mixed train on which plaintiff was a passenger was unusual or extraordinary; that the instruction given for plaintiff is erroneous and prejudicial, in that it authorizes a verdict for negligence not alleged in the amended petition; that it conflicts with the one given for defendant, and that the failure to warn as referred to in plaintiff's instruction is not alleged as a ground of negligence in the amended petition.

[1] The St. Louis Court of Appeals properly held that:

"The gravamen of the action is the failure of the defendant to keep its passenger car stationary for a sufficient time to enable passengers to safely alight therefrom."

At the time the injury occurred the rules concerning the movements of mixed trains had no application, as was also held by that court. There is no variance between the allegations and proof. What are the acts of negligence alleged in the petition? That defendant "negligently and carelessly backed the forward part of the train immediately in front of said passenger coach violently back and against the said passenger coach." The allegation that the forward part of the train was uncoupled and pulled some distance up the track from where the coach was left standing is not alleged as a part of the negligent act. This is alleged as one of the series of acts that took place, and it may or may not have been true, and yet defendant would be liable. The act of negligence alleged and proved was that of the sudden jerk of the coach and the principle announced in the cases cited by appellant, to the effect that when specific acts of negligence are pleaded they must be proved, has not been violated in this case. The very act of negligence alleged was proven.

[2] If, however, it was necessary that plaintiff prove that the front part of the train was uncoupled, run up, and then shoved back, the jury would have been justified in finding that this was done, because in no other manner could the impact have been as great as some of the witnesses testified that it was. Since the jerk came so soon after the train was stopped, certainly no one would conclude that anything did it except the forward part of the train. Some witnesses testified that the impact was sufficient to knock "the train straight back four or five feet." When the sudden jerk was shown, under the circumstances previously disclosed,

then negligence was shown, and the inference justified that it could have been caused in no other way than by the sudden backing of the engine and cars in front.

[3] The defendant complains that the plaintiff's instruction required the jury to find that the lurch of the train was caused without warning to the plaintiff. This was an essential fact to make the sudden movement of the coach negligent. In the petition the jerk was characterized as negligent, and it might not have been so if due warning had been given. There was no evidence that any warning was given, but because the jury was required to find none was given, that could not injure defendant. The allegations of the petition included this issue.

[4] The point that the judgment must be reversed because defendant's instruction is in conflict with plaintiff's instruction is equally without merit. This instruction told the jury that a finding must be made that every allegation of the petition was proven before plaintiff could recover, while as a matter of law the plaintiff could recover when he showed the alleged negligent jerk. The negligence consisted in the sudden movement of the train when passengers were alighting, and the question was, Did the train make such a movement? Even if the jury should have found every allegation of the petition to be true, there were facts and circumstances, as we have already noticed, from which this conclusion could have been reached. But the defendant cannot be heard to complain that by reason of the fact that it procured an instruction, requiring the jury to find more than was essential, such instruction thereby and to that extent conflicted with a correct one given in behalf of plaintiff, which required a finding of no more than he was required to prove in order to recover.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

RIPKEY v. GRESHAM et al. (No. 1899.)

(Springfield Court of Appeals. Missouri. Jan. 8, 1917.)

COURTS ¶231(39)—**APPELLATE JURISDICTION** — **TITLE TO REAL ESTATE** — **ENJOINING ROAD.**

A suit to enjoin the opening of an alleged public road through plaintiff's land, on the ground that the road overseer had not given plaintiff the legal notice required to make the proceedings binding, involves the title to real estate, so as to give the Supreme Court jurisdiction of an appeal therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 867; Dec. Dig. ¶231(39).]

Appeal from Circuit Court, St. Clair County; C. A. Calvird, Judge.

Action by Francis M. Ripkey against John Gresham and others. Judgment for the de-

fendants, and plaintiff appeals. Cause transferred to Supreme Court.

Waldo P. Johnson, of Osceola, for appellant.

PER CURIAM. It appears from the record before us that the plaintiff in this suit seeks to enjoin the opening of an alleged public road through her land on the ground that there was an attempt by the road overseer to open the road without ever having given her the legal notice required to make such proceedings legal and binding on her. This, under the authority of *Monroe v. Crawford*, 163 Mo. 178, 63 S. W. 373, *Summers v. Cordell*, 171 Mo. App. 184, 156 S. W. 486, and *Reeves v. Green*, 185 S. W. 218, is clearly a case wherein the title to real estate is involved, and the appellate jurisdiction lies in the Supreme Court.

It therefore results that the order of this court be that the cause be transferred to the Supreme Court as provided by section 3938, R. S. 1909.

MITCHELL v. BROWN et al. (No. 1912.)

(Springfield Court of Appeals, Missouri. Dec. 16, 1916.)

1. CARRIERS ¶320(21)—**MUNICIPAL CORPORATIONS** ¶706(6)—**AUTOMOBILE COLLISION** — **NEGLIGENCE—QUESTION FOR JURY.**

In an action for personal injuries by an automobile passenger against owners of the car in which she rode and another with which it collided, case against each defendant held for the jury under the evidence as to their negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1323; Dec. Dig. ¶320(21); Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ¶706(6).]

2. PARTIES ¶27, 31—**JOINDER—JOINT AND SEVERAL LIABILITY.**

An injured party may sue singly or jointly each tort-feasor whose negligence or wrongdoing contributes to cause the injury.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 35, 46, 47; Dec. Dig. ¶27, 31.]

3. APPEAL AND ERROR ¶880(1)—**APPEAL OF JOINT TORT-FEASOR—QUESTIONS PRESENTED.**

On appeal by one defendant in an action against tort-feasors, the Court of Appeals is concerned with whether appellant had a fair and impartial trial without material error committed against him, rather than whether some error was committed for or against the other defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584, 3585, 3587, 3589, 3590; Dec. Dig. ¶880(1).]

4. APPEAL AND ERROR ¶882(14)—**INVITED ERROR.**

Appellant, who has asked that a certain issue be submitted to the jury, will not be heard on appeal to challenge the verdict on the ground that the submission of the issue was improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3604; Dec. Dig. ¶882(14).]

5. MUNICIPAL CORPORATIONS ⇨706(5)—AUTOMOBILE COLLISION—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action by an automobile passenger for injuries received in collision, evidence held sufficient to warrant finding that the driver of the car with which the one in which plaintiff rode collided was negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(5).]

6. MUNICIPAL CORPORATIONS ⇨705(2)—OPERATION OF AUTOMOBILE—STATUTE.

Laws 1911, pp. 326, 327, requires an automobile driver, approaching a crossing, corner, or curve, where his view is obstructed, to slow down and give signal, etc., so that an automobile driver traveling a busy street of a large city, especially when about to cross another much-used street, must slow down his car so as to have it under control and to be in a position to stop, if necessary, in meeting another car at the crossing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇨705(2).]

7. MUNICIPAL CORPORATIONS ⇨706(8)—AUTOMOBILE COLLISION—INSTRUCTIONS—DEGREE OF CARE REQUIRED.

In an action for injuries received in collision between automobiles, the court charged that defendant was negligent if he carelessly and negligently operated his car by negligently or carelessly failing to sound any whistle or alarm or to give any warning of his approach to the crossing where the accident took place, or carelessly and negligently failed to slow down so as to have control of his car or to stop it in case of meeting any one, or negligently or carelessly operated at a high and dangerous rate of speed. A number of instructions repeated that the negligence complained of was failure to slow down on approaching the crossing so as to be able to control the car in case of meeting another car or person. Held, that the jury was not misled into applying a higher degree of care than required by law of persons operating automobiles on public highways.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(8).]

8. MUNICIPAL CORPORATIONS ⇨705(1)—OPERATION OF AUTOMOBILE—STATUTE.

By Acts 1911, p. 330, persons operating automobiles on highways rest under the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons using such highways.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇨705(1).]

9. MUNICIPAL CORPORATIONS ⇨706(5)—AUTOMOBILE COLLISION—ACCIDENT—SUFFICIENCY OF EVIDENCE.

In an action for injuries in an automobile collision, evidence held insufficient to warrant finding that the collision was an accident for which the driver of neither car was to blame.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇨706(5); Pleading, Cent. Dig. § 123.]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by May Mitchell against D. E. Brown and W. A. Banks. From a judgment against defendant Banks and for defendant Brown, defendant Banks appeals. Judgment affirmed.

John P. McCammon, of St. Louis, for appellant. George Pepperdine and Patterson & Patterson, all of Springfield, for respondent.

STURGIS, J. The plaintiff sues for personal injuries caused by the collision of two automobiles, in one of which she was riding as a passenger, at the intersection of Center and Campbell streets in Springfield, Mo. These streets cross at right angles, and the car in which she was riding, designated as the Brown car from its owner and driver, was going west on Center street and the other or Banks car, so designated for the same reason, was traveling north on Campbell street. The two cars collided with such great force that plaintiff and other occupants of the Brown car were hurled from the car to the pavement, both cars being badly demolished and the chassis, or steel frame of each, especially the Banks car, being bent and twisted so as to require new ones. The Banks car was considerably larger and heavier than the Brown car. The Brown car was thrown against the curb and a telegraph pole at the northwest corner of the street intersection. The plaintiff sued both car owners, alleging that each was guilty of negligence in failing to sound the horn or give other warning on approaching the street crossing, and that each was driving at a high and negligent rate of speed and failed to slow down at the crossing so as to have his automobile under control and be able to stop or avoid a collision in case of meeting another car on such crossing. There was a store building at the southeast corner of the street intersection obstructing the view and making the giving of signals and slowing down important in case two cars should arrive, as these two did, at this crossing at the same instant.

[1] The physical facts show that one or both said cars were going at a high rate of speed at the time of the impact, and that if either gave a sufficient warning, the other gave no heed thereto. There can be no doubt, under the uncontradicted facts, that the driver of one or both cars was guilty of negligence resulting in plaintiff being severely injured. Each party, realizing this fact, sought to exonerate himself from blame, and cast the negligence and wrongdoing on the other, and we are free to say that each succeeded in the latter better than in the former, for the evidence of each made a strong case in plaintiff's favor against the other, both as to excessive speed and failure to warn. This made a case for the jury against each, and while the jury might well have found both guilty of negligence, it might also, as it did, believe part and disbelieve other parts of the evidence in the light of the physical facts and place the blame on one defendant only. The jury found against defendant Banks and in favor of defendant Brown, awarding plaintiff \$500 damages.

[2, 3] An injured party may sue singly or jointly each tort-feazor whose negligence or wrongdoing contributes to cause the injury, and if defendant Banks was, as the jury found, guilty of negligence on his part which was a proximate cause of plaintiff's injury, then it matters little whether defendant Brown was also guilty of negligence contributing to the same result. It follows also that on this appeal by defendant Banks, we are concerned with whether he had a fair and impartial trial with no material error committed against him, rather than whether some error was committed for or against defendant Brown. These remarks are made because appellant Banks asserts, though we are not to be taken as so deciding, that the instructions given were, in certain particulars, more favorable to defendant Brown than to him.

The court instructed the jury, by separate instructions, to the effect that if the defendant Brown was negligent in failing to give warning or in not slowing down to a speed at which he could control his car in approaching the crossing, then to find against him; also, if defendant Banks was guilty of such acts of negligence, to find against him; that it was not proper to find against both unless both were negligent in one or more of the ways specified; that the finding should be for defendant Banks unless he was negligent and for defendant Brown for a like reason.

[4] The appellant makes the point that under the uncontradicted facts he was not responsible for the collision, though we fail to find any request for an instruction to that effect. The case was submitted to the jury on instructions given at his request, leaving it to the jury to say whether he was negligent under the evidence. *Gayle v. Mo. Car Co.*, 177 Mo. 427, 76 S. W. 987; *Browning v. Dorton*, 143 Mo. App. 249, 128 S. W. 230; *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917; *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356. It was well said by Judge Bland in *Hayes v. Bunch*, 91 Mo. App. 467, 471:

"It is a well-settled rule of practice in appellate courts, that when the appellant has asked that a certain issue be submitted to the jury, he will not afterwards be heard to challenge the verdict on the ground that it was improper to submit such issue to them" (citing *Berkson v. K. C. Cable Co.*, 144 Mo. 211, 45 S. W. 1119, and *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917).

[5] Aside from this there is, we think, abundant evidence which, if believed, warranted the jury's finding as to Banks' negligence. There was evidence that he was driving 20 to 25 miles per hour, and that while slowing up and sounding his horn while passing other vehicles a hundred feet or more from the crossing, he then speeded up and gave no further signal. One witness said that his speed was so great that he tried to get the number of his car on that account. Several of the witnesses said that the Banks

car hit the other car in front of the forward door, pushing such car to the curb and against the telegraph pole. Nor do we think the injury to the Banks car necessarily refutes this. Banks says that he swerved his car to the left or away from the front of the other car, and that would cause the right-hand forward corner of his car to strike the other, and there was where his car was injured. Compton, a witness for defendants, testified:

"Mr. Banks' car hit it [the Brown car] right near the front door of the car. Hit the left-hand wheel of it, and both just went kind of northwest direction over against the curb. * * * The Banks car then run into right back of the front wheel of the other car. One of the springs was in the front wheel of the other car, in the wheel of the Dodge (Brown) car, and the other spring was kind of between the fender and the wheel. I helped pull it out."

There is also evidence, as bearing on the speed of the Banks car, that the wheels, caught by the brake, slipped on the pavement for a short distance before striking the other car. There is other evidence tending to show this defendant's negligence which need not be repeated, as we must rule this point against appellant.

[6-8] Criticism is made of plaintiff's instruction No. 2, defining appellant's negligence in these words:

"And further find and believe from the evidence that the said defendant W. A. Banks at the time so carelessly and negligently ran and operated his said car by negligently and carelessly failing to sound any whistle or alarm or give any warning of his approach to said street crossing, or carelessly and negligently failed to slow down his said automobile so as to have control of same, or to stop same in case of meeting any one at said crossing, or negligently and carelessly operated his machine at a high and dangerous rate of speed at said point."

One criticism is that there is no statute requiring automobiles to stop under such circumstances, citing *State v. Wilson*, 188 Mo. App. 342, 174 S. W. 163, a case dealing with an entirely different proposition from the one here presented. The negligence counted on here is not statutory, as defendant suggests. It is common-law negligence as applied to these rapid, high-power, and rather dangerous vehicles of travel on public highways. Our statute (Laws 1911, pages 326, 327) does contain these provisions, which are largely declaratory of the common law:

"Upon approaching an intersecting highway or a curve or a corner in a highway, where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling. * * * Every person [etc.] shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person."

We think it is in accord with this statute to require an automobile driver, traveling on a busy street of a large city, and especially when about to cross another much-used street, to slow down his car to such an extent as to have control of same and to stop it if made

necessary in meeting another car at such crossing. A number of instructions were given repeating and reiterating that the negligence complained of as to both parties was a failure to slow down his car on approaching the crossing so as to be able to control the same in case of meeting another car or person on the crossing. We are satisfied that the jury was not misled into applying a higher degree of care than required by law of persons operating automobiles on public highways, to wit:

"The highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over," such highways. Acts 1911, p. 330: *Fields v. Sevier*, 194 Mo. App. 685, 171 S. W. 610; *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

The problem for the jury in the present case was a narrow one. There was no question but that one of the cars, at least, ran into the other at a high rate of speed on this crossing without excuse—an act speaking negligence—and the only thing for the jury to determine was which one or both did so. Having exonerated the defendant Brown, there was no excuse left for defendant Banks. The facts were not such as to warrant a finding that the occurrence was an accident for which no one was to blame, as in the *Field* case, *supra*, and the instructions cannot be criticized for failure to present that theory.

Something is said, though the point is not distinctly presented, as to the verdict being excessive. It will be sufficient to say that a reading of the evidence does not convince us that this is a case warranting the interference of this court on such ground.

The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

MITCHELL v. DAVIS. (No. 1913.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. FRAUDS, STATUTE OF §26(6)—ORAL PROMISE—SUFFICIENCY.

If a physician before treating defendant's adult son called defendant in and exacted from him a promise to pay for the services, the agreement was binding notwithstanding the statute of frauds, the debt then becoming primarily that of the father as well as of the son.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 40; Dec. Dig. §26(6).]

2. FRAUDS, STATUTE OF §160—CONSIDERATION—EVIDENCE—SUFFICIENCY.

If the instructions in an action by physician to recover for his services to defendant's adult son required the jury to find before returning verdict for the physician that he rendered the services at the special instance and request of defendant relying on his promise to pay therefor, they were not defective as omitting consid-

eration; since if the jury found such facts sufficient consideration was shown.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 379; Dec. Dig. §160.]

3. PHYSICIANS AND SURGEONS §18—CONTRACTS FOR SERVICES—CONSIDERATION.

No intrinsic or financial value is necessary to constitute consideration for rendition of services by a physician, and any trouble or labor undertaken by one person at the request of another will support a promise by the other, although the labor was of no benefit to him.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 18-20; Dec. Dig. §13.]

4. PHYSICIANS AND SURGEONS §24(5)—CONTRACTS FOR SERVICES—INSTRUCTIONS.

In a physician's action for services rendered to defendant's adult son at defendant's instance and request, and on his promise to pay therefor, based on services separate and distinct from any rendered solely on the boy's credit, it is proper to refuse an instruction requiring the jury to find that the agreement was entered into before the physician rendered any services for the son.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 61; Dec. Dig. §24(5).]

5. PHYSICIANS AND SURGEONS §24(5)—CONTRACTS FOR SERVICES—INSTRUCTIONS.

In such case instruction that if the physician gave the boy any credit and looked to him for payment or part payment, he could not recover from the father, was properly refused for although the father promised to pay the debt it nevertheless continued to be a liability of the son.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 61; Dec. Dig. §24(5).]

6. TRIAL §252(1)—INSTRUCTIONS—CONFORMITY TO ISSUES.

Requested instructions submitting issues not made by the evidence were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596, 612; Dec. Dig. §252(1).]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by S. E. Mitchell against John E. Davis. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Edmonds and H. S. Shaw, both of Bernie, for appellant. Phillips & Cox, of Malden, for respondent.

ROBERTSON, P. J. Plaintiff, a practicing physician at Malden in Dunklin county, at the special instance and request of the defendant, rendered medical aid to defendant's son of the value of \$107.50 for which he sued and recovered judgment as the result of a jury trial. Defendant has appealed. The case originated in Dunklin county, and on change of venue taken by defendant was sent to New Madrid county.

[1] The only defense is that of the statute of frauds; it being contended by defendant that the testimony tends to prove no more than a verbal promise to pay the debt of another. The son had reached his majority and was afflicted with a disease for which the plaintiff refused to give a special treatment until after the boy's father consulted

him and agreed to pay for said services. Plaintiff testified that this agreement was entered into before and as a condition precedent to the rendition of the services. These facts were denied by the testimony of the defendant and his son, but the issues were properly submitted to and passed upon by the jury. The verdict must stand in the absence of error in ruling on the admission of testimony or the giving or refusing instructions. The promise was an original one and is in no manner affected by the statute of frauds. *Waggoner v. Davidson*, 189 Mo. App. 345, 350, 175 S. W. 232.

There are no objections concerning testimony, but defendant complains of instructions given for plaintiff and of the refusal of instructions requested by him. The defendant requested and was refused a peremptory instruction. From what we have already said it is evident this was not error, and we so hold.

[2] Two instructions were given for plaintiff requiring the jury to find, before a verdict could be returned for him, that he rendered the services at the special instance and request of defendant relying on his promise to pay therefor. It is said these instructions are defective because they omit the essentials of a consideration. When the jury found these facts to exist a sufficient consideration is shown.

[3] The third instruction given in behalf of plaintiff told the jury that no intrinsic or financial value was necessary to constitute a consideration, but if defendant hired plaintiff and plaintiff rendered the services the consideration was sufficient and defendant was liable. "Any trouble or labor, however slight, undertaken by one person at the request of another, will support a promise by such other person, although the trouble or labor be of no benefit to the promisor." *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522, 530, 119 S. W. 400, 405 (25 L. R. A. [N. S.] 1173). The third instruction is correct.

[4] The defendant requested an instruction upon the burden of proof and required the jury to find that the agreement upon which this action is based was entered into before plaintiff rendered any services for the son. The court struck that part out and then gave the instruction. There was no error in this. The plaintiff based his action against defendant for services separate and distinct from any that he may have rendered solely on the boy's credit before entering into the contract with defendant. The instruction as requested did not confine the question of previous services to those for which plaintiff was seeking to recover.

Defendant complains of the refusal of an instruction (No. 7) setting out his theory of lack of consideration, and for the reasons above given we hold that point without merit.

[5] An instruction requested by defendant and refused stated that if plaintiff gave the boy any credit during said treatment and looked to him for payment or part payment of said services, then he could not recover. This instruction was properly refused, because the fact that plaintiff had an agreement with defendant upon which he relied and which induced him to render the services did not thus release the son from liability therefor.

[6] Defendant's requested instructions 2 and 3, which were refused, sought to submit issues not made by the evidence, and were therefore properly refused.

The judgment is affirmed.

FARRINGTON and STURGIS, JJ., concur.

SPAIN v. ST. LOUIS & S. F. R. CO.
(No. 1739.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. RAILROADS \S 348(2)—INJURIES AT CROSSING—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries at a crossing, evidence held sufficient to justify the jury in believing that some trainman with apparent authority directed plaintiff, whose way was blocked by cars, that she might go between them.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1189; Dec. Dig. \S 348(2).]

2. RAILROADS \S 326(2)—INJURIES AT CROSSING—DUTY TO USE CARE.

The direction of a trainman at a crossing blocked with cars that a pedestrian could pass through the openings between cars, while imposing due care on the railroad, did not relieve the pedestrian of duty of using care commensurate with her surroundings.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1039; Dec. Dig. \S 326(2).]

3. RAILROADS \S 326(2)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—"INVITEE"—"TRESPASSER."

A pedestrian who came to a railroad crossing blocked by cars and was informed by a trainman that she might pass through openings between cars was an "invitee" to whom the road owed the duty of reasonable care and warning, but if she went further down the yards than was necessary she became a "trespasser," and if thereby incurring unnecessary danger was contributorily negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1039; Dec. Dig. \S 326(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Trespasser*.]

4. RAILROADS \S 351(12)—INJURIES AT CROSSINGS—INVITATION—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for injuries to a pedestrian, who, at invitation of a trainman, attempted to pass between cars blocking a crossing, the road was entitled to an instruction embodying the defense of contributory negligence positively and adapted to the particular facts.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1204; Dec. Dig. \S 351(12).]

5. RAILROADS —337(2)—INJURIES AT CROSSING—VIOLATION OF ORDINANCE.

Violation by the railroad of a city ordinance prohibiting the blocking of a street for more than five minutes was not a proximate cause of the injury, and not one of the necessary ultimate facts to be proven.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1091; Dec. Dig. —337(2).]

6. APPEAL AND ERROR —997(2)—REVIEW OF FACTS—DEMURRER TO EVIDENCE—CONCLUSIONS AND EVIDENCE CONTRARY TO FACTS.

On demurrer to evidence, in giving credence to plaintiff's evidence, the Court of Appeals should reject parts contrary to the physical facts, and any statements which are merely conjectures or conclusions, rather than facts within the witness' knowledge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4023, 4024; Dec. Dig. —997(2).]

7. RAILROADS —348(2)—INJURIES AT CROSSING—SUFFICIENCY OF EVIDENCE.

In a pedestrian's action against a railroad for injuries in attempting a crossing blocked by cars, evidence held to show that the main track was not blocked, and that plaintiff was already safely across the blocked track when injured, and was going heedlessly down the track for some other purpose than to cross.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1139; Dec. Dig. —348(2).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Suit by Florence C. Spain against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Judgment reversed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellant. Von Mayes, of Hayti, and Everett Reeves, of Caruthersville, for respondent.

STURGIS, J. Plaintiff sued defendant railroad for personal injuries inflicted by being struck and knocked down, but not run over, by defendant's cars at a point on its main line 100 feet or more north of where same crosses Cardinal street in Hayti, Pemiscot county. The plaintiff alleges that on this occasion the defendant had obstructed the street crossings with its cars and kept same obstructed an unreasonable length of time and in violation of an ordinance of said city prohibiting the obstruction of any street by railroad trains or cars for longer than five minutes. The petition then proceeds:

"Plaintiff further states that on said date, while said crossing was obstructed as aforesaid, and after the same had been obstructed for a period of over five minutes as aforesaid, she was traveling on foot along said street in a lawful manner and approached said crossing on her way home with the intent and for the purpose of crossing over the track or tracks of said line of railroad at said crossing and on account of said crossing being obstructed as aforesaid she was prevented then and there from crossing over said track or tracks lying across said street at said crossing, and thereupon the plaintiff then and there, at the direction and invitation of said agents, servants and employes, went upon the right of way of said line of railroad a

short distance from said crossing and street and attempted to cross over said track or tracks thereof by passing around the end of said cars, when the defendant, by its agents, servants and employes, negligently caused certain cars to be moved, without any warning to plaintiff thereof, and to strike and run against plaintiff with great force and violence, fracturing plaintiff's collar bone and left shoulder blade, mashing and bruising her left hip and cutting and bruising her head and arm, all of which injuries so received are permanent."

The answer contains a general denial, and that plaintiff, when injured, was a trespasser and was guilty of contributory negligence. There was judgment for plaintiff for \$2,000. Cardinal street runs east and west and crosses defendant's tracks through its switch yards. Defendant has four tracks running north and south across Cardinal street and another track, the extreme western one, coming from the north and terminating at the north boundary. The east track is the house track or switch; next west is the main track; next the passing track or switch, designated as No. 1; and next the storage track or switch designated as No. 2. Plaintiff says that when she approached this crossing going west she found the east track blocked by cars; that the cars on this track extended only a short distance north of the crossing, not further than the width of a small tool-house standing at the edge of the street and a few feet east of the track. After waiting about ten minutes for the crossing to be clear, the plaintiff says she remarked to herself, but in the hearing of a train employe standing there, something about how she could ever get across. This trainman, she says, spoke to her saying that she could go around the cars through the opening to the north and there would be no danger; that she went between the cars and this tool-house, crossed the switch track, and then went on further north, and was going through an opening between cars standing on the main track, which was next west, and while doing so she was struck by the cars coming from the south and closing this opening; that this opening between the cars on the main track was two or three car lengths from the crossing and was nearly that wide; that she went about 15 feet north and beyond the cars before turning through this opening and was still going north, diagonally, and stepping over the west rail, when she was struck from behind without any warning being given.

[1] There were two train crews at the yard at the time, and they severally deny that any one of them gave plaintiff any such directions as to passing around or through cars on the crossing or side tracks; and, as plaintiff only identifies this man as a trainman by his dress and acts, defendant insists that any proof of the authority of this man to give such directions is wholly wanting. One of three boys who were near the crossing west of

the main track identifies this man as one whom he saw on the cars and engine directing and assisting in the train's movements. One of defendant's train conductors said he was at the crossing at this time for the purpose of protecting the same and, while he gave a radically different version of what took place and while not identified by the plaintiff, the jury might have believed he or some trainman with apparent authority directed plaintiff as she says. *Snider v. Railroad*, 108 Mo. App. 234, 244, 83 S. W. 530.

[2-4] As to plaintiff's contributory negligence, the law imposes on her care commensurate with the danger she necessarily encounters in leaving the crossing and passing over railroad tracks and through openings between cars standing thereon. The direction of the trainman at the crossing that she could do this, while imposing due care on the part of the defendant, did not relieve her of using care commensurate with her surroundings. *Gurley v. Railroad*, 104 Mo. 211, 231, 16 S. W. 11. On her version of what took place the question as to her contributory negligence being one of law only, is close, as it is hard to see no negligence in her going on the main track in this wide opening and continuing on north, even if diagonally, instead of turning back toward the crossing and not again looking until the cars struck her, 100 feet (she says four or five car lengths) distant from the crossing. It is only on the theory that the crossing was blocked on the main track in addition to the side track that plaintiff would be justified in going on north to the opening to cross the main track instead of turning back the short distance to the crossing after rounding the cars at the toolhouse. While plaintiff was not a trespasser, but an invitee, to whom defendant owed the duty of reasonable care and warning, in going around the car obstructing her pathway (*Waite v. Railroad*, 168 Mo. App. 160, 165, 153 S. W. 66; *Brown v. Railroad*, 50 Mo. 461, 467, 11 Am. Rep. 420), yet, if she needlessly went further down in the yards she became a trespasser, and if she incurred unnecessary dangers this would be contributory negligence. The jury, therefore, should have been fully instructed on contributory negligence, and while plaintiff's instruction mentioned that plaintiff must have used due care, this was done casually only and in such a way as to avoid criticism of ignoring this defense in an instruction covering the whole case. Defendant was entitled to an instruction embodying this defense positively and adapted to the particular facts of this case. *Stephens v. Eldorado Springs*, 185 Mo. App. 464, 471, 171 S. W. 657; *Allen v. Transit Co.*, 183 Mo. 411, 436, 81 S. W. 1142.

[5] Entirely too much importance was given to the violation of the city ordinance in blocking the street for more than five minutes. The length of time the street was blocked was only important as justifying the

plaintiff in leaving the crossing to go around and through openings between cars. As showing this, proof of the ordinance, while not necessary, may have been proper. But it was not a proximate cause of plaintiff's injury nor even one of the necessary ultimate facts to be proven. Plaintiff's instruction made it so and was calculated to impress the jury that defendant should be held liable because it violated this ordinance. This instruction was a comment on, and gave undue prominence to, this bit of evidence.

[6, 7] We are impressed, moreover, that the demurrer to the evidence should have been sustained. In giving credence to plaintiff's evidence as making a case for her, we should reject such parts as are contrary to the physical facts and any statements which are merely conjectures or conclusions rather than facts within the witness' knowledge and which in the light of the other evidence are unbelievable. *Spiro v. Transit Co.*, 102 Mo. App. 250, 262, 76 S. W. 684; *Gurley v. Railroad*, 104 Mo. 211, 233, 16 S. W. 11; *Lange v. Railroad*, 151 Mo. App. 500, 505, 132 S. W. 31; *De Maet v. Storage Co.*, 121 Mo. App. 92, 104, 98 S. W. 1045. We have noted that plaintiff was injured considerably north of the crossing (4 or 5 car lengths as she says) on the main track, and since the opening on this track commenced, according to her evidence, 2 or 2½ car lengths from the crossing and was about 2 car lengths wide, plaintiff must have been, when struck, nearly to the cars north of the opening. Plaintiff's excuse for not seeing the cars moving north toward her is that when she entered on this track she looked, and these cars were standing still, and no engine was attached; that same afterwards came from behind and struck her. On cross-examination she admitted that she was then going north, but in the act of stepping over the west rail. All the other witnesses say she was going north either between the rails or just outside the west one. We have also noted that plaintiff's case rests on the fact, persistently adhered to by her, that the main track, the second one, was blocked at the crossing also, and that she went so far north in order to pass through the opening in the cars on that track. Here she was hurt. We think the undisputed physical facts show that this main track was not blocked, and that no cars were standing there on or north of this crossing when plaintiff rounded the car on the east track by the toolhouse; that she was not caught in attempting to cross this main track from east to west through an opening or otherwise, but that she was already safely across, whether she had gone across at the open crossing as the trainmen say or otherwise, and was going heedlessly down the track looking for her boy or for some other purpose of her own.

There is no humanitarian doctrine asserted in that the trainmen saw her peril in time

to avert the accident. It is undisputed that the engine which pushed these cars against plaintiff first came from the north down the main track and with a caboose was going on south to another station to bring back a train. Another train and crew were in the yards doing some switching and had left two cars and a caboose on this main track north of the crossing (or if on it would make no difference). This south-bound engine and caboose had to get by these standing cars on the main track and to do so pushed the same south about 100 yards beyond the crossing in order to make a flying switch, and thus get behind the same. The switch connecting the east track with the main track was about 75 feet south of this street crossing. When this engine had pushed these cars far enough south of this switch connection it started north pulling the cars, and when sufficient speed was attained cut loose, ran ahead, and, the switch being thrown, went in on this switch track. The switch was again thrown and the two cars and caboose rolled on north on the main track across this street crossing and back to near where they first stood. These are the cars which, without any engine attached, struck plaintiff north of the crossing. This engine must have swept the main track clear of cars as it went south, leaving no cars on or north of the crossing. When plaintiff rounded the cars blocking the crossing of the east track (if any were there, as this was the short track on which the engine ran in at the switch 75 feet south in making the flying switch) she was then at the main line track ready to step across, and there could have been no standing cars there. The track had been cleared in making the flying switch; the cars which had been standing there having been taken away south and were then rapidly moving north over a clear track and crossing. Plaintiff's theory of passing along standing cars to reach an opening north of the crossing in order to cross this main track is unbelievable. No other witness says there were standing cars on the main track, blocking the crossing and forming an opening 100 feet or so north, immediately before plaintiff was struck, or at any time for that matter. All the trainmen and other witnesses for defendant say that the crossing was kept clear on all these tracks except for the necessary crossing and recrossing in switching. The plaintiff's witness Pike corroborates this and says that while he was cautious and waited with his horse and buggy a considerable time on the west side in order to get a clear track to cross, yet that this was because of the switching backward and forward and he says positively that:

"There were no cars standing stationary on that crossing, but they were passing up and down while they were switching."

He also says that he saw this engine come from the north on the main track, take these

three cars on south, make the flying switch, and then the cars went on over the crossing north and stopped a short distance beyond where plaintiff was injured. While these cars passed beyond plaintiff when she was injured, there is no pretense that they struck other cars which would be north of the pretended opening. Many other facts might be mentioned, but it will suffice to say that the evidence in the light of the physical facts shows that plaintiff was not injured in the manner nor by the negligence alleged in the petition. That is fatal to her recovery. *Spiro v. Transit Co.*, 102 Mo. App. 250, 261, 76 S. W. 684.

We are not called upon to say how the accident did happen, but to the curious we might say that defendant's conductor who was at the crossing of the east track watching same while the switching was going on and another eyewitness say that plaintiff passed over this east track and main track crossing while open and went over into the yards; that she was looking for and asked another trainman if he had seen her boy, who was one of the three who later appeared on the scene; that she was last seen by a brakeman of the other one of the train crews and was coming from the west, where there were some cars, to and stopping beside the west rail of the main track where she stood looking north when these cars struck her. This brakeman was a short distance away, started toward her, and was the first one to her after the accident.

The judgment will therefore be reversed.

FARRINGTON, J., concurs. ROBERTSON, P. J., not sitting.

OLIVER et al. v. ST. LOUIS, I. M. & S. RY. CO. (No. 1742.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

DAMAGES ⇐69—INTEREST—TORTS.

Interest is not recoverable on a claim ex delicto against a railroad company for fires prior to rendition of judgment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. ⇐69.]

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Action by John R. Oliver and others, doing business as W. R. Slack & Co., against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed on condition.

J. F. Green, of St. Louis, and N. A. Mozley, of Bloomfield, for appellant. H. C. O'Bryan and Haw & Brown, all of Charleston, for respondents.

FARRINGTON, J. Plaintiffs recovered judgment for \$2,418.13 damages (and inter-

est) alleged to have been occasioned by a fire set out by one of defendant's locomotives in Mississippi county. It was alleged and shown that the property destroyed was personal property consisting of axe handles and other articles of merchandise timber stored in a warehouse and in and around a saw-mill. The plaintiffs had \$2,000 insurance on this stock, which they collected and thereupon sued the defendant for the balance of the value of the merchandise destroyed and recovered the judgment hereinbefore mentioned.

The facts of this case are identical with those in the case of *Slack v. St. L., I. M. & S. Ry. Co.*, 187 S. W. 275, decided by this court on June 17, 1916. Practically the same evidence was introduced and the same instructions given in both cases; the evidence in the present case being, if any different, a little stronger in favor of the plaintiffs on the question of the engine throwing out sparks as it passed along by the mill. We therefore refer to that opinion for a statement of the facts and for the discussion of the law touching the demurrer to the evidence, as well as instructions given and refused.

There appears the same error in this case that occurred in the *Slack Case*, supra, to wit, the jury were instructed to allow 6 per cent. interest on the amount of the loss between the date of the fire and the date of the judgment. This question was discussed in the *Slack Case* and the ruling made that in actions ex delicto of this character interest may not be recovered. There was no dispute concerning the value of the property destroyed, the plaintiffs' evidence showing that it was worth at the time of the fire at least \$2,100.55, and the instruction of the court told the jury they could allow damages not to exceed the sum of \$2,100.55 and interest thereon at the rate of 6 per cent. per annum from the 20th day of April, 1913. We will therefore affirm this judgment on condition that respondents file in this court within 10 days from the date on which this opinion is handed down a written remittitur of \$317.58 of the judgment so as to make the judgment rendered on October 27, 1915, stand for \$2,100.55; otherwise, the judgment will be reversed and the cause remanded.

ROBERTSON, P. J., and STURGIS, J., concur.

DAVIS v. LUSK et al. (No. 1879.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. CARRIERS — EJECTION OF PASSENGERS — DAMAGES.

Where a passenger is wrongfully ejected from the train of a common carrier without fault on his part, the carrier is liable for damages which might reasonably be expected to

flow from the objection, together with damages for humiliation and mental distress.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1483, 1485; Dec. Dig. ¶ 382(1).]

2. CARRIERS — EJECTION OF PASSENGERS — DAMAGES.

Damages for humiliation and mental distress caused by wrongful ejection of a passenger from a train may be recovered although there is no contemporaneous physical injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1487; Dec. Dig. ¶ 382(4).]

3. CARRIERS — EJECTION OF PASSENGERS — CONSEQUENTIAL DAMAGES.

Where a passenger is wrongfully ejected from a train on a rainy night and takes a cold, such cold is a consequential damage naturally and directly flowing from the wrongful act for which the carrier is liable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1483, 1485; Dec. Dig. ¶ 382(1).]

4. CARRIERS — EJECTION OF PASSENGERS — DAMAGES.

Where a passenger was wrongfully ejected from the train of a common carrier, a verdict of \$750 was excessive, where the passenger, a farm hand, had almost reached his majority and was ejected on a dark night in July, and compelled to walk 20 miles to his destination the next day, and made sick by a cold and rendered unable to work for about a week.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1490; Dec. Dig. ¶ 382(7).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Fitzhugh Lee Davis, by his next friend, Bula Neal, against James W. Lusk and others, receivers. Judgment for plaintiff, and defendants appeal. Affirmed on condition.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. J. E. Duncan and R. L. Ward, both of Caruthersville, for respondent.

FARRINGTON, J.: A judgment for \$750 actual damages was rendered in plaintiff's favor for being wrongfully ejected from one of defendants' passenger trains, and defendants have appealed.

The case made by the plaintiff's testimony, corroborated on most material matters by two witnesses, is, in substance, as follows: Plaintiff on July 18, 1915, purchased a ticket at Osceola, Ark., from the defendants' station agent at that place to Caruthersville in this state, paying the required fare for such transportation. He boarded one of defendants' passenger trains about 7 o'clock in the evening, and the conductor took up his ticket. Accompanying plaintiff was his brother-in-law, one Neal, and the conductor likewise took up Neal's ticket, putting a yellow slip in plaintiff's hat and a red slip in Neal's hat. They proceeded on their journey until the train had passed Blytheville, the conductor having taken the yellow ticket from plaintiff's hat just before the train reached Blytheville. After the train left the station just

mentioned, the conductor came and asked plaintiff why he did not alight at Blytheville, and plaintiff replied that he had purchased his ticket to Caruthersville and that that was the place he was going to, whereupon the conductor told him the ticket read to Blytheville, and that he had not bought a ticket to Caruthersville and that he must either pay fare or get off the train. The plaintiff was without any means with which to pay fare on to Caruthersville, and the conductor stopped the train at Yarbrow, a small station on defendants' line, and ejected him. Plaintiff testified that the conductor insulted him, called him a liar and a hobo, jerked his hat down over his eyes, and took hold of him by the arm and put him off the train. The plaintiff, after being ejected from the train, attempted to board it again and was kept off by the conductor and brakeman. This was about 8 o'clock at night when plaintiff was some 20 miles from Caruthersville, his destination. The night was dark and rainy. Plaintiff was a minor, about 20 years of age. He had no money when put off the train and said he was forced to sleep that night in one of defendants' empty box cars which was standing on a track at Yarbrow. The next morning he started afoot to Caruthersville, arriving there about 4 o'clock in the afternoon. He told the conductor before being ejected that he had no money with which to pay the fare. The depot at Yarbrow was closed. Plaintiff slept in the box car, and testifies that he thereby contracted a cold. It is not contended that plaintiff was in any way injured, physically, in being ejected from the train; but it is claimed that he suffered physical injury as a consequence of being required to sleep in the box car on a rainy night, to wit, that he contracted a cold, and that he suffered mental anguish and humiliation, besides being required to walk a distance of 20 miles to his destination.

[1] There is substantial evidence to the effect that plaintiff was wrongfully ejected from this train and without any fault whatever on his part. This being true, the defendants are liable to him for such damages as might reasonably be expected to flow from such act, together with such as were occasioned by the humiliation and mental distress brought on by the wrongful eviction and insulting and abusive language used by the conductor, and such as were occasioned by the inconvenience suffered by reason of this act of defendants' conductor. This is settled law in this state requiring no array of authorities to be cited.

[2] It is argued by appellants that there could be no damages allowed for humiliation and mental distress where there was not a contemporaneous physical injury. The Supreme Court, in the recent decision rendered in *Ferguson v. Missouri Pac. Ry. Co.*, 177 S. W. 616, set at rest this contention. In that case the judgment was reversed and the cause

remanded because the instruction given by the trial court did not permit to be included in the measure of damages the matter of humiliation and mental distraction as an element of damage; and in that case there were no aggravating circumstances. Indeed, the eviction there, though wrongful, was about as mild and free from wrongful intent as any wrongful eviction could be. The facts of that case may also be found stated in (same title) 144 Mo. App. 262, 128 S. W. 799, and in (same title) 186 S. W. 1134. The same question is discussed in *Morris v. St. L. & S. F. R. Co.*, 184 Mo. 65, loc. cit. 74-76, 168 S. W. 325.

The cases above referred to dispose of appellants' points on the principal instruction and the instruction on the measure of damages.

[3] The plaintiff took cold, which was a natural result of defendants wrongfully ejecting him on a rainy night. For this consequential damage, flowing naturally and directly from the wrongful act, defendants must answer. *Miller v. St. L., I. M. & S. Ry. Co.*, 90 Mo. 389, 2 S. W. 439. See, also, *MacDonald v. Metropolitan St. Ry. Co.*, 219 Mo. 468, loc. cit. 491, 118 S. W. 78, 16 Ann. Cas. 810.

[4] The petition did not pray for punitive damages, and no such issue was submitted to the jury. As stated in the beginning of the opinion, the actual damages allowed was \$750. We think that amount is excessive under the evidence. Plaintiff had almost reached his majority. The night on which he was ejected in the darkness and rain was in July at a time of the year when in Southern Missouri and Northern Arkansas the weather is such as not to cause great suffering from exposure. He walked about 20 miles the next day, which in itself would cause one not accustomed to it some discomfort and soreness. Plaintiff testified:

"I wasn't able to work for about a week afterward, wasn't down in bed sick, but was puny and wasn't able to do anything. Q. Did you contract a cold? A. Yes, sir; had some cold."

The jury was not called upon, nor are we, to punish the defendants for the wrongful treatment of the plaintiff, but only to compensate the plaintiff for his damage. He was insulted and necessarily humiliated. He was required to seek shelter in a box car, where he slept that night, and to walk 20 miles, which he says gave him some cold and made him puny for about a week so that he was not able to do anything. If, under the pleadings, evidence, and instructions, plaintiff was entitled to recover anything for his loss of time (about one week), it could not have been any considerable sum, because the evidence shows that he had been working as a farm hand in Arkansas, so that even if it be conceded that the jury could consider his loss of time as an element of damage, along with the other items of damage we have referred to, since he suffered no permanent injury from

the wrongful act, the verdict was excessive to the extent of \$400.

Therefore, if the plaintiff within ten days from the date on which this opinion is handed down will file in this court a remittitur of \$400 of the judgment rendered, the judgment will be affirmed in the sum of \$350; otherwise, the judgment will be reversed, and the cause remanded for a new trial.

STURGIS, J., concurs. ROBERTSON, P. J., concurs, except as to the holding that the judgment is excessive.

CITIZENS' TRUST CO. v. WARD. (No. 1812.)

(Springfield Court of Appeals. Missouri. Dec. 18, 1916.)

1. BILLS AND NOTES ⇨200—INDORSEMENT FOR COLLECTION—TRANSFER OF TITLE.

The indorsement of a note, "Pay to any bank or banker," is an indorsement for collection, and an indorsement for collection does not transfer title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 470, 471; Dec. Dig. ⇨200.]

2. BILLS AND NOTES ⇨195—ACQUISITION OF POSSESSION BY THIRD PARTY—RELATION TO PAPER—INTENTION.

The question, what is the relation of a stranger or third party to commercial paper when he puts up his money and acquires possession of it, is one of intention, to be ascertained from all the facts and circumstances, and the condition of the parties, surrounding the transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 404, 474-476, 478-480, 488, 490; Dec. Dig. ⇨195.]

3. BILLS AND NOTES ⇨537(5)—PAYMENT OR PURCHASE OF NOTE BY STRANGER—QUESTION FOR JURY.

Where a note, indorsed, "Pay to any bank or banker," was forwarded for collection to a bank which was a stranger to it, and, on receipt of the note, the bank drew a draft for the amount and forwarded it to the bank which had sent on the note for collection, the note not being marked paid or in any way on its face shown to have been paid and remaining in the possession of the bank to which it had been forwarded, whether the bank, by forwarding its draft, intended to pay the note and discharge it, or intended to purchase it, was a question of fact for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1876-1881; Dec. Dig. ⇨537(5).]

4. BILLS AND NOTES ⇨508—ACTION—EVIDENCE.

In suit on a note against an indorsee by the receiver of a bank, which, upon receiving the note for collection, had forwarded a draft for the amount, the intention of the bank in acquiring and holding possession of the note being a matter to be ascertained, evidence that the note had never been listed on the books of the bank as an asset, and evidence showing where the note was found by the bank's receiver after taking charge, was admissible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1728-1732; Dec. Dig. ⇨508.]

5. EVIDENCE ⇨158(28)—EVIDENCE OF AUDITOR—CONDITION OF BOOKS OF BANK.

In suit on a note by the receiver of a bank which had either paid the instrument or purchased it by returning a draft for the amount upon receiving it for collection, where the bank's books were voluminous, it was proper to permit a witness, though he had never audited bank books before, to show the condition in which he found the books and papers of the bank, and what he discovered while going through them as auditor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 523-525; Dec. Dig. ⇨158(28).]

6. BILLS AND NOTES ⇨460—INDORSERS—SUIT AGAINST ALL OR ANY.

The holder of a note has the privilege of suing all or any of the indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1434-1443; Dec. Dig. ⇨460.]

7. RECEIVERS ⇨178—SUIT ON NOTE—SUIT AGAINST ALL PARTIES.

Where a bank's receiver sues one of a number of indorsers of a note, the court will, on application, order the receiver to sue all parties, to avoid a multiplicity of suits.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 346-351; Dec. Dig. ⇨178.]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by the Citizens' Trust Company, a corporation, as receiver of the Pemiscot County Bank, a corporation, against J. M. Ward. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

R. L. Ward, of Caruthersville, for appellant. C. G. Shepard, of Caruthersville, for respondent.

FARRINGTON, J. The plaintiff (respondent) recovered a judgment for \$6,141.65, which represents the balance due on the principal sum of a promissory note with interest thereon, which note had been signed by the Missouri Cotton Oil Company, a corporation, as principal, and the defendant herein, together with five others, as accommodation indorsers.

The amended petition alleged that plaintiff is the duly appointed receiver of the Pemiscot County Bank; that the Missouri Cotton Oil Company on January 25, 1912, executed this note payable to itself in the sum of \$10,000; that Ward and others indorsed their names on the back guaranteeing its payment; that the note was delivered by the Missouri Cotton Oil Company, indorsed, to the American Trust Company, and a copy of the note is set out showing the indorsers thereon; that on October 24, 1912, there was remaining a balance due and unpaid on said note amounting to \$5,025; that the American Trust Company was the owner and legal holder of the note; that one A. C. Tindle was at that time the acting cashier of the Pemiscot County Bank, and was at the same time the president of the Missouri Cotton Oil Company; that this note

was forwarded by the American Trust Company to the Pemiscot County Bank for collection, that is, it was indorsed on the back, "Pay to any bank or banker"; that on receipt of the note by the Pemiscot County Bank the said Tindle caused the amount due thereon to be drawn out of the funds of the Pemiscot County Bank by drawing a draft and forwarding the same to the American Trust Company; that neither the Missouri Cotton Oil Company nor any of the indorsers or signers of said note ever paid the balance due on the note either to the American Trust Company or to the Pemiscot County Bank; that the action of the Pemiscot County Bank in paying its funds to the owner of said note constituted it the owner and holder of the note entitled to collect the same from the maker and indorsers of the same, one of whom is the defendant.

The defendant answered by a general denial, and by special pleas (1) that the Pemiscot County Bank never became the owner of the note, and (2) that the amount that was paid by the Pemiscot County Bank was not its own funds, but that the payment was out of funds on deposit in said bank belonging to the Missouri Cotton Oil Company. The first of these special pleas raises a question of law; the second, one of fact.

If the contention of the defendant based on the first of these pleas is well taken, that is, that the Pemiscot County Bank could not become the purchaser of this note even though it did forward its own funds because the note was sent to it for collection and not negotiation, plaintiff's case must fail entirely, and we will therefore take up the consideration of that contention.

[1] Following the defendant's (appellant's) reasoning, it must be admitted that the indorsement on the note, "Pay to any bank or banker," is an indorsement for collection, and that an indorsement for collection does not transfer title. *Bank of Indian Territory v. First National Bank*, 109 Mo. App. 635, 83 S. W. 537; *National Bank of Rolla v. First National Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513.

Appellant contends, relying on the fact that the note was in the hands of the Pemiscot County Bank for collection and for no other purpose, that when it sent the money to the owner and holder of the note the same thereby became extinguished and the signers and indorsers thereby discharged on that obligation, in support of which he cites the case of *People's & Drivers' Bank of Washington v. Craig*, 63 Ohio St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639. That case clearly sustains appellant in his contention, and the facts of that case are so like the facts in the case at bar as to make it an authority. Appellant also cites the case of *Eastman v. Plumer*, 32 N. H. 288, which, however, is not an authority on the

question before us, because in that case the maker of the note, when called upon for payment, borrowed the money from a third party and took it to the holder of the note, paying it over to him and receiving the note from the holder; and it was held that the note was paid and discharged and was not kept alive for the benefit of the person from whom the maker borrowed the money with which to pay it off. Likewise, in the case of *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604, cited by appellant, Lincoln was primarily liable for the payment of a certain note. He took some money belonging to the plaintiff in that suit and paid that money to the holder of the note. He then sent the note to the man from whom he had obtained the money, and in an action by the latter it was held that, when Lincoln had taken the note up, from the holder, he being primarily liable, the note was discharged; that, had Lincoln brought suit on the note when he took it up, there could be no recovery by him, and, as the note was past due, the plaintiff in the case, acquiring or getting it from Lincoln, merely stood in Lincoln's shoes.

If the Ohio case, *supra*, had been a decision by the Supreme Court of this state, we would hold that the plaintiff in this case has no cause of action.

[2] But the question, what is the relation of a stranger or third party to commercial paper when he puts up his money and acquires possession of the paper, is one, under many authorities, of intention; the same to be ascertained from all the facts and circumstances and the condition of the parties surrounding the transaction.

In 7 Cyc. 1025, we find that, if a note is paid after its maturity by a stranger, it will generally be held to be a purchase and not a payment of the instrument, and that whether it is a purchase or a payment is a question of intention to be determined from the facts, acts, and declarations of the parties, and surrounding circumstances, citing a great number of decisions from nearly all the states.

In the case of *Swope v. Leffingwell*, 72 Mo. 348, it is held that, if a stranger to a note takes it up with his money, the presumption is that it was a purchase and not a payment, and that the question whether it was a purchase or a payment is one of intention. See, also, *Kyne v. Erskine*, 7 Mo. App. 691; *Vansandt v. Hobbs*, 84 Mo. App. 628; *Allen v. Dermott*, 80 Mo. loc. cit. 59; *Lipscomb v. Talbott*, 243 Mo. 1, 147 S. W. 798; *Prather v. Hairgrove*, 214 Mo. 142, 112 S. W. 552.

The case of *Harbeck v. Vanderbilt*, 20 N. Y. 395, was cited with approval and quoted from in the case of *Swope v. Leffingwell*, 72 Mo. 348, loc. cit. 358-360. In the case of *Harbeck v. Vanderbilt* it was held, in dealing with this question, that, where the amount due upon a judgment is paid wholly or in part by one who is not a party to nor bound

by it, the judgment is extinguished or not according to the intention of the party paying.

The rule is laid down as clearly against the appellant's contention in the case of *President, Directors, etc., of the Pacific Bank v. Mitchell*, 9 Metc. (Mass.) 297, as it is in his favor in the *Ohio* case, *supra*. That case (the *Massachusetts* case) is cited with approval in the case of *Dodge v. Freedman's Saving & Trust Co.*, 98 U. S. 379, 23 L. Ed. 920. The holding of the *Massachusetts* case is that when the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, when the bill comes to maturity, passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but that the bank succeeds to the rights of the holder, and may maintain an action on the bill against the acceptor. See, also, *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; and *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762.

It is held in the case of *Johnston v. Schnaubaum*, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838, 15 Ann. Cas. 876, that, where a stranger pays the amount of a note and receives a delivery of it to himself from a bank with which it has been placed for collection only, such stranger is a purchaser of the paper.

In *Daniel on Negotiable Instruments* (6th Ed.) vol. 2, §§ 1221 and 1222, in a discussion of this question, it is declared that the question whether it is a payment or a purchase is one of intention.

The question is squarely met and decided in the case of *McDonnell v. Burns*, 83 Fed. 866, 28 C. C. A. 174, in an opinion rendered by Philips, J., as a circuit judge, which opinion was approved and adopted on an appeal to the United States Circuit Court of Appeals. In that case it was held that the indorsement of a note without recourse, after maturity, by a bank to which it was sent for collection, to one paying full value therefor, but who prior to said transfer was a stranger thereto, is not a payment of the debt, but is a valid transfer of the note with its security.

[3] In the case at bar the evidence of the plaintiff tended to show that the *Pemiscot County Bank*, for which plaintiff now stands, was a stranger to the note in question, that it advanced the full face value out of its funds and paid the same to the owner and holder of the note, that the note was not marked paid nor in any way on its face shown to have been paid, and that it was in the possession of the *Pemiscot County Bank*. This, we think, clearly raised a question of fact to be determined by the jury under all the circumstances and conditions as to

whether or not the *Pemiscot County Bank* when it forwarded the draft for the full amount due on this note as a stranger intended to pay it off and discharge the obligation or intended to purchase the same. We must therefore hold against the appellant on his contention that under these facts the plaintiff, as a matter of law, is precluded from suing on this note.

On the question of whether the amount paid by the *Pemiscot County Bank* to the owner and holder of the note had been paid to it by the *Missouri Cotton Oil Company*, the evidence of the plaintiff tended to show that there was nothing on the books of the bank showing a charge against the cotton oil company or the accounts of certain officers of that company who had money belonging to the company; that is, the evidence of the plaintiff tended to show the payment of this money by the *Pemiscot County Bank*, and also tended to show that neither the maker of the note nor any of the indorsers on it had ever paid the money to the bank with which it took up the note from the owner and holder.

[4] While on this subject, we think the trial court committed reversible error in the exclusion of certain testimony on this point. It was shown without controversy that the books of the bank failed in many cases—yes, in hundreds of instances—to show the true and proper condition of its accounts and the accounts of its customers; the books failed to show deposits that had been made running into the hundreds of thousands of dollars, and failed to show credits due the bank. It was also disclosed that after this payment there were charges against the *Missouri Cotton Oil Company* on the bank's books which exceeded the amount of the payment, and as to some of these items shown on the bank's books the plaintiff did not disclose in what they consisted. If the intention of the *Pemiscot County Bank* in acquiring and holding possession of this note is to be ascertained, then evidence offered by the defendant was improperly excluded. The defendant undertook to show that on the books of the *Pemiscot County Bank* this note had never been listed as an asset of the bank, and the court, over the objection and exception of the defendant, refused to allow this evidence to go in. Defendant also undertook to show where the note was found by the receiver after taking charge of the bank, and this the court also excluded. We think these matters are material in ascertaining the intention of the bank. If the note was not listed as an asset and was not kept by the bank where valuable papers—such as this was if it was purchased—were kept, the jury had a right to weigh this in determining the question whether the bank made a purchase or a payment.

Instruction No. 1 given by the court elimi-

nated entirely the question of intention, but told the jury, if they found that the money was paid by the Pemiscot County Bank and was not repaid to it by the Missouri Cotton Oil Company, they should find for the plaintiff. This was erroneous. The same error occurred in instructions numbered 3 and 4 given by the court.

[5] It was proper to permit the plaintiff to show by witness Peck the condition in which he found the books and papers of the bank and what he discovered while going through the books and papers as an auditor. It was shown that the books were voluminous. The only reasonable and practicable way in which the court and jury could be informed concerning what they disclosed was by taking the testimony of some one who had examined them with a view of ascertaining the facts concerning this transaction. The fact that plaintiff had never audited bank books before merely went to the weight of his testimony.

In view of the fact that the case must be retried, we suggest that plaintiff, if so advised, amend its petition so as to leave no doubt that it counts upon the ownership of the note in the Pemiscot County Bank as a purchaser, and that it either file the original note with the petition or a verified copy thereof to conform to section 1844, R. S. 1909.

[8, 7] The defendant, who is a citizen and resident of the state of Tennessee, filed a motion in the trial court asking that the plaintiff be required to make the other five indorsers of this note parties defendant, and alleged in his motion that these five indorsers were all residents of Pemiscot county, and that, if they were made parties defendant and a judgment should be rendered in favor of the plaintiff, it would save the necessity of litigation for contribution. We readily agree with the plaintiff that it was not error for the trial court to overrule this motion, as the plaintiff has the privilege of suing all or any of the indorsers on the note. However, in this case the plaintiff is a receiver, a quasi public official, an arm of the court, and no good reason has appeared to us in this record why the receiver should not be entirely willing to join all the indorsers on the note as defendants, or why the court appointing such receiver would not on application made order the receiver to sue all parties to the note. If the indorsers are to be adjudged liable for the payment of this note, it will undoubtedly tend to avoid further litigation, among themselves, to make them parties to this suit, and we take it that it is the duty of the courts and their officers and receivers to be of one mind in the matter of avoiding, whenever feasible, a multiplicity of suits.

The judgment is reversed, and the cause remanded.

ROBERTSON, P. J., and STURGIS, J., concur.

WILLIAMS v. DEERING SOUTHWESTERN RY. (No. 1809.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. EMINENT DOMAIN — 241 — RAILROAD IN STREET—DAMAGES—INSTRUCTIONS.

In action for damages for constructing a railroad in street in front of plaintiff's lots, where neither the instructions nor the evidence distinguished the permanent damages from temporary damages from overflow of the lots, judgment for plaintiff was erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621-625; Dec. Dig. — 241.]

2. EMINENT DOMAIN — 141(2)—RAILROAD IN STREET—DAMAGES.

The permanent damages recoverable for constructing a railroad in the street in front of lots are the difference in the value of the lots before and after such construction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 878; Dec. Dig. — 141(2).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Ella Williams against the Deering Southwestern Railway, a corporation. From judgment for plaintiff, defendant appeals. Reversed and remanded.

R. L. Ward, of Caruthersville, for appellant. C. G. Shepard, of Caruthersville, for respondent.

ROBERTSON, P. J. Plaintiff, as the alleged owner of a tract of ground in the city of Caruthersville with a frontage of 225 feet on Fifteenth street, sued defendant for damages alleged to have been caused to said property by it in constructing its railroad in front thereof, elevating the street and railroad track above the natural surface, excavating so as to make a ditch 9 feet wide and 3 feet deep in front of said property and causing the water to accumulate and overflow her property during rains. The answer of the defendant is a general denial, and it alleges that it constructed its railroad along said street under the authority therefor given it by an ordinance of said city, and that all property in the vicinity of that claimed to be owned by plaintiff was benefited by reason of the drainage thereby afforded. This property is lower than the dikes of the Mississippi river near which it is situated, and there is not much irregularity in the surface of plaintiff's property and the surrounding land. There is testimony that the water carried in this ditch at times overflows and runs onto plaintiff's property. The testimony is also undisputed that prior to the construction of the railroad in 1910 that the city excavated and made a ditch for drainage purposes, where the ditch now alleged to have been made by the defendant is located, which drained a pond on a portion of plaintiff's property. There is some testimony that the railroad company enlarged the

ditch, but how much and its effect on plaintiff's property is not shown. There is also testimony that a slight fill was made by the railroad company in front of plaintiff's property, and as to its height the testimony ranges from 6 to 18 inches, and it is claimed that the ditch encroaches so near to plaintiff's property that it renders ingress and egress difficult. We find no testimony that gives the width of the street.

The jury trial was had, and a verdict, upon which judgment was entered, was returned in favor of plaintiff for \$1,000, and the defendant has appealed.

It is first urged that there is no proof that plaintiff was the owner of the property alleged to have been damaged. We think there is sufficient proof on this question, but if there is another trial plaintiff can, no doubt, offer her deed in evidence and show her possession, but if defendant is making no serious contention on this point, but is simply relying on it for a technical avenue of escape in this suit, plaintiff's ownership ought to be admitted and thus eliminate any unnecessary controversy.

Defendant contends that, since it had a right to construct its railroad upon the established grade, therefore the plaintiff could not be heard to complain when it did this, but it had no more right than did the city to change the natural grade to the injury of plaintiff's property without due compensation. *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 714, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524, and *Sheely v. Kansas City Cable R. Co.*, 94 Mo. 574, 579, 7 S. W. 579, 4 Am. St. Rep. 396.

[1] It is also contended in behalf of appellant that for such damages as were not permanent, but temporary, such as the overflow, recovery could not be had, except for damages suffered up to the date of the commencement of the suit, and this theory of the law the plaintiff does not controvert, but seeks to so construe the facts as to obviate the effects of an instruction wherein the alleged permanent injuries and the temporary injuries caused by the overflow are undistinguished. The jury was told that they could take into consideration not only what was considered as permanent damages, but also the overflow, and assess the damages, and then when the rule for measuring the damages was laid down it was stated to be the difference between the value of said property just before and after the railroad was constructed. If the testimony were such that it could be ascertained what the damages caused by the overflow were and to distinguish them from the alleged permanent damages, there might be some method whereby the contention of the plaintiff could be applied with favorable results, but there was not even any testimony from which the jury could divide the damages, had a proper

instruction been given. For these reasons, which in effect answered the principal contentions of the appellant, though not in detail or in their order, the judgment must be reversed, and the cause remanded.

[2] If there is another trial of this case, much uncertainty and unnecessary delay may be obviated by making clear the exact situation in front of plaintiff's property before and after the construction of the railroad. These are things that are undoubtedly susceptible of clear proof. The defendant cannot be held liable for a ditch that was constructed there prior to the time when the defendant constructed its railroad. If defendant changed the ditch, then such fact can certainly be proved, and to what extent the ditch was changed and its effect, if of an injurious character, on plaintiff's property. Proof as to the value of the property before and after the construction of the railroad and the effect of the overflow, if any, ought to be capable of clear proof. If plaintiff has really suffered damages, she ought to be able to make her proof clear on all the important issues involved, much clearer than the record before us discloses. Upon the record and its sufficiency to sustain a judgment for \$1,000 more might be said if it were an essential or the only point involved in the case.

The judgment is reversed, and the cause remanded.

FARRINGTON and STURGIS, JJ., concur.

KING v. SLIGO FURNACE CO.

(No. 1881.)

(Springfield Court of Appeals, Missouri,
Dec. 16, 1916.)

1. MORTGAGES \Leftrightarrow 217—TRESPASS—RIGHT OF ACTION.

As against strangers, the mortgagor of realty remains the owner, and they cannot plead the mortgage in defense to actions for trespass or injuries to the property.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 559-562; Dec. Dig. \Leftrightarrow 217.]

2. TAXATION \Leftrightarrow 760—TAX DEED—VALIDITY—RECITAL OF NAME.

A tax deed, regular on its face, which recited a judgment against "Reynor" instead of "Rynor," the then holder of the legal title, unless based on constructive service, conveyed the lands, and not merely the interest of the person or persons therein.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1509; Dec. Dig. \Leftrightarrow 760.]

3. TAXATION \Leftrightarrow 788(3)—TAX TITLE—PRESUMPTIONS.

As against a trespasser not asserting any title or right in the land, the person having constructive possession under a tax deed, fair on its face, and conveying the land to him, need not show that the proceedings leading up to the tax sale were regular, but the presumption obtains that the necessary official acts and the attempted transfer by judicial process were regular and according to law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1559; Dec. Dig. \Leftrightarrow 788(3).]

4. JUDGMENT \Leftrightarrow 250—CONFORMITY TO PLEADINGS.

In a suit for trespass in connection with other persons in cutting and removing plaintiff's timber, brought under Rev. St. 1909, § 5448, providing for treble damages when a person shall cut, injure, or destroy any trees or timber growing on the lands of another in which he has no interest, where the jury found that plaintiff purchased the timber, not knowing that it had been cut from the plaintiff's lands, and was therefore not liable under the statute, the plaintiff cannot recover as on a common-law action for a conversion of the property taken, although he could have sued in conversion, and the verdict is equivalent to a finding for the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. \Leftrightarrow 250.]

Appeal from Circuit Court, Iron County; E. M. Dearing, Judge.

Action by William King against the Sligo Furnace Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Edgar & Edgar, of Ironton, and Watts, Gentry & Lee, of St. Louis, for appellant. Ernest A. Green, of St. Louis, for respondent.

STURGIS, J. This is an action for trespass, charging defendant, in connection and collusion with other persons, with cutting and removing timber and railroad ties made therefrom on plaintiff's lands in Iron county. The petition is in five counts, identical in form, and each describing a particular tract of land. Each count charges defendant with willful trespass committed without any claim of right or title in the land or timber, and asking for treble damages under section 5448, R. S. 1909. Each count refers to and states a good cause of action under such statute. The plaintiff recovered on each count, the verdicts aggregating \$1,000, and each reciting that defendant took (purchased) the timber (ties) without knowledge that same had been wrongfully taken from the lands of plaintiff.

[1] It was shown that the lands in question were incumbered by a deed of trust in the nature of a mortgage at the time the timber was taken, and defendant contends that the trustee or beneficiary therein is the party entitled to sue and recover the damages instead of the mortgagor. The deed of trust was still outstanding, but no steps had been taken to foreclose the same or take possession thereunder. The law in this state is, as stated in 27 Cyc. 1272, that:

"As against strangers, the mortgagor of realty remains the owner, and they cannot plead the mortgage in defense to actions against them for trespass or injuries to the property." Logan v. Railroad, 43 Mo. App. 71, 74; Watts v. Loomis, 81 Mo. 286.

The cases cited by defendant (Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877; Heitkamp v. La Motte Granite Co., 59 Mo. App. 244; Life Insurance Co. v. Mangold, 83 Mo. App. 281) go no further than to hold that such mortgagee or beneficiary can, after fore-

closure and acquiring title to the land, recover for prior trespass, diminishing the value of the land, which failed to sell for enough to pay the secured debt. In Heitkamp v. La Motte Granite Co., 59 Mo. App. 244, 250, the court expressly recognizes the rule that prior to entry or foreclosure the mortgagee cannot recover for a trespass unless fraudulently committed for the purpose of impairing the security.

[2] Another point raised by defendant is that as this land was not in the actual possession of the plaintiff, he cannot recover, except upon proof of title in him, and that as to the land described in the second count of the petition plaintiff's title fails because his title depends on a tax deed which recites a tax judgment against Daniel Reynor instead of Daniel Rynor, the then holder of the legal and record title. Defendant rests his argument on the ground that the tax suit must be against the real or record owner, and that Reynor was not such owner, nor is Reynor idem sonans with Rynor. It is insisted that these names are pronounced differently, Rynor being pronounced Rinor, and Reynor being pronounced Ranor. A number of cases are cited wherein courts resorted to this doctrine in order to preserve the land to the real owner as against a purchaser in a tax proceeding based on constructive service. There is grave doubt as to whether these names would not be pronounced the same even to the attentive ear, but we need not let the case ride off on that doctrine. The doctrine invoked is applicable only to suits based on constructive service, and since nothing but the tax deed was put in evidence, there is no showing that the judgment and sale were based on constructive service, except what inference might be drawn from the recital in the tax deed that the judgment was "against Daniel Reynor and all interested unknown parties." There may have been personal service on Daniel Rynor and constructive service as to the unknown parties, and the mere misspelling of his name in the summons or judgment, or both, would not invalidate a judgment had on personal service. The tax deed recites the judgment, issuance of execution, due advertisement and sale of the land, and conveys the land, and not merely the interest of any person or persons therein. The deed itself does not show that the tax judgment and sale are void. Smith v. Vickery, 235 Mo. 413, 421, 138 S. W. 502.

[3] Moreover, this is not a contest between parties claiming ownership of the land, the one under a tax sale and deed and the other under the original ownership. Defendant asserts no title or claim of title or interest whatever in this land, and is a naked trespasser—a stranger to the title—seeking to justify his trespass, not on any claim of right, but solely on the defects in his adversary's paper title, constituting fair color of title at least. The rule in such cases is that, as

against such trespasser not asserting any title or right in the land, the person having constructive possession under a tax deed, fair on its face and conveying the land to him, need not show that the proceedings leading up to the tax sale were regular; but the presumption obtains that the official acts necessary to be performed in order to make a valid sale were taken, and that the attempted transfer of title by judicial process was regular and according to law. Such is the law as declared by Goode, J., in his able opinion in *Kries v. Land & Lumber Co.*, 121 Mo. App. 184, 98 S. W. 1086, from which we quote:

"In view of the foregoing authorities and the principles they announce, we feel justified in holding in the present contest between the plaintiff and the defendant company, which has shown to have had no color of title to the timber in controversy or any sort of right to enter on the land where it grew, that the proceedings leading up to the tax deed in plaintiff's chain of title should be presumed to have been regular, and therefore that she had the legal title and constructive possession at the time of the trespass by defendant."

This opinion shows great research and cites a wealth of authorities, principally from other jurisdictions, as the question was somewhat new, and is in striking contrast to many opinions giving merely the first impressions of the writer, without taking the trouble to see if his views are in accord with judicial wisdom and learning. This point having there been so ably and exhaustively treated, it is unnecessary for us to again review the authorities.

[4] The next contention is that the instructions, verdict, and judgment based thereon are erroneous in allowing single damages only, since the cause of action is for treble damages under the statute. Defendant asserts that since the case is based on the statute for treble damages no recovery can be had for the actual value of the ties, where the finding is that the ties were innocently bought by defendant without knowledge that the timber did not belong to the parties taking the same. The evidence is such as to warrant the finding that defendant did no more than buy ties at its yards from certain tie haulers, who in fact had cut same from plaintiff's lands, defendant not knowing this fact and being under the belief that the tie haulers were the owners of the ties. This, in effect, is what the jury found. Defendant invokes the doctrine that a plaintiff cannot sue on one cause of action and recover on another, and that in this case plaintiff has sued on a penal statute, giving treble damages, and is allowed to recover as on a common-law action for conversion of the property taken. If we are to follow the adjudged cases, there is no escape from defendant's contention in this respect, though contrary to our first impression. The evidence here shows that defendant bought some of these ties from haulers who represented that same came from the land of one Isenberg, whom

defendant paid for same, although plaintiff's evidence is to the effect that they were cut from his land. The recital in the verdicts, following plaintiff's instruction, is that:

"The timber [ties] received and taken [bought] by defendant was taken [bought] without the knowledge that it had been wrongfully taken from the lands of the plaintiff."

Under such finding the plaintiff cannot recover in this action, even if he could have had he sued in conversion, and the verdict is equivalent to a finding for defendant. The case of *Carls v. Nimmons & Bennett*, 92 Mo. App. 66, 71, is a case for treble damages under the statute, and the court there held:

"The law on the subject of participation in trespasses of this kind is so far settled as to affirm the proposition that where a party buys timber which has been wrongfully and unlawfully cut from another's real property, and acquires the same with 'guilty knowledge of the trespass,' the purchaser, in such circumstances, becomes a party to said trespass itself, and may be held to answer therefor. It is not sufficient in this kind of action to show that a purchaser has bought timber wrongfully cut from another's land. It is necessary, in order to fix liability, to further prove that at the time the buyer acquired the timber he was aware that the same had been wrongfully taken from another's land. Neither the statute nor any other law holds one answerable for a trespass of this sort without proof that the property was obtained with knowledge that the seller was not the true owner thereof, and that it had been acquired by the trespass complained of (citing authorities). No count of the petition in this case can fairly be construed to contain a claim for mere conversion of the property. If mere conversion of the timber had been charged, other principles might be applicable which are not now germane to the merits of the controversy."

In *Holliday v. Jackson*, 30 Mo. App. 263, the court held (syllabus):

"In order to hold a party liable for a trespass who was not personally present and participating therein, it is not sufficient to show only that he received the fruits of the trespass. There must also be evidence tending to prove that he received them with a guilty and assenting knowledge of the fact that they were procured by a trespass."

The facts being as stated, the defendant was absolutely discharged. In *Land & Lumber Co. v. Tie Co.*, 79 Mo. App. 543, a suit for treble damages under the statute, the court said that an instruction was proper, and "properly submitted the only issue in the case," which told the jury that, although certain parties cut timber on plaintiff's land and made same into ties and then hauled the ties to defendant's tieyards and sold them to defendant, yet unless defendant had knowledge of the fact that the timber from which the ties were made had been obtained from plaintiff's land by trespass and without compensation, the verdict should be for defendant. In *McCormick v. Kaye*, 41 Mo. App. 263, 267, where an action was for treble damages under the statute, the court held:

"This being, in form and substance, an action for a penalty on the statute, the plaintiff will not be permitted at the trial—with a view of avoiding the limitation of three years applicable to such an action—to recover as for a common-law trespass, which may not be barred. Plain-

tiff has chosen his ground of action, and invited defendants to meet him thereon, and he cannot avoid the result of his own choosing."

Holliday v. Jackson, 21 Mo. App. 660, holds that the changing of a cause of action for treble damages under the statute to one at common law for single damages is a change to an entirely new and different cause of action. See, also, Mo. Lumber Co. v. Zeitlinger, 45 Mo. App. 114, 123. The plaintiff has yet his remedy if he desires to sue for single damages.

These rulings are in no way in conflict with the rulings in other cases, to the effect that where a petition lacks essential elements of stating a cause of action under the statute for treble damages, it may yet be good as a pleading for single damages, and, treating it as such, plaintiff can recover accordingly. O'Bannon v. Railroad, 111 Mo. App. 202, 208, 85 S. W. 603 and cases cited.

The result is that, since on the facts found by the jury the plaintiff cannot recover in this action, the judgment must be reversed and the cause remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

FLYNN v. ST. LOUIS SOUTHWESTERN RY. CO. (No. 1923.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. CARRIERS \S 820(4)—ACTIONS FOR ASSAULT—DEMURRER TO EVIDENCE.

Where the evidence, in a passenger's action for an assault committed by a conductor, was conflicting, defendant's demurrer thereto was properly overruled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 320(4).]

2. CARRIERS \S 321(22)—PUNITIVE DAMAGES—INSTRUCTIONS—"WANTON."

In a passenger's action for a lustful assault committed by the conductor, an instruction authorizing the assessment of punitive damages if the assault was committed in a willful, wanton, and unlawful manner, and defining "wanton" as being "in a manner wholly disregarding the right of the plaintiff" was not erroneous for failure to require a finding of the lustful character of the assault, especially where other instructions required as a prerequisite to a verdict for plaintiff that the jury find the assault to have been lustfully and lasciviously made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1343; Dec. Dig. \S 321(22).]

For other definitions, see Words and Phrases, First and Second Series, Wanton.]

3. ASSAULT AND BATTERY \S 39—PUNITIVE DAMAGES—FINDING.

A finding of a willful and wanton assault is sufficient to support a recovery of punitive damages.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. \S 54; Dec. Dig. \S 39.]

4. CARRIERS \S 321(22)—PUNITIVE DAMAGES—INSTRUCTION.

In a passenger's action for a willful and wanton assault by the conductor, it was not error to instruct that the jury could assess an additional sum as punitive damages "as a punishment to defendant and as a protection to

society and a warning to others, as in your discretion you may deem proper."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1343; Dec. Dig. \S 321(22).]

5. CARRIERS \S 319(3)—PUNITIVE DAMAGES—EXCESSIVE RECOVERY—ASSAULT.

Recovery of a judgment for \$1,500 as punitive damages, in addition to \$500 recovered as actual compensatory damages, for a wanton and lustful assault committed by the conductor on a female passenger, was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1344, 1345; Dec. Dig. \S 319(3).]

Appeal from Circuit Court, Scott County; Frank Kelly, Judge.

Action by Birdie Flynn against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edw. A. Haid and A. L. Burford, both of St. Louis, and Wammack & Welborn, of Bloomfield, for appellant. Thomas F. Lane, of Cape Girardeau, and W. L. Proffer, of Illmo, for respondent.

FARRINGTON, J. Plaintiff obtained a verdict in the sum of \$3,500 damages against defendant, \$1,600 of which was assessed as actual, and \$2,000 as punitive, damages. Before the motion for a new trial was passed on, the plaintiff remitted \$1,000 of the amount allowed as actual damages and \$500 of the amount allowed as punitive damages.

[1] The action is based on an alleged assault, and insulting, abusive conduct of one of defendant's servants, a conductor on one of its passenger trains. There is a clear conflict in the evidence. Plaintiff testified that while she was a passenger on one of defendant's passenger trains going from Illmo, Mo., to Texarkana, Ark., she was assaulted and insulted by James Birdsong, the conductor on the train, in that he continually came and sat beside her, made indecent and insulting proposals to her of a licentious nature, leaned over against her, and with his hand took hold once of her breast and at another time of her thigh; that she was sick at the time, and was greatly humiliated and suffered for some time afterward from nervousness on account of the manner in which she was treated. The evidence for plaintiff further showed that soon after the occurrence she made complaint to the defendant's superintendent, and that no discharge or reprimand had been made. Testimony of other passengers on the train tends to support the plaintiff in her charges. It is true that she made no outcry at the time nor called for help. We, however, surmise that the jury took into account that a woman on a train among strangers might, so long as she did not feel that she was in absolute and immediate danger, refrain from making a public spectacle of herself on account of the alleged proposals and conduct of this trainman toward her. The plaintiff also testified she

could detect the odor of whiskey in his breath, and that he asked her to have a ginger ale highball with him. The defendant's evidence by the conductor, Birdsong, contradicted that of the plaintiff. The question was therefore one for the jury to determine. The statement of facts hereinbefore made shows there was substantial evidence in support of the verdict. This disposes of defendant's contention that its demurrer to the evidence should have been sustained.

[2, 3] In the petition, the assault was characterized as being willful, wanton, wicked, licentious, and lustful. The instruction on punitive damages authorized the jury to assess damages if the assault was committed in a willful, wanton, and unlawful manner, and defined "wanton" as being "in a manner wholly disregarding the right of the plaintiff." Defendant criticizes this instruction because it lacked a requirement of a finding of the lustful character of the assault. Plaintiff does allege in her petition that there was a willful and wanton assault and the instruction required a finding of a willful and wanton assault. This is sufficient to support a recovery of punitive damages. *Jennings v. Appleman*, 159 Mo. App. 12, 139 S. W. 817. Instructions of both plaintiff and defendant required that, before the jury could find a verdict for the plaintiff, they must find from the evidence that the assault made by Birdsong was lustfully and lasciviously made.

[4] It is contended that the court erred in instructing the jury that they should assess an additional sum as punitive damages "as a punishment to defendant and as a protection to society and a warning to others, as in your discretion you may deem proper," etc. We see no objection to letting the jury know the law in exercising their discretion in this respect. It is elementary law that punitive damages are given to punish in the particular case and to serve as a warning to others to desist from such wrongful acts. *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597, 617, 77 S. W. 162.

A number of objections are made to other instructions, all of which we have examined. Some of the alleged errors were clearly cured by defendant's instructions, and the other errors relied upon are not of sufficient gravity to work a reversal.

[5] It is said that the judgment is excessive. To this we can in no wise assent. The actual compensatory damages allowed in this judgment was only \$500, and the punitive damages given by the judgment was \$1,500. We venture the assertion that no jury or court in Missouri so lightly estimates the dignity and virtue of womankind as to brand as excessive a \$1,500 fine against an individual in whose care and protection a woman is placed and who in the exercise of that trust attempts to debauch and disgrace

her. The evidence showed that this conductor not only tried to induce the plaintiff to go to the sleeping car and take a berth with him and offered her money to get off the train at Jonesboro and go to a hotel with him, but that he took hold of her and forced his attentions on her in the manner described. The lower court has set the figure at which this verdict in plaintiff's favor is to stand, and this court will not meddle with it.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

STANLEY et al. v. WEBER IMPLEMENT & VEHICLE CO. (No. 1938.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. PARTIES \S 15—PLAINTIFFS—JOINDER.

Under Rev. St. 1909, \S 1729, requiring actions to be prosecuted by the real party in interest, and section 1731, allowing all persons having an interest to join as plaintiffs, the buyer of an automobile and a conditional sale purchaser from him properly joined in an action against the seller based upon breach of the sales contract.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 1599, 1599-1601; Dec. Dig. \S 15.]

2. SALES \S 181(5)—BREACH OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

Where plaintiff buyer claimed that defendant seller breached a sales contract in not delivering an automobile in good condition, evidence covering the repairs to the car for some 18 months after the delivery was inadmissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 480; Dec. Dig. \S 181(5).]

3. SALES \S 181(5)—BREACH OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

Where plaintiff claimed that an automobile was not delivered in proper condition, testimony that car was of a kind and make of little inherent value is incompetent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 480; Dec. Dig. \S 181(5).]

4. SALES \S 181(5)—BREACH OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

Where plaintiff buyer claimed the seller breached a sales contract by not delivering an automobile in good condition, testimony that the car was not of the value placed upon it by defendant when making the trade is immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 480; Dec. Dig. \S 181(5).]

5. SALES \S 68—CONSTRUCTION OF CONTRACT—REPAIRS.

An automobile sales contract, providing that it was subject to acceptance by the seller, who reserved right to fill orders to the extent of its ability, etc., refers to the automobile purchase, and not to subsequent orders for repairs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 182, 184-186; Dec. Dig. \S 68.]

6. CONTRACTS \S 170(1)—CONSTRUCTION OF CONTRACT.

A written automobile sales contract is not subject to be varied by a construction which the buyer placed upon it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 753; Dec. Dig. \S 170(1).]

7. SALES \S 81(1)—CONSTRUCTION OF CONTRACT—REPAIRS.

Where defendant advised plaintiff that his order for new automobile parts would have prompt attention and that it carried a full line thereof, but later advised it could not ship them for three weeks because the factory was not able to sooner supply them, *held*, defendant was not liable because plaintiff meanwhile lost profitable chances to sell his machine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 217; Dec. Dig. \S 81(1).]

8. SALES \S 418(19)—BUYER'S REMEDY—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where plaintiff buyer claimed defendant seller breached an automobile sales contract by not delivering the car in good condition, the measure of damages is the difference in the car's value as delivered and its value if in good condition, not exceeding the reasonable cost of putting it in good condition, together with the loss of the use of the car for such repair period.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1200; Dec. Dig. \S 418(19).]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Replevin action by H. L. Stanley and T. A. Crow against the Weber Implement & Vehicle Company. Judgment for plaintiffs and defendant appeals. Reversed and remanded.

George Smith and Orville Zimmerman, both of Kennett, for appellant. Bradley & Bradley, of Kennett, and R. J. Smith, of Campbell, for respondents.

STURGIS, J. This is a suit in replevin for an automobile, originating in the justice court. Plaintiffs recovered in that court, and also in the circuit court on appeal. Defendant sold or traded the automobile in controversy to plaintiff Stanley, receiving part payment in cash and trade, and took Stanley's notes for the balance of \$250, secured by chattel mortgage on the automobile. One of plaintiff's notes for \$75 was paid, and, the others being due and unpaid, the defendant took possession of the automobile for the purpose of foreclosing its mortgage. In the meantime the plaintiff Crow had become a conditional purchaser from Stanley, paying part of the purchase price to him. The plaintiffs thereupon instituted this suit in replevin and prevented defendant from foreclosing its mortgage.

[1] The first question presented relates to the right of Stanley to be a coplaintiff on the ground that he had parted with both title and right to possession. The condition on which both plaintiffs say that plaintiff Crow purchased the property had not yet been fulfilled, and Crow had not paid all the purchase price. Stanley had such an interest in the property that it was proper for him and Crow to sue jointly, as a question would likely have been raised as to the right of either to sue alone. Sections 1729 and 1731, R. S. 1909. No harm could result to defendant, and this point is highly technical and without merit.

The real ground on which plaintiffs base their right to recover the automobile, in the face of the fact that the mortgage debt was due and unpaid, is that defendant did not make good its contract as to the quality of the automobile and that plaintiff was damaged thereby to an amount equal or greater than the amount due on the mortgage. The contract as to the sale of the automobile to plaintiff Stanley is in writing and stipulates that the car sold is to be in "first-class shape." It was, however, a used or second-hand car, and the contract recites:

"If the above order is for a secondhand automobile the purchaser hereby agrees that said secondhand car is purchased absolutely without warranty, either express or implied, unless same is written in and made a part of this order."

[2-4] There is evidence tending to show that when the automobile was received by plaintiff, it being shipped to him from St. Louis to Campbell, Mo., it was far from being in first-class shape, even for a used car. There is evidence that the axle was defective, as were also the clutch, batteries, transmission, etc. The defendant, however, only agreed to have the car in first-class shape when same was delivered to plaintiff, and not to keep it so, and the court should have confined the evidence to this point. As defendant did not agree to keep the car in good condition, evidence as to breaks, defects, and repairs should have been excluded unless same related to defects then existing. The evidence took entirely too wide a range as to cost of repairs, covering, as it did, the entire time after the car was sold to plaintiff, some 18 months, and including even cost of tires, etc. The real issue was as to the diminished value of the car by reason of its not being in first-class shape for a car of this character at the time of delivery. That the car was of a kind and make which some witnesses said made it inherently of little value was not competent. Nor was it material that the car was not of the value placed on it by defendant when making the trade. If the car was not in first-class shape for such a car, the cost of making such repairs as were necessary to put it in such shape would be material in determining the difference in value of the car as it was and what it would have been had it been in first-class shape; but as to the cost of any other repairs evidence was not competent. Plaintiff might also recover for the loss of, or impaired use of, the car while using due diligence in having it put in first-class shape.

[5, 6] Much of plaintiff's evidence went to the question of damage, direct and remote, caused by his being unable to promptly get necessary parts for making repairs. We do not find, however, that defendant violated any provision of its contract in this respect. It is agreed that the special clause inserted in the contract reading, "See me for work to

be done on car," relates to work and repairs which defendant was to do and make in order to put it in first-class shape before delivery to plaintiff. Defendant's failure to do this and the measure of damages therefor have already been discussed. The contract of sale is on a printed form used by defendant, and is in the form of an order by plaintiff and acceptance by defendant and contains this printed clause:

"This order is subject to the acceptance of Weber Implement & Automobile Company, who reserves the right to fill orders to the extent of their ability to do so, provided such orders are acceptable and they have the goods in stock, and shall in no wise be liable for any damages, either real or supposed, in this connection."

This clause evidently refers to each particular order received and accepted by defendant and the goods therein ordered, and is not an agreement to fill all future orders by the same party. This clause only says that defendant will fill the particular order accepted to the extent of their ability to do so and provided they have the goods so ordered in stock, and exempts defendant from damages either real or supposed for its failure to do so. The plaintiff Stanley gave as his construction of the contract that defendant agreed to furnish repairs if it had them on hand, reserving the right to fill orders if accepted, and that it did accept his order. Of course, the contract should speak for itself and is not subject to be varied by parol evidence, though plaintiff's version may not be very far wrong. He also testified that after the contract was signed nothing was said about repairs.

[7] The only other evidence as to defendant's failure to furnish repairs (other than plaintiff's general statement that he tried to get repairs and could not) is that defendant mentioned, when selling this car, that it carried a line of repairs and certain letters written by defendant as to repairs ordered by plaintiff after he got the car. Plaintiff's letters or orders are not in evidence. These letters show no more, however, than that some eight months after plaintiff got the car he wrote to defendant for some new parts, and defendant then replied that as soon as the old parts were received by it the matter would have immediate attention, and adding that it carried a full line of repairs. About a week later defendant answered another letter from plaintiff saying that the filling of the order was delayed on account of the defendant not having the "No. 690 pinion" in stock, but would get same as soon as possible. The repairs so ordered were shipped some three weeks later, and defendant states that the delay was caused by the factory not being able to ship same sooner to defendant. No showing to the contrary is made. Certainly defendant did not agree to keep and have on hand at all times every part for repairs which plaintiff might order. Under these facts, defendant cannot

be held for damages in failing to furnish repairs, and it was clearly improper to admit evidence as to plaintiff losing two chances to make a profitable sale of this automobile because he could not get repair parts in time. The loss of profits of such a sale or trade would not be a proper element or measure of damages under the facts here.

[8] We can, of course, speak only of the facts as they now appear in the record, and should the facts be the same on another trial there is only one issue in the case, and that is whether defendant did put the automobile sold to plaintiff in first-class shape for the kind of car sold in view of the fact that plaintiff saw the car and knew the kind he was buying. The measure of damages for defendant's breach of contract in this respect is the difference in the value of the car as delivered to plaintiff and what it would have been had it been in first-class shape, not to exceed the reasonable cost of putting it in first-class shape, together with loss of the use of the car, if any. If the damage equals or exceeds the amount due on the mortgage notes, the finding should be for plaintiffs; but, if less, then the jury should find defendant's interest in the property to be the amount due on the notes less such damage.

From what is said above it will be seen that the court erred, both in the admission of evidence and in the giving of instructions. Other errors are mentioned which are not likely to occur again.

The judgment is reversed, and the cause remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

POUNDS v. FARMERS' UNION MERCANTILE CO. (No. 1886.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. BILLS AND NOTES \S 538(2)—INSTRUCTIONS—PRESUMPTIONS—POSSESSION.

In replevin for a promissory note in which delivery and consideration were denied, instructions held to adequately represent the rights of defendant arising from naked possession of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1900, 1909; Dec. Dig. \S 538(2).]

2. TRIAL \S 260(5)—INSTRUCTIONS—REQUESTS COVERED BY THOSE GIVEN.

In replevin for a promissory note alleged not to have been delivered to defendant by plaintiff, a requested instruction that the burden was on plaintiff to prove the note was not delivered to defendant by plaintiff was sufficiently covered by the instruction that the burden of proof was upon plaintiff to prove his case by the preponderance of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 655; Dec. Dig. \S 260(5).]

3. TRIAL \S 140(2)—QUESTIONS FOR JURY—VARIED TESTIMONY.

Where the testimony of a party is conflicting with itself and his testimony is the sole

testimony in the case, which version of the transaction given by him is correct is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 335; Dec. Dig. ¶ 140(2).]

4. **BILLS AND NOTES** ¶ 518(1)—**CONSIDERATION—EVIDENCE.**

Evidence held sufficient to sustain a finding of want of consideration for a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816, 1817, 1819, 1820; Dec. Dig. ¶ 518(1).]

5. **BILLS AND NOTES** ¶ 517—**ACTIONS—EVIDENCE—DELIVERY.**

Evidence held sufficient to sustain a finding that there was no delivery of a note to payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807-1815; Dec. Dig. ¶ 517.]

6. **REPLEVIN** ¶ 4—**PROPERTY SUBJECT—PROMISSORY NOTE.**

A paper in the form of a promissory note, but not delivered nor supported by any evidence of consideration, may nevertheless be the subject of replevin by the maker.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 4-19, 21-26; Dec. Dig. ¶ 4.]

7. **APPEAL AND ERROR** ¶ 231(3)—**RESERVATION OF GROUNDS BELOW—OBJECTIONS.**

An objection to evidence which fails to state the grounds thereof will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. ¶ 231(3); Trial, Cent. Dig. § 195.]

8. **REPLEVIN** ¶ 88—**QUESTIONS FOR JURY—PRESUMPTIONS.**

Where evidence of a substantial character is produced by the plaintiff in replevin action to rebut presumptions in favor of defendant, the question of whether such evidence overcomes the presumptions is one for the jury.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 843-848; Dec. Dig. ¶ 88.]

Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.

Replevin by C. B. Pounds against the Farmers' Union Mercantile Company. Judgment for plaintiff in justice's court was affirmed on appeal by the circuit court, and defendant appeals. Affirmed.

Harry Clymer, of Steelville, for appellant. A. H. Harrison, of Steelville, and Frank H. Farris, of Rolla, for respondent.

FARRINGTON, J. This action of replevin to recover from appellant a promissory note for \$25, dated January 1, 1914, due 60 days after date, signed by respondent, and made payable to the appellant, was commenced in a justice court. There was no answer filed. On appeal to the circuit court the plaintiff prevailed. As stated in defendant's (appellant's) brief, plaintiff's contention was that the note was without consideration and had not been delivered.

Appellant, at the time of the execution of the note, was engaged in the general mercantile business in Steelville, Mo., and had been so engaged for a long time prior thereto. In the fall of 1912, respondent was employed by the appellant as its bookkeeper, and continued

as such until about June, 1913, when he was made general manager of appellant's mercantile business in addition to being bookkeeper and continued to act as such until in September, 1914. While serving in that capacity (on January 1, 1914), he executed the note sued for, payable to the appellant. His employment by appellant terminated in September, 1914, at which time the position of bookkeeper was temporarily filled until December, 1914, when William Wright was employed in that capacity by the board of directors of the appellant corporation. Later Wright was made general manager and bookkeeper, and continued as such to the date of this trial. In May or June, 1915, Wright discovered the note in question in a drawer of his desk among other papers of the appellant—such as statements from wholesale houses and a copy of the return corporations are required to make to the Secretary of State. He testified there were no other notes in the drawer where he found this one. The desk was the same one respondent had used while employed by appellant and the one in which the books and certain papers of appellant were kept, but respondent while so employed had not kept the notes and other assets of the corporation where this note was found, and Wright, his successor, had kept the notes and assets of the corporation in a different place than that where this note was found, so that this note was never among the assets of the company. Wright called the attention of the board of directors to the note, and when respondent was before the board on some other business he was asked about the note. He admitted the signature on the note was his own, but said he did not recollect the transaction; that he did not have the faintest idea about the note. He did not then deny that the company had a right to the note, or that he had delivered it, and did not make any explanation except to admit he signed it and asked where they found it. About two months later he was before the board again, and then claimed there was no consideration given for the note, and gave this version at that time which is the same as that given by him at this trial: That on January 1, 1914, the date of the note, he owed a note for \$50 to the Crawford County Farmers' Bank which fell due on that day, and that he wanted to pay it, but did not have money enough at that time, lacking about \$25; that he drew up this note for the purpose of getting the money from the appellant company; that he then thought that would not be the proper thing to do, so he just brushed the note aside and went over to the First National Bank and borrowed \$25 and deposited that with his salary check for \$45, which made a deposit of \$70, and went to the Crawford County Farmers' Bank and gave that bank a check for \$50, the amount of the note he owed there. He told the board that was the

only way in which he could account for the execution of this \$25 note to the company. He testified that he knew he did not borrow the money and did not see how it was possible he ever received anything for it; that according to all the records he had and all the company produced he did not get anything for the note; that it was his opinion he did not get anything for the note. It is true, he stated on cross-examination that he testified in the justice court that he would not say he had not received any consideration for the note, and that he did not know whether he received any consideration for it; but he went on to say (in the circuit court) that, if he were to answer from his recollection now, he would say he did not receive any. He also said that as a matter of fact he did not have much personal recollection that the note was executed in the way and manner he had detailed.

The appellant did not undertake to show that respondent received anything for the note, by its books or otherwise, or that it was given in any kind of a business transaction, resting on the bare possession of the note; no one connected with the corporation attempted to show that appellant took any money or goods from the corporation to cover this note.

[1] Appellant raises these propositions, citing authorities in support thereof: (1) That the possession of personal property is presumptive evidence of rightful ownership; (2) that the payee named in a note when in possession of it is *prima facie* the owner; (3) that the note being a written instrument for the direct payment of money imports a consideration; (4) that the note is deemed *prima facie* to have been given for a valuable consideration, and that the maker received value therefor; (5) that the burden of proof was upon the plaintiff in this case to establish by evidence that there was no consideration for the note; and (6) that the doctrine that a scintilla of evidence will support a finding is not the law in this state.

Respondent concurs in all of the above, but avers that these rules have all been met and complied with in this trial.

The court in the first instruction, given for appellant, told the jury that the note imports a consideration—that is, that plaintiff received value for the giving of the note—and that before plaintiff could recover he must prove by a preponderance of the evidence that there was no consideration for the giving of the same. In the third instruction, given for appellant, the court told the jury that it is not sufficient for the plaintiff to recover that he simply had no recollection of the giving of the note, or of receiving any value for it, but that the burden was on him to prove the want of consideration for the giving of the note. In the fourth instruction, given for appellant, the court told the jury that, if plaintiff signed the note sued for and

left it in the desk of appellant for appellant's use and benefit, the law implies it was given for a valuable consideration, and that the burden is on the plaintiff to prove the contrary by a preponderance of the evidence. Again, in the seventh instruction, given for appellant, the court told the jury the burden of proof was upon the plaintiff to prove his case by a preponderance of the evidence, defining "preponderance of evidence." The court then of its own motion gave another instruction as follows:

"While it is necessary for a note to be delivered to make it binding, yet in this case if Pounds was the general manager and book-keeper of the defendant, and executed the note and took a valuable consideration therefor, this would constitute a delivery by him, as maker, to himself as manager of defendant company."

Those instructions liberally presented defendant's theory.

[2] One of the two instructions given for plaintiff was that, if the jury found from the evidence that this note was never delivered to defendant by plaintiff, they would find the issues for the plaintiff. Defendant contends that, since the court gave that instruction, it was then entitled to have its refused instruction B given, which was as follows:

"The court instructs the jury that the burden is on the plaintiff to prove that said note was not delivered to defendant by plaintiff."

Leaving out of consideration other instructions given for defendant emphasizing who had the burden of proof, defendant's instruction No. 7, referred to above, amply covers what is contained in defendant's refused instruction B.

[3] The result of this case rested on the plaintiff's own testimony, as defendant knew nothing about the note except that it was found in a desk in the store. Defendant seems to think that, because there was some variance in plaintiff's statements made at different times, this is sufficient to defeat his recovery. In *Guthrel v. Slater*, 153 Mo. App. 214, 132 S. W. 274, it is held that where the testimony of a party is conflicting with itself, and his testimony is the sole testimony in the case, the question which version of the transaction given by him is correct is for the jury.

[4-6] We think there was substantial evidence—not a mere scintilla—upon which the jury was justified in finding that there was no consideration, or that there was no delivery of the note as owing by plaintiff to the defendant, or both. It was not charged on the books; none of defendant's officers knew anything about a loan of \$25 to plaintiff, and did not claim that he gave the note in any kind of business transaction with the corporation; it was found by plaintiff's successor in a drawer of a desk plaintiff had used while manager, not among notes and assets of the defendant, but among papers of little value, not in a place where notes and assets would reasonably be kept, but in a place where plaintiff did not keep the notes of the

defendant. The jury was amply warranted in finding that this note was a mere scrap of paper—yet such as may be the subject of an action of replevin at the instance of the maker. *Sigler v. Hidy*, 56 Iowa, 504, 9 N. W. 874; *Savery v. Hays*, 20 Iowa, 25, 89 Am. Dec. 511; *Bailey v. Gilman Bank*, 99 Mo. App. 571, 74 S. W. 874. See, also, *Dunsworth v. Chemical Co.*, 190 Ill. App. 453, loc. cit. 455, wherein the court clearly would have held replevin a proper remedy had the note not been supported by a good consideration when executed.

[7] Appellant contends it was error to permit plaintiff to testify "over the objection of the defendant" that on January 1, 1914, he did not owe the defendant any debt except the store account. Turning to the abstract, we find that defendant merely objected, stating no ground for the objection, which is equivalent to no objection at all for appellate purposes. *Taylor v. Pullen*, 152 Mo. loc. cit. 440, 53 S. W. 1086; *Steffens v. Fisher*, 161 Mo. App. 386, 143 S. W. 1101.

[8] Defendant entered upon the trial of this case favored by certain presumptions; but, when evidence of a substantial character was brought forward by the plaintiff tending to rebut those presumptions, there arose a question for the jury to determine—whether such evidence was sufficient to overcome the presumptions. The jury answered this question adversely to the defendant, and, under circumstances, this forecloses further inquiry.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

WILLIS v. REED. (No. 1809.)

(Springfield Court of Appeals, Missouri, Dec. 16, 1916.)

1. APPEAL AND ERROR § 987(1)—REVIEW—FINDINGS OF FACT—TRIAL WITHOUT JURY.

Where questions of fact are tried to the court without a jury, the appellate court cannot weigh the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893, 3894; Dec. Dig. § 987(1).]

2. BILLS AND NOTES § 525—ACTIONS—DEFENSES—ILLEGALITY.

Evidence held sufficient to sustain finding that plaintiff, the purchaser of a promissory note, did not have knowledge of the illegality of the transaction in which note was given, and that she did not take the note from her son, the original payee, for the purpose of evading the defense of illegality.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.]

3. BILLS AND NOTES § 327—ILLEGALITY—KNOWLEDGE OF PURCHASER.

Under Rev. St. 1909, § 10028, in order for the purchaser of a promissory note to be charged with knowledge of the illegality of the transaction in which it was given, he must have had actual knowledge of such infirmity or knowledge

of such facts that his purchase amounted to bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 729; Dec. Dig. § 327.]

4. EVIDENCE § 580—EVIDENCE IN ANOTHER ACTION—ADMISSIBILITY.

In an action by purchaser of a note, evidence given by the payee, in another action involving other notes as to the ownership of the notes in suit, is not admissible, where the plaintiff in this action was not a party to or interested in the action in which the testimony was given.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2413; Dec. Dig. § 580.]

Appeal from Circuit Court, Butler County; John P. Foard, Judge.

Action by Mrs. Thomas Willis against J. A. Reed. Judgment for plaintiff, and defendant appeals. Affirmed.

Mozley & Green and L. M. Henson, both of Poplar Bluff, for appellant. Herbert H. Freer and Hugh E. Tyson, both of Poplar Bluff, for respondent.

STURGIS, J. This is a suit on two promissory notes given at the same time, by the same parties, and for the same consideration as the note involved in *Farmers' Savings Bank v. Reed*, 192 Mo. App. 344, 180 S. W. 1002. In that case we held that a promissory note, part of the consideration of which was the sale and transfer or attempted transfer of an unexpired saloon license, was not void ipso facto, but was valid and not subject to such defense in the hands of a bona fide purchaser for value and without notice. We distinguished that case from *Sawyer v. Sanderson*, 113 Mo. App. 233, 88 S. W. 151, in that the latter case was between the original parties.

[1-3] The plaintiff here likewise makes the claim that she acquired the notes now sued on for value, in good faith, before maturity and without any knowledge of the consideration being tainted with illegality. The case was tried by the court sitting as a jury, who found for plaintiff on this issue and entered judgment accordingly. The question now presented in one of fact only, and we cannot weigh the evidence. The defendant's contention is that plaintiff, being the mother of one of the parties to the illegal transaction as to the saloon license, is conclusively shown to have had knowledge of that transaction tainting the note with illegality, and that she took the note from her son for the purpose of evading that defense. We do not so find. The plaintiff testified that she had previously loaned her son money expecting him to pay her out of the profits of the saloon business, and when he sold out and got these notes she took the same in part payment of his valid indebtedness to her. There is little reason to question the son's indebtedness to her, and the notes show an indorsement to her at the time she claims to have acquired same. She says that the notes have been in her possession and have been

her property ever since the date of this indorsement. That there was any agreement to sell and transfer the saloon license along with the stock and fixtures is denied by the seller, and, if such was the case, it was evidently intended to be kept secret. While the mother knew of her son buying and selling an interest in the saloon, she swore that she did not, and there is no reason why she would, know of the particular fact tainting the transaction with illegality. In order for plaintiff to be charged with knowledge of any infirmity in this note, she must have had actual knowledge of such infirmity, or knowledge of such facts that her action in purchasing the note amounted to bad faith. R. S. 1909, § 10026.

[4] The fact that plaintiff's son testified on the trial of the other case (Farmers' Savings Bank v. Reed, supra) that he was the owner of the other two notes now sued on would only contradict plaintiff's evidence on that point, if the evidence given in that case was properly admissible; but it was not admissible for the reason that plaintiff was not a party to or interested in that case (Bates v. Bates, 94 Mo. App. 70, 67 S. W. 932). Plaintiff was clearly entitled to have such evidence given first hand in this case, where she could cross-examine the witness and elicit from him any explanation or contradiction of such evidence. No sufficient reason is shown why this was not done.

The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

KNOTT v. FISHER VEHICLE WOODSTOCK & LUMBER CO. OF ERIN, ARK. (No. 1724.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. FRAUDULENT CONVEYANCES — 41 — WHAT CONSTITUTES — CONSIDERATION.

Where a Missouri corporation assumed a chattel mortgage given by its promoter, and, having defaulted, the mortgage was foreclosed and the property purchased by the mortgagee, which then sold it to an Arkansas corporation, with practically the same name, and organized by the same promoter, a creditor of the Missouri corporation could not attach such property; the validity of the mortgage and sale thereunder being unquestioned.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 59; Dec. Dig. 41.]

2. CORPORATIONS — 49(1) — SIMILARITY OF NAMES — DIFFERENT SOVEREIGNTIES.

Similarity or identity of names does not make identity of corporations formed under different sovereignties, even though there be identity of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. 49(1).]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Attachment by W. D. Knott against the

Fisher Vehicle Woodstock & Lumber Company, a Missouri corporation, wherein the Fisher Vehicle Woodstock & Lumber Company of Erin, Arkansas, filed an interplea. Judgment for plaintiff, and interpleader appeals. Reversed and remanded, with directions.

Riley & Riley, of New Madrid, for appellant. Thomas Gallivan, of New Madrid, for respondent.

STURGIS, J. This is an interplea ingrafted on an attachment suit. The defendant in the attachment is the Fisher Vehicle Woodstock & Lumber Company, a Missouri corporation, and the interpleader is a corporation of Arkansas with practically the same name. For convenience we will designate the defendant as the Missouri corporation and the interpleader as the Arkansas corporation. The Missouri corporation became indebted to plaintiff, and he brought suit and attached the property of interpleader, some woodworking machinery, as defendant's property, and the Arkansas corporation has interpleaded claiming ownership. A. B. Fisher purchased this attached machinery from an Indiana manufacturing company and mortgaged it back to secure \$2,500 of the purchase price. Fisher then helped organize the Missouri corporation, which took over the property subject to the mortgage which had been duly recorded. The Missouri corporation became involved in debt and made default in the payment of this mortgage debt. The mortgage was foreclosed by the holder of the note, an Indiana bank, and that bank became the purchaser and owner of the machinery. Fisher then helped organize the Arkansas corporation, and the Indiana bank sold this machinery to it. Plaintiff, a creditor of the Missouri corporation, attached this property of the Arkansas corporation as belonging to the former.

[1] No attack is made on the validity of the mortgage, the proper foreclosure of the same, or on the title of the Indiana bank under its purchase at the foreclosure. The claim is, as stated in the plaintiff's instruction, that Fisher and his wife incorporated the interpleader, the Arkansas corporation, and "took over the property without consideration for the purpose of defrauding this man W. D. Knott," plaintiff herein. The evidence clearly shows, however, that the Arkansas corporation paid \$1,200 for this machinery, \$400 in cash and two notes of \$400 each with good personal security.

[2] The transfer which plaintiff attacks as fraudulent is not a transfer of his debtor's property or property which would be liable for his debt. Prior to the foreclosure of the mortgage, or rather prior to the mortgage debt coming due, plaintiff could have attached this property, subject to the mortgage debt, as it then belonged to the Missouri corpora-

tion; but plaintiff could not do so after such debt was due, and certainly not after the foreclosure. *Pollock v. Douglas*, 56 Mo. App. 487, 490; *Merchants' National Bank v. Abernathy*, 32 Mo. App. 211, 226. After the foreclosure of the mortgage, this machinery became the property of the Indiana bank. It was not the subject of a fraudulent transfer as against this plaintiff, who could, by no possibility, subject it to the payment of his debt, since the owner, the Indiana bank, had good title and owed him nothing. That bank could give it away or do what it pleased therewith, and any transfer by it was not subject to attack by plaintiff as a fraudulent conveyance. *Funkhouser v. Lay*, 78 Mo. 458, 465; *Burns v. Bangert*, 92 Mo. 167, 177, 4 S. W. 677; *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1, 9. There was no fraudulent conveyance by the Missouri corporation, plaintiff's debtor, and, unless the property on its transfer to the Arkansas corporation became the property of the Missouri corporation, plaintiff had no right to attach it. This, however, was not the theory upon which plaintiff recovered, as his instruction predicated his right to recover on the transfer being fraudulent. This particular property was no more subject to attachment as the property of the Missouri corporation than was any other property owned by the Arkansas corporation. Similarity or even identity of names does not make identity of corporations formed under different sovereignties. Even if there was identity of stockholders, the corporations would be distinct (10 Cyc. 287; 5 *Thompson on Corporations*, §§ 5985, 6094; *Richmond & I. Const. Co. v. Richmond, etc., R. Co.*, 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625); but even that is not shown to be true here. The Arkansas corporation was formed with entirely new capital stock, and it was not a corporation formed to take over the assets of another corporation owing debts, thereby depriving such other corporation of assets applicable to its debts, as was the case in *Berthold v. Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233.

The judgment is for the wrong party and will be reversed, and the cause remanded, with directions to enter judgment for the interpleader.

ROBERTSON, P. J., and FARRINGTON, J., concur.

KINSOLVING et al. v. STATE SAVINGS & TRUST CO. (No. 1849.)

(Springfield Court of Appeals, Missouri, Dec. 16, 1916.)

1. CARRIERS §58—BILL OF LADING—TRANSFER WITHOUT INDORSEMENT.

In view of Rev. St. 1909, § 11956, making bills of lading negotiable, although section 11957, provides that they may be transferred by indorsement in writing, they are transfer-

able without indorsement for value, and carry with them the property in the goods they cover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 168; Dec. Dig. §56.]

2. CARRIERS §58—BILL OF LADING—RIGHTS AND LIABILITIES OF TRANSFEREE.

Where a bank agreed in advance to furnish the price of lumber and take the bills of lading as security, right of possession passed to the bank and its obligation became binding, and it became the owner for value of the bills of lading as soon as they were issued on delivery of the lumber, and not when the draft was paid to seller by another bank, so that the lumber could not be subsequently attached as the property of the consignee.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. §58.]

3. CARRIERS §58—BILL OF LADING—RIGHTS AND LIABILITIES OF TRANSFEREE.

Where seller of lumber retained bills of lading to keep title until payment by a bank, and bills were then forwarded to a second bank, pursuant to its agreement with the buyer and first bank to pay for the lumber and take the bills of lading as security, when title to the lumber passed from buyer to seller, it also passed to the second bank by virtue of the bills of lading, and hence could not, either before or after, be attached as the property of the buyer.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. §58.]

Error to Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by T. F. Kinsolving and another against N. A. Webster, in which the State Savings & Trust Company filed an interplea. From a judgment of the circuit court for plaintiffs, on appeal from a judgment of the justice court for interpleader, the interpleader brings error. Reversed and remanded, with directions.

Tribble & Byrkit, of Kennett, for plaintiff in error.

ROBERTSON, P. J. The plaintiff in error filed an interplea for two carloads of lumber attached by plaintiff in a case of defendants in error against N. A. Webster instituted in the court of a justice of the peace. The interpleader prevailed in the justice court, the defendants in error appealed to the circuit court, and the result of a jury trial there was in favor of the defendants in error, and the interpleader brings the case here by writ of error.

A firm, Highall Bros. of Hollywood, Dunklin county, agreed to sell to said Webster, of Texarkana, Ark., the said lumber and deliver the same to the St. Louis & Southwestern Railroad Company at Cowee switch near Hollywood. It seems that payment was contemplated by attaching draft to bill of lading, but Highall Bros., being unwilling to dispose of the lumber in this way, acting through a manager, George Ray, had the bank of Hollywood, before the lumber was loaded, telegraph the interpleader at Texarkana and ascertain if the draft would be paid, and the interpleader answered that it would pay the draft. The next day the lumber was loaded,

the bill of lading issued, and the lumber consigned to Webster. The Bank of Hollywood paid the draft. Shortly before or after the draft was paid the defendants in error attached the lumber on a debt due them from Webster.

That action was by mistake brought against the wrong defendant, but afterwards it was dismissed, and this action brought over one month after the levy. The lumber was held at Hollywood until after the second suit was brought, and was again levied upon, and then the interplea was filed. The trial of the interplea resolved itself into a contest as to when the real levy took place, and the instructions are conflicting. The defendants in error claimed that the first attachment was levied before the Bank of Hollywood paid the draft, and that by an agreement with the interpleader the new suit was no more than a continuation of the old suit. The interpleader contended the defendants in error must rely on the new attachment, and that, as it was subsequent to the bank's payment of the draft, the interpleader had the paramount title.

The trial of the case covered many issues not necessary to discuss. If at the time the bill of lading was issued the interpleader was, and is now, entitled to the possession of the lumber, all other points are eliminated from the case.

[1] By section 11956, R. S. 1909, bills of lading are made negotiable, and section 11957 provides that they may be transferred by indorsement in writing; yet they are transferable without indorsement for value, and then carry with them the property in the goods they cover. *Scharff v. Meyer*, 133 Mo. 428, 449, 34 S. W. 858, 54 Am. St. Rep. 672. A general discussion and citation of cases on the method of transfer of bills of lading and the effect it has on the title to the property shipped will be found in 4 R. C. L. 30 et seq., §§ 34 and 35.

[2, 3] If the interpleader became the owner for value of the bill of lading when it was issued, then the question of when the levy was made would be immaterial, because the defendants in error do not claim the first levy was made until after the lumber was delivered to the railroad and the bill of lading was issued. The contention of defendants in error that the right of possession did not pass to the interpleader until after the draft was paid by the Bank of Hollywood cannot be upheld, since the obligation to pay the draft became binding on the interpleader as soon as Ray delivered the lumber to the railroad company, and prior to that time, as the undisputed testimony shows, the interpleader had agreed with Webster to advance the price of the lumber and take the bills of lading as security therefor. Two days thereafter Webster gave his notes to the interpleader and pledged the lumber as security therefor.

Of necessity defendants in error concede the title to the lumber passed to Webster when it was delivered to the railroad company, and the bills of lading issued, but the vendor of this lumber retained possession of the bills of lading, so as not to part with title to the lumber, until he took the bills of lading to the bank and received the money thereon. These bills of lading were then forwarded to the plaintiff in error. In this way, at the instant the title to the lumber passed from the vendor to the purchaser, Webster, it also passed to the interpleader by virtue of the bills of lading. If defendants in error attached the lumber prior to that time, the lumber belonged to the vendor, and, if subsequent, then to the interpleader.

The judgment is reversed, and the cause remanded, with directions to enter judgment for the plaintiff in error.

FARRINGTON and STURGIS, JJ., concur.

BRIGGS v. LUSK et al. (No. 1838.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. APPEAL AND ERROR \hookrightarrow 1064(4) — HARMLESS ERROR—INSTRUCTIONS—ASSAULT.

In a passenger's action for an assault, an instruction to find for plaintiff if she entered the train intending to and able to pay the legal fare and was received as a passenger, and, while the train was in motion, the conductor seized or jerked her in a violent manner, not with intent to remove her from the train, and with the exercise of more force than was necessary to eject her, did not require a reversal, though it was not perfect in form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224; Dec. Dig. \hookrightarrow 1064(4); Trial, Cent. Dig. § 525.]

2. CARRIERS \hookrightarrow 321(4)—INJURY TO PASSENGER—INSTRUCTIONS—DAMAGES RECOVERABLE.

Where, in such case, there was evidence that a greater portion of the controversy between plaintiff and the conductor took place after the train stopped to permit her to be ejected for failure to pay her fare, an instruction that in determining the damages recoverable the jury could consider plaintiff's humiliation, if any, and mental suffering, together with the injury to her person, and find such amount as they deemed just and fair, not exceeding the amount sued for, was fatally defective for failure to distinguish between the effects of the wrongful acts committed by the conductor before the train stopped, from the rightful acts committed by him after it stopped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. \hookrightarrow 321(4).]

3. CARRIERS \hookrightarrow 283(3) — PASSENGERS — EJECTION—ASSAULT BY CONDUCTOR.

Where a conductor before stopping his train takes hold of a passenger to eject her for failure to pay her fare, he is guilty of an assault rendering the company liable in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1123, 1124; Dec. Dig. \hookrightarrow 283(3).]

4. CARRIERS \hookrightarrow 319(1) — PASSENGERS — DAMAGES—MENTAL SHOCK—ASSAULT.

The rule precluding recovery for mental shock alone does not preclude a passenger from recovering damages as for an assault, where the

conductor before stopping the train has taken hold of her to eject her for failure to pay her fare.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1340; Dec. Dig. ¶ 319(1).]

5. CARRIERS ¶ 357—PASSENGERS—FARE.

Where a passenger requested information as to why the cash fare demanded of her was more than the usual fare, the conductor should have explained that it was his duty to collect 10 cents extra according to a provision in the tariff furnished pursuant to the acts of Congress governing interstate commerce.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1419, 1433; Dec. Dig. ¶ 357.]

6. APPEAL AND ERROR ¶ 172(1) — REVIEW — PRESENTATION BELOW.

In a passenger's action for an assault committed by the conductor who undertook to eject her for nonpayment of her fare, plaintiff's contentions that the train was not stopped at a place where she could have been lawfully ejected, and that the conductor failed to return the fare paid to him, before undertaking to eject her, could not be considered on appeal when not presented below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1073, 1076-1078; Dec. Dig. ¶ 172(1).]

7. CARRIERS ¶ 319(3)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

Where a female passenger entered into an argument with the conductor, relative to a difference of 10 cents in the fare, and the conductor before stopping the train took hold of her and turned her around in the aisle and talked gruffly to her without, however, using any insulting language or causing other than slight physical injury, a recovery of \$750 was excessive above \$500.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1344, 1345; Dec. Dig. ¶ 319(3).]

Appeal from Circuit Court, Newton County; Carr McNatt, Judge.

Action by Mrs. E. C. Briggs against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. From judgment for plaintiff, defendants appeal. Affirmed conditionally.

W. F. Evans, of St. Louis, O. L. Cravens, of Neosho, and Mann, Todd & Mann, of Springfield, for appellants. M. E. Benton and Horace Ruark, both of Neosho, for respondent.

ROBERTSON, P. J. This is an action to recover for an alleged wrongful attempt to eject plaintiff from defendants' passenger train. A jury trial resulted in a verdict for plaintiff in the sum of \$750. Defendants appeal.

Plaintiff started to Neosho, this state, from Vinita, Okl., and she bought a ticket to Afton, Okl., over defendant's road thinking it was the last station in that state before reaching Missouri. At Afton she bought a ticket to Wyandotte, Okl., the last station in that state on defendants' line. The train did not stop long enough at this last place to enable her to purchase a ticket. After leaving that station, the conductor called on her for her fare. She desired to pay to Seneca, the first station in Missouri, and think-

ing the distance to be eight miles, and assuming that the rate would be three cents per mile, she handed the conductor three dimes she had in her hand. The conductor told her the fare was 35 cents. She asked him for information on the subject. He refused to make any explanation, and, while she was seeking light of another passenger at another place in the coach in which she was riding, the conductor approached her, took her by the arm, and turned her around in the aisle, stating that he was going to put her off the train. She told the conductor she was only wanting an explanation as to why the fare was the amount demanded. The conductor positively refused to explain, caused the train to stop, and some time during the trouble he had hold of plaintiff and plaintiff had hold of a seat when her niece, who was traveling with her, gave the conductor five cents more, thereby ending the controversy. There is considerable uncertainty as to when, with reference to the stopping of the train, the conductor first laid hands on the plaintiff and threatened to put her off. The plaintiff said she was not positive, but thought it was before. From other testimony we think it may fairly be deduced that it was prior to the stopping of the train. We think it may be assumed, as is in effect done by plaintiff's instructions, that the fare demanded by the conductor was correct.

[1] Plaintiff's instruction numbered 1 reads as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff entered the defendant's train in good faith as a passenger, intending to and able to pay the usual and legal fare for her transportation, and was received thereon by the defendant as such, and while on said train and while the same was in motion the conductor of such train made an assault upon the plaintiff by seizing or jerking her in a rude and violent manner, and that the same was not done by him in good faith with intent to remove the plaintiff from the train, and was the exercise of more force and violence than was necessary to eject the plaintiff, then the jury will find for the plaintiff."

She alone testified of her injuries, and all the evidence on that subject is as follows:

"Q. Tell the jury how his grabbing you and dragging you around there, and talking to you like he did, affected you? A. I wasn't well anyway, and it gave me a nervous headache, and I didn't get over it that day, and I did not sleep that night. I didn't eat any dinner."

[2] The plaintiff's instruction numbered 2, being on the measure of damages, is as follows:

"If the jury find for the plaintiff, then in determining the amount of damages, if any, she is entitled to recover, the jury may take into consideration her humiliation, if any, and mental suffering, and the indignities to which she was subjected, if any, together with the injury, if any, to her person, and find such amount as they deem just and fair not to exceed the sum of \$5,000."

[3] The conductor should have stopped his train before taking hold of plaintiff for the

avowed purpose of ejecting her therefrom, and when he thus failed in his duty it must be held that on account thereof he used more force than was necessary. *Harkless v. Chicago, R. I. & Pac. R. Co.*, 151 Mo. App. 463, 470, 132 S. W. 29, and *Glover v. Atchison, Topeka & Santa Fé Ry. Co.*, 129 Mo. App. 563, 573, 108 S. W. 105. While plaintiff's instruction one is not recommended as a model, we hold that it contains no reversible error in this case.

Instruction 2, quoted above, is fatally defective. If we hold that there is testimony of any injury to her person, yet it appears from the testimony that the greater portion of the trouble between plaintiff and the conductor took place after the train was stopped, for which we understand plaintiff concedes the defendants are not liable. Neither the testimony nor the instruction undertakes to separate the effects of the alleged wrongful acts of the conductor from those that were rightful. This could not be done to a nicety, but the jury should have been given an opportunity to exercise their judgment on the matter.

[4] Cases cited in behalf of appellants (among them *Crutcher v. The Big Four*, 132 Mo. App. 311, 319; 111 S. W. 891) hold that in certain cases there can be no recovery for mental shock, etc.; but such a rule has no application in a case like this, where the effort to eject the passenger was made before the train is stopped, thus constituting an assault. *Glover Case*, supra, 129 Mo. App. page 572, 108 S. W. 105.

[5] The action of the conductor in refusing to give the plaintiff any information about the fare between Wyandotte and Seneca was improper. He knew the regular fare would ordinarily have been 25 cents, but that by reason of a provision in the tariff furnished pursuant to the acts of Congress governing interstate commerce, as he testified, it was his duty to collect 10 cents extra. An explanation would have likely avoided all this trouble. It was his duty to have made it. *Holt v. Hannibal & St. Joseph R. Co.*, 174 Mo. 524, 532, 74 S. W. 631. The conductor testified that he told her all he knew about it, but she testified differently, and the jury believed her.

[6] In the brief filed here in behalf of plaintiff, something is said about the train not having been stopped at a place where plaintiff could be lawfully ejected, but no such issue was urged in the trial court, and it now comes too late.

Some mention is made of the failure of the conductor to return the 30 cents paid him by plaintiff before undertaking to eject her, but that is also a point not relied on in the trial of the case, and it cannot be first urged here.

[7] The appellants charge that the judgment is excessive, and we must so hold. Be-

fore the conductor touched her, she had been told, not only by the conductor but by another passenger of whom she asked advice, that the amount she was offering to pay was not enough. Before there was any assault whatever, according to all the testimony, she saw fit in order to save a dime to make herself conspicuous, and therefore the subject of humiliation, by entering into an argument with the conductor over a matter about which she was clearly in the wrong. She is entitled to compensation for the assault, which, putting it in the most favorable way for her, consisted in the conductor before the train stopped abruptly taking hold of her and turning her around in the aisle and talking gruffly to her (yet there is no charge of any insulting language nor any physical injury other than consequential), and also for such mental distraction as the feature of the fracas caused.

The judgment cannot stand for the further reason of the error in the instruction on the measure of damages, but if the plaintiff will remit \$500 from her judgment it will be affirmed; otherwise, it will be reversed, and the cause remanded.

FARRINGTON and STURGIS, JJ., concur.

COMPTON HEIGHTS LAUNDRY CO. v. GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORP., LIMITED, OF PERTH, SCOTLAND. (No. 1797.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. On Motion for Rehearing, Jan. 1, 1917.)

1. INSURANCE — 388(5) — EMPLOYER'S LIABILITY INSURANCE — ASSIGNMENT OF POLICY — WAIVER.

Where a policy was issued to several individuals doing business as a partnership and they afterwards incorporated and the insurer's general manager, on request, agreed to see that the insurance covered the corporation and the insurer's auditor afterwards examined the pay roll on which the premium was based but where there was no change made upon the policy, the agent by his conduct foreclosed the insurer's right to insist on a formal written assignment of the policy and its consent indorsed thereon, as provided for in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1027; Dec. Dig. — 388(5).]

2. INSURANCE — 646(5) — EMPLOYER'S LIABILITY INSURANCE — ACTION UNDER POLICY — PRESUMPTION.

Where an employer's liability insurer recognized an accident as covered by its policy and proceeded to act thereunder according to its terms, the insured was conclusively presumed to have been prejudiced by such conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1658; Dec. Dig. — 646(5).]

3. INSURANCE — 665(8) — EMPLOYER'S LIABILITY INSURANCE — EXCEPTION — WAIVER — EVIDENCE.

In an action on an employer's liability policy by an employer who had suffered a judgment in an employee's personal injury suit, evidence held

to show the insurer's waiver of the provision of a rider that mangling machines operated by the insured should be provided with fixed guards or safety feed tables, and that the insured's failure to provide such guards should relieve the insurer from liability on account of personal injury due to such neglect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1725; Dec. Dig. ¶ 665(8).]

4. TRIAL ¶194(11)—EMPLOYER'S LIABILITY INSURANCE—INSTRUCTIONS—QUESTION FOR JURY.

In such action, an instruction on waiver, in effect a peremptory instruction to find for the plaintiff upon a finding of the matters referred to in the instruction, was erroneous, as waiver is a mixed question of law and fact to be determined by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 458-460; Dec. Dig. ¶194(11).]

5. TRIAL ¶253(5)—EMPLOYER'S LIABILITY INSURANCE—INSTRUCTION—WAIVER.

Such instruction was also erroneous for failure to submit the question as to whether the insurer's agent, having the right to make such investigation as was reasonably necessary to determine whether the accident was covered by the policy, when investigating and assuring the insured that he would look after the claim, knew or ought to have known by the exercise of ordinary diligence that the accident was caused by insured's failure to provide guards for mangling machines, excepted from the policy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 617; Dec. Dig. ¶253(5).]

6. INSURANCE ¶668(1)—EMPLOYER'S LIABILITY INSURANCE—VEXATIOUS REFUSAL TO PAY—EVIDENCE.

In action upon employer's liability policy by employer suffering a judgment in the suit of an employé for personal injury, evidence held to make the question of the insurer's vexatious refusal to pay the amount due under its policy, subjecting it to damages, etc., a question for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶668(1).]

7. INSURANCE ¶513—EMPLOYER'S LIABILITY INSURANCE—ACTION—DAMAGES—ATTORNEY'S FEE.

In an action upon an employer's liability insurance policy by an employer suffering judgment in an employé's action for personal injury, the fact that the insurer had tendered the employer the free use of its legal claim departments, if the employer would agree that such aid should not waive any of the insurer's rights, did not prevent the employer's recovery of an attorney's fee incurred in defending the suit, as the insurer in refusing to discharge its duty to defend such claim lost all right to dictate to the employer how the matter should be handled.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶513.]

On Motion for Rehearing.

8. MASTER AND SERVANT ¶297(4), 298—PERSONAL INJURY—PLEADING—VERDICT.

In an employé's action for personal injury alleging as the sole ground of negligence the employer's failure to guard a mangling machine as required by law, the verdict and judgment therein for the employé must be held to have been responsive to that issue.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1198; Dec. Dig. ¶297(4), 298.]

9. INSURANCE ¶388(5)—EMPLOYER'S LIABILITY INSURANCE—EXCEPTION FROM LIABILITY—WAIVER—RIGHT TO DEFEND.

Since an insurer in an employer's liability insurance policy can refuse to defend an action

for damages only at its peril, it cannot be held to have waived any defense under the policy by defending or negotiating for a compromise settlement, so long as any peril exists.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1027; Dec. Dig. ¶388(5).]

10. INSURANCE ¶512—EMPLOYER'S LIABILITY INSURANCE—RIGHT TO DEFEND.

Where there is or may be different grounds of liability asserted, for some of which an insurer in an employer's liability insurance policy is liable, and for some of which the employer must stand the loss, neither party can exclude the other from participating in the defense.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶512.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by Compton Heights Laundry Company against the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Holland, Rutledge & Lashly and Ernest A. Green, all of St. Louis, for appellant. Merritt U. Hayden, of St. Louis, and Mozley & Green, of Poplar Bluff, for respondent.

ROBERTSON, P. J. This is an action on an employer's liability policy. The suit was brought in Iron county, and by agreement the venue was changed to Butler county. By the terms of the policy defendant agreed to protect the insured for one year from May 18, 1914, against loss by reason of liability for damages on account of the injuries of its employés suffered through the assured's negligence. On December 1, 1914, an employé in the laundry was injured, afterwards sued the plaintiff, obtained a judgment for \$3,750 which the plaintiff paid, and then brought this suit to recover said amount, together with the costs therein and their attorney's fees, also 10 per cent. as damages and attorney's fees in this case for vexatious refusal to pay. The father of the employé made a claim against plaintiff for loss of the services of said employé, and that was settled by plaintiff paying him \$250, and that is included in this suit. A jury trial was had and resulted in a verdict for plaintiff for \$4,225.25 and an attorney's fee for this case at the sum of \$200. The defendant has appealed.

The defenses are that the policy was not issued, or assigned with the consent of the defendant, to the plaintiff, and that there is no liability on the part of the defendant by reason of the following rider attached to and made a part of the policy:

"It is hereby understood and agreed, that all the mangling machines owned or operated by the assured shall be provided with fixed guards or safety feed tables adjusted at the point of contact of the rolls so as to prevent the fingers or hands of the employés from being drawn into the rolls, and that such guards shall be maintained during the term of this policy. Any failure on the part of the assured to provide and maintain such guards shall relieve the General

Accident Fire & Life Assurance Corporation, Limited, from liability on account of personal accident due to such neglect, and this policy is accepted by the assured accordingly."

The policy limited the defendant's liability to \$5,000 for any one person injured. In the suit brought by the injured party involved in this litigation damages in the sum of \$10,000 were sought to be recovered.

The policy was issued to John F. Winter, Louis M. Winter, and Joseph N. Barthelmass doing business in St. Louis as Compton Heights Laundry. In the latter part of June, 1914, these parties, being desirous of organizing a corporation under the laws of Missouri, informed the general manager of defendant for the state of Missouri, and a portion of Illinois, that they were going to incorporate and requested him to see that the insurance properly covered the corporation, and this the manager agreed to do. The incorporation was perfected and the certificate issued on June 30, 1914, and thereafter the business was continued at the same place by the same individuals and under the same management, although there were no changes or notations made upon the policy. The premium was based upon and regulated by the amount of wages paid the employes and called the pay roll. An auditor for the defendant examined the pay roll from the week ending May 23, 1914, to the week ending February 27, 1915. He also made an audit of the pay roll up to March 1, 1915, when the policy was canceled. So far as the record discloses the premium was paid up to the date of the cancellation. After the accident happened and after the suit was brought by the injured person against the plaintiff here as a corporation, the defendants denied liability therefor solely upon the ground that by reason of the rider it was not liable to plaintiffs on account of any claim made by the injured person.

The injury caused the employe, and upon which the action to recover damages therefor was based, was caused by the failure of plaintiff to equip its machinery as required in said rider. The defendant was duly notified of the accident, and upon the next day thereafter its representative was at the laundry taking the statements of witnesses who were working with the injured employe at the time of the accident. Two days later another employe of defendant in charge of its claim department in St. Louis was at the laundry investigating the accident, examined the machine where it occurred, and stated to plaintiff's manager that they would take care of the matter. Various employes of defendant were thereafter at the laundry at various times looking after the matter of this accident and made numerous visits to the injured employe endeavoring to effect a settlement and made an offer of compromise. The investigations and the negotiations with the injured party were continued in behalf of defendant until January 18, 1915, when a

letter was written to the plaintiff quoting the contents of the rider and stating that the investigation of the case would be continued "under full reservation of rights under the terms of our policy, and if it should develop that this machine was not provided with a fixed guard or safety feed table such as is required by the terms of your policy, and if above injured attempts to and succeeds in predicated liability on the failure above mentioned, then in such event we would not be required to indemnify you for any judgment that might be obtained by above injured against you." This letter was written in behalf of defendant by said employe in charge of the defendant's claim department at St. Louis who had examined the machine and negotiated with the injured employe. Under date of February 13, 1915, the same employe of defendant in its behalf wrote another letter to the plaintiff stating that they had investigated the accident and discovered that the injury occurred on a machine that was not equipped as required by said rider and denied liability under its policy on account of the injury. The defendant alleges in its answer that the injury, if any, to plaintiff's employe, was due to the absence of the guard referred to in the rider, and the facts and circumstances tend to prove that during all the time its agents were investigating the accident, promising to take charge of the claim and endeavoring to settle it, they knew that there was but one ground of negligence relied upon, and this would justify the further conclusion that what they did was not for the purpose of ascertaining if the policy covered the accident, but for the purpose of treating it as a liability thereunder. On March 8, 1915, the injured party commenced suit against the plaintiff, and it caused a copy of the summons and petition to be sent to the defendant to which it replied, as above stated, denying any obligation to proceed with the defense solely because the accident involved was not covered by the policy. The plaintiff here, the defendant in that case, filed an answer in the case, and after some negotiations a settlement was agreed upon whereby the injured person was to obtain a judgment for \$3,750. Testimony was introduced, and a judgment entered for the amount agreed upon. The injured person was a minor, and the father made a claim for loss of services which was compromised for \$250 without litigation.

Plaintiff in its petition, after alleging the commencement of the suit against it by the injured party, the existence of an opportunity to compromise and settle the claim, and notice to the defendant of that fact, alleged that such proceedings were had in said suit that judgment was rendered therein as aforesaid. The defendant in its answer which contains a general denial alleges, besides the other defenses, the terms of its policy to the effect that it was liable to the assured only for loss actually sustained and paid in satis-

faction of a judgment after trial of the issue, and alleged that while a judgment was entered in said case it was not after a trial, but that the judgment was rendered by consent of the parties and without any trial of the issues. This portion of the answer was stricken out. No exceptions thereto were saved, and no complaint was made of the court's action in this regard in the motion for a new trial.

The plaintiff, in order to meet the defense as to the effect of the rider, contends that it had as a matter of law and fact met the requirements of the provisions of the rider. This is based upon an argument concerning what could be done towards a literal compliance. We do not deem it necessary to go into the details of the construction and arrangement of the machine, but it is sufficient to say that we do not uphold plaintiff's contention. The plaintiff did not comply with this provision, and, if the effects thereof can be avoided, it must be done in this case on the theory of a waiver on the part of the defendant.

[1] The contention made in behalf of defendant that it is not liable to the plaintiff because of the fact that the policy was issued to and indemnified a partnership cannot be upheld. The same agency that was its general manager for Missouri and portions of Illinois was also engaged in and had charge of the soliciting, collecting premiums, and issuing policies in the city of St. Louis. The policies did not become effective until after countersigned by the person in charge of that agency. This agency by its conduct which we have related foreclosed defendant's right to insist on a formal written assignment of the policy and its consent indorsed thereon, as provided for in said policy.

[2, 3] The question in this case that involves the real gist of the controversy is that of the alleged waiver of the requirements of the rider. The provisions, of these liability policies are peculiar and are in a class to themselves, in that they carefully and explicitly reserve to the insurer the exclusive right to manage and control all controversies that arise by reason of accidents to the employees of the insured, and they expressly prohibit any interference on the part of the insured. It is a well-known practice concerning all transactions to require of any one to take advantage of his rights at a proper time. It is also held in many instances that a party has relinquished or refused to accept a right in such a way that the contention cannot thereafter be entertained that such right was ever possessed. It must also be remembered, in considering a case of this character, that the insured, if not protected by the terms of his policy, should have a free hand to proceed, as soon as practical, in his own way. This right is as essential to the insured as are the provisions in the policy giving the insurer exclusive control of accidents covered by its policy.

In the case of Fairbanks Canning Co. v. London Guaranty & Accident Co., 154 Mo. App. 327, 335, 336, 133 S. W. 664, 666, in discussing the characterization of the action of an insurer under a policy of this kind which deprives it of a defense otherwise available, the court states:

"But in whatever way it may be designated, it is such conduct on the part of the insurer as will cut him out of a defense he might have made had he insisted upon it at a time when the other party might have taken care of himself to his complete exculpation, or, at least, a betterment of his condition. If, instead of relying upon his right when the claim was first brought to his attention, he, without due investigation, assumes himself to be liable, sets the assured aside, and claims the right of control of the defense, he cannot afterwards ignore the right the assured has acquired by reason of such action, merely because he has made a belated discovery of fact, or law, which he thinks puts the case outside the terms of the policy."

Where, as in the case at bar, the testimony tends to prove that the insurer recognized an accident as covered by its policy and proceeded to act thereunder according to its terms, the insured is presumed to have been prejudiced by such conduct, and this is not a rebuttal presumption. *Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 161 Mo. App. 185, 197, 142 S. W. 438.

Under the well-established rules of law in this state governing the actions of an insurer in a case of this character, unquestionably there was sufficient testimony upon which to base the conclusion that defendant waived the provisions of its rider. It becomes necessary, therefore, to ascertain if the issues were properly submitted to the jury under the instructions given in behalf of the plaintiff.

There were four instructions (A, B, C, and D) in behalf of plaintiff. Instruction A is upon the question of the authority of the agent who solicited, countersigned, and issued the policy, and B is upon the transfer of the policy to the corporation by the partnership. These two instructions were without error.

[4, 5] Instruction C is as follows:

"The court instructs the jury that if, under the preceding instructions and from a preponderance of the evidence in this case, you find that the policy introduced in evidence was in full force, covering and insuring the plaintiff on the 1st day of December, 1914; and if you further find that on said date one Florence Behrns was injured while in the employ of the plaintiff and while feeding a machine known as a mangle, that plaintiff gave defendant due notice of said injury, that within a few days thereafter the defendant caused an investigation of the accident resulting in said injury to be made by its duly authorized adjuster or adjusters, that at the time of making such investigation, if you find one was made, said adjuster or adjusters either saw and knew, or by the exercise of due diligence would have seen and known, that said mangle was not equipped with fixed guards or safety feed tables adjusted at the point of contact of the rolls, in the manner in which defendant now claims it should have been equipped and as provided in the rider to said policy, that, nevertheless, said adjuster or adjusters then proceeded and thereafter con-

tinued to treat said accident and the injury to said Florence Behrns, as if the same were fully covered under said policy, and that he or they thereafter entered into negotiations with said Florence Behrns and her parents for a settlement of any claim which she or they might have for damages against plaintiff, because of such injuries, and that negotiations were continued from time to time until on or about the 16th day of January, 1915, without any notice from defendant to plaintiff to disclaim liability under said policy, for said injury—then the defendant is not relieved from liability in this case because of any failure on the part of plaintiff to equip said mangle in the manner hereinbefore described, even though you may find and believe from the evidence that said mangle was not so equipped."

This instruction was a peremptory one to find for the plaintiff upon a finding of these things referred to in the instruction. This was error because:

"A waiver is a mixed question of law and fact. * * * It is a question of intention and a fact to be determined by the jury." Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654, 659, 83 S. W. 534, 535, and cases there cited.

This instruction should have also submitted to the jury the question as to whether defendant's agents knew, or by the exercise of ordinary diligence would have known, that at the time they were investigating the accident, assuring plaintiff that defendant would look after the claim and undertaking to settle, it was caused as alleged in the answer. The defendant had the right to make such investigation as was reasonably necessary to determine if the accident was covered by the policy, and this right should not be ignored in the instructions to the jury. The defendant's agent may have seen the machine and known it was not equipped as required by the rider, yet it may have been necessary to make further investigation to ascertain if that was the cause of the injury or the basis of the employee's claim and, if so, in doing this no ground of waiver would be created while properly endeavoring to ascertain those facts. Murch Bros. Construction Company Case, 190 Mo. App. 490, 176 S. W. 399.

Instruction D required the jury to find that the injured party recovered the judgment paid by the plaintiff and the attorney's fees incurred by reason of the litigation resulting in the judgment, and further told the jury, in effect, that if it was found that the plaintiff paid the father of the injured employé in settlement of his said claim the sum of \$250, and that in doing so plaintiff acted honestly and in good faith, they should find for it for said sum. This instruction is erroneous because the jury should have been required to find, before being allowed to assess the sum paid the father, that the amount was reasonable and properly paid as a liability under the policy.

From the fact that the judgment against the plaintiff here, in the suit by its employé, was entered by agreement and testimony was likely taken as a mere matter of form, it

may be doubtful if it should be treated as a judgment obtained as the result of a regular trial. We call attention to this phase of the case and to the opinion in the case of Dunham v. Philadelphia Casualty Co., 179 Mo. App. 558, 565, 162 S. W. 728, wherein it is stated that the insurer is not obligated to the insured by the latter "merely paying out money on claims presented." See, also, the cases cited in Carthage Stone Co. v. Travelers' Ins. Co., 186 Mo. App. 318, 327, and 328, 172 S. W. 458, and Murch Bros. Construction Co. v. Fidelity & Casualty Co., 190 Mo. App. 490, 493, 176 S. W. 399 et seq. This question not being a decisive point, and not being covered extensively by the briefs, we pass it without deciding it as likely it will not arise again even if there is another trial.

[6] Defendant contends that there is no evidence upon which the jury could properly base a finding that it had vexatiously refused to pay the amount due under its policy. This contention cannot be upheld. If the jury finds that the defendant waived the provisions of the rider, assumed control of the claim of the injured party under the terms of the policy, which excluded plaintiff from all concern thereabout, and it is found that after defendant did all this it thereafter concluded its interests would be better served by then withdrawing from the controversy and denying all liability, which it did, there would be sufficient disclosed to justify a finding of vexatious refusal to pay, when proof is made of the amount due.

[7] In defendant's letter of February 13, 1915, it tendered plaintiff the free use of its legal claim departments to handle the claim of the injured employé, provided plaintiff would agree that such aid would not waive any of defendant's rights. The defendant requested an instruction that, if the jury believed this offer was made, then they should allow no amount on account of any attorney's fee incurred by plaintiff in defending the damage suit. The instruction was refused, and this is urged here as a fatal error. We cannot so hold. When defendant refused to discharge its duty as to this claim, it thereby lost all right to participate therein or dictate to plaintiff how the matter should be handled. It could not select plaintiff's lawyers, even though they could be obtained free of charge; neither was there any duty devolving on plaintiff to accept the offer. It had an interest in the defense of this claim over and beyond the indemnity of the policy. The suit was for \$5,000 more than the amount called for by it. When defendant repudiated its contract, it surrendered all rights pertaining to the management of the defense of the claim and can be heard to complain only that it was not honestly and fairly conducted in a reasonably prudent and economical manner.

By reason of the errors in giving said in-

structions in behalf of plaintiff, the judgment is reversed, and the cause remanded.

FARRINGTON, J., concurs. STURGIS, J., concurs in the result.

On Motion for Rehearing.

STURGIS, J. [8] In the plaintiff's motion for rehearing it is claimed that, while defendant alleged in its answer that the failure to guard the machine in question was the cause of the injury for which plaintiff was held liable in the damage suit of Florence Behrns against the plaintiff herein, there is no proof of such allegation. The proof, however, is contained in the pleadings and judgment in such case. Such pleadings disclose that the sole ground of negligence complained of was the failure to guard the machine as required by law, and the verdict and judgment in that case must be held to have been responsive to that issue.

[9, 10] Another point is that instruction C criticized in the main opinion predicates waiver on undisputed facts, and therefore the question of waiver is one of law only and the instruction is correct. Cases are cited—as, for instance, *Myers v. Maryland Casualty Co.*, 123 Mo. App. loc. cit. 687, 101 S. W. 124—holding that, where the facts are undisputed and leave no room for divergence of opinion as to the force and effect of the same in establishing a waiver, the question is one of law only. That, however, is not this case. There is grave doubt in the present case whether or not the proven facts do not fail to show a waiver as a matter of law rather than the converse. In *Murch Bros. Construction Co. v. Fidelity & Casualty Co.*, 190 Mo. App. 490, 176 S. W. 399, the court held that, so long as there is a probability, if not a possibility, of the plaintiff in the damage suit recovering on a ground of liability covered by the indemnity policy, the insurer is not only justified in taking charge of the litigation, but can withdraw therefrom only at its peril. In that case the injured party claimed damages on a ground of liability covered by the policy and on a ground not so covered, and the court held that so long as there remained in the case a ground of liability covered by the indemnity policy the insurer could withdraw from the defense of the case only at its peril. In the present case, the plaintiff herein (defendant in the damage suit of Florence Behrns) then and here insisted that it had fully complied as far as is possible with the policy requirement as to placing a guard on the machinery, and that its liability, if any, to the injured party must be placed on other grounds. While defendant may have readily discovered, as plaintiff now claims, to its own satisfaction at least that plaintiff's failure to place a guard on the machinery was the cause of the accident and exempted it from liability,

yet it may be seriously contended that the defendant insurer, notwithstanding its belief in that respect, could not know in advance of the bringing of the damage suit on what ground of negligence the injured party might assert liability and produce evidence to sustain the same. Not only did the defendant have the right before withdrawing from the defense of the damage suit to make such investigation as was reasonably necessary to determine if the accident was covered by the policy, but it had a right to stay in the defense and negotiate for a compromise settlement so long as there was any reasonable ground to apprehend that a claim of liability could or would be made on any ground covered by the policy. *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 136 N. Y. Supp. 977, 984. Since an insurer in this form of policy can refuse to defend an action for damages only at its peril, it ought not to be held to have waived its rights by defending so long as any peril exists. Where there is or may be different grounds of liability asserted, for some of which the insurer is liable and for some of which the insured must stand the loss, then it would seem that neither party can exclude the other from participating in the defense (*Buffalo Steel Co. v. Aetna Life Ins. Co.*, supra; *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of N. Y.* [C. C.] 130 Fed. 957, 960); but that question is not before us.

YAZOO & M. V. R. CO. v. PICHER LEAD CO. (No. 1878.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. EVIDENCE — 417(16) — PAROL EVIDENCE — BILL OF LADING.

A bill of lading constitutes the contract between a shipper and a carrier, and, where no more appeared than that it was the intention of a shipper and the initial carrier that the shipment was to be made and the charges therefor collected from the consignee at destination, its terms could not be varied.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1893; Dec. Dig. — 417(16).]

2. CARRIERS — 194 — FREIGHT — LIABILITY OF SHIPPER.

The shipper is primarily liable under a bill of lading providing that the owner or consignee should pay the freight, and, if required, should pay it before delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. — 194.]

3. CARRIERS — 194 — FREIGHT — LIABILITY OF CONSIGNEE.

In such case, the consignee also becomes liable when he accepts the shipment and pays a part of the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. — 194.]

4. CARRIERS — 197(1) — FREIGHT — DELIVERY.

A carrier may lawfully refuse to deliver goods until all the transportation charges are paid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891, 894, 895; Dec. Dig. — 197(1).]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by the Yazoo & Mississippi Valley Railroad Company against the Picher Lead Company. Judgment for defendant, and plaintiff appeals. Judgment reversed, and cause remanded, with directions to enter judgment for plaintiff.

Owen & Davis, of Joplin, and Clinton H. McKay, of Memphis, Tenn. (Charles N. Burch and H. D. Minor, both of Memphis, Tenn., of counsel), for appellant. Spencer & Grayston, of Joplin, for respondent.

ROBERTSON, P. J. Defendant, at the request of a commission company of St. Louis that had bought from it a carload of lead, shipped the same from Joplin to Isaac C. Mishler at Clarksdale, Miss. The freight was not prepaid thereon. The bill of lading provided that:

"The owner or consignee shall pay the freight on said property, and, if required, shall pay the same before delivery."

The shipment was over the St. Louis & San Francisco Railroad to Memphis, Tenn., and from there to destination over plaintiff's road. The shipment was delivered to the consignee, but by mistake plaintiff collected only the legally established transportation charges from Joplin to Memphis. This action was brought to recover the balance due, \$98. It was tried on an agreed statement of facts, and judgment entered for defendants. Plaintiff has appealed.

A general survey of the adjudication on the question here involved is given along the same line, but in a more condensed form, as in the briefs filed here, in 4 R. C. L. 857, § 310, which we quote, adding the citations in parenthesis:

"Ordinarily a carrier has a right to look for his compensation to the person who required him to perform the service by causing the goods to be delivered to him for transportation, and that person is generally of course the shipper named in the bill of lading, or the consignor. (Finn v. Western Railroad Corporation, 112 Mass. 524, 17 Am. Rep. 128; 38 Am. St. Rep. 402, note; 49 L. R. A. [N. S.] 96, note.) The fact that the latter does not own the goods has been held material (Wooster v. Tarr, 8 Allen [Mass.] 270, 85 Am. Dec. 707), on the ground that the carrier's contract and right to recover his freight cannot be made to depend on what may prove to be the legal effect of the negotiations between the consignor and the consignee on the title to the property which is the subject of transportation (Finn v. Western Railroad Corporation, 112 Mass. 524, 17 Am. Rep. 128). Furthermore, even though there is a stipulation in a bill of lading providing that the consignee shall pay the freight, that does not of itself relieve the consignor, and a carrier is not bound at his peril to enforce the payment of freight from the consignee. The usual clause in bills of lading, that a cargo is to be delivered to the person named, or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master of a ship to retain the goods carried until his lien is satisfied by payment of the freight; it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees

fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. (Holt v. Westcott, 43 Me. 445, 69 Am. Dec. 74; Wooster v. Tarr, 8 Allen [Mass.] 270, 85 Am. Dec. 707, and note; Hayward v. Middleton, 3 McCord [S. C.] 121, 15 Am. Dec. 615.) True, the consignee, or the indorser of a bill of lading, may be sued if he has received the goods in pursuance of a bill of lading, imposing the payment of freight on him, at all events in cases where there is no charter party. The receipt of goods under such a bill of lading is evidence of a contract by the person so receiving them to pay the freight. But the liability of the consignee does not depend, in such a case, on the assumption that the original shipper would not be liable, as once seems to have been thought, but on a new contract to pay the freight evidenced in ordinary cases by the bill of lading and the reception of goods under it. There is no shifting of liability. The contract of the consignor and that of the consignee are not considered to be inconsistent with each other; each is an original contract based on a sufficient consideration. (North-German Lloyd v. Heule [D. C.] 44 Fed. 100, 10 L. R. A. 814; Grant v. Wood, 21 N. J. Law, 292, 47 Am. Dec. 162.) Moreover, it has been held that the consignee and receiver of a cargo is liable for the freight, although the master, owing to a dispute with the person who loaded the vessel about the price of trimming the cargo, sailed without signing the bill of lading. (Hatch v. Tucker, 12 R. I. 501, 34 Am. Rep. 707.) But by many authorities the view is entertained that where it appears that the goods were not owned by the consignor, and were not shipped on his account, for his benefit, the carrier is not entitled to call on the consignor for freight. (Union Freight Railroad Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; Barker v. Havens, 17 Johns. [N. Y.] 234, 8 Am. Dec. 393, and note.) Also it seems that the shipper of goods, who is impliedly bound by the bill of lading to pay the freight, may show by parol an agreement of the owner of the vessel to look to another for payment, and that payment has been made. (Wayland's Adm'r v. Mosely, 5 Ala. 430, 39 Am. Dec. 335.)"

[1] The agreed statement of facts recites that it was the intention of defendant and the initial carrier that the shipment was to be made and the charges therefor collected from the consignee at destination. The bill of lading constituted the contract between the parties and in the absence of more than is shown by the above statement its terms cannot be varied. Kellerman v. Kansas City, St. Joseph & Council Bluffs R. Co., 136 Mo. 177, 180, 34 S. W. 41, 37 S. W. 828; Russell v. Quincy, Omaha & Kansas City R. Co., 177 Mo. App. 186, 192, 164 S. W. 164; Portland Flouring Mills Co. v. British & Foreign Marine Insurance Co., 130 Fed. 860, 65 O. C. A. 344.

[2-4] The result in this case must be reached with reference to the liabilities imposed on the defendant by the bill of lading. The decided weight of the authorities is to the effect that the shipper is primarily liable under a bill of the character here involved. The consignee also becomes liable in a case of this kind when he accepts the shipment and, as here, pays a portion of the freight. It may also be conceded, as is held in this state (Sutton v. St. Louis & San Francisco R. Co., 159 Mo. App. 685, 140 S. W. 76), that the

carrier may lawfully refuse to deliver the goods until all transportation charges are paid.

This case resolves itself into the question as to whether the defendant has brought itself within any rule that should exempt it from the general principles of law that relieve it from its original liability as the shipper of the goods. There is no allegation or statement of facts that tend to prove waiver or estoppel, and no such defenses are urged here. The case of *Union Pacific R. Co. v. American S. & R. Co.*, 202 Fed. 720, 121 O. C. A. 182, is cited, but that only supports the contention that the consignee in this case is liable, which we concede, but does not hold that thereby the defendant is released from the requirements of its contract. In the opinion in *Great Lakes C. & D. Co. v. Seither Transit Co.*, 220 Fed. 34, 136 C. C. A. 110, reference is made to the duty of a carrier to collect the legal rate, though a lesser amount has been accepted by mistake, but there is no holding there to the effect that the shipper would not be liable for the unpaid balance. Appellant also cites *Howatt v. Barrett*, 78 Misc. Rep. 156, 137 N. Y. Supp. 916, Penn. R. Co. v. Titus, 78 Misc. Rep. 347, 138 N. Y. Supp. 325, and *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366, which discuss the liability of the consignee, but do not hold the consignor not liable.

In support of the contention that parcel evidence is admissible to show that it was understood between the initial carrier and defendant that the freight should be collected from the consignee defendant cites the cases of *Union Freight R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398, and *Wayland v. Mosely*, 5 Ala. 430, 39 Am. Dec. 335. If it can be said that the decisions in those cases are in point we could not follow them in face of the decisions of the Supreme Court of this state, cited above, to the contrary.

Under the provisions of the bill of lading the defendant became liable for the transportation charges, and as there is no showing of any facts that should relieve it from liability we must reverse the judgment and remand the cause, with directions to enter judgment for plaintiff. It is so ordered.

FARRINGTON and STURGIS, JJ., concur. STURGIS, J., adding the following: It seems to me that there is nothing in the agreed statement of facts which varies or contradicts the bill of lading. It is literally true and is consistent with the bill of lading that the carrier intended to collect the freight charges from the consignee and conversely did not intend to collect same from the consignor. Such is the usual intent when goods are shipped collect. But that is far from

showing, as the legal effect of such intention, that the carrier has lost his legal right to collect from the consignor in case his intentions go awry.

SISK v. DILLMAN EGG CASE CO.

(No. 1901.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. BROKERS — §82(4) — ACTIONS — PLEADING AND PROOF — VARIANCE.

Under petition alleging that defendant employed plaintiff to locate, negotiate, or buy for it cottonwood timber, and agreed to pay plaintiff a commission therefor, and that defendant did locate, negotiate for, or purchase certain timber, evidence that plaintiff merely reported to the president where timber could be bought, and the president bought the timber, does not present a variance; the essential elements entitling a broker to commission being present in the evidence and in the pleading.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 103; Dec. Dig. §82(4).]

2. BROKERS — §7 — CONTRACTS — REQUISITES AND SUFFICIENCY.

Such alleged contract, though it placed no limit on the purchase or price, was not too indefinite for enforcement, especially after it was executed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 5-8; Dec. Dig. §7.]

3. APPEAL AND ERROR — §1006(2) — REVIEW — CONFLICT IN EVIDENCE.

Though a court might well agree that the weight of evidence was with defendant, yet where the trial court granted one new trial because the verdict was against the weight of the evidence, and a second jury found the same way, the appellate court could not grant relief on that ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3951; Dec. Dig. §1006(2).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Albert Sisk against the Dillman Egg Case Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. L. Oliver, of St. Louis, and C. G. Shepard, of Caruthersville, for appellant. R. L. Ward, of Caruthersville, for respondent.

STURGIS, J. Plaintiff recovered \$700 in a suit for commission as a broker for negotiating and bringing about the purchase of the standing timber on a tract of land in Pemiscot county. The defendant was engaged in manufacturing egg cases and like products in which it used large quantities of cottonwood timber. The petition alleges that:

"On the ——— day of March, 1912, the defendant employed the plaintiff to locate, negotiate for, or buy for it cottonwood timber in Pemiscot county, to be used in its mills and factories at Caruthersville, Mo., and agreed to pay plaintiff for his services in looking for, locating, and negotiating for or buying said cottonwood timber the sum of 50 cents per one thousand feet as a commission for his services; that thereupon the plaintiff entered into the employ of the defendant and made many trips to differ-

ent owners of timber and looking over divers tracts of cottonwood timber in Pemiscot county, and on the — day of April, 1912, and while in the employ of defendant under the contract aforesaid, did locate, negotiate for, or purchase from the Pemiscot Land Cooperage Company about 2,800,000 feet of cottonwood timber situated in Pemiscot county, for the defendant; that the defendant thereupon paid for said timber, took the same, and has up to this date removed from the forest where said timber grew to its factories at Caruthersville, Mo., a large amount of said cottonwood timber; that under the plaintiff's contract with defendant he is entitled for his services in effecting and procuring or purchasing of said timber the sum of 50 cents per one thousand feet."

The answer, in addition to a general denial, is to the effect that defendant only employed plaintiff to buy logs and timber from parties having same to sell along the railroad and to measure and have same loaded, for which plaintiff was to receive 50 cents per 1000 feet; denies that it employed plaintiff to purchase any standing timber and particularly that for which he claims commission; says that plaintiff had nothing to do with the purchase of said timber and that same was bought by its president; that plaintiff made an estimate of the amount of timber on said land and was paid therefor by defendant.

Plaintiff's evidence is to the effect that while he was working for defendant in another capacity the defendant, by its president and bookkeeper, made the proposition to have him go out to buy cottonwood timber for it, and plaintiff asked if there was any limit to the amount, and defendant said there was not, to buy all he could find, and that defendant would pay him 50 cents per 1,000 feet for all the cottonwood timber he could get; that plaintiff went about doing this and bought several smaller amounts, one of which was standing timber on another tract of land; that he found this tract of timber was for sale and went to see the owner and found he would sell; that he reported this to defendant and the negotiations were started and continued between the owner and defendant resulting in defendant buying the timber; that plaintiff went to see the owner several times and visited and reported on the timber in the course of the negotiations.

The court instructed the jury that if defendant employed plaintiff to locate and negotiate for the purchase of cottonwood timber for defendant and agreed to pay him 50 cents per 1,000 feet as commission for so doing, and if plaintiff, under such employment, located and negotiated for the purchase of the timber in controversy and "that defendant, by reason of such location and negotiation or purchase by plaintiff, did purchase and receive said timber and that such location and negotiation brought about the sale thereof," then plaintiff was entitled to recover.

[1] The defendant insists that there is a fatal variance between the allegations of plaintiff's petition, his proof, and his instruc-

tions, but to this we do not agree. Defendant's argument is that there is a wide difference between being employed to "buy" and "negotiate a purchase"; between "buying" and "bringing the parties together and letting them consummate the deal." The plaintiff, however, is suing here as a broker for a broker's commission, and when we consider the essential elements necessary to entitle the broker to such commission, we think they will be found present in the petition, the evidence, and the instructions. It is said in 4 R. O. L. pp. 242, 243, that:

"A broker is an agent who bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of property, real or personal, the custody of which is not intrusted to him for the purpose of discharging his agency. * * * The sole function of the broker is the negotiation of contracts in behalf of others, and the duties of his position require him to deal merely with the contracting parties rather than with the property to which the contract relates."

In this same work, at page 320, is this statement:

"In many cases the question has arisen as to whether or not there has been a performance of the contract on the broker's part, where the transaction contemplated has been negotiated or closed by the principal himself. The general rule deducible from the decisions upon the question would seem to be that if there is nothing peculiar in the contract of employment it is not necessary that the broker should negotiate the sale when he has found, or procured, or if he has introduced, or given the name of, a purchaser who is able, ready, and willing to purchase the property upon the terms named by the principal, and the principal has entered into negotiations with such purchaser, and concluded a sale with him; and in such cases the broker has performed his contract, and is entitled to his commissions."

And again, on page 322:

"The general proposition is well established that if property is placed in the hands of a broker for sale at a certain price or upon certain terms, and a sale is brought about through a broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the broker or terms more liberal than those the latter was authorized to accept."

In *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683, the broker alleged a contract to sell at a certain commission, that a sale was arranged on terms accepted by his principal and the same thereafter consummated. The jury were instructed, and found in accordance with the evidence, that the plaintiff was given power to sell; that he found a purchaser ready, able, and willing to purchase on terms different from those fixed by the principal; that he brought the parties together; that they negotiated a sale and agreed on terms satisfactory to both; that said parties, after adjusting some differences, consummated the sale. The court held that the instruction was correct, and that plaintiff was entitled to his commission. The court announced the rule of law that an

agent given power to sell is entitled to his commission if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the purchaser and his principal in person on terms substituted by the principal and different from those given to the agent.

[2] We note the point, but do not agree that the contract of employment is too indefinite for enforcement, especially after it has become an executed one. The price which defendant would pay for cottonwood timber varied from time to time, depending to some extent on the location of the timber and other conditions. In the nature of his employment the plaintiff would report to his principal for acceptance and confirmation any proposed purchase of timber, especially in large quantities.

[3] The point most stressed by defendant is as to the sufficiency of the evidence to support the jury's finding. We find, however, a direct conflict in the evidence—that of plaintiff supporting his version of the contract and his being the procuring cause of the purchase, and defendant's evidence supporting the allegations of the answer. We may well agree that the weight of the evidence is with defendant, and we learn that the trial court granted one new trial because the verdict was against the weight of the evidence. A second jury found the same way and this court, under the facts, is not authorized to grant relief on that ground. The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

MESTON v. CRAWFORD. (No. 1822.)

(Springfield Court of Appeals. Missouri.
Dec. 16, 1916.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS §45—REQUISITES AND SUFFICIENCY—RETENTION OF CONTROL.

A purported assignment for benefit of creditors under which the assignor attempted to retain control of the property was fraudulent and void; it being requisite to its validity that the transfer to the trustee be absolute.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 198-207; Dec. Dig. §45.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS §36—REQUISITES AND SUFFICIENCY—POWERS OF ASSIGNEE.

A purported assignment for the benefit of creditors by which the trustee was given power to continue in course of retail business as his judgment directed was fraudulent and void for placing no limit upon the term of the trustee.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 119-148; Dec. Dig. §36.]

3. APPEAL AND ERROR §499(1)—SCOPE—REVIEW—PRESUMPTION OF EXCEPTIONS.

Where the bill of exceptions discloses no request of plaintiff to argue the question of value of goods in replevin, no ruling, and no

exception saved, no question in relation thereto is presented to the court upon appeal from the judgment rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. §499(1).]

4. REPLEVIN §106—JUDGMENT—INTEREST OF PARTY.

Where a stock of goods which the owner had assigned for the benefit of creditors was taken under execution, whereupon the trustee replevied it, but in the replevin possession was decreed to the constable who levied the execution, which was on a judgment for a small portion of the value of the goods, it was error to find for him for the full value of the goods, but only his actual interest should have been allowed.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 416-423; Dec. Dig. §106.]

5. COSTS §255—APPEAL—AMOUNT—FAILURE TO COMPLY WITH RULES.

If the appellant fails to abstract the testimony as required by rule, he cannot have costs for printing the abstract, though successful on the appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 967; Dec. Dig. §255.]

Sturgis, J., dissenting in part.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Replevin by William A. Meston, trustee for the English Store Company, against J. F. Crawford, Constable. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Goodbar & Tittmann, of St. Louis, for appellant. Tribble & Byrkit, of Kennett, for respondent.

FARRINGTON, J. Action of replevin to recover certain merchandise. The defendant, a constable, had seized the goods on March 25, 1915, under an execution in his hands based on a judgment for \$34.50 rendered by default in a justice court on March 8, 1915, in favor of Kaminer, Boasberg & Co. and against the English Store Company, a corporation that had been operating a store at Campbell, Mo. The appellant, William A. Meston, claiming as trustee under a purported deed of assignment from the English Store Company executed February 16, 1915, brought this action to recover the goods and damages. The circuit court, at the close of all the evidence, instructed the jury to return a verdict for the defendant for the return of the property, assessing its value at such sum as the jury found from the evidence was its value at the time the same was taken from the defendant. The jury fixed the value at \$140. Before giving the instruction the trial judge dictated into the record the statement that he was holding the deed of assignment void as a matter of law. Plaintiff has appealed.

The purported assignment is as follows:

"This instrument witnesseth:

"That the English Store Company, a corporation of Campbell, Dunklin county, Mo., party of the first part, for and in consideration of one dollar paid and other considerations below named, does transfer unto Wm. A. Meston, of St. Louis, Mo., party of the second part, for benefit,

as below stated, of certain and sundry creditors, as may later appear, being parties of the third part, transferring as follows all and singular the certain merchandise stock, present property of English Store Company, now contained in the Hopkins Building on north side of public square in Campbell, Mo., including all fixtures and books of accounts and bills receivable, and including one-half interest in warehouse in rear of lot.

"To take immediate possession of such property and chattels and to administer upon such to best advantage, with power to continue in course of retail business as the judgment of such trustee shall direct.

"The purpose of this transfer being to convert into money such assigned effects, doing so to best advantage and from the funds arising to pay: First, the necessary expenses of carrying this instrument into effect. Second, to pay Mrs. Ethel Smith an amount of sixty-five dollars, being back salary now due and owing. Third, to distribute the net proceeds resulting amongst creditors—parties of the third part, who may have provable demand against said corporation such pro rata to be paid upon proven accounts filed with said trustee, and such proven claims to be subject to the approval of said English Store Company.

"The intention of this instrument being to place at the disposal of its bona fide creditors the assets in total of the English Store Company for the express purpose of payment of such creditors' demands, and after such final satisfaction the surplus shall revert to the credit of the English Store Company.

"This action being the vote of all the directors of the English Store Co., at a special call meeting, as per their signatures hereto attached.

"J. R. English.

"Mildred English.

"W. B. English.

"On behalf of said corporation executed February 16, 1915.

"English Store Company,
 "[Seal.] "W. B. English, President.
 "Attest: J. R. English, Secretary."

Following this is an acknowledgment, and then a certificate of the recorder of deeds that the instrument was filed for record on February 17, 1915. This is as far as the parties went toward complying with chapter 8, R. S. 1909, which treats of assignments for the benefit of creditors.

There is nothing to indicate who were the "certain and sundry creditors as may later appear" in the instrument. They were referred to as "parties of the third part," as the "bona fide creditors" of the English Store Company, and as "creditors, parties of the third part, who may have provable demand against said corporation such pro rata to be paid upon proven accounts filed with said trustee, and such proven claims to be subject to the approval of said English Store Company."

Meston, the trustee, was a representative of the Sipple Adjustment Company, a collection agency of St. Louis, which, according to the testimony of W. B. English, represented about 85 per cent. of this corporation's creditors. Meston left Campbell as soon as the assignment was executed, leaving his father in charge of the store, who, with certain clerks, carried on the business until the merchandise was seized, as stated, by the defendant as constable, under the justice's judg-

ment rendered on March 8, 1915, against the English Store Company.

[1] I. We find this language in 5 Corpus Juris, p. 1051, § 20:

"In order that a transaction shall operate as an assignment for the benefit of creditors, it is necessary that there be an absolute transfer of title to the assignee without any right of redemption. In other words, there must be a surrender of all right and control, and an absolute appropriation by the debtor of his property to raise a fund to pay his debts"—citing *Mills v. Williams*, 31 Mo. App. 447, and *Bascom v. Rainwater*, 30 Mo. App. 483, and numerous cases from other states.

Certainly there was not a "surrender of all right and control" provided for by the purported deed of assignment in the case before us. The English Store Company retained the right to approve or disapprove the demands presented to the trustee. Thus did the assignment, considering only its face, lose its general character; thus did the English Store Company, though apparently dedicating its assets to the payment of all its creditors, by express provision reserve unto itself the right to decree:

"This creditor's demand is approved, and the trustee may provide for it," and "that creditor's demand is too much, or is not due; it is disapproved; the trustee will throw it out."

The trustee was not to have the absolute title; the alienation was not complete.

It is said that the assignment law and the statute concerning fraudulent conveyances are to be construed together. Turning to the case of *Scudder v. Payton*, 65 Mo. App. 314, loc. cit. 318, we quote from that part of the opinion which declares a certain instruction erroneous:

"All the evidence concurs in showing that the accounts assigned to Jenkins were of a face value of about \$900, and of a real value of about \$400. The assignment was absolute upon its face. The claim of Jenkins against defendant was only \$36. It is true that one of the defendants testified that he directed Jenkins at the date of the assignment to pay the surplus, after paying his own claim, to other creditors of the defendants, but that direction, even under defendant's testimony, was vague, did not distinctly name all the creditors thus to be paid, and did not exhaust the entire surplus. That the defendants reserved a certain control over the assets thus assigned is conclusively shown by their making subsequent disposition of part of them for the payment of debts incurred after the attachment, a disposition wholly different from that contained in the actual or pretended oral declaration of trust contemporaneous with the absolute assignment. Such a disposition of assets must be held to be, in part at least, a conveyance to the debtors' own use, and, as such, fraudulent against creditors."

In that case the assignment was absolute, and extrinsic evidence was introduced to show that the assignors nevertheless retained a certain control of the assets assigned. In our case one need only examine the face of the purported assignment to ascertain that a certain control of the assets assigned was reserved in the assignor, thus stamping it, as a matter of law, as fraudulent against creditors. While the circuit court in

this case admitted extrinsic evidence covering a wide range, it is clearly shown by the statement dictated into the record before giving the peremptory instruction that all of the extrinsic evidence was disregarded. Nor have we been governed by such evidence. It may be stated, parenthetically, that amid all that evidence there is no showing that Kammer, Boasberg & Co., under whose judgment against the English Store Company the defendant constable proceeded, was one of the creditors represented by the Sipple Adjustment Company. W. B. English testified that he did not know about that, that he would have to go to the books and see, and that "that is one I am not sure we owed anything."

[2] Closely associated with the foregoing discussion is the consideration of another feature of this purported deed of assignment. It will be noticed that, while the trustee is directed to convert into money the assigned effects to the best advantage, he is, nevertheless, given "power to continue in course of retail business as the judgment of such trustee shall direct." He is not only empowered to continue in course of retail business, but no time limit is fixed. Respondent contends that this power given by the assignment renders it fraudulent in law as to creditors, citing *Donk Bros. Coal & Coke Co. v. Kinealy*, 81 Mo. App. 646, loc. cit. 651, *State, to Use of Hepburn, v. Mueller*, 10 Mo. App. 87, and *First National Bank of Attleboro v. Hughes*, 10 Mo. App. 1, loc. cit. 14. In the *Kinealy* Case, first above cited, is found this language:

"The contention of respondent is that the deed of trust is fraudulent, and that the fraud is apparent on its face, because it vests the trustee with power to carry on the business of the Grant Quarry Company as long as he sees fit, and because it leaves to the trustee the right to fix the time, terms, and place of sale of the personal property conveyed by the deed. The deed permits and authorizes the trustee, if he deems it advisable, to continue the business of the Grant Quarry Company indefinitely and until the trust shall have been executed. He might or might not continue the business; he might or might not execute the trust; both are left optional with him. He is permitted by express grant of power to rent an office, to quarry rock from the premises conveyed, and to employ labor, and to charge the expense to the trust; no time is fixed for the sale of the personal property, nor terms of sale; both are left to the discretion of the trustee. Under the conditions of the trust the trustee might say to the officers of the Grant Quarry Company: 'Gentlemen, as trustee, I re-employ you at your old salaries. Proceed to carry on the business of the corporation as heretofore. The old scale of wages will be in force. Employ what labor you need. Make what contracts you deem advisable. Only be careful to do all the business and make all the contracts in my name as trustee, and I will stand between the company and its creditors and hold the latter at bay until such time as you and I may agree to execute the trust.' That such a contrivance is fraudulent in law needs no argument or citation of authorities in its support. * * *

In the *Hughes* Case, last above cited, the court, in speaking of certain decisions of courts of other states, said:

"The reasoning of these two courts seems conclusive. They proceed upon the ground that the deed recites that the assets of Sackett, Davis & Co. amount to about three times their indebtedness, and that it clothes the trustees with discretionary power to carry on the business of the firm 'for such time as the trustees shall deem for the best interest of the creditors, and necessary for the purpose of preventing shrinkage and loss, and of closing out and liquidating the same to the best advantage.' It cannot be doubted that a deed made with such extensive reservations is voidable as tending to hinder, delay, and defraud creditors."

Again (In re Assignment of Howard, 128 Mo. App. loc. cit. 450, 107 S. W. 400):

"Lastly, the provision authorizing the trustee to continue the business under certain conditions and in such event to use the proceeds of sales or any part thereof to renew and assort the stock of merchandise would be nugatory should the deed be construed as a general assignment."

[3] II. It is contended there was reversible error committed by the trial court in submitting to the jury the question of the value of the goods in controversy without first permitting counsel for plaintiff to argue that question before the jury. We do not find in the abstract of the bill of exceptions presented by plaintiff (appellant) any refusal on the part of the court to permit plaintiff to argue the question of the value of the goods. There is no such request, no ruling, no exception saved, so far as the record presented to us shows. The question is not before us.

[4] III. Finally, it is argued that the defendant constable had only a special interest in the property taken from him by plaintiff, to wit, the judgment for \$34.50, plus interest, together with \$2.55 court costs, and that the judgment could not be rendered against plaintiff for more than the amount of this special interest, whereas the jury brought in a verdict for the defendant for \$140, which was the full assessed value of the goods; that, where a replevin suit is between the owner of property and a defendant who claims a special interest, it is error to render a judgment exceeding that special interest. We think this contention is well taken. The instruction given by the trial court was:

"Your verdict must be for the defendant for the return of the property, and you may assess its value at such sum as you may find from the evidence was its value at the time the same was taken from the possession of the defendant."

The jury assessed the value at \$140, and the court rendered a judgment against the plaintiff for that amount. This was error, as the judgment should have limited the defendant's recovery to an amount not to exceed his special interest in the property, which special interest would be the amount of the judgment on which the writ of execution in his hands was based, together with interest and costs. *Hall v. Bramell*, 87 Mo. App. loc. cit. 289; *Gaston v. Johnson*, 107 Mo. App. 590, 80 S. W. 276; *Pierce v. Lowder*, 54 Mo. App. 25; *Cobbey on Replevin* (2d Ed.) § 958.

Points made concerning the admission by the trial court of extrinsic evidence are without merit. The trial judge clearly showed by

the record that this evidence did not influence him in declaring the instrument void.

The judgment will be reversed, and the cause remanded, in order that the trial court may enter a judgment as hereinbefore indicated.

[5] The appellant failed to abstract the testimony as required by our rule, and will therefore not be entitled to any costs for printing the abstract.

ROBERTSON, P. J., concurs. STURGIS, J., dissents as to paragraph I.

B. J. SEMMS & CO. v. BARNETT et al.
(No. 1852.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. BILLS AND NOTES — §64 — DELIVERY FOR SPECIAL PURPOSE — STATUTE.

Under Rev. St. 1909, § 9987, providing that as between immediate parties delivery of a negotiable instrument may be shown to have been for a special purpose only, and not to transfer the property in the instrument, where a dramshop keeper, his brother, and another executed two notes to plaintiff to discharge plaintiff's judgment against the brother, on condition that plaintiff deliver a stock of whisky to the dramshop keeper, plaintiff could not return the note for the whisky, and, retaining the other note, treat it as payment of the judgment, since it could not become effective for that or any other purpose until plaintiff, by delivering the whisky, complied with the special purpose for which it was delivered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 104; Dec. Dig. § 64.]

2. PAYMENT — §33 — CONDITIONS — ACCEPTANCE IN TERMS.

If two defendants had ordered whisky of plaintiff, and remitted him cash to cover the price and the amount due on his judgment against the third defendant, plaintiff could not have refused to ship the whisky, returned the amount intended for it, and retained sufficient to satisfy the judgment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 13; Dec. Dig. § 33.]

Error to Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by B. J. Semms & Co., against J. I. Barnett, W. H. Barnett, and J. H. Briggance. To review a judgment for plaintiff against J. I. Barnett, but for the other defendants, plaintiff brings error. Judgment affirmed.

Von Mayes, of Hayti, and J. S. Gossom, of Caruthersville, for plaintiff in error.

ROBERTSON, P. J. This is an action on a promissory note executed by defendants in error and delivered to plaintiff in error. A jury trial was had, resulting in a verdict and judgment for plaintiff in error against J. I. Barnett and for the other defendants, W. H. Barnett and J. H. Briggance. The plaintiff brings the case here by writ of error.

Plaintiff in error held an unsatisfied judgment against defendant in error J. I. Bar-

nett, and he and the other defendants gave the note in suit for the amount due on that judgment. Prior to the time when this note was executed and as the inducement therefor J. I. Barnett had the promise of plaintiff that if this note and one for \$959.33 were executed by him and the other defendants in error and delivered to plaintiff, the plaintiff would sell and deliver to W. A. Barnett, a brother of J. I. Barnett, a stock of whisky. W. A. Barnett was a licensed dramshop keeper in Caruthersville. Upon these express conditions defendant in error, W. H. Barnett and Briggance, executed the note sued on and delivered it, together with the other one, to plaintiff, but the stock of whisky was not delivered. The large note was returned. Section 9987, R. S. 1909, reads, so far as necessary to now quote, as follows:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

At the close of the testimony the plaintiff requested and was refused a directed verdict. Plaintiff also requested and was refused an instruction, telling the jury that if it was found that defendants executed and delivered the note in payment of the judgment then to find for the amount due on the note.

In behalf of defendants W. H. Barnett and Briggance two instructions were given, to the effect that if they executed and delivered the note and the consideration on their part was the shipment of the whisky, and that plaintiff agreed to make this shipment and thereby induced said defendants to sign and deliver the note, and plaintiff did not ship the whisky, then the verdict should be for said defendants.

[1, 2] The testimony was all one way and undenied. There was no testimony that defendants gave the note except on the conditions we have mentioned, so that the court properly, in view of the above-quoted section of our statutes, refused both of the instructions requested by plaintiffs. The note could not be treated by plaintiff as a payment of the judgment, or become effective for that or any other purpose, until the "special purpose" for which it was delivered was complied with by plaintiff.

The note was given in compliance with a proposition pending between the parties, and it is a general rule that a contract is not binding on the parties thereto until a proposal on the one hand is accepted on the other, and "such acceptance must have been

unequivocal, unconditional, and without variance between it and the proposal made." Chapin v. Cherry, 243 Mo. 375, 401, 402, 147 S. W. 1084, 1092. If defendants W. H. Barnett and Briggance had ordered the whisky and remitted cash to cover it and the amount due on the judgment, and if plaintiff had refused to ship the whisky, returned the amount intended for it, and retained sufficient to satisfy the judgment, the case would not, in principle, have been different. Then, as in the case of this note, plaintiff must accept and comply with the proposition as contemplated by all of them, or be placed in the attitude of having declined the whole of it.

There is no reversible error shown by the record, and the judgment is affirmed.

FARRINGTON and STURGIS, JJ., concur.

CITIZENS' TRUST CO. v. FERGUSON et al.
(No. 1984.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. BANKS AND BANKING ⇐54(4)—ASSISTANT CASHIER — LIABILITY ON BOND — WILLFUL ACTS—DEFAULT COVERED.

The bond of a bookkeeper or assistant cashier of a bank was conditioned that it should be void if he should well and truly account for all loss of money, or property, notes, or evidences of debt which might be occasioned or caused on account of his willful misconduct or failure to properly protect the property and interest of the bank. The bookkeeper was inexperienced when he accepted the employment from the cashier of the bank, and, whenever he discovered a discrepancy between a customer's passbook and his ledger balance, the cashier directed him to another series of passbooks kept in a separate drawer for the correct account. In fact, the cashier and other officers had for some time been acting fraudulently, crediting deposits in full on passbooks, but not in full on the deposit ledger. The bookkeeper or assistant cashier was not a party to the fraud, and received none of the proceeds. *Held*, that the bookkeeper or assistant cashier and his bondsmen were not liable on the bond, since his conduct in permitting speculation by others must have been willful to come within the bond, while he had the right to assume that the directors of the bank had performed their duty to meet at least once a month and pass upon the business of the bank, as required by Rev. St. 1909, § 1069, and that a committee of stockholders had examined its affairs at least once a year, as required by section 1088.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 97; Dec. Dig. ⇐54(4).]

2. APPEAL AND ERROR ⇐1017 — REVIEW — REFEREE'S FINDING.

The referee's finding of facts in an action at law stands before the Court of Appeals as a verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. ⇐1017.]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by the Citizens' Trust Company, a corporation, against L. A. Ferguson and oth-

ers. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

C. G. Shepard, of Caruthersville, and Oliver & Oliver, of Cape Girardeau, for appellant. R. L. Ward, of Caruthersville, for respondents.

ROBERTSON, P. J. This is an action on an indemnifying bond in the penal sum of \$5,000 executed by defendant L. A. Ferguson as principal, and the other defendants as sureties, to the Pemiscot County Bank, October 8, 1912, reading, except italics, added for the purpose of reference, so far as necessary to quote, as follows:

"The condition of the above and foregoing obligation is that if the said L. A. Ferguson as assistant cashier of the Pemiscot County Bank aforesaid, shall well and truly account for all money, property of whatsoever, belonging to said Pemiscot County Bank, and which shall come under his control or possession, as said and such assistant cashier of and for said bank, or if he shall well and truly account for all loss of money, or property, notes or evidences of debt, which may be occasioned or caused on account of his willful misconduct or failure to properly protect the property and interest of said bank, and shall at all times observe and fulfill the duties and requirements had or made of him by the board of directors of and for said bank, and shall at any time deliver over to the directors of said bank, any, and all property, money, or evidences of debt, which may come into his possession, or under his control, during the time of his employment as said and such assistant cashier, then this obligation shall be void; otherwise to remain in full force and effect."

The following concerning the bond is in the finding of facts to which reference is hereafter made:

"The minutes of the proceedings of the board of directors of said Pemiscot County Bank show that on March 27, 1912, a motion 'to instruct the cashier to employ temporarily any person that suited him to assist in the bank work' was 'duly seconded' and unanimously carried. Later, probably in July or August, in the same year, one W. H. Johnson was employed, and the bond sued on in this case was prepared for, but not signed by, him. In October, 1912, Tindle spoke to defendant L. A. Ferguson about taking employment at the bank as bookkeeper, and agreed to put him in at ninety dollars per month, giving him, at this time, the bond sued on herein, to be filed. The bond was executed under date of October 8, 1912, by L. A. Ferguson, as principal, and his codefendants, as sureties."

Ferguson worked in the bank, doing the work of a bookkeeper, until May 13, 1913, when said cashier resigned. It was then discovered by the board of directors that the business of the bank had been so manipulated that said cashier, and other officers of the bank, had dissipated nearly one-half million dollars of the bank's funds, and up until then had accurately entered the customers' deposits on their passbooks, but making the entry on the deposit ledger for a less amount, keeping an account of the difference in a separate place, a particular drawer set apart for that purpose. When Ferguson entered

upon his duties in the bank he was inexperienced in that line of work, and for that reason reluctantly accepted the position. He would not discover the method of keeping the accounts of the depositors until he undertook to balance a passbook. When he did this and called the cashier's attention to the discrepancy, he was directed to the drawer for the correct account, or duplicate passbook, of the particular customer whose account was to be balanced. This method applied to only the largest depositors, and it was a custom, as observed by Ferguson, that had prevailed for several years before he commenced work in the bank. There is no pretense that there is any evidence tending to show that Ferguson got any of the funds of the bank, or intended to assist in any fraud upon the bank, unless such facts may be inferred by reason of his failure to report the cashier's conduct to a superior. Plaintiff alleges in its petition that it is the receiver of the Pemiscot County Bank, and that Ferguson colluded and worked together with the cashier and other named officers of the bank for the fraudulent purpose of taking from said bank large sums of money belonging to it and appropriating the same to their own use; that in carrying out said designs Ferguson made the false entries on the bank books, so the other officers and directors were deceived and misled and the shortages concealed. The petition then proceeds to allege false entries, and naming the depositors, to the amount of over \$100,000. After the issues were made up the trial court appointed Mr. J. M. Haw, a member of the Caruthersville bar, referee to hear the testimony and to report his finding of facts and conclusions of law. The referee made his report accordingly, and recommended judgment for defendants. Plaintiff filed exceptions to the report, which were overruled, and judgment entered as suggested by the referee. The plaintiff has appealed.

The report of the referee disposes of all the questions of fact and law submitted to him in a concise and clear manner. The burden of the controversy here is on the question as to whether the conditions of the bond should be extended to cover the acts of Ferguson in falling into and carrying out the plan and methods of the officers of the bank, in the active charge thereof, in keeping the depositors' accounts. We shall assume, without so holding, that such acts were within the terms of the undertaking. The question then follows, and a correct decision of which properly disposes of this case, What portion of the conditions of the bond apply, and did Ferguson breach such portion? We italicized the portion of the bond applicable to the conduct of which complaint is made. This is clear because he did nothing except keep books, and a very few times waited on customers making small deposits no way involved in this suit or questioned, so that it can-

not be properly said that any of the money lost ever came under his control or into his possession. The board of directors made no requirements, and he was completely under the dominion of the cashier whose wishes he complied with to the letter. But Ferguson's conduct, in order to hold the bondsmen, must have been, according to the terms of the bond, *willful*, and this plaintiff recognizes by characterizing his acts complained of as fraudulent.

"Bonds frequently provide in effect that the principal shall well and truly or honestly, faithfully, and efficiently discharge the duties of his position. A condition of this kind in the bond of a cashier or an assistant cashier of a bank was held, not only to guarantee the personal honesty of such officer, but also to guarantee his competency, efficiency, and diligence in the discharge of his duties. And while, within the scope of a bank cashier's authority, and so long as he is apparently acting on behalf of the corporation, his directions may control the assistant cashier and teller, and the latter may not be required to look beneath the surface of his superior's acts, still when the assistant cashier is led to believe that the cashier is violating his duty to the bank and is taking its funds for his own ends, irregularly and without authority from the directors, he has no right to aid in, or connive at, such misappropriation, and he is liable on his bond therefor." 3 R. C. L. 481, § 109.

In the case of *Cope v. Westbay*, 188 Mo. 638, 646, 87 S. W. 504, 506, a quotation as to the high office of cashier is approved that shows that he has properly executed his trust when he has exercised "a reasonable degree of skill, care, and diligence."

[1] Considering the age and experience of Ferguson when he went to work in the bank with the cashier who hired him, and that nothing occurred to arouse any suspicion that the cashier was misappropriating the funds of the bank, we think it going too far to assume that Ferguson was acting in bad faith. Besides, the cashier had held that position for years, and had other large interests there. Ferguson was born and grew to maturity in that city. He no doubt had a high regard for the cashier, and would naturally not do anything to question a custom that appeared to have been in vogue there for years and report to members of a board of directors who had ostensibly approved of it. The referee found, and we think properly so, that there was no collusion by Ferguson with the cashier or the other defaulting officials.

Suppose we argue that since Ferguson undertook this work his bondsmen should be held to what an experienced person would likely do under the same or similar circumstances, but that would be answered with the suggestion that the employé had a right to assume that the directors had performed their duty, met at least once a month, passed "upon the business of the bank back to the previous meeting of the board," as then required by section 1099, R. S. 1909, and had observed and approved the manner of keeping a portion of some of the depositors' account

elsewhere than on a ledger. He would also have had a right to assume that a committee of at least three stockholders of the bank had examined its "condition and affairs, assets, liabilities and management" not less than once a year, as then required by section 1068, R. S. 1900, and found no reason for complaint as to the method of bookkeeping required of him by the cashier. We are mindful of the fact that the failure of some other officer to do his duty would be no excuse for Ferguson being derelict, but we are discussing what he had a right to assume when we resort to presumptions of law for a rule by which to measure his conduct.

[2] The finding of facts in a case at law stands before us as a verdict of a jury (State ex rel. John P. Bell v. United States Fidelity & Guaranty Co., 236 Mo. 352, 375, 189 S. W. 163, and Commercial Bank v. American Bonding Co., 187 S. W. 99, 100), and from what we have said concerning the finding of the referee that Ferguson was in no collusion with the defaulting officers of the bank, it is evident we cannot disturb his finding, and we think it is so clear that neither Ferguson nor his bondsmen can be held to account for anything he did while working for the bank that we must affirm the judgment. It is so ordered.

FARRINGTON and STURGIS, JJ., concur.

DUNSCOMB v. LUSK et al. (No. 1884.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. RAILROADS § 275(1)—INJURIES TO LICENSEES—PERSONS WORKING ABOUT CAR.

Defendant railway company was not negligent because its station agent permitted plaintiff, a minor, to assist the agent and plaintiff's father in spotting an empty car at a stockyard chute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275(1).]

2. RAILROADS § 275(1)—INJURIES TO LICENSEES—PERSONS WORKING ABOUT CAR.

Defendant railway company was not negligent because its station agent permitted plaintiff, a minor, to assist the agent and plaintiff's father in moving a loaded car from a stockyard chute and gave plaintiff a block of wood with which to assist in the work.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275(1).]

3. RAILROADS § 275(1)—NEGLIGENCE—FAILURE TO PLACE STOCK CAR.

Defendant railway company was not negligent because its train crew failed to spot an empty car at a stockyard chute, where such place was already occupied, plaintiff's stock had not arrived, and the crew would return within an hour.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275(1).]

4. RAILROADS § 275(1)—INJURIES TO LICENSEES—PERSONS WORKING ABOUT CAR.

Defendant railway company was not negligent because its agent permitted plaintiff, a minor, to assist in moving cars along a track

where the ties extended above the ground and on which he tripped, falling beneath the car, where such track construction was usual.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275(1).]

5. RAILROADS § 275(1)—INJURIES TO LICENSEES—PERSONS WORKING ABOUT CAR.

Defendant railway company was not negligent because its agent permitted plaintiff, a minor, while assisting the agent and plaintiff's father in pushing a box car, to pass out of the agent's sight to the forward part of the car where he was injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275(1).]

6. RAILROADS § 275(2)—INJURIES TO "LICENSEE"—DUTY.

Where plaintiff, a minor, assisted his father and defendant railway company's agent in moving an empty car to a stock chute to load his father's stock, plaintiff was a licensee with an interest to whom the railway company was liable for its agent's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 874; Dec. Dig. § 275(2).]

For other definitions, see Words and Phrases, First and Second Series, Licensee.]

7. RAILROADS § 282(16)—FINDINGS—QUESTION FOR COURT.

A jury finding that certain alleged acts of defendant railway company were a violation of some duty it owed plaintiff added nothing to plaintiff's case, since this was a question for the court.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 922; Dec. Dig. § 282(16).]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Raymond Dunscomb by K. L. Dunscomb, his next friend, against James W. Lusk, W. C. Nixon, and W. B. Biddle, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Bradley & McKay, of Kennett, for respondent.

STURGIS, J. Suit for personal injuries to a boy 11 years of age, occasioned by his falling under the wheels of a stock car while same was being moved by hand in connection with loading some stock belonging to plaintiff's father at the station of Clarkton, in Dunklin county. Plaintiff had assisted his father in bringing the hogs to town, and on arriving there they found another car loaded with stock standing at the chute of the stock pen. Two other cars were standing east of this one on the side track, one of which plaintiff's father was to use in loading his stock. The local freight train had placed, or "spotted," the one car at the stock chute, and then went on to Malden, whence it would return to Clarkton in about an hour. Malden was not on the main line, and the train went to that town on a branch line, and then back to Clarkton, and the evidence shows that when more than one car had to be placed at the cattle chute at Clarkton the train crew usually spotted one and then went on to Mal-

den. When plaintiff's father found that the train had just gone and he would have to wait an hour or more in order to have the loaded car moved and his car placed in position to be loaded, the station agent suggested that they move these cars by hand so as to save time both in loading the stock and in getting the car out. To this plaintiff's father readily assented, and he, with his two boys, one being plaintiff, and his hired man, together with defendant's station agent, Elkins, proceeded to move these cars. They moved the loaded car away from the chute westward without any mishap, but in moving the first empty car in the same direction the plaintiff, while on the north side of the same near the front end, slipped and fell under the wheels, resulting in his arm being crushed and broken. For this injury the jury awarded him \$1,000 in damages.

The allegations of negligence in the petition and in plaintiff's instruction authorizing a finding for plaintiff are as follows:

"The negligence of the agent or agents of the defendants in requesting or directing plaintiff to assist in moving a box car; (2) and in requesting or permitting plaintiff to go upon the north side of said box car out of the view of the station agent of defendants and the others there assisting in moving said box car for the purpose of assisting in moving said car, when the defendant knew the youth and inexperience of plaintiff; (3) the negligence and carelessness of the defendants in directing or permitting plaintiff to assist in moving a box car over and along a track, the ties of which extended above the ground; (4) and the failure of the defendants to spot or place the Dunscomb car with the engine before making trip to Malden."

[1] I. We will note more at length the facts in evidence in connection with each ground of negligence specified, though not following the same order as the pleader. First, as to the negligence of defendant's agent in directing or requesting plaintiff to assist in moving the box cars: The plaintiff was with his father and hired man for the purpose of helping to drive and load these hogs just as any 11 year old farm boy would do. There is little difference in the evidence as to what the agent did and said when plaintiff's father came to the depot and learned that the train had just gone and that these cars would have to be moved before the hogs could be loaded. Plaintiff's father testified that he was about to go up town when the agent said: "Could we spot that car and load that stuff?" Plaintiff's father at once assented, and they all proceeded to move the cars by hand. It was shown to be a common thing for stockmen to move or assist in moving cars in this way, and plaintiff's father had so helped at other times. It was near 11 o'clock, and the reason for not wanting to wait until the train returned was to save time and get the hogs loaded before dinner and ready to go out as soon as the train returned. While plaintiff's father was under no obligation to move or help move the car in place to be loaded, it

was an advantage to him, and he readily agreed. Nothing was said to plaintiff, and what he did was to merely follow along with his father ready to help as best he could. Certainly without more it was not negligence of the agent to permit this boy to accompany his father and to render such assistance as such a boy might under the immediate eye and care of his father. To so hold is to convict the father of even greater wrong.

[2] II. The loaded car being hard to move, defendant's agent procured two crowbars commonly used to pull spikes, and these were used as pinch bars under the hind wheels to move the car along. One was used by the hired man and plaintiff's father and the agent took turns in using the other. It appears that in doing this the pinch bars would slip on the rails and this boy, plaintiff, commenced helping by placing a stick of wood at the heel of the pinch bars, or "scotching," as it was called. Some stress is laid on the fact that the agent, Elkins, picked up a block of wood and gave it to the boy to use for this purpose, telling him to be careful not to mash his fingers. This agent says that when he did this the boy was already using a stick for this purpose which had become somewhat mashed, and he merely gave him and told him to use the other. We find no contradiction of this. The boy was helping both his father and the agent in this way.

The plaintiff insists that this boy sustained the relation to the father of helper, and that defendant owed him the same duty as it did the father and his hired man, that of a licensee with interest, which we will note later. Since the boy owed the father the duty of service and obedience, both law and morals imposed on the father the duty to care for his son's safety. Why, then, should defendant's agent be called upon to stop the boy from doing work which the facts show met the approval of his father? Moreover, the plaintiff was not injured in this particular work or in any way connected with it. Its only force is that it gave the agent knowledge that the boy was assisting in the work generally, and bears on the question of its being negligence per se in the agent to permit the boy to do so. We rule this point against plaintiff.

[3] III. We also rule that there is no negligence in defendant's failure to have the train crew spot or place the Dunscomb car at the stock chute before proceeding to Malden. Another car was placed there, though the evidence does not show when it was loaded with reference to the train's departure. It is not shown that plaintiff's father's hogs were to arrive or be loaded at any particular hour, and when the train crew were ready to depart these hogs had not yet arrived, and the agent and train crew could not know just when they would arrive. The train would be back in an hour, and plaintiff's father could have declined to assist in moving the

cars by hand and it would then have been up to the railroad to do this for him. There was no negligence in this respect, and, if there was, it was so remote that it would be difficult to hold that such negligence was the proximate cause of plaintiff's injury.

[4] IV. Another ground of negligence is that defendant's agent directed or permitted plaintiff to assist in moving cars along a track where the ends of the ties extended above the ground. The place of the accident was on the loading switch some 200 feet from the depot in a small town. It was shown that outside the immediate depot grounds the defendant's tracks generally were not so ballasted as to cover the entire ties, but left the ends more or less exposed. It was shown that other railroads were so constructed, and we think it is common knowledge that most Western railroads are constructed that way. We again, therefore, return to the question of its being negligence, without more, for the agent to permit (for that is all he did) this boy to accompany his father and assist in moving these cars on a track constructed in the usual way. The father evidently did not apprehend any danger, and such as there was was as open and obvious to him as to the agent. It is casting more than ordinary care on defendant's agent if we hold that the agent is required to forbid the boy to accompany his father and assist under such conditions of defendant's tracks, because of the mere possibility that the boy might get so close to the side of the car as to stumble on the end of a tie and fall under the wheels.

[5] V. This brings us to the last alleged ground of negligence, in that defendant's agent required or permitted plaintiff to go to the north side of the box car out of the agent's view in moving the empty car when the agent knew the plaintiff's age and inexperience. The very statement of this ground of negligence strikes us as placing on the agent the duty of watching over and keeping this boy within his sight, and that, too, when the boy's father is there, and the boy is there because of being his father's helper. What is there to call for this high degree of care on the part of the agent? The loaded car having been moved without mishap, the empty one was started by using the pinch bars in the way described. It was then found that this car could be kept moving by all hands pushing, including a couple of men who then happened along and volunteered a friendly push, and the pinch bars were discarded. The boy joined in the pushing, but there was hardly room for all at the rear or east end of the car. The plaintiff testified that:

The agent "then told me to step up a little to the front of the car, and I went up and got hold of the ladder on the north side at the west end and was pushing."

He there slipped and fell under the wheels. We think it is evident from plaintiff's fur-

ther evidence that his including his going to the front end of the car in what the agent said is a mere inference of his from the fact that plaintiff was virtually deprived of a place to push at the rear end. In his cross-examination he testified:

"We put that block under the pinch bar to get it started, and we lifted it up, and it was going, and most of the men were on the back, and that crowded me over, and he told me to step up, and I went to the front of the car. I went on the same side I was already on, and went to push. Q. He never told you to push the car, did he? A. I don't hardly remember whether he told me to do that or not. I remember he told me to put a block under the pinch bars, and I did that; I did that on the empty car until we got it started. After we got it started I don't remember his telling me anything more about pushing. We were already on the north side, and he told me to move up. I was already pushing and was doing this because he told me to. He never told me to quit. Q. Why did you go on the north side of the car? A. To kind of push. Q. Who told you to go? A. Well, nobody never told me to go on there, but he said to move up. Q. He didn't say what particular place to go, but he just told you to move up; is that right? A. Yes, sir. Q. And you obeyed him? A. Yes, sir. Q. You mean Mr. Elkins, he is the one that told you to do this? A. Yes, sir. Q. You state that Mr. Elkins just said, 'move up'? A. Yes, sir. Q. And didn't tell you to push? A. No, sir; he didn't tell me to do nothing, but I was already pushing."

Plaintiff's father, who stood by the agent's side and could readily have heard what was said, testified:

"Q. Was any orders given him as to what he should do? A. I never heard any; I was busy."

And on cross-examination he said:

"He was on the west end of the north side of the car, and I was behind the car. The agent was on the outside of the rail, and he and I were standing side by side. Q. Who told the boy to go up there at the side? A. They crowded him over from the east end, and I didn't see him any more. Q. Did the agent see him? A. I don't know. Q. Did the agent say anything to him then? A. Well, I don't remember. After we pushed him over to one side he says, 'Get over that way a little.' Q. What did he say at that time? A. He just told him to get over that way, get over south. That was when he was on the east end. I said nothing to the boy that I remember. We were all working there together."

Plaintiff's other witness, the hired man, testified:

"The agent directed all of us when and where to push, and he said 'push,' and we, of course, pushed. From the way we were pushing the car, the boy was on the right-hand side of the car when he was hurt; that would be the north side. I and the boy and the others were at the east end of the car when we first went to pushing. When the boy went around the car the agent was there pushing with the rest. * * * Q. Did you hear the agent tell the boy to go on the north side and push on the car after he had quit scotching? A. He told the boy to move and give him some room to push, and the boy moved over, and this is what he said, 'Move over and give me some room in here to push.' * * *

Dunscomb's boy was first pushing in the middle, and Elkins came over and said, 'Let him in there.' * * * Q. The agent had nothing to do about sending the boy around the car, did he? A. I don't know. Q. Well, as a matter of fact, you don't know if he had

anything to do with the boy going around the car or not, do you? A. I don't know. * * * That was the only order that Mr. Elkins gave the boy. He told him to keep up with the pinch bars at that time, until he told him to move over and let him push. Nobody else said anything to the boy but the agent. I remember what the agent said, but don't remember what anybody else said."

The defendant's agent denied giving the boy any orders or directions in regard to his work except to give him a block to scotch with when they were using the pinch bars on the first car moved, and to warn him not to mash his fingers; said that he knew nothing as to the boy's movements while they were pushing the second car until the boy halloed and he was discovered just after the wheel passed over him; that his father was right there and made no objection to what the boy was doing; that he never asked the boy to help, but, since he went along to help his father, he did not tell him to quit. The other evidence corroborates the agent's version of the matter.

[6] VI. We concede that plaintiff occupied much the same position with reference to his father as did the hired man, and that plaintiff owed to the father the same duty of obedience and service as an employé, which duty the father could enforce, though not by the same penalty as with the hired servant. The recollections of our boyhood days do not fall us in this respect. This makes the relation of plaintiff to defendant that of the servant of one master who aids the servant of another master in work for the mutual benefit of both, or which both have an interest in having performed. Such servant is a licensee with an interest, and when injured by the negligence of the servant whom he assists, the master of the servant must respond. The law is stated in *Ryan v. Boiler Works*, 68 Mo. App. 148, 151, as follows:

"But it is settled that one who, in furtherance of his own interests or those of his master, assists the servants of another in the performance of their work, is neither a fellow servant of such servants nor a mere volunteer, but occupies a third position, namely, that of a licensee with an interest. He is not a trespasser, because he is lawfully in his place; he is not a fellow servant of the other servant, because he is not directly or indirectly retained or employed by the master of such servant; neither is he a bare volunteer, because he does the work to further his own interests or those of his master. When a person thus situated is injured through the negligence of the servant whom he assists, the doctrine of respondeat superior applies, and the master of the negligent servant is responsible for the injury."

In the case of *Railroad v. Ward*, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848, where a shipper's servant was engaged in loading a car on a side track, and at the invitation of a brakeman undertook to assist in moving the car to a point where it would be more easy of access, because the shipper's interest and his own would thus be served by expediting the loading, and while so assisting

was injured by the railroad company's negligence, it was held that the defendant was liable, though it did not need the servant's assistance. See, also, *Tinkle v. Railroad*, 212 Mo. 445, 469, 110 S. W. 1086; *Railroad v. Marsh*, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142.

The difficulty with plaintiff's case is that the defendant or its agent is not shown to have been guilty of any negligence which would impose liability under the same rule of law which would prevail in case *Dunscumb's* hired man had been injured instead of his son. The defendant's agent did not fail to perform any duty toward plaintiff which the law imposed on him.

[7] VII. Plaintiff's principal instruction sought to aid the weakness of his case by requiring the jury not only to find that defendant was guilty of the alleged acts of negligence, but that "said alleged acts on the part of defendant were, in fact, in violation of some duty that defendant owed to plaintiff." This was submitting to the jury a question of law, since it is the province of the jury to find the hypothetical facts, and the question of whether such acts are violative of some duty owed by defendant to plaintiff was for the court, and not the jury. *Goodwin v. Railroad*, 75 Mo. 73; *Yarnall v. Railroad*, 75 Mo. 575, 583; *Joy v. Railroad*, 263 Ill. 465, 105 N. E. 330. This additional finding, therefore, was improper, and adds nothing to plaintiff's case.

It follows that the judgment is reversed.

FARRINGTON, J., concurs. ROBERTSON, P. J., concurs except as to paragraphs VI and VII, holding as to paragraph VI that the injured boy was a mere volunteer, and his father should have kept him out of danger.

BRADSHAW v. LUSK et al. (No. 1851.)

(Springfield Court of Appeals, Missouri. Dec. 16, 1916.)

1. MASTER AND SERVANT §293(1)—ACTION FOR INJURIES—INSTRUCTION.

In a section hand's action for loss of an eye when a spike being driven by the section foreman flew out and struck him, in the absence of any instruction defining the issues and acts of negligence on which the jury could find for plaintiff, the instruction that if the jury found the issues for plaintiff they should assess his damages at fair compensation for injuries caused by the spike striking him was erroneous, because the jury might infer from it that they were to assess damages for plaintiff if they merely found that the spike being driven by the section foreman struck plaintiff in the eye and injured him, since instructions which attempt to tell the jury in any way how they can find for plaintiff must cover the case in all its essential elements.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1148; Dec. Dig. § 293(1).]

2. MASTER AND SERVANT — 258(3)—INJURIES TO SERVANT—PLEADING—RES IPSA LOQUITUR.

Where a railroad section hand lost his eye when struck by a spike being driven by the section foreman which flew out from beneath a blow, the case was not one where the doctrine of *res ipsa loquitur* applied to aid the petition, which failed to plead specific acts of negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 818; Dec. Dig. — 258(3).]

3. MASTER AND SERVANT — 258(11)—INJURIES TO SERVANT—PETITION—SUFFICIENCY.

The petition, which alleged that defendants, by the foreman, negligently failed to provide plaintiff with a reasonably safe place in which to work, and that the foreman negligently attempted to drive a spike into an unsteady post in close proximity to plaintiff, resulting in the injury, insufficiently charged negligence in the use of an improper tool by the foreman, in the improper use of the tool, or in not giving plaintiff time to move to a place of safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 825, 826; Dec. Dig. — 258(11).]

4. JUDGMENT — 248—PLEADING—SUPPORT OF JUDGMENT—STATUTES.

Rev. St. 1909, §§ 1813, 1831, providing that only the substantive facts necessary to constitute the cause of action or defense need be pleaded, and that pleadings shall be liberally construed, were not intended to aid a judgment based on an entire failure of proof, or on a case made by evidence presenting an entirely different cause of action from that stated in the petition.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 494; Dec. Dig. — 248.]

5. MASTER AND SERVANT — 216(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a railroad's section foreman called a section hand to ask him if it would be any use to drive a spike into a post of the fence they were repairing, the section hand, in coming up and answering, did not assume the risk of injury when the foreman negligently or prematurely struck the spike, which glanced and struck the section hand in the eye.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 570; Dec. Dig. — 216(3).]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by Charles Bradshaw against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad. From a judgment for plaintiff, defendants appeal. Judgment reversed, and cause remanded that plaintiff may plead with particularity.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. David W. Hill, of Poplar Bluff, for respondent.

FARRINGTON, J. The plaintiff recovered a judgment for \$5,000 for the loss of an eye alleged to be due to the negligence of the defendants. The charge of negligence in the petition is as follows:

"The defendants by and through their section foreman, carelessly and negligently failed to provide the plaintiff with a reasonably safe place in which to work, and said section foreman carelessly, negligently and awkwardly attempted to drive a railroad spike into an un-

steady fence post in close proximity to the plaintiff, resulting in the spike flying from the fence post and striking the plaintiff in the right eye."

The facts of the case are in substance as follows: That plaintiff was a section hand working for the defendants, and that on October 16, 1915, he was at work repairing a wing fence on a cattle guard, and Charles Gattis, who was the foreman on that day, was driving a spike in a fence post. That Gattis had set the spike by tapping it lightly, and called the plaintiff to come to him, and asked him, "Do you reckon that will do any good? Do you reckon it will bust the post?" The plaintiff came and looked at it and said, "I don't think it would do any good; I think it would bust the post." "And just about that time he drew back and hit the spike before I could get out of the way—well, I was getting out of the way, while I was getting out of the way, and he hit the spike and it glanced and hit me in the right eye. Gattis set the spike up in the post and then hit it a light lick, so the spike would hold until he got to hit it a hard one. I was back by the side of the fence at work before he called me up there; was out of the way of the spike when called. When he hit the spike I was trying to get out of the way, and was something like 6 feet from him. When I say spike I mean a railroad spike which is about 4½ or 5 inches long, about an inch thick, and a half inch wide, made of steel or iron. The fence post was a white oak post about 4 inches thick and 4 feet tall. He was driving this spike about 3½ feet from the ground." At this point the attorney for the plaintiff asked this question: "Now what kind of a thing was Gattis driving that spike with? Mr. Whybark, attorney for defendants: We object to that; there is no allegation about that." The object was overruled, and defendants excepted. He answered that it was a steel cleaver with a chisel on one end and a hammer on the other. Again, he was asked, "What kind of a lick did it take to make that spike fly off?" He answered, "A glancing lick." The record here recites that Mr. Whybark stated: "We object to that if the court please, nothing alleged about that." And that Mr. Hill remarked: "General negligence." The objection was overruled, and defendants excepted. Again, the plaintiff said: "It was a railroad spike Gattis drove in the post. He hit it with a hammer a glancing lick; I am sure of that; if he hadn't it wouldn't have glanced." The record then recites: "Mr. Whybark: I move to strike out all of the testimony about the glancing lick, hitting the glancing lick, because there is nothing stated in the petition about hitting a glancing lick. Mr. Hill: General negligence, your honor." The objection was overruled, and defendants excepted. It was then shown that a track chisel is not used by section men for the purpose of driving spikes.

Gattis, the foreman, admitted that he never saw or heard of a foreman using it and never saw any other man use it in that way. He said, "I suppose this spike glanced. I hit it and in some way it jumped out and flew over and hit Bradshaw." He testified that Bradshaw was within 2 or 3 feet of him.

This is all the evidence in the record before us bearing on any question of negligence.

At the close of all the evidence the court refused a peremptory instruction in the nature of a demurrer to the evidence requested by defendants.

Plaintiff submitted the case on the following instructions:

"A. The court instructs the jury that if you find the issues in this cause for the plaintiff, you should assess his damages at such sum as you may believe, from all the evidence, will be a fair compensation for any pain of body or mind, and for any permanent injuries or disfigurement (if any, or either, or all such) which you may believe from the evidence the plaintiff has sustained, or will hereafter sustain, by reason of his said injuries, if any, and which you may believe from the evidence to have been caused by the railroad spike striking him, if you believe he was so struck; in all not to exceed \$10,000."

"B. The term 'negligence,' as used in these instructions, means want of ordinary care, and the term 'ordinary care' means such care as a person of ordinary prudence would have exercised under the same or similar circumstances."

To the giving of these instructions the defendants excepted.

At the request of defendants the court gave an instruction on contributory negligence, one on assumption of risk, and the following:

"4. You are further instructed that the mere fact that plaintiff was struck and injured by the spike which flew from the post as the section foreman was attempting to drive it into said post does not make the defendants liable for plaintiff's injury; but before plaintiff can recover in this case he must prove to your satisfaction, by the preponderance of the testimony, that his said injury was directly caused by the act of defendants' section foreman in attempting to drive said spike into the fence post, and that such act of said foreman was negligent, and if he has not done so your verdict must be for the defendants."

Appellants contend that plaintiff's instruction A was misleading and constituted error; that the petition failed to state a cause of action; that the court erred in admitting testimony concerning the kind of hammer used and with reference to a glancing lick; and finally that under the evidence the plaintiff was injured as the result of a risk incident to the business and one assumed by him.

[1] We think the objection to instruction A under the facts of this case is well taken, and that the jury as appellants contend in the absence of any instruction defining the issues and acts of negligence on which they could find for the plaintiff might well infer from that instruction that they were to assess damages in plaintiff's favor if they found that the spike which was driven by the foreman struck plaintiff in the eye and injured him. There was no denial that the

spike struck the plaintiff in the eye. The jury in that instruction were not even required to find that the injury was occasioned by negligence. And we are unable to see why plaintiff asked instruction B defining "negligence" as used in these instructions" when the only other instruction he asked did not contain an intimation of negligence.

[2] The question as to the sufficiency of the allegations of the petition, the admission of the testimony quoted and objected to as to the hammer and the glancing lick, and the vice of instruction A, all go to the same proposition, and that is that the act complained of here and the act shown is not an act of negligence which itself speaks. The striking of the spike with the wrong kind of tool or the striking of it by a glancing lick are not matters peculiarly within the knowledge of the master and under his control; the plaintiff was in as good a position to know, to plead, and to have a finding on the specific acts of negligence by which the evidence shows he was injured as was the defendants; it is not a case where the *res ipsa loquitur* doctrine applies. *Klebe v. Parker Distilling Co.*, 207 Mo. 480, 105 S. W. 1067, 13 L. R. A. (N. S.) 140. It is not a case wherein the act of negligence is similar to that charged in *Stewart v. Mason*, 186 S. W. 578, or that charged in *Compton v. Mo. Pac. Ry. Co.*, 182 S. W. 1055. The charge in this petition is similar to that condemned after verdict in the following cases: *Waldhler v. Hannibal & St. J. R. Co.*, 71 Mo. 514; *Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212; *Current v. Mo. Pac. Ry. Co.*, 86 Mo. 62; *Gurley v. Mo. Pac. Ry. Co.*, 93 Mo. 445, 6 S. W. 218; *Young v. Schofield*, 132 Mo. 650, 661, 662, 34 S. W. 497; *Leete v. Bank of St. Louis*, 141 Mo. loc. cit. 581, 42 S. W. 1074. See, also, *Castle v. Wilson*, 183 S. W. 1106, where the judgment was reversed because the petition did not charge negligence under the humanitarian rule, although the evidence tended to show liability under that charge.

[3, 4] The act of negligence in this case, if any, as shown by the evidence, was in the use of an improper tool, or in the improper use of the tool, or in not giving plaintiff time to move himself to a place of safety when the section foreman knew or ought to have known of plaintiff's danger. The place which the master furnished was entirely safe in the absence of these specific acts. And as defendants are entitled to know from the pleadings the charge of negligence they are required to meet we must hold that the petition fails to meet that requirement. So far as plaintiff pleads any specific negligence it is in driving a spike into an unsteady fence post and defendants would expect to have to meet that charge, but it was not tried on that theory, and the only testimony on that score is found in the di-

rect examination of the plaintiff, as follows:

"The fence post was a white oak post, about 4 inches thick and about 4 feet tall. He was driving this spike about 3¼ feet from the ground. The ground there is black gumbo; it was a little loose, not a great deal; had some spring to it."

No one on reading the charge of negligence in the petition could be held to a knowledge that he must meet and defend against evidence tending to show that his foreman had used an improper tool or had improperly used a tool. When analyzed, the only reason for allowing a general charge of negligence where the *res ipsa loquitur* doctrine applies is that the act, speaking for itself, advises the defendant of the charge he must meet, and is, after all, stating the case with particularity. There is no specific allegation as to the kind of tool used or the manner of its use in the petition, and if the plaintiff is relying on general negligence (and from the remarks made by his attorney when the evidence was being introduced he is relying on general negligence) the proof adduced fails utterly to prove that the defendants furnished the plaintiff an unsafe place in which to work. There is therefore an entire failure of proof, and sections 1813 and 1831, R. S. 1900, were never intended to aid a judgment based upon an entire failure of proof or on a case made by evidence which is an entirely different cause of action from that stated in the petition. This question is discussed at length by Sturgis, J., in the case of Thornton v. American Zinc, Lead & Smelting Co., 178 Mo. App. 38, 163 S. W. 298. The error is made most manifest in the case before us. The plaintiff, as his attorney twice remarked during the progress of the trial, is relying on general negligence. His proof shows specific acts of negligence within the knowledge of all parties concerned. He then submits the case without instructions, thereby again relying on his term "general negligence." It should be the purpose of courts and attorneys to so try cases as to make the issues clear-cut and well-defined, and as simply put before the jury as is possible. It is true that the Supreme Court, although severely condemning a plaintiff who refuses to submit his case on instructions defining the issues, has not held that the failure to do so constitutes reversible error; yet where it is apparent, as it is in this case, that the plaintiff does submit his case on an instruction which not only deals with the measure of damages but leaves it open to the jury to find for the plaintiff if they find that plaintiff was struck in the eye by the spike, which fact was not disputed, reversible error is committed. It takes a negligent act to justify a jury in assessing damages in this kind of case, and if the instructions asked by plaintiff attempt to tell the jury

in any way how they can find for the plaintiff they must cover the case in all of its essential elements. We think the jury in this case could easily have been misled as to the verdict reached, and that this misleading is due to the pleading, evidence, and instructions so far as they went, of the plaintiff, and the failure to instruct as well, and is a verdict that should not be permitted to stand.

[5] We fail to agree with the appellants that the case which the evidence tends to make out is one in which the plaintiff assumed the risk of the injury he sustained. If he was called by the foreman to a place for the purpose of examining the post and spike and giving his advice, and the foreman negligently struck the spike before a reasonably prudent man would have struck it considering plaintiff's proximity to him, or if the foreman called plaintiff for the purpose of advice and struck the spike with an improper tool, or carelessly struck it a glancing lick, the plaintiff would in our judgment be entitled to a recovery for the consequences of these acts of negligence.

We will therefore reverse the judgment and remand the cause to the end that plaintiff if he is so advised may plead the negligent acts of which he complains with some degree of particularity so that the evidence which he introduces will conform to the allegations of his petition. It is so ordered.

STURGIS, J., concurs. ROBERTSON, P. J., concurs in the result.

WITHAM v. LUSK et al. (No. 1880.)

(Springfield Court of Appeals. Missouri, Dec. 16, 1916.)

1. APPEAL AND ERROR ⇨1002 — REVIEW—FINDINGS OF JURY—CONCLUSIVENESS.

In personal injury action, findings of the jury on sharply conflicting evidence as to cause of injuries is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

2. TRIAL ⇨251(8)—INSTRUCTIONS—ISSUES — NEGLIGENCE.

Where the complaint in personal injury action alleges several acts of negligence, but only one ground of negligence is alleged to have caused the injury, the jury must be confined to that ground, and it is error to submit the other alleged acts of negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593; Dec. Dig. ⇨251(8).]

3. TRIAL ⇨251(8)—INSTRUCTIONS—ISSUES — NEGLIGENCE.

Instructions submitting issue of negligence to jury held not erroneous in not restricting the jury to the consideration of a single act of negligence, where the complaint recited several acts of negligence and alleged that they all contributed to the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593; Dec. Dig. ⇨251(8).]

4. CARRIERS \Leftrightarrow 287(5)—NEGLIGENCE — INJURIES TO PASSENGERS.

A railroad company is required to stop its freight and mixed trains carrying passengers at stations a sufficient length of time to permit passengers to enter or leave, and a failure to do so is more culpably negligent than in the case of a passenger train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1159, 1163, 1164; Dec. Dig. \Leftrightarrow 287(5).]

5. CARRIERS \Leftrightarrow 321(7)—INJURY TO PASSENGER — INSTRUCTIONS—NEGLIGENCE.

In an action against a carrier for injuries to plaintiff by reason of negligence in not stopping a mixed train for sufficient length of time to enable plaintiff to safely board the train, instruction held not erroneous for containing a general charge of negligence in addition to the specific charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1330; Dec. Dig. \Leftrightarrow 321(7).]

6. CARRIERS \Leftrightarrow 321(8)—INJURY TO PASSENGER — INSTRUCTIONS—NEGLIGENCE.

An instruction, that defendant carrier's liability continues not only while its passengers are in transit, but while entering the cars at stations, held not erroneous or misleading in using the word "liability" instead of "duty."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1330; Dec. Dig. \Leftrightarrow 321(8).]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by A. J. Witham against James W. Lusk and others, receivers of St. Louis & San Francisco Railroad. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Virgil McKay, of Kennett, and B. A. McKay and R. L. Ward, both of Caruthersville, for respondent.

STURGIS, J. Plaintiff recovered \$2,500 for personal injuries received by being thrown from defendants' passenger coach while in the act of attempting to enter same as a passenger at the station of Octa, in Dunklin county. This passenger car was attached to the rear of a train of some ten freight cars, making what is called a "mixed train." The petition alleges that the station of Octa was a regular station for receiving and discharging passengers, and that plaintiff went there for the purpose of taking passage on said train; that it became and was the duty of defendants to stop their said train at said station of Octa and there hold said train stationary for a reasonable and sufficient length of time to permit plaintiff to safely board same with safety; that on said day defendants, by and through their agents, servants, and employes, in charge of their said train, ran the same up to the said station of Octa and at the usual and ordinary place for stopping the same to let their passengers on and off, and brought said train to a standstill and invited plaintiff to board said train as a passenger thereon; that while the plaintiff was in the due exercise of ordinary care on his part and with no

fault on his part whatever, and just as plaintiff had reached the platform at the end of the passenger coach and was in the act of entering the door thereof, and before plaintiff had a reasonable and sufficient length of time to safely enter said passenger coach, the said defendants, by and through their agents, servants, and employes in charge of and operating said train, negligently, carelessly, and recklessly caused said train to be started forward with a sudden and violent jerk, lurch and bound, and forward movement, without the knowledge of or any warning whatever to this plaintiff. The petition further alleges that, while plaintiff was endeavoring to enter said passenger car, another passenger was attempting to leave same, and while both were on the rear platform, and before plaintiff had time to safely board said car or the other passenger to leave the same, the train suddenly and violently started forward with a jerk, whereby both plaintiff and the other passenger lost their balance and were thrown with great violence to the ground, such other passenger falling on plaintiff, whereby plaintiff was greatly injured. The answer was a general denial.

The evidence is that plaintiff, an old man aged 67, and two companions, went to this small station to take this train to Kennett; that the train stopped with the passenger coach partly past the station platform, which was quite short. As soon as the train stopped, these three persons started to board the train at the rear steps. One of plaintiff's companions went up the steps first and was just inside the car door when the train started. Plaintiff was then on the rear platform in the act of turning to enter the door, and his other companion was ascending the steps. Plaintiff testified that the accident occurred in this way:

"When the train slowed down and came to a standstill, we three men started to board the train just as quick as it came up. Mr. Westfall was in front, I was next, and Judge Spence was the last man. When I went up the steps, I just went right on and went to make my turn to go in the door. About that time she caught me on the turn and just jerked me right backward. I had got up on the platform on the rear end of the coach, and was just turning into the door, when she caught me on the turn and started and jerked me backward; I mean the jerk from the train the way it started forward. It started forward with enough force to throw me backward and threw me off on the rails. A man was just starting to come out the door when the train started, and I had just come on, and I fell, and he fell on me. He did not strike me before I felt myself unbalanced and falling. We both struck the ground about the same time. He fell on top of me, on my breast. I fell over the cast-iron drawhead."

Plaintiff was picked up with four or five ribs broken and other lesser injuries. Plaintiff further testified that the train "barely came to a stop and then started up again." In this he is corroborated by other witnesses

and the physical facts; so that the evidence strongly shows that this train did not stop long enough to allow plaintiff, using due diligence, to safely enter the car, much less become safely seated, before it again started. There is also plenty of evidence that the train started with a sudden and violent movement or jerk, and defendant only claims that this is usual and inevitable in starting and stopping freight trains, and that the movement was not more violent than usual.

[1] Defendant attempted to prove, and there is considerable evidence to that effect, that plaintiff was knocked from the rear platform, not by any sudden and violent movement of the train, but by the other passenger, who was attempting to leave the train, running against him in his attempt to get off; that this passenger delayed leaving the train by reason of talking to a friend till the train started, and then, in a frantic effort to get out and off, knocked plaintiff from the platform and fell with and on him. Plaintiff, however, testified positively, both on direct and cross examination, that his fall from the rear platform was not due to this passenger striking against him, but by the sudden and violent forward lurch of the car, and that the fall of the other passenger was likewise due to the same cause; in other words, that they went down in much the same way, though from a different cause, as did Jack and Jill of nursery fame. This was the chief matter in controversy at the trial and was squarely put to the jury by defendant's instructions as well as those for plaintiff. The finding is therefore conclusive.

[2, 3] The defendant makes the point that, while the petition charges several acts of negligence—the failure to stop long enough, the sudden and violent start, the falling of the other passenger with and on him—yet there is only one ground of negligence, the sudden jerking of the train, which is alleged to have caused plaintiff's injury, and this, therefore, is the only act of negligence which should have gone to the jury, citing *State ex rel. v. Ellison* (Sup.) 176 S. W. 11. This case announces good law and, if applicable, renders the instructions erroneous in several particulars. We do not, however, so read the petition. The gravamen of the charge is the failure to hold the train long enough to allow plaintiff to safely board the same, and the other matters are stated as contributing to plaintiff's injury. The petition, after reciting the above matters, charges:

"Plaintiff charges and avers that by reason of the carelessness, negligence, and recklessness of defendants by and through its agents, servants, and employees in charge of and operating said train of cars, as aforesaid (which evidently refers to the negligent failure to hold the train long enough to allow plaintiff to go aboard same), and by reason of the sudden and violent jerking, lurching, bounding, and forward movement of said train as aforesaid, and by reason of plaintiff's fall from said train, and by reason

of said passenger being thrown upon plaintiff with great force and violence as aforesaid, plaintiff was greatly injured, mangled," etc.

See *Kirby v. Railroad*, 146 Mo. App. 304, 310, 130 S. W. 69; *Nelson v. Railroad*, 113 Mo. App. 702, 707, 88 S. W. 1119. This point is not, therefore, well taken, and with it falls several other points based thereon.

[4] Plaintiff's case, therefore, does not rest on the doctrine of negligence applicable to injuries received by passengers while riding on freight or mixed trains resulting from jerks, jolts, and violent movements of such train and which amount to negligence only when shown to be unusual and extraordinary and such as speak some defect in the machinery or equipment or unskillful handling of the engine or train or the like. *Rissmiller v. Railroad*, 187 S. W. 573; *Shields v. Railroad*, 87 Mo. App. 637, 646; *Saxton v. Railroad*, 98 Mo. App. 494, 503, 72 S. W. 717. In the present case the only negligence submitted to the jury was that of failure to stop the train a sufficient length of time to permit plaintiff to go aboard, and freight and mixed trains carrying passengers are required to do this the same as passenger trains. Indeed, the fact that sudden and violent movements are more or less unavoidable in the stopping and starting of freight and mixed trains makes it all the more important that such trains be kept standing still while passengers are entering or leaving the same. A failure to do so is more likely to cause injury, and therefore more culpably negligent, than in case of a passenger train. *Johnson v. Railroad*, 192 Mo. App. 1, 178 S. W. 239; *Nelson v. Railroad*, 113 Mo. App. 702, 88 S. W. 1119; *Kirby v. Railroad*, 146 Mo. App. 304, 310, 130 S. W. 69; *Erwin v. Railroad*, 94 Mo. App. 289, 296, 68 S. W. 88; *Allison v. Railroad*, 157 Mo. App. 72, 79, 137 S. W. 896.

[5] Without quoting plaintiff's principal instruction, we will say that it is substantially the same as that approved in the *Kirby* Case, *supra*, and is not subject to the criticism that it contains a general charge of negligence in addition to the specific charge which we have discussed. The language which defendant says contains a general charge of negligence follows and clearly refers only to the acts of negligence which precede and the jury evidently so understood.

[6] We also note the criticism of plaintiff's third instruction, telling the jury that defendant's liability (instead of its duty) continues, not only while the passengers are in transit, but while entering the cars at stations. Liability arises from violations of duty, and that is what this case involved. We are satisfied the jury was not misled by the wording of this instruction.

The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

CITY OF GREENFIELD v. FARMER.

(No. 1867.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. CRIMINAL LAW — 260(13)—MISSOURI—APPELLATE JURISDICTION—CIRCUIT COURTS.

Under Rev. St. 1909, § 9343, providing that certain cases appealed to the circuit from police court should proceed as misdemeanor cases, the practice and procedure after appeal is essentially that of a criminal proceeding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569-571, 593-609; Dec. Dig. — 260(13).]

2. COSTS — 3—NATURE OF RIGHT.

The right to tax costs is purely statutory.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. — 3.]

3. COSTS — 284—CRIMINAL PROSECUTIONS—CITY—"PROCEEDINGS OF ANY KIND."

Rev. St. 1909, § 2263, providing that in all civil actions, "or proceedings of any kind," the prevailing party shall recover costs, etc., does not include criminal proceedings, especially since the section has been consistently included in the civil procedure chapter.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1082, 1085; Dec. Dig. — 284.]

4. MUNICIPAL CORPORATIONS — 644—Costs—CRIMINAL PROSECUTIONS.

Rev. St. 1909, §§ 5377-5379, providing that the state and county shall pay costs upon conviction in certain cases, does not warrant taxing costs against a city which unsuccessfully prosecuted an alleged ordinance violation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1417; Dec. Dig. — 644; Costs, Cent. Dig. § 1125.]

5. MUNICIPAL CORPORATIONS — 644—Costs—CRIMINAL PROSECUTIONS.

Rev. St. 1909, § 5380, providing that persons instituting prosecutions to recover fines, etc., shall pay the costs if defendant is acquitted, etc., refers only to personal offenses, where the informant is injured, and is inapplicable to a prosecution by a city for an alleged ordinance violation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1417; Dec. Dig. — 644; Costs, Cent. Dig. § 1125.]

6. MUNICIPAL CORPORATIONS — 644—Costs—CRIMINAL PROSECUTIONS.

Rev. St. 1909, § 9344, allowing taxation of costs in malicious criminal prosecutions, but providing that a city shall not be liable therefor to its officers, unless the defendant be convicted, does not authorize the defendant taxing costs against a city unsuccessfully prosecuting an alleged ordinance violation, where the prosecution was not malicious.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1417; Dec. Dig. — 644; Costs, Cent. Dig. § 1125.]

7. MUNICIPAL CORPORATIONS — 644—Costs—CRIMINAL PROSECUTIONS.

A fourth class city is not liable for costs upon an unsuccessful prosecution of an alleged ordinance violation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1417; Dec. Dig. — 644; Costs, Cent. Dig. § 1125.]

Appeal from Circuit Court, Dade County; B. G. Thurman, Judge.

Ode Farmer was prosecuted by the City of Greenfield for an alleged ordinance violation, and on appeal from a police court was acquitted in the circuit court, which rendered

a general judgment for costs against the City of Greenfield. From an order overruling the city's motion to retax the costs, it appeals. Reversed and remanded with directions.

Fred L. Shafer, of Greenfield, for appellant.

FARRINGTON, J. The defendant (respondent) was prosecuted for the alleged violation of one of the ordinances of the plaintiff, a city of the fourth class, and on appeal from the police court was acquitted in the circuit court, that court rendering a general judgment for costs against the plaintiff city upon which an execution was issued. The city filed a motion to quash the execution, which motion was overruled, and later the city filed a motion to retax the costs, which, as to the main contention on this appeal, was likewise overruled. The case is here on the city's appeal from the order overruling such motion.

The circuit court of Dade county acquired jurisdiction of the case by virtue of section 9343, R. S. 1909.

No case in Missouri has been cited or found by the court involving the direct question in issue here. It will therefore require an examination of our statutes governing costs in court proceedings to determine the correctness of the order of the circuit court.

[1] Under section 9843, R. S. 1909, the appeal in this case from the police court to the circuit court as to time and manner is governed as provided by statute in relation to appeals from justices of the peace in civil suits, but when the appellate court—that is, the circuit court—is vested with the appeal, it shall proceed with the case in the same manner as is provided in cases of appeals from justices of the peace in misdemeanor cases, and the judgments rendered on such appeals are such as are rendered in misdemeanor cases. The action, therefore, as to manner and time of appealing is civil in nature, but the practice and procedure after appeal is essentially that of a criminal proceeding.

[2] It is the well-settled law of this state and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and, unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It is held in the case of State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S. W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo. App. loc. cit. 377, the following language is used:

" * * * It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs,

which are contested, must be able to put his finger on the statute authorizing their taxation."

See, also, *State v. Union Trust Co.*, 70 Mo. App. loc. cit. 315. *McQuillin on Municipal Corporations*, vol. 3, § 1070, lays down the rule that costs cannot be awarded unless expressly provided for, and that at common law they were not recoverable in either a criminal or civil proceeding, and that it has been often held, in the absence of statute providing therefor, that costs cannot be taxed against a city in cases for violation of ordinances regardless of whether there was an acquittal or a conviction. 11 Cyc. 278, states the rule that a city, town, or village is never liable for costs for proceedings under its ordinances, whether the defendant be acquitted or convicted, unless a statute so provides, and that this is true whether the proceeding is considered civil or criminal, and that (page 289), in the absence of statutes so providing, costs of an appeal to an intermediate court from a judgment for violation of an ordinance or on certiorari to such court are not taxable against a municipality. See, also, 7 R. C. L. § 13, p. 790; *Id.*, § 2, p. 781. We must therefore look to the statutes to ascertain whether there is any authority therein for the taxing of the costs against the plaintiff city in this kind of proceeding.

[3] Our attention is directed to section 2263, R. S. 1909, which provides:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

It is held in this state, in numerous decisions not necessary to be cited herein, that a proceeding to recover a fine for the violation of a city ordinance is a quasi criminal proceeding, and section 9343, R. S. 1909, certainly makes the procedure in the circuit court in such cases conform to that provided for in criminal proceedings begun in a justice court and appealed to the circuit court. The case, after it reaches the circuit court, so far as the procedure is concerned, is governed only by the statutes relating to criminal procedure.

Section 2263, R. S. 1909, is contained in the article on "Costs" in the chapter on "Civil Procedure." And we take it that since this case is, by the statute vesting the appeal in the circuit court, made to conform to the rules of criminal procedure, the statute governing civil procedure (section 2263) has no place in the determination of the question; that statute provides for "all civil actions, or proceedings of any kind."

It will be found by reference to our statutes that that section as it now stands was in the revision of the statutes of 1845 at page 242 in article 1 of chapter 35, said article dealing with costs in civil cases; it is not contained in article 2 of that chapter which pertains to costs in criminal cases. Prior to that time, in the revision of the statutes of 1835, at page 127, we find "An

Act Concerning Costs" approved February 20, 1835. Section 5 of the act provides that if any person shall sue in any action, and shall recover judgment, then the plaintiff shall have judgment for costs against the defendant. Following that, there were some three or four sections giving judgment for costs in cases where plaintiff is non prossed, or suffers a discontinuance, or is nonsuited, cognizance in replevin, and judgment on demurrer, from which it can be seen that when the Legislature passed the act referred to (found in the statutes the first time in the Revision of 1845, now section 2263, R. S. 1909), it intended to cover all civil actions "*or proceedings of any kind*," the clause we have italicized being intended to cover the various provisions for costs theretofore enumerated in separate sections, and we think also to cover any proceeding partaking of a civil character, such as certiorari, mandamus, and the like, and that "proceedings of any kind" did not cover criminal cases, or cases which are in their trial and procedure governed entirely by the Criminal Code.

[4, 5] Turning to the statutes pertaining to costs in criminal cases, we find that section 5377, R. S. 1909, provides when the state shall pay costs on conviction, and that section 5378 provides when the county shall pay costs on conviction, in neither of which is there any provision for a city to pay the costs in the case of an acquittal in the circuit court. Section 5379 provides when the state or county shall pay the costs on an acquittal, and in this section we find no warrant for the taxation of costs against a city in the kind of case before us. Section 5380 provides that every person who shall institute any prosecution to recover a fine, penalty, or forfeiture shall be adjudged to pay all costs if the defendant is acquitted, although he may not be entitled to any part of the same. This section would seem to come nearer the case in hand than any so far mentioned; but it has been held that it applies only to offenses personal and not public and in cases where the informant is the person injured. See *State v. Lavelle*, 78 Mo. 104; *State v. Hulatt*, 31 Mo. App. 302.

[6] Attention is called to the concluding clause in section 9344, R. S. 1909, providing:

"The city shall in no event be held liable for any costs or fees to any officer of the city in any cause tried before the mayor or police judge of such city, unless the defendant be convicted and committed."

It can be seen that this provision, in the first place, is only applicable in cases arising under section 9344, where there is a finding in the verdict that the prosecution was malicious and without probable cause, and there was no such finding in this case, and, in the second place, it was put in as a charter prohibition for a city of the fourth class to be held for costs and fees to *any officer of the city*. This provision in the statute evidently was passed with a mind as to what the city could, by ordinance, give or not give (its of

ficers in the form of fees growing out of prosecutions. This is the view taken in the cases of *Fortner v. City of Higginsville*, 106 Mo. App. 560, 565, 80 S. W. 983, and *Kemp v. City of Monett*, 95 Mo. App. 452, 69 S. W. 31.

[7] In addition to the reason that we have been unable to find any statute authorizing the taxation of costs, in a proceeding like this, against a city of the fourth class, we think it would be manifestly wrong to hold the city for attempting to enforce its ordinances in its police regulation; the city is thereby acting in its governmental capacity or on its governing side, and if it were to be mulct in costs in cases where the proceedings are against individuals for the violation of its ordinances, it might, because of its limited powers to raise revenue, become a bankrupt in attempting to police the city, or, on the other hand, would be slow to enforce municipal regulations for fear of becoming liable for the costs.

We, therefore, hold that the trial court erred in sustaining the fee bill containing charges against the city of Greenfield, and accordingly reverse the order made and remand the case, to the end that such charges against the city may be stricken from the bill.

ROBERTSON, P. J., and STURGIS, J., concur.

MATLACK v. KLINE et al. (No. 1856.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. LIFE ESTATES \S 16, 25—POWERS OF LIFE TENANT.

A life tenant without the consent of the remaindermen has no power to lease or incumber land beyond the period of his life, and any lease or incumbrance terminates ipso facto on his death.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 36, 47; Dec. Dig. \S 16, 25.]

2. LIFE ESTATES \S 25—POWERS OF LIFE TENANT.

The mere giving consent by the remaindermen to the making of a lease by the life tenant for a term which may extend beyond the life tenancy, or ratifying such a lease before the death of the life tenant, would not, without more, have any greater effect than to prevent the remaindermen from terminating the lease on the death of the life tenant, and in such case the lease would continue in force, but the rent would go to the remaindermen after such death, since the right to the rent follows the ownership of the land.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 47; Dec. Dig. \S 25.]

3. LIFE ESTATES \S 12—RIGHTS OF LIFE TENANT—MINERALS.

Since the life tenant can do nothing to destroy or diminish the value of the inheritance, he cannot, where no mines have already been opened, either in person or by tenant, open such mines or extract minerals from the land.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 31, 42; Dec. Dig. \S 12.]

4. LIFE ESTATES \S 12 — POWERS OF LIFE TENANT.

Since the remaindermen could have given or withheld consent to having the land mined by the life tenant, where he did consent, the rent or royalty, which follow the ownership of the land, would go to the remaindermen when the estate of the life tenant ceased.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 31, 42; Dec. Dig. \S 12.]

5. LIFE ESTATES \S 12 — POWERS OF LIFE TENANT—"HEIRS."

Where the remaindermen consented to a lease by the life tenant granting the right to mine the land for a certain royalty for a period of 20 years to be paid to the lessor or his heirs, the word "heirs," designated the successors to the land on the life tenant's death, and on his death the remaindermen became entitled to the royalty, though they could not terminate the lease.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 31, 42; Dec. Dig. \S 12.]

For other definitions, see Words and Phrases, First and Second Series, Heirs.]

6. COURTS \S 231(50) — JURISDICTION — AMOUNT INVOLVED.

In a suit to determine ownership of royalty or contract rental for mines, where one defendant claimed an amount of \$130 a month for a 12-year balance of the lease, the amount involved being approximately \$17,000, and the other claimed a 10 per cent. royalty already accrued amounting to \$5,552, the jurisdictional amount of the St. Louis Court of Appeals being \$2,500, such court could only transfer the case to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 659; Dec. Dig. \S 231(50).]

7. APPEAL AND ERROR \S 23—JURISDICTIONAL QUESTIONS—FAILURE TO OBJECT—DUTY OF COURT.

It is the duty of appellate courts to raise jurisdictional questions sua sponte.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 99; Dec. Dig. \S 23.]

Farrington, J., dissenting in part.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Bill in the nature of a bill of interpleader by Sarah B. Matlack against Rowena Kline and Mary E. Smith. From the judgment rendered, defendant Kline appeals. Reversed and remanded, but for want of jurisdiction transferred to the Supreme Court.

George Hubbert, of Neosho, and W. Cloud and Thos. Carlin, both of Pierce City, for appellant. White, Hackney & Lyons, of Kansas City, for respondent. Jas. T. Neville, of Springfield, and Norman A. Cox and Hugh Dabbs, both of Joplin, for defendant Smith.

STURGIS, J. The plaintiff, at the time of bringing this suit, was in possession of certain land in Lawrence county, conducting mining operations thereon on a large scale and with valuable machinery and appliances. She held such land under a mining lease executed by one F. D. Smith, a life tenant of the land, who had recently died, and the object of the suit is to have the court determine to whom and in what amount she shall pay royalty for the further use of the land. The one defendant is the remainder-

man, Rowena Kline, who became the full owner of the land on the death of Smith, life tenant, and the other defendant is the wife of Smith, who by his will has succeeded to all his rights to any royalty under the lease. Each of said defendants filed answer setting up their respective claims to the royalty. The court found for defendant Mary E. Smith, wife of the life tenant lessor, and denied any right to the other defendant, landowner, to have royalty and she has appealed.

The lease in question was executed in January, 1909, for a period of 20 years to one Bowen, assignor of plaintiff, and gave him and his assignee the exclusive right to mine the land for lead, zinc, and other ores during that period under certain conditions, among them to pay Smith, the "lessor or his heirs," 10 per cent. of the value of the ores mined on said land. The will under which Smith was given a life estate in said land provided that, if he died leaving no living issue, said land should go to the other surviving named devisees. As Smith owned only a life estate in the land, when he first made the contract for leasing same, the persons who were likely to be the remaindermen, including the defendant Kline, who did become such, signed an agreement to the effect that they "consented to and ratified the provisions of the contract for the lease" and "would execute a lease to our interests in said land for mining purposes under its provisions." The mining lease, however, was in fact executed by Smith alone, reciting, however, the above consent of the remaindermen. Some three years later, when Bowen, the lessee, sold and assigned this lease to plaintiff, the same probable remaindermen, inclusive of defendant Kline, signed and indorsed on the lease this agreement:

"For and in consideration of the sum of one dollar and other valuable considerations the receipt of which we hereby acknowledge, we hereby consent to and ratify in full the foregoing mining lease."

Later in 1910, Smith, who up to that time had received as rent or royalty 10 per cent. of the ores mined, made an agreement by which plaintiff, as lessee, paid him \$1,000 in cash and he was to receive thereafter the fixed sum of \$130 per month in lieu of the 10 per cent. royalty. This agreement provided that the lessee would pay "unto Fred D. Smith, or in the event of his death to his wife, Mary E. Smith, the said sum of \$130 per month on the third day of each calendar month thereafter" to the termination of the lease. The remaindermen had nothing to do with this last agreement. Thereafter the lessor and life tenant, Fred D. Smith, received the \$130 per month till his death on June 20, 1915.

Plaintiff's petition states that, since the death of Smith, the lessor, the defendant Kline, as owner of the land subject to the mining lease in question, has demanded that

plaintiff, as lessee, pay her 10 per cent. of the ores mined on said land since the death of the life tenant, and that defendant Mary E. Smith, wife of said lessor, is demanding the rent or royalty of \$130 per month for the same time; avers that plaintiff ought to pay only the latter sum and is willing to pay same to whomsoever the court may determine is entitled to receive it.

It is admitted that defendant Kline, on the death of Smith, the lessor and life tenant, and by reason of the prior death of the other contingent remaindermen, became the owner of this land, and said defendant acquiesces in the validity and continuing force of the mining lease having some 14 years yet to run. She demands the 10 per cent. royalty as following the ownership of the land. It is also conceded that, if the right of Smith to receive the royalty to be paid under this lease continued after his death to any one claiming under him, then defendant Mary E. Smith, his wife, is entitled to the \$130 per month.

[1] There can be no question but that the life tenant, without the consent or concurrence of the remaindermen, had no power to lease or otherwise incumber this land beyond the period of his life, and that any such lease or incumbrance would *ipso facto* terminate on and by his death. 16 Cyc. 640; Edghill v. Mankey, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; Guthmann v. Valtery, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; Hinton v. Bogart, 78 Misc. Rep. 46, 187 N. Y. Supp. 697; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424; Foote v. Sanders, 72 Mo. 616, 621; Missouri Central Building & Loan Ass'n v. Eveler, 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913A, 486. Section 7871, R. S. 1909, recognizes this principle.

[2] The mere giving consent by the remaindermen to the making of a lease by the life tenant for a term which may extend beyond the life tenancy, or ratifying such a lease before the death of the life tenant, would not, without more, have any greater effect than to prevent the remaindermen from terminating the lease on the death of the life tenant. In such case the lease would continue in force, but the rent would go to the remaindermen after such death, since the right to the rent follows the ownership of the land. Vantage Mining Co. v. Baker, 170 Mo. App. 457, 466, 155 S. W. 466; 16 Cyc. 652; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Stevenson v. Hancock, 72 Mo. 612, 615. In the note to Deffenbaugh v. Hess (Pa.) 74 Atl. 608, 36 L. R. A. (N. S.) 1099, 1106, the law is stated thus:

"Doubtless, where new mines are opened or mining rights sold after the inception of the life estate, by agreement between the life tenant and the remaindermen, they may make such provision as they choose for sharing the proceeds between themselves. But, in the absence of a stipulation on that subject, the proceeds from the sale or from mining operations belong to the corpus, and the life tenant will be entitled, not to the proceeds themselves, but mere

ly to the income from these proceeds during the continuance of the life estate."

[3] We have been speaking of such leases or incumbrances as a life tenant has a right to place on the land, but it is also true that, since the life tenant can do nothing to destroy or diminish the value of the inheritance, he cannot, where no mines have already been opened, either in person or by tenant, open such mines or extract minerals from the land. *Hill v. Ground*, 114 Mo. App. 80, 85, 89 S. W. 343, and cases cited. A list of cases supporting this proposition will be found in the note to *Deffenbaugh v. Hess*, 36 L. R. A. (N. S.) at page 1100. In *Hill v. Ground*, supra, this court said:

"Neither the life tenant nor the remaindermen before the contract was made had any right to conduct mining operations upon the land; the former for the reasons shown, and the latter for the reason that during the life term—a freehold estate—the remaindermen had no right to enter the land at or below the surface for any purpose."

[4] The remaindermen could, of course, have given or withheld consent to having the land mined by the life tenant, and could also consent to the making of a lease by the life tenant for a term which might extend beyond the life tenancy. But in such case, unless stipulated otherwise, the rent or royalty would follow the ownership of the land and would go to the remaindermen when the estate of the life tenant became extinct. The life tenant and remaindermen could, of course, in consenting to have this land mined, agree on a division of the rent or royalty, either as to the proportional amount to be paid to each during the entire term, or as to what portion of the term each should enjoy the rent. This principle was applied in *Mining Co. v. Baker*, 170 Mo. App. 457, 155 S. W. 466, where this court held that two persons jointly interested in land could, in making a mining lease thereon, expressly stipulate and agree that a certain portion of the rent should go to each during the entire term of the lease, and in such case the rent due one party would, on his death, continue for the benefit of his estate, though his interest in the land terminated with such death. This same principle is recognized in *Higgins v. California Petroleum Co.*, 109 Cal. 304, 41 Pac. 1087; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

[5] With these principles in view, we must interpret and determine the force and effect of the lease in question and the consent thereto given by the remaindermen. We would have no trouble in holding that the remaindermen have consented to the making of a lease permitting the removal of mineral ores from the land detrimental to the inheritance, and that such consent was given for the full term of the lease in question, though same extended beyond the termination of the lessor's life estate; but this, however, the remainderman concedes. It is also apparent that the remainderman, instead of

demanding, as she might, that a portion of the royalty be paid to her during the entire term, consented that all of it be paid to the life tenant during his life. Such is the reading of the lease to which the remainderman assented, containing this clause, to wit:

"The lessee agrees to pay lessor or his heirs ten per cent. of the gross value of all minerals removed by him."

We find nothing, however, upholding the contention that this remainderman has agreed that the rent or royalty shall, after the death of the life tenant and termination of his estate in the land, continue in favor of his estate rather than follow the ownership of the land under the law. The rent being made payable to the life tenant "or his heirs" indicates the contrary; for, if he had had issue, such issue would have been the remaindermen and entitled to the rent on the life tenant's death. The life tenant had no power to dispose of the land or any interest therein beyond his life by deed or will, and the persons who would take the land after his death were fixed by the conveyance to him. The word "heirs," as used in this lease, naturally and evidently was used to designate those who would succeed to the land on the life tenant's death (21 Cyc. 416; *Taylor v. Perkins*, 72 N. H. 349, 56 Atl. 741), and in the absence of issue such persons are the surviving remaindermen designated by the will giving the lessor the life estate, to wit, defendant Rowena Kline. The consent which the remaindermen first signed to the contract for a lease refers to the interest of the parties as being fixed under the provisions of the will of David Caldwell giving Smith the life estate with remainder over to the survivor of the persons there named. Since, however, the law invests the remainderman with the full ownership of the land and the right to the rents therefrom on the termination of the life estate, it is sufficient if we find nothing in the lease and consent of the remainderman thereto manifesting a different agreement. This we do not find.

The contract by which the life tenant and lessee agreed to commute the 10 per cent. royalty into a fixed monthly stipend of \$130, payable to the life tenant and on his death to his wife, is without influence, since the remainderman is in no way a party thereto or bound thereby.

We think it would be exceedingly harsh and not according to the real intention of the parties that in her desire to reduce the royalty to a fixed monthly stipend the plaintiff lessee bound herself to continue to pay such stipend in lieu of royalty after the death of the life tenant, when, by such death, no royalty would be due to his estate. The fixed payments are evidently intended to be in lieu of the royalty of 10 per cent., and, when the royalty ceases by termination of the life estate supporting it, then the payments in lieu thereof also cease. We hold therefore that defendant Rowena Kline is

entitled to the 10 per cent. royalty since the death of the life tenant, Smith, and the judgment of the trial court is reversed, and the cause remanded, to be proceeded with accordingly.

Since writing the foregoing opinion, in which ROBERTSON, P. J., concurs in the result, the question is raised as to the power of this court to interfere with the judgment in favor of defendant Smith. It is true that this suit is somewhat an anomaly, but we must treat it as we find it. Neither party made any objection in the trial court or here as to plaintiff's right to maintain the action, nor are there any objections to any of the pleadings. It is true that some at least of the essentials of a bill of interpleader are lacking, and that plaintiff is not altogether a disinterested stakeholder. The proceeding is more nearly what is sometimes termed a "bill in the nature of a bill of interpleader," of which it is said in 23 Cyc. 29:

"A bill in the nature of a bill of interpleader is distinguished from a bill of interpleader proper, in that there are grounds of equitable jurisdiction other than the mere right to compel defendants to interplead, and the complainant may seek some affirmative relief."

"A bill in the nature of a bill of interpleader differs from a bill of interpleader, in that the complainant by it seeks, not only to have the conflicting claims of defendants against himself, which he desires to discharge to the proper parties, adjudicated, but also some affirmative relief." *Brocklebank v. Lasher*, 109 Ill. App. 627.

It is also said in 23 Cyc. 28 that, where a defendant claims a larger sum than is admitted in the bill and seeks affirmative relief against the complainant, it is proper to file a cross-bill in order to bring all the equities of the parties before the court. It is also true that, where the bill is demurrable and the parties answer and go to trial, the defects are waived; and, if defendants interplead without objection and go to trial on the issues, objection that the case is not a proper one for interpleader is waived. 23 Cyc. 26. Nor is it objectionable that the claim of one defendant is legal and that of the other equitable. 23 Cyc. 19.

That a tenant from whom two or more persons are demanding rent may cause such persons to assert their respective claims in court is held in *Claser v. Priest*, 29 Mo. App. 1, and other cases to this effect are cited in 23 Cyc. 14. The present case is essentially an interplea, or rather a bill in the nature of a bill of interpleader, in which the plaintiff is tenant and the defendants rival landlord claimants. Plaintiff in her petition asserts the facts as to her tenancy and the rival claims of the defendants to the rent. While she asserts that she ought not to pay other than the \$130 per month, and that she has been paying same to defendant Smith, she offers to pay same to defendant Kline if the court so determines; and also offers to pay the original 10 per cent. royalty as rent to either claimant if the court

determines that is the amount due. It is apparent, however, that Mrs. Smith is demanding the \$130 per month as rent as the sole landlord and Mrs. Kline the ten per cent. royalty as rent as the sole landlord. The plaintiff's partiality to defendant Smith is due to the fact that she is demanding the smaller sum.

Neither party, however, has suggested or urged that plaintiff should pay rent to both, and each defendant has proceeded, both in the trial of the case and in the briefs here, on the theory that one defendant only is entitled to receive rent under this lease. The monthly stipend claimed by defendant Smith is but a substitution for the 10 per cent. royalty, and therefore represents the same fund. The essential element of an interplea or bill in the nature of interplea is that two or more parties claim the same fund, though possibly not the same amount, and that the parties instituting the proceeding do not want to be in danger of having to pay both and ask the court to determine which one is entitled to it. The determination of the court that one is so entitled carries with it the determination that the other is not so entitled, unless, indeed, the court makes a division thereof, and this was not done nor claimed in this case.

The plaintiff did not appeal and could not, since she was not aggrieved by the judgment of the trial court in that she was willing to pay either defendant and the court awarded it to the one demanding the least. Defendant Smith did not and could not appeal for the reason that she got all she demanded. On the only issue made by the pleadings, we hold that the court awarded the rent—the fund in dispute—to the wrong party, and in reversing that judgment and directing that it be awarded to the right party we must deprive the other party of the same.

The question of our jurisdiction of this appeal has not been raised by either party and is not briefed or discussed. If, however, it appears from the record that we have no jurisdiction, we should transfer the case. It seems to me that the amount of the rent already due is all that is directly involved in the appeal, and the payment of such rent may cease at any moment. Since my Associates, however, are of the opinion that the amount in dispute exceeds our jurisdiction for the reasons stated in the separate opinion of FARRINGTON, J., the cause will be transferred to the Supreme Court.

ROBERTSON, P. J., concurs in the result as stated.

FARRINGTON, J. (dissenting). I. Leaving out of consideration for the present the question of our jurisdiction, I can concur in what is said in the opinion of STURGIS, J., in so far as it affects Sarah B. Matlack and Rowena Kline, but I cannot concur in that part of his opinion which holds that the fixed

monthly stipend—payment of which under the contract of sale by the Smiths to Sarah B. Matlack was provided for in the sum of \$130 per month to Smith as long as he lived and in the event of his death to his wife during the period the lease was to run—is to abate and be no longer payable to Mary E. Smith.

Both the plaintiff and Mary E. Smith (a defendant) were asserting that there was due under this lease but \$130 to be paid during the entire unexpired term of the lease, monthly. Mary E. Smith was insisting that that be paid to her. Rowena Kline was insisting, as against the plaintiff, that she was entitled to 10 per cent. royalty on all minerals taken from this ground subsequent to the death of Smith.

As I view it, this is a three-cornered suit. Mary E. Smith, a defendant, made so by plaintiff's bill, was contending principally that she was entitled to a judgment decreeing that she be paid the sum of \$130 per month by the plaintiff until the lease expired and that this sum be paid to her by virtue of a contract made September 7, 1910, wherein Mary E. Smith and her husband were parties of the first part and the plaintiff was party of the second part, and wherein it was provided that the parties of the first part sold to the party of the second part all right, title, and interest they had in and to the minerals, mining rights and privileges, and access thereto until January 31, 1927, together with all right, title, and interest said first parties had in and to a certain mining lease dated January 31, 1907, wherein the royalty to be paid by the plaintiff, the lessee, was 10 per cent. In her answer Mary E. Smith sets up the facts and the contract under which she claims and the death of her husband, and asks that she be given judgment for \$130 per month until January 31, 1927. Defendant Rowena Kline, made so by the plaintiff, was contending principally that she was entitled to be paid 10 per cent. royalty on all ore taken out under the lease made in the first place by Smith and his wife and assented to by her; this royalty to be paid to her from the date of Smith's death until the expiration of that lease. The plaintiff set up all the facts and asked the court to adjudge and decree the validity of the Smith contract and to whom the \$130 per month should be paid. In her reply plaintiff in no way contradicts nor makes an issue of the claim set up in Mary E. Smith's answer as against the latter. As to Rowena Kline's answer, the plaintiff in her reply alleged that said Rowena Kline is estopped and debarred from claiming anything under the lease.

The trial court decreed, first, that the plaintiff had a valid lease to run for 20 years ending January 31, 1927, and that Mary E. Smith is entitled to and is to be paid under and by virtue of the lease and contract of September 7, 1910, the sum of \$130 per month

until the expiration of the lease, and that Rowena Kline is entitled to nothing. This decree was entirely satisfactory to the plaintiff, because it was the identical decree she was asking to have entered.

Now, the case comes up on appeal with Mary E. Smith, one of the defendants, not appealing, because she was given a judgment for just what she asked in her answer, and the plaintiff has taken no appeal from that judgment rendered against her in favor of Mary E. Smith wherein plaintiff is adjudged to pay Mary E. Smith \$130 per month during the entire unexpired term of the lease. On the other hand, the only party appealing is defendant Rowena Kline, because she was by the judgment of the trial court cut out of her alleged rights as a remainderman. Therefore the only rights that are for adjudication on an appeal from the judgment rendered are those asserted by the appealing defendant Rowena Kline. It is apparent that, so far as Rowena Kline's rights against the plaintiff are concerned, it is immaterial to her what the judgment is as to Mary E. Smith so long as she (Rowena Kline) can or does get what she is asking for, to wit, 10 per cent. royalty during the unexpired term of the lease; and it is apparent that so far as Mary E. Smith is concerned it is immaterial what final basis the law puts plaintiff and Rowena Kline on so long as she (Mary E. Smith) is getting what she asks for from the plaintiff. Their claims, as against the plaintiff, are based on different contracts, and their relations toward the plaintiff are different; Rowena Kline basing her rights on the original lease, and Mary E. Smith basing her rights on the contract of September 7, 1910.

The opinion of Judge STURGIS holds, and I think properly so, that Rowena Kline was in no way bound by the agreement between Smith and his wife and the plaintiff, and that she is entitled to the 10 per cent. royalty from the date of Smith's death until the expiration of the lease. He therefore reverses the judgment of the trial court and directs a decree to be entered in favor of Rowena Kline for the 10 per cent. royalty. The question whether, even though Rowena Kline is entitled to the 10 per cent. royalty, Mary E. Smith is or is not entitled to receive the \$130 per month from the plaintiff under the contract between plaintiff and the Smiths, is not, as I view the case, in issue on an appeal from the judgment rendered, as there was no appeal taken from that judgment by the party against whom it was rendered. We must presume that the Smiths and the plaintiff knew the law when they entered into that contract for the payment of \$1,000 and \$130 per month (payable to Smith, or to Smith's wife in the event of his death, until the expiration of the lease); Smith at that time owned more than a mere life estate, as he was entitled to the fee if he sur-

vived Rowena Kline, which (at September 7, 1910) was the probable thing that would happen considering the ages of Smith and Rowena Kline. We must presume that they knew when they entered into that contract of September 7, 1910, that so far as Rowena Kline was concerned they could not defeat her right to receive the 10 per cent. royalty in the event of Smith's death. There is nothing in the law, so far as I have been able to ascertain, to prevent the plaintiff entering into such a contract with Smith (who was the owner of both a life estate and a base fee) and his wife to pay them a stipulated amount per month for the full 20 years of the lease, even though, owing to the death of Smith prior to the termination of the lease, the plaintiff might be required and would be required to pay the holder of the remainder the 10 per cent. royalty mentioned in the lease. The judgment rendered against the plaintiff in favor of Mary E. Smith decreed the validity of such contract, and that judgment stands with no appeal therefrom taken by the party against whom it was rendered; there was nothing to prevent the plaintiff filing a cross-appeal attacking the judgment rendered against her in favor of Mary E. Smith.

All parties seem to have treated the various controversies in issue as in equity—that this is an equitable proceeding. In just what branch of equitable jurisprudence the plaintiff's petition could be said to fall I am unable to say. It certainly was not a bill of interpleader, because, as laid down in *Pomeroy's Eq. Jur.* vol. 4, § 1322, all the essential elements of such a proceeding are absent here. The same thing, debt, or duty is not claimed by the two defendants; that is, Rowena Kline demands something like \$5,552 royalties accrued since Smith's death, together with 10 per cent. future royalties, whereas Mary E. Smith claims, not that she is entitled to past royalties or payments in lieu of royalties, because plaintiff's bill and testimony show that Mary E. Smith has been paid the \$130 per month up to the date of filing the suit, but that she is entitled to future payments. The claim or title of Rowena Kline is based on the will and the original lease, whereas the claim of Mary E. Smith is based on the contract of September 7, 1910. Plaintiff has a personal interest in the determination of the question which of the defendants is to prevail, which fact is manifested by her bill and by her reply to Rowena Kline's answer and by the concluding prayer in her brief in this court to affirm the judgment of the trial court decreeing that Mary E. Smith is entitled to the benefits of the contract of September 7, 1910. Plaintiff also had incurred an independent liability to Mary E. Smith, dated September 7, 1910. Hence we see that the four essential elements of a bill of interpleader are

manifestly not in the plaintiff's petition in this case.

[8] II. Now as to our jurisdiction: Laying aside the question that this suit does or does not involve the title to real estate or to rights in real estate, we will look to the amount involved and determined by the judgment. First, as to Rowena Kline, it is claimed by the parties that covering the brief period of 7½ months (from the date of Smith's death on June 20, 1915, to January 29, 1916) the royalty due from plaintiff under the 10 per cent. provision amounts to \$5,552. If this is anything like a criterion, the amount involved in the judgment, so far as Rowena Kline is concerned, far exceeds our jurisdiction. As to Mary E. Smith, if the right to determine her interest under the contract in this appeal taken by Rowena Kline exists, the amount involved, if Mary E. Smith's judgment stands, is \$130 per month for nearly 12 years, provided the plaintiff does not voluntarily surrender the lease and quit mining under it, and if, as the majority opinion (on this particular question) holds, her judgment entered by the circuit court decreeing her this amount were to be by us set aside, we would be determining an appeal in which we would set aside a judgment involving something over \$17,000.

In the case of *Gartside v. Gartside*, 42 Mo. App. 513, which has been cited and followed by the Courts of Appeal and the Supreme Court, it was held that a suit for the removal of a trustee of an estate for life wherein the trust fund involved was some \$200,000 (although by death or for other cause the trusteeship might end before the trustee would have earned or received \$2,500, the jurisdictional amount at that time of the St. Louis Court of Appeals) must go on appeal to the Supreme Court, as the judgment manifestly affected his interest or might affect his right to a sum far in excess of the jurisdictional amount triable in the Court of Appeals. The case was transferred to the Supreme Court and jurisdiction retained. Same title, 113 Mo. 343, 20 S. W. 669.

The case of *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601, is cited in the case of *Gartside v. Gartside*, 42 Mo. App. 513, and it is also cited in Missouri Supreme Court cases discussing this question as to the manner of determining the amount involved. It held, that, where the Supreme Court of the United States has jurisdiction only when the amount involved in an appeal exceeds \$5,000, a case where an officer is dismissed who may earn from his salary a sum to exceed that amount is vested on appeal in the Supreme Court; and, of course, in that case the contingencies existed that the officer might be dismissed sooner on some other ground, or might die before he would have actually earned a sum to exceed \$5,000.

The case of *Gartside v. Gartside*, *supra*,

is approved in *McCoy v. Randall*, 222 Mo. loc. cit. 33, 34, 121 S. W. 31.

It is held in *State ex rel. Union El. L. & P. Co. v. Reynolds et al.*, 256 Mo. loc. cit. 718, 165 S. W. 801, that, if from the whole record the amount in dispute or the monetary value of the right lost is within the jurisdiction of the Supreme Court, the appeal lies there, rather than elsewhere, citing authorities. See, also, *Town of Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249, and *Bowles v. Troll*, 262 Mo. 377, 171 S. W. 326, wherein the Supreme Court refused to entertain jurisdiction in a case where it was attempted to make a guardian deliver the corpus of a ten thousand dollar estate, because, it held, such guardian was only entitled to certain commission and fees for handling this sized estate; the Supreme Court not believing that a guardian would be allowed more than \$7,500 for handling a ten thousand dollar estate, and therefore, as the only interest the guardian had in the management of the estate was the amount coming to him which was the real amount in dispute, the case went to the Court of Appeals.

I think the foregoing cases clearly show that the appellate court that undertakes to in any way affect, change, or reverse the judgment rendered for the nonappealing defendant, *Mary E. Smith*, will be dealing with a judgment wherein the amount involved is far in excess of the jurisdictional amount triable on appeal in a Court of Appeals in this state.

[7] All appellate courts agree that it is their duty to raise jurisdictional questions *sua sponte*. *Beechwood v. Joplin-Pittsburg Ry. Co.*, 173 Mo. App. 371, 158 S. W. 868.

I therefore dissent from that part of the opinion of *Sturgis, J.*, which affects in any way the judgment entered in favor of *Mary E. Smith*: First, because there has been no appeal from that judgment by the party against whom it was rendered; and second, because, if we desired to take that up, the amount involved precludes our jurisdiction.

ROBERTSON, P. J., concurs in paragraph 2 on the question of our jurisdiction.

BOOTMAN v. LUSK et al. (No. 1788.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916. Rehearing Denied Jan. 1, 1917.)

1. MASTER AND SERVANT — 129(1) — ACTION FOR INJURY — NEGLIGENCE — "PROXIMATE CAUSE."

Where a servant in loosening a bolt in a truck stood on the journal and pried with a claw bar, which slipped, causing him to fall from the truck, which stood on an unballasted track with the ties exposed, so that his injury was made more severe by striking one of the exposed ties, in his action for injuries on the ground of the master's negligence in failing to furnish a safe place to work, the slipping of the claw bar and

his fall, and not the exposed ties, were the proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 57; Dec. Dig. 129(1).]

For other definitions, see *Words and Phrases*, First and Second Series, Proximate Cause.]

2. MASTER AND SERVANT — 107(2) — INJURIES TO SERVANT — SAFE PLACE TO WORK.

A safe place to work does not ordinarily include a safe place to light in case of an accidental fall, unless the probability of the falling was so obvious as to require precautions with reference to a safe lighting place.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 200, 254; Dec. Dig. 107(2).]

3. MASTER AND SERVANT — 107(1) — ACTION FOR INJURY — NEGLIGENCE.

If the master was negligent in supplying the servant with a defective claw bar which slipped when in use and caused the servant to fall, the master was responsible for all consequences, though the result was made unusually disastrous by the exposed condition of ties in the track over which the servant worked, since, where the master should anticipate that any injury is likely to result from his negligence, he is liable for all that does naturally occur.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199, 212; Dec. Dig. 107(1).]

4. MASTER AND SERVANT — 219(5) — INJURIES TO SERVANT — DEFECTIVE CROSSING — SIMPLE TOOL DOCTRINE.

Where a car repairer having only occasional use for a claw bar, a number of which were supplied by the master, but none of which was included in his tool kit, picked up a claw bar for momentary use which was defective and caused him to fall and be severely injured, the simple tool doctrine should not be applied to defeat, as a matter of law, the servant's recovery for the injury, since the servant in such circumstances was not charged with the duty of observing whether the tool was or was not defective.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 614; Dec. Dig. 219(5).]

5. MASTER AND SERVANT — 219(5) — INJURIES TO SERVANT — DEFECTIVE CROSSING — SIMPLE TOOL DOCTRINE.

Nor in such circumstances should the master be excused on the theory that the car repairer himself selected the tool which caused the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 614; Dec. Dig. 219(5).]

6. MASTER AND SERVANT — 289(6) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Where a car repairer in removing a bolt from a truck requiring considerable force, jerked down on a claw bar he was not necessarily guilty of contributory negligence as a matter of law, but the question was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1095; Dec. Dig. 289(6).]

7. MASTER AND SERVANT — 276(2) — INJURIES TO SERVANT — CAUSE OF INJURIES — EVIDENCE.

Evidence held not to warrant holding as a matter of law that the servant's injuries resulted wholly from his diseased condition, and not from his accidental fall caused by defective appliances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 951, 959; Dec. Dig. 276(2).]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by F. M. Bootman against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Evans, of St. Louis, Neville & Gorman, of Springfield, S. E. Bronson, of Ozark, W. P. Sullivan, of Billings, and Mann, Todd & Mann, of Springfield, for appellants. Hamlin, Collins & Hamlin, of Springfield, for respondent.

STURGIS, J. The plaintiff was injured while working for defendant as a car repairer in the repair yards at Springfield, Mo. He claims to have ruptured an artery in his leg which necessitated an amputation of the same about a month later. The injury is alleged to have been caused while plaintiff was doing repair work on the trucks of a freight car, which trucks had been moved from under the car for that purpose. The attached photograph will explain the manner of his being injured:

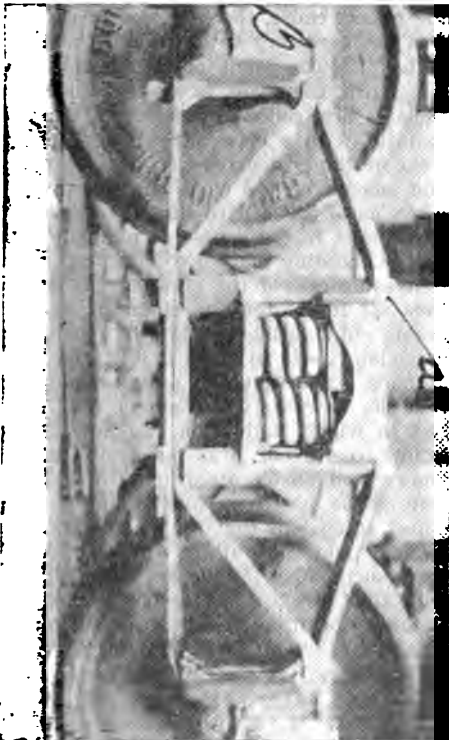


Exhibit 3.

Plaintiff was attempting to remove the column bolt A. To do so he had driven the bolt up an inch or so, and then used a claw bar weighing 25 or 30 pounds, such as section men use to pull spikes, to draw the bolt still higher by inserting the claws of this bar under the head of the bolt at A and pulling down upon it as a lever. The point A is some 2½ feet from the ground, and, to get a better

leverage, the plaintiff stepped up and stood on the journal box B. He then pulled down on the claw bar, which slipped from the head of the bolt causing him to lose his balance. To save himself from falling he stepped or jumped from the journal box on which he was standing, and in lighting the ball of his right foot came down on a tie some 6 inches above the level of the ground, and his weight, coming on this, forced his heel downward. The plaintiff described what happened thus:

"Now these column bolts go down through the queen post with a nut on the bottom. This particular bolt that I took out was a short bolt. It was all right, only it was short, and didn't have a full nut. Some car repairer put it in and just stuck a nut on it on the bottom. It did not extend over half an inch beyond the bottom of the post. That is the reason I had to take it out. I unscrewed the nut and took a toe jack and jacked it up to get all the space I could get so as to get a claw bar under the top, and after I jacked it up I picked up a claw bar and put it under the end. * * * Now, when I went to pull this column bolt that set over on that corner (indicating) I stepped my foot up on this box and brought myself up so I could reach over to get under that bolt, and I took hold of the bar and jerked back, and the bar slipped. If you understand, here is the box, and there the bolt, and here is the rail underneath them, and here is the column bolts and back here two box bolts (indicating). Now, I took out that first column bolt and jacked it up and drew this clear. That gave me about the distance to step on this box, and when I jerked down on this bolt the bar slipped and I went down on my right foot. Q. You pulled down on that bar? A. I jerked down. Q. What position was your body in? A. I was standing right up there (indicating). I jerked the bar toward me to the side, and as I made that jerk the bar slipped, and I stepped down with this foot, and when I stepped down I hit the edge of this tie with the ball of my foot, and, it not being ballasted up level, my heel went down to the ground. I fell down to the ground and let go of my bar and felt a stinging sensation about halfway between the ankle and the knee in the calf of my leg. It felt like a right smart sprain, kind of a tingling sensation. I got up and rubbed it a few minutes, and it felt a little easier, and I went on to work. It made me feel a little sick. This happened along maybe 2 or 3 o'clock. This truck would be two feet above the rail. This box upon which I was standing was somewhere near there. I couldn't tell you how high the rail was above the ties. It was an ordinary rail. The ties were six inches thick. I fell from the box onto a tie and caught the ball of my foot on the tie. I worked all the rest of that day."

The grounds of defendant's negligence alleged in the petition and submitted by the instructions are: (1) That defendant did not furnish plaintiff a safe tool with which to do his work, in that the claw bar on the edges and points was rounded and smooth to such an extent that it would not hold when inserted under the head of the bolt, but would, as it did, slip and cause plaintiff to fall; (2) that defendant did not furnish plaintiff a safe place to work, in that the railroad track where the defective car was placed to be repaired was a new, and what is termed a skeleton, track, the ties being laid on the ground without any ballast or filling in between the same, so that when

plaintiff fell or stepped from the truck in question his foot landed on the exposed end of the tie.

[1, 2] The defendant makes only one assignment of error here, that a demurrer to the evidence should have been sustained. The evidence abundantly supports the facts as to both alleged grounds of negligence, and same were hardly controverted at the trial. As to the conceded fact that the track at which defendant was working was a skeleton one with the ties exposed instead of being covered with ballast, the defendant's contention is that such condition of its track is merely one of the incidents attending plaintiff's fall from the truck and the consequent injury, and is not the efficient or proximate cause of such injury. It is certain that the condition of this track and tie had nothing to do with causing plaintiff to fall. This condition rather contributed to the amount than to the cause of plaintiff's injury. If a carpenter at work on a house should fall because of the breaking of the platform on which he is at work, and lights on a pile of rough stone instead of grass or mud, the stones would inflict the injury, but the cause, so far as negligence is concerned, is the breaking of the platform, and if that is due to the master's negligence there is liability, but not so if due to the servant's own negligence. We considered a somewhat similar proposition in *Schaller v. Lusk*, 184 S. W. 1179, wherein a workman fell from an engine, and in trying to save himself he grasped a loose pipe (negligently left loose so plaintiff claimed), which then fell with and on him to the ground. We there said:

"The loose branch pipe was not the proximate cause of plaintiff's injury, but it was the catching of his foot that started him on his fall. The thing that sets in motion a train of events that in their natural sequence ought to be expected to produce the result of which complaint is made is the proximate cause (*Holwerson v. St. Louis & Suburban Ry.*, 157 Mo. 218, 231, 57 S. W. 770, 50 L. R. A. 850, and *Glenn v. Metropolitan Street Ry. Co.*, 167 Mo. App. 109, 117, 150 S. W. 1029) and that thing must, of course, be characterized by the negligence of the party against whom complaint is made. It was not the duty of defendants to protect plaintiff against accidents not caused by defendants."

See, also, *Cody v. Lusk*, 187 Mo. App. 327, 342, 171 S. W. 624, and cases cited. Where a person is injured by a fall, the question of actionable negligence must be generally determined by the cause of the fall rather than any circumstance or condition connecting with his lighting. A safe place to work does not ordinarily include a safe place to light in case of an accidental fall. This, we think, would be true unless the probability of falling was so obvious as to require precautions with reference to a safe lighting place, as was true in the unofficial report of *In re "Darius Green And His Flying Machine."*

[3] But it is also true that negligence fixing responsibility for a fall also carries with it responsibility for all its consequences, though the result may be unusually disas-

trous. Thus, to use the same illustration of a carpenter working on a house, if he falls because the master has furnished a defective and unsafe platform to stand on, and thereby falls on sharp stones, causing death, where only slight injuries would otherwise occur, the master is liable for the death. We know of no case that would exempt defendant from liability for all the injuries received by plaintiff, provided defendant is responsible for causing his fall, although it is true that plaintiff's injuries would have been slight, and probably negligible, had it not been that his foot came in contact in a peculiar manner with the exposed tie; and this is true regardless of any negligence connected with this tie being exposed. When the master should anticipate that any injury is likely to result from his negligence, he is liable for all that does naturally occur. *McDonald v. Railroad*, 219 Mo. 468, 491, 492, 118 S. W. 78, 16 Ann. Cas. 810, and cases cited.

The jury was required to and did find that both alleged grounds of negligence existed; i. e., that both the proximate and remote cause of plaintiff's injury arose from defendant's negligence. Such finding as to the remote cause, the condition of this track, was not necessary to fix liability and is immaterial. The point on which this appeal must turn, therefore, is whether there is actionable negligence in defendants' furnishing plaintiff with a claw bar which, because of wear or faulty construction, was so rounded and smooth on the edges and points of the claws as to cause it to slip when used to remove bolts in the course of plaintiff's work.

[4] Conceding that such defect existed and that same caused the claw bar to slip, and thus set in motion the chain of successive events culminating in plaintiff's injury, the defendant seeks to avoid liability on various grounds. The first and most serious one is that the claw bar was a simple tool, any defect in which, and when and how to avoid injury therefrom, was as well or better known and easily discovered by the workman as the master—a tool so simple and the defect so obvious that the master should not be held liable for failure to inspect and discover such defect for the workman. The doctrine thus invoked has received some, though slight, recognition in this state. *Blundell v. Mfg. Co.*, 189 Mo. 552, 562, 88 S. W. 103; *Anderson v. Box Co.*, 103 Mo. App. 382, 77 S. W. 486; *Rahn v. Railroad*, 129 Mo. App. 679, 108 S. W. 570; *Beckman v. Brewing Co.*, 98 Mo. App. 555, 561, 72 S. W. 710; *Lowe v. Railroad*, 265 Mo. 587, 178 S. W. 442. This doctrine was discussed and its application narrowly limited in *Harris v. Railroad*, 146 Mo. App. 524, 124 S. W. 576. That case, on reaching the Supreme Court, went off on the ground of contributory negligence. 250 Mo. 567, 157 S. W. 564.

Plaintiff was 59 years of age, a skilled carpenter, and had worked for defendant rail-

road for 8 years as a car repairer. There were 19 tracks in the yards, and the number of car repairers varied from 400 to 1,000. Each car repairer was furnished a kit of tools, but this did not include such heavy tools as jacks, claw bars, and pinch bars. These bars were left laying about the yards as used. There were a number of them, some 12 to 15, about the yards. The one used by plaintiff was found near his place of work. He says he made a casual inspection of it, saw nothing wrong, thought it was all right, and proceeded to use it. He made no particular inspection or test to see if it would hold on the bolt. He placed the claws under the head of the bolt, threw his weight on it, and it slipped, and he fell. An examination after the injury showed that the claws of this bar were worn off and rounded and would not go clear around the bolt, and this caused it to slip. Plaintiff did not look for any other claw bar till after his injury, and then found another "away up in the yards." It took him from 15 to 20 minutes to find another bar.

We are persuaded that the doctrine should not be applied to defeat plaintiff's recovery as a matter of law under the facts in this case. This claw bar in question was not a tool in frequent use by plaintiff, and was not furnished for his special or exclusive use. It was not under his control or inspection. Several such claw bars were furnished and left in the yards for general use by the numerous employes whenever needed. When plaintiff had need of one on this occasion he found this one near his place of work, and, as he says, he merely glanced at it, and, seeing no defect, he proceeded to use it. It is also true that a person standing on the ground and using a claw bar to draw spikes, as in the Harris Case, *supra*, or using a pick to remove ties as in the Lowe Case, *supra*, is in little danger of being injured from a defect in so common and simple a tool. Yet it would be quite different with one doing work as plaintiff was while standing on a narrow elevated position. In such position the slipping of the claw bar would be far more likely to result in injury. This case therefore falls more nearly in the class where, though the tool itself is simple, the work is complicated and dangerous. Harris v. Railroad, 146 Mo. App. 524, 536, 547, 124 S. W. 576.

[5] Nor do we think this case calls for the application of the rule of contributory neg-

ligence, in that plaintiff himself selected the defective tool. It is true that there were other such tools in the yards, and, had plaintiff known of or discovered a defect in this one, he might be held negligent as a matter of law in not discarding it and hunting a better one. He was working by the piece, and naturally would use the tools at hand so as to save time, and, with no knowledge of any defect, he should not be conclusively held negligent for not more closely inspecting this tool and then going to the trouble and delay of looking through the yards for a better one.

[6] Nor can we hold plaintiff guilty of contributory negligence in his manner of using the claw bar in that he "jerked down on it" in trying to pull this bolt. It is evident that it took considerable force to move this bolt, and this expression was plaintiff's way of saying that considerable force was applied. This case differs from both the Lowe Case and the Harris Case, *supra*, in that plaintiff did not know or have reason to believe that the claw bar was defective and might slip. The respective plaintiffs in those cases were held guilty of contributory negligence in that, knowing of the defective tool and what might result therefrom, they took no precautions for their own safety in the manner of its use. These questions of contributory negligence were properly submitted to the jury, and its finding thereon is conclusive.

[7] The verdict was for only \$1,000 for the loss of plaintiff's leg. This is accounted for by the fact that the evidence showed that plaintiff's leg was already diseased, having what is termed an aneurism or diseased artery below the knee. The medical evidence is to the effect that this aneurism was the real and probably the only cause of the leg having to be amputated. There is evidence, however, that the injury sued for aggravated this already considerably developed diseased condition. The jury was instructed that if they found that plaintiff's leg was already diseased to take such fact in consideration in estimating damages. This the jury doubtless did, and we are not willing to hold that there is no substantial evidence of plaintiff receiving any injury from the accident in question, and that is all defendant asks us to do.

The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

RISINGER v. BEGLEY. (No. 1790.)

(Springfield Court of Appeals. Missouri. Dec. 18, 1918.)

1. APPEAL AND ERROR ¶882(12)—GROUND FOR REVERSAL—INSTRUCTIONS.

In an action for a balance due for services, the giving of defendant's instruction alleged to be in conflict with a correct instruction given for plaintiff did not make plaintiff's instruction erroneous so as to require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ¶882 (12).]

2. PRINCIPAL AND AGENT ¶24—EXISTENCE OF AGENCY—DIRECTION OF VERDICT.

Where, in an action against two defendants for services, the evidence was conflicting on the issue whether one defendant acted as the other's agent in employing plaintiff, the court properly refused to direct a verdict for the alleged principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 722, 723; Dec. Dig. ¶24.]

3. ACCOUNT STATED ¶1—PLEADING—ACTION FOR SERVICES.

An action for a balance due for services was not an action on an account stated, where there was no allegation that plaintiff stated the account to defendants and that either defendant agreed to its correctness and promised to pay the balance due.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1-8; Dec. Dig. ¶1.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by J. D. Risinger against George Begley, Junior, and another. From judgment for plaintiff, the defendant named appeals. Affirmed.

John A. Gloriod, of Poplar Bluff, for appellant. B. J. Puckett, of Poplar Bluff, for respondent.

STURGIS, J. The plaintiff was convinced that there was a balance due him of \$136.60 for his services in holding and taking care of a farm and farm house owned by defendant Begley, but in charge of defendant Blankenship, and as each of said parties, while admitting the correctness of his claim, insisted that the other was the proper one to pay, he brought suit against both. He alleges that he was employed by and worked for defendants for six months at \$45 per month, and had been paid \$133.40, leaving a balance as stated. With his claim, first filed in a justice court, was filed a statement of the account charging defendants with six months' work at \$45 per month, amounting to \$270, and giving credit for various items of payment with dates amounting to \$133.40, and showing a balance due of \$136.60. The real contest was whether defendant Blankenship had authority to and did employ plaintiff for and on behalf of defendant Begley, or whether he should be held personally. The jury found for plaintiff and against defendant Begley only.

It appears from the record that defendant Begley was anxious to get and hold possession of a certain house and land which he claimed to own, though we are not informed as to who was the adverse claimant or the circumstances of such claim. Neither defendant makes any contest of the fact that plaintiff was selected as the proper man to hold possession of these premises, and so strenuous were his duties that he kept a Colt's automatic and a shotgun as his companions. He says the price he was to receive was very low for these services; and to this we agree.

[1, 2] As to the contract of hiring, plaintiff says that defendant Blankenship hired him, but that he understood that Blankenship was acting for defendant Begley, who was to be the paymaster and who did afterwards pay him in part. Defendant Blankenship testified that defendant Begley authorized and directed him to employ plaintiff, and that he did so as Begley's agent and on his behalf. All this is denied by defendant Begley, who claims Blankenship employed him on his own account as he had rented the land and wanted possession. This was a sharply drawn issue, and plaintiff's instruction on this point is short and simple. It reads:

"The court instructs the jury that if you believe from the evidence that J. D. Risinger was employed by E. H. Blankenship under and by the consent of defendant Begley to hold possession and work on the farm at the price and sum of \$45 per month, then your verdict should be for the plaintiff, provided you further believe Begley agreed to pay for Risinger's services."

If defendant's instruction on this same point is conflicting therewith, as he claims, then that is his fault and does not make plaintiff's instruction erroneous. It is seldom that the giving of an instruction for defendant which conflicts with a correct instruction given for plaintiff can work a reversal of the case when the verdict is for plaintiff. On reading the instructions, however, we do not find any material conflict therein. What we have said also disposes of the point that a verdict should have been directed for defendant Begley for lack of evidence to sustain the same.

[3] Another point is that plaintiff sued on an account stated and was allowed to recover on an open account. The principle is invoked that a plaintiff cannot sue on one cause of action and recover on another. To this plaintiff replies that plaintiff's statement of his claim is no nearer a stated account than it is an indictment for murder. No authorities are cited. Plaintiff's counter suggestion raises a novel and interesting comparison. It will suffice, however, for this court to decide that plaintiff's claim is not founded on an account stated. There is no allegation that plaintiff stated the account to defendants and that either agreed to its cor-

rectness and promised to pay the balance due.

If the verdict and judgment are for the wrong party, as defendant claims, the jury is to blame therefor, and this court cannot correct such an error even if it exists, though we do not so decide.

The judgment must be affirmed.

FARRINGTON, J., concurs. ROBERTSON, P. J., not sitting.

BUCKNER v. MIDLAND FARM & LAND CO. (No. 1829.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1916.)

1. APPEAL AND ERROR ⇐171(2)—THEORY OF CASE.

Where attorneys for both parties announce in trial court that they will try the case as one in equity, such theory of the case controls on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1161-1165; Dec. Dig. ⇐171(2).]

2. EQUITY ⇐39(1) — AWARDING COMPLETE RELIEF.

Where a case is submitted by both parties as one in equity, the court will decide the whole issues, and award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is one which might be conferred at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114; Dec. Dig. ⇐39(1).]

3. SPECIFIC PERFORMANCE ⇐99 — RIGHT — PLEADINGS.

Where a vendee sued on an orchard contract for damages for failure of vendor to plant and care for trees as agreed, and the vendor made general denial and asked for specific performance, and the case was submitted in equity, the vendor, although failing to perform, was entitled to specific performance on allowing damages for such failure to perform; the vendee not asking rescission, but that he be made whole by allowance of damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 299-304; Dec. Dig. ⇐99.]

Robertson, P. J., dissenting in part.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by R. A. Buckner against the Midland Farm & Land Company. From judgment, plaintiff appeals. Modified and affirmed.

Lee B. Ewing, of Jefferson City, and Wright Bros., of Springfield, for appellant. H. D. Green, of West Plains, and Sebree & Orr, of Springfield, for respondent.

ROBERTSON, P. J. The defendant is incorporated under the laws of Iowa and authorized to do business in this state. Some time prior to 1912 it purchased a great many acres of land near Koshkonong, in Oregon county, and began the planting of orchards

and the selling of the land in small tracts. Defendant had its principal office and place of business at Des Moines, Iowa, and from that point it did its advertising and corresponded with prospective and actual purchasers. The plaintiff saw defendant's advertisement, and upon making further inquiry concerning the proposition he received a circular from defendant which contained a map showing what was designated as the Koshkonong peach district and also a plat of the land owned by the defendant. The circular stated that:

"We will sell you one of these ten-acre tracts, develop and care for same for a period of three years, and at that time deliver to you an orchard of 1,600 Elberta peach trees of bearing age."

The circular contained many statements concerning the productiveness of peach trees in that locality and the value of such orchards. This circular was accompanied by a letter from defendant to the plaintiff, and after some correspondence and negotiations between the plaintiff and representatives of the defendant the plaintiff made a formal written application upon a blank furnished by the defendant for 20 acres of land known as blocks numbered 1 and 2. The application stated that the plaintiff directed the defendant to prepare the ground and plant it to Elberta peaches and to "care for the same for a period of three years from the time of planting, such care to consist of proper cultivation, pruning, protecting, and shaping the trees." For the land and the orchard so planted and cared for the plaintiff agreed to pay the sum of \$5,500. Six hundred of this was remitted with the application, and he was to pay \$50 on the 1st day of each month until such payments amounted to one-half of the purchase price. He was then to receive a warranty deed and execute his note, due in one and two years, secured by a deed of trust on the land for the balance of the purchase price. Included in the application was also a provision that the defendant should build a house on each tract, and if the houses were not desired by the plaintiff, a deduction of \$700 was to be made from the purchase price. It is also stated that, if the defendant accepted the application, a contract should be executed by the defendant. The application was accepted on December 9, 1911. The contract was executed, and it recited that, in consideration of the application (which was expressly made a part of the contract) for 20 acres of peach land fully developed, accompanied by the \$600, and in consideration of the agreement to make the monthly payments, the defendant agreed to execute a warranty deed for the land fully developed. The defendant also agreed therein to clear the land, plant the required number of fruit trees, and care for the orchard for the period of three years

according to the application. The defendant planted the trees, but not according to contract, as contended by plaintiff, a question to be hereafter discussed, the plaintiff made the payments to and including March, 1914, thus making a total sum paid of \$1,900, and in April, 1914, a breach occurred between the parties, resulting in this litigation. The plaintiff apparently elected to take credit for the \$700 provided for the house. It is claimed by plaintiff that the orchard became worthless.

In May, 1915, this action was brought in Oregon county, the plaintiff alleging:

The failure of defendant to comply with its "contract in this, to wit: That it did not set out said orchard at the first planting season after December 19, 1911; that it did not put the land in good condition for planting before setting out the trees; that it did not set out trees of good quality on said tract; that it did not set out said orchard in a good husbandmanlike manner; that it did not set out 160 trees to each acre; that it did not properly or skillfully cultivate, prune, shape, protect, and care for the trees set out in said orchard; that it did not turn over to plaintiff said tract of land containing 3,200 peach trees in good condition and of bearing age, and at the end of said three-year period in 1915, and did not execute and deliver to plaintiff a warranty deed to said tract of land."

To this answer the defendant filed a general denial and set up the copy of the application and contract, alleged that it had complied with all of the terms and provisions thereof and that the plaintiff had not made the payments as therein provided for and prayed judgment for the balance due to be satisfied by the payment of cash and the notes secured by a deed of trust as provided for in said application and contract upon the delivery to plaintiff of the warranty deed, and for general relief. A change of venue was taken by defendant, and the case was sent to and tried in Greene county.

Immediately preceding the introduction of testimony one of the attorneys for defendant remarked that:

"The defendant's answer sets up matters asking for specific performance of the contracts sued on and for equitable relief. We think the case is an equitable case."

To which an attorney for plaintiff replied: "We will try the case before the chancellor."

The plaintiff then proceeded to the introduction of his testimony, and the trial took the regular course of a trial to the court. As the result of the trial the court found that the plaintiff had sustained damages in the sum of \$900 on account of the failure of the defendant to properly care for the orchard, and that after deducting that amount from the purchase price the defendant was entitled to have the contract fully performed, and ordered the defendant to execute the plaintiff a warranty deed, the plaintiff to deliver to defendant his two promissory notes for \$1,000 each, and that the defendant have judgment for \$2,000 to be satisfied by execut-

ing said notes within 30 days; otherwise to have execution therefor. The plaintiff has appealed.

The rule that an action at law is converted into one in equity by the filing of an answer may have no place in this case. The answer denies the allegations of the petition and prays for equitable relief, but this may not convert the plaintiff's action into a suit in equity. *Grayson v. Weddle*, 80 Mo. 39, 42. Had defendant confessed the allegations of plaintiff's petition and sought to avoid the effects thereof by a plea for equitable relief, based on allegations justifying it, then the action would have been wholly converted into one in equity. *Schuster v. Schuster*, 93 Mo. 438, 443, 6 S. W. 259; *Allen v. Logan*, 96 Mo. 591, 598, 10 S. W. 149; *Betzler & Clark v. James*, 227 Mo. 275, 390, 391, 126 S. W. 1007. We refer to these matters without deciding them, because it has been intimated that the trial of other similar cases await the result of this, and if they are to be tried less confusion will arise if the established rules of procedure are recognized and followed.

The trial court found that defendant had not complied with its contract, and, since defendant has not appealed, and has thereby signified its willingness to accept that as a correct ruling, we might so treat it, and decide the case on that theory; but, as we think the trial court's finding must be upheld upon this point, and this is to be treated as a suit in equity, we shall not base our conclusions on the technical attitude in which defendant is placed by its failure to appeal. We shall as briefly as we think proper review the testimony and discuss the contract.

It will be observed in reading the assignments of the breaches of the contract by defendant, which are copied above, and which are based on previous allegations in the petition of said things the defendant agreed to do, that the failure of many things are charged that are not expressly provided for in the contract. The plaintiff contends that all of matters complained of must be construed as coming within the spirit of the contract when construed in the light of the facts and circumstances surrounding its execution and performance. The defendant quotes and relies on the old test of:

"Tell me what you have done under a deed, and I will tell you what that deed means."

So that we have no serious controversy over the law of this phase of the case, but concerning the facts.

One contention is as to when the trees should have been planted under this contract. In November before plaintiff signed the application in December he visited the orchard district and there talked with a representative of this defendant. He was assured that the orchard would be planted before Christmas; that the company's teams were idle, and they would be put to work

within a week plowing and cross-plowing the land. This testimony is undenied. Later, and evidently before the application was received by defendant, the said representative wrote plaintiff stating that the teams were at work plowing the 40 acres, of which the 20 taken by plaintiff was a part. Under date of January 19, 1912, after plaintiff's application was accepted, this same representative wrote to plaintiff stating that:

"The ground is prepared for planting, and as soon as the weather conditions are all right we will have the trees in the ground."

There was uncontradicted testimony to the effect that the trees should have been planted as soon as the frost leaves the ground, and that trees planted as late as these (about April 20th) did not produce the best results. As a matter of fact there was no plowing done until in April on plaintiff's tract, and then only one way. The contract which defendant executed and delivered to plaintiff contemplated and must be construed to mean that defendant would do all things which were usually done, under the same or similar conditions, by those engaged in this line of business, and also the things that it intentionally led plaintiff to believe, before he signed his application, would be done, if plaintiff relied thereon, and by reason thereof entered into the contract thinking that would be its construction. We have no doubt of the correctness of the plaintiff's contention that the trees were not planted sufficiently early. There is testimony tending to prove that the trees were poorly set, but, as it is meager, we shall pass that question and announce no conclusion thereon.

That good husbandry demanded that the land where the trees were set be cultivated is shown by the testimony of all witnesses on that question. The defendant failed to meet this requirement. It undertakes to excuse this from the fact that the spring and summer of 1912 was a very dry one, but again the uncontradicted testimony is that the early part of it was wet. The further fact is likewise disclosed that when ground is properly plowed in the winter or early spring no drought thereafter renders it too dry for cultivation. Such cultivation is especially beneficial in dry weather. A few rows of corn were planted between the trees. The trees were never sprayed or pruned. There was but little, if any, cultivation of the corn. Many trees died of the first year's planting. Every year there were trees that had to be replaced, and at the time the controversy arose which led to this suit plaintiff claims it had become evident to him, inexperienced as he claims to have been in this line of business, that the orchard on his piece of land was not up to the standard of what orchards usually were at that age when properly planted and cared for. The witnesses for defendant conceded the necessity of proper plowing before setting the trees out and of cultivation thereafter. The defend-

ant had in charge at the time the trees were set out and for some time thereafter a local manager by the name of Moore, and it was shown by statements made by Benson, who afterwards became manager, that Moore not only made no effort to comply with the contract, but refused to allow such work to be done as was contemplated by its terms. There is some testimony that plaintiff undertook to interest his friends and acquaintances in defendant's proposition, even after it is claimed he should have discovered that defendant was not complying with its contract with him. If plaintiff did this under such circumstances, we cannot see how that could excuse defendant from living up to its contract. We are not convinced that at the time plaintiff was undertaking to interest others after he had become aware of the true conditions. The trial court properly found that the defendant did not properly care for the orchard, and we uphold that finding. We also conclude that the ground was not properly prepared for the trees before they were planted.

The most difficult question to be determined under the evidence is the amount of the damages plaintiff should recover. The plaintiff adopts as his measure of damages the difference between the value of the land with an orchard such as defendant grew thereon and the value of the land with an orchard such as would have been thereon had defendant complied with the contract. This the defendant does not challenge. We find the land with an orchard thereon of the kind defendant would in all probability have grown if the contract on its part had been carried out to have been worth not less than \$275 per acre, but that the land with the orchard actually produced thereon was worth not to exceed \$100 per acre. The difference was therefore \$175 per acre, or a total of \$3,500. This amount should have been assessed instead of \$900, the sum allowed by the trial court, as plaintiff's damages.

The next question to decide is whether or not a court of equity should decree specific performance where it is found that the party seeking such relief has not complied with the contract to be thus enforced. The plaintiff asserts that no such relief should be granted, and the defendant offers no argument or authorities to sustain the action of the court in this regard. We doubt if any authority can be found for such a course. In fact, it is stated in defendant's brief that:

"No one is entitled to a decree of specific performance without allegation and proof of performance of the conditions precedent thereto."

Then defendant argues that it performed, but plaintiff did not. The trial court held the contrary, and we sustain that holding. The plaintiff did comply with the contract, and made his payments up until the time the controversy arose that culminated in this suit, but the defendant long prior thereto had defaulted. Under such circumstances if

should not have a decree of specific performance. It is so held in decisions of the Supreme Court of this state. *Lanyon v. Chesney*, 186 Mo. 540, 551, and 552, 85 S. W. 568; *Compton-Hill Improvement Co. v. Tower's Executors and Devisees*, 158 Mo. 282, 292, 59 S. W. 239.

The other judges do not agree with my views as to the amount of plaintiff's damages or as to that part of the judgment concerning specific performance as stated in their separate concurring opinion. The result, however, is that the judgment must be reversed, and the cause remanded, with directions to modify the judgment as directed in said separate opinion.

It is so ordered.

FARRINGTON, J. (concurring in part). We think the decree of the trial court should be affirmed in all particulars except as to the amount of damages allowed the plaintiff. After carefully considering the evidence on the question of the damage to the orchard by reason of the failure on defendant's part to fully carry out and perform its agreements, we think it shows that the damages sustained by plaintiff amount to \$1,900, which is \$1,000 more than was allowed by the trial court.

Appellant seriously contends in this court that the decree of the trial court is erroneous, in that, having found that the defendant had breached its contract, the trial court then decreed specific performance of the contract after crediting the amount of the damages sustained by reason of the breach.

We are cited by appellant to authorities holding, and we are fully cognizant of the rule in equity, that specific performance of a contract will generally be denied to one who cannot show a substantial compliance with his part of the contract.

We, however, do not believe that this rule applies to the case before us, or that appellant's position and insistence that we increase the damages allowed is consistent with the position taken as to specific performance.

If his suit for damages now stands as purely one at law, then all we are permitted to do is to read the record produced to determine whether or not there is any substantial evidence to uphold the verdict, and unquestionably this record contains evidence which tends to uphold the verdict and judgment for damages in the amount allowed.

[1, 2] We have not treated the case as one at law, for the reason that it appears in the abstract furnished that both the attorneys for plaintiff and the attorneys for defendant announced to the trial judge that they would try this case in equity, and, having submitted to try the whole controversy in equity, the court of equity thereby acquired jurisdiction of the entire controversy, and, since this is true, the rule applies that, where equity once acquires jurisdiction of a portion or feature

of a controversy, it will generally proceed to decide the whole issues, and will award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law. 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 231; 16 Cyc. 106, 107, 108; *Reyburn v. Mitchell*, 106 Mo. loc. cit. 378, 16 S. W. 592, 27 Am. St. Rep. 350; *Real Estate Saving Inst. v. Collonious*, 63 Mo. loc. cit. 295.

Therefore, for the reason that both plaintiff and defendant treated the cause of action stated in the petition and the cause of action set up in the answer as of such a nature as to invoke the jurisdiction of a court of equity, and because both parties have asked this court to review the whole case, including the amount of damages, as a case in equity, we will do so, on the principle of deciding the case here on the theory on which it was tried below, and on the further principle that a court of equity, having once acquired jurisdiction of the subject-matter, will proceed to decide the whole issues and award complete relief to all parties, whether of an equitable or legal nature.

[3] On analyzing plaintiff's petition it will be seen that he is laying a cause of action for damages because the defendant failed to do certain agreed things affecting the land which plaintiff had agreed to purchase. His suit must necessarily therefore be for the damages occasioned by the breach by defendant of its contract to do certain things to the land of which plaintiff is at least the equitable owner. He has not asked for a rescission of the contract, but, as said before, has based his cause of action for damages on the ground that he is the owner of this land. It is damages to his land that he seeks pay for from the defendant by reason of its breach of contract. If he was not claiming the land, he would have no cause of action because of defendant's failure to carry out some contract as to that land. We can see no difference in Buckner's position as it stands in this case than it would have been had the land company brought a bill in equity asking specific performance on the part of Buckner, and Buckner, instead of refusing to take the land, had admitted in an answer to such bill that he had made the contract to purchase the land, and that the land company had by reason of failing to do certain things damaged him, for which he would ask an allowance in damages. The position he would take on that supposed case would necessarily waive the right to defeat the bill because of a failure to fully perform, and would affirm the contract, and, as the equitable owner of the land, require the land company in fully performing its contract to pay him in damages for that which it had failed to do in carrying out its agreements. In other words, we hold that, had the land company brought a suit for specific performance against

Buckner, and Buckner had merely answered denying that the land company had fulfilled its contract, the land company's bill should be dismissed on a showing that it had failed to fully perform its part of the contract. But where the land company brings a suit for specific performance, and Buckner does not defend on the ground that it had failed to fully perform its part of the contract and that he will therefore not take the land, but does defend on the ground that he has been damaged by virtue of the failure, he thereby necessarily says to the land company:

"You make me whole by making me a warranty deed to my land and by me then paying you the contract price, less the damages you have occasioned me in failing to comply with certain particulars of the contract."

And this is exactly the view the trial court took in rendering the decree as it did.

We think the decree of the lower court should be affirmed, but that it should be amended to the extent that it allow the plaintiff damages in the sum of \$1,900 instead of \$900, and that defendant is to furnish plaintiff an abstract of title to the land and execute to plaintiff a warranty deed to the land, and that plaintiff thereupon deliver to defendant his promissory note for \$1,000 to become due December 8, 1917, bearing interest at the rate of 6 per cent. per annum from the date on which the warranty deed is tendered, said note to be secured by a deed of trust on the land, and that defendant have judgment for \$1,000 to be satisfied by the plaintiff executing within 30 days his said note and deed of trust as above provided; otherwise to have execution therefor.

STURGIS, J., concurs herein.

REYNOLDS v. ST. LOUIS S. W. RY. CO.
(No. 1914.)

(Springfield Court of Appeals. Missouri. Dec. 16, 1918.)

COMMERCE §47—"INTERSTATE COMMERCE"—
BREAKING SHIPMENT.

Where a showman, intending to go from a point in Arkansas to a point in Missouri, checked his outfit to a point in Missouri near the state line, and then rechecked it to his intended destination, intending thereby to avoid the baggage regulations governing interstate shipments, and the outfit was destroyed while in a car waiting to be transported from the last checking place to the final destination, the shipment was interstate not intrastate, and the liability of the carrier is limited by the regulations approved by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. §47.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by C. C. Reynolds against the St. Louis Southwestern Railway Company.

Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Edw. A. Hald, of St. Louis, A. L. Burford, of Texarkana, Tex., and Wammack & Welborn, of Bloomfield, for appellant. J. F. Kifer, of Bernie, J. L. Downing, of Malden, and H. N. Phillips, of Caruthersville, for respondent.

FARRINGTON, J. The plaintiff recovered a judgment for damages in the sum of \$1,750 on account of the total loss of a moving picture show outfit, a number of articles such as are used by sleight of hand performers, and other paraphernalia of a moving show.

Plaintiff bought a ticket from Bernie, Mo., to Delta, Mo., towns on defendant's line of railway, and checked his show outfit to Delta, paying excess baggage charges. These articles were in a car on the track at Bernie, having been transported by defendant from St. Francis, Ark. While the car was waiting at Bernie to be transported to Delta, an explosion occurred in the car from some cause not disclosed, and the car and contents were consumed by fire.

The petition was based on the theory that the shipment from Bernie to Delta was an intrastate shipment, that the defendant was an insurer, and, having failed to deliver the plaintiff's property at its destination, was liable for its value. This was the theory adopted by the trial court in the instructions given, and is the theory on which the judgment was rendered, and, of course, is the theory on which respondent seeks to have the judgment affirmed. The defendant set up the defense that this car of goods was shipped by the plaintiff from Humphrey, Ark., to Delta, Mo., that it was an interstate shipment, and that the liability for the loss, if any, is to be governed by the rules applicable to a loss sustained by an interstate shipment rather than the rules applicable to a loss sustained by an intrastate shipment.

Defendant offered to prove the tariff approved by the Interstate Commerce Commission under which it claims the shipment was made from Humphrey, Ark., to St. Francis, Ark., and from St. Francis, Ark., to Bernie, Mo., and from Bernie Mo., to Delta, Mo., as follows:

"Baggage of Excess Value. (a) This company will not accept for transportation as baggage from any one passenger property that is declared to exceed twenty-five hundred dollars in value. (b) Unless a greater sum is declared by the passenger and charges paid for increased valuation at time of delivery to carrier, the value of baggage belonging to or checked for an adult passenger shall be deemed and agreed to be not in excess of one hundred dollars, and the value of the baggage belonging to or checked for a child traveling on a half ticket shall be deemed and agreed to be not in excess of fifty dollars. (c) If passenger, at time of checking baggage, declares, according to the form prescribed by

checking carrier, a greater value than one hundred dollars for an adult and fifty dollars for a child, each one hundred dollars in value, or fraction thereof, above such allowance will be charged for at ten per cent. of the excess baggage rate per hundred pounds, for the distance carried. The minimum rate will be ten cents per hundred dollars and the minimum charge for increased valuation twenty-five cents. (d) Charges for declared excess valuation must be prepaid. Note. Excess Baggage Money Book coupons will not be accepted for excess valuation; the collection of excess valuation must be made in cash."

"20. *Public Entertainment Paraphernalia.* (a) Property and scenery, domestic and trained animals, calcium light cylinders (consisting of one cylinder containing hydrogen gas and one cylinder containing oxygen gas, see note), stereopticon outfits, musical instruments, tents and tent poles (not exceeding 15 feet in length) balloons, securely wrapped and roped and other paraphernalia of size and character convenient for safe handling in baggage cars, used in producing a theatrical performance, concert, lecture or other public entertainment, indoors or out of doors, which may be loaded in ordinary baggage cars, will be transported at owner's risk, in regular baggage service, subject to the usual allowance and excess weight charged for at regular excess baggage rates, or in special baggage car (subject to special baggage car rules), at the convenience of the carrier, except that no article or animal weighing over 250 pounds will be accepted for transportation in regular baggage service."

The foregoing matters which defendant offered to introduce in evidence were excluded by the court on the theory that the shipment was intrastate and not interstate.

The instructions offered by the defendant presented the theory of an interstate shipment which it relied upon, and these were refused.

We agree with the appellant that the court erred in excluding the evidence referred to and holding that the shipment under the evidence introduced was intrastate in character for the reason that plaintiff's own testimony shows conclusively—according to the decisions of the Supreme Court of the United States—that the shipment was interstate in character. His testimony shows that when he packed his goods in the car at Humphrey, Ark. (the same car in which they were later destroyed at Bernie, Mo., never having been unloaded), he intended to make Delta, Mo., his destination, as well as the destination of the baggage. It also shows that he in no sense broke the continuity of the shipment, but that for the purpose of defeating the interstate rate he divided the trip into stages by purchasing tickets and rechecking the baggage. He testified:

"I wanted to get by, and I didn't violate the law by shipping from Humphrey to St. Francis, and then meant to ship to Campbell and then to Delta, because that commission comes pretty high."

He also testified that the agent at Humphrey, Ark., spoke to him "about the Interstate Commerce Commission," and that "he already knew something about it, having shipped several times from one state to another," and "knew it was high." When he

reached St. Francis, where he intended in keeping the charges low to ship to Campbell, Mo., and then recheck to Delta, he learned of a gasoline engine that was to be operated that night (and which he desired to see in operation) at Bernie, Mo., on defendant's line of railway between St. Francis and Delta, and, instead of checking to Campbell and then rechecking to Delta, he checked to Bernie, intending to there recheck to Delta. After he reached Bernie, the evidence shows that he desired and undertook to check from there to Delta in time to let the car go straight through on the train in which it was being transported without being stopped at Bernie, but that he arrived at the depot too late, reaching there after the car had been set out of the train. He immediately bought his ticket to Delta and rechecked the baggage.

These facts clearly bring this shipment within the character of interstate commerce under the rulings of the Supreme Court of the United States in the following cases: *Texas & New Orleans R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; *Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, a baggage case; and *Baer Brothers Merc. Co. v. Denver & Rio Grande R. Co.*, 233 U. S. 479, 34 Sup. Ct. 641, 58 L. Ed. 1055. In *Louis Werner Sawmill Co. v. Kansas City So. Ry. Co.*, 180 S. W. 1118, the St. Louis Court of Appeals said:

"The court pays but slight heed to the billing in matters of this character, because of the opportunity for the practice of subterfuge which attends it and looks rather to the substance of the transaction as by inquiry touching the intention of the parties to transport the goods into a foreign state or country through continuity of movement which attends or is contemplated in the transaction. Therefore it is said that the shipment takes on the character of either intrastate or interstate commerce at the point the shipment is started. The rule reflected in the authorities is that if, through continuity of movement, the goods are destined at the time they are started for a point in another state, the shipment is regarded as interstate commerce, and therefore falling within the purview of the interstate statutes in respect of rates rather than intrastate, though the billing when looked to alone may suggest the latter"—citing the two cases first above cited.

See, also, *Wright v. Southern Pac. Co.*, 181 Mo. App. loc. cit. 141, 167 S. W. 1137.

This question is discussed at length in the text and notes of *Fuller's Interstate Commerce*, p. 74, under the title "Goods Shipped Between Points Within a State to be Transported to or from a Foreign Country."

In the case of *Chicago, M. & St. P. Ry. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988, it is held that the question

whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract; and, further, that the fact that commodities received on interstate shipments are reshipped by the consignees in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character. The court says the question is with respect to the nature of the actual movement in the particular case.

In the case of *Gulf, C. & S. F. Ry. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, the court held that, in view of the fact that the shipment there on the interstate bill of lading carried the goods to Texarkana, Tex., the mere intention on the part of the purchaser of those goods to sell them to some one at Goldthwaite, Tex., and rebilling them in the same cars under another contract, did not make the latter contract interstate. That case is discussed in the case of *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. It will be noted in that case (i. e., 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540) the corn remained in Texarkana five days; that the Hardin Grain Company was under no obligation to ship it further; that it could have filled its contract with Saylor & Burnett, the Goldthwaite consignees, with any other corn it saw fit and could have unloaded the corn shipped from South Dakota in Texarkana; that it was not paid for by the Hardin Grain Company until its receipt in Texarkana; and that the Hardin Grain Company did not have, until paid for, title and control of the corn until it had reached Texarkana, and that was after the first contract of transportation had been completed. It must be admitted that the language of the Supreme Court in that case tends to support the contention of the respondent in the case before us, but later decisions of the Supreme Court, hereinbefore cited, on facts similar to those in the case at bar, hold such a shipment to be interstate and not intrastate.

Respondent cites the case of *Kolkmeier v. Chicago & A. R. Co.*, 192 Mo. App. 188, 182 S. W. 794, which is based on the case last discussed. However, we think the facts in the case at bar contain the elements which the Kolkmeier opinion holds must control. The Kansas City Court of Appeals in that opinion, after discussing the case of *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, said:

"But we think this case" (meaning the Kolkmeier Case) "lacks the controlling fact of that case. Here there was no intention to ship to Horatio when the freight was delivered to defendant at Glasgow. The manifest intention was to ship only to Kansas City, at which point plaintiff was to have free transportation to Horatio. Rates of freight and rules of commerce

did not concern plaintiff further than Kansas City. The object of his delivery of the stock to defendant at Glasgow was not for a through shipment to Horatio. The object was to get it to a point where commerce was at an end and plaintiff could have free transportation. The face of the case wholly negatives the idea that a through or continuous shipment was intended to start at Glasgow and end at Horatio."

In our case, it was the admitted intention of the plaintiff to ship his goods from Humphrey, Ark., to Delta, Mo. It was intended by him, according to his own testimony in this record, to be a continuous shipment, and the only break in the shipment was because of his failure to reach the depot at Bernie, Mo., in time to recheck to prevent the car being set out of the train there.

This question has recently been before the Supreme Court of this state in the case of *Lusk et al. v. Atkinson et al.*, 186 S. W. 703, wherein a majority of the court held that ties which were to be assembled at a tie buyer's yards intended to be shipped out of Missouri were from the time they were loaded on cars in Missouri at the initial loading points an interstate shipment in character although the first stop was at a point in Missouri—at the buyer's yards. The court, in determining the essential character of the shipment, holds (186 S. W. loc. cit. 710) that in order to decide this question it is important and necessary to ascertain, first, what was the motive or intention of the shipper, and, second, what was the object and purpose to which the shipment was devoted? The minority opinion (of three of the seven members of the court) lays down this rule (186 S. W. loc. cit. 716):

"In my opinion, none of those cases are applicable to the case at bar. In each the cargo was homogeneous, could have been shipped from the point of origin to the point of destination on a through bill of lading, and the uncontradicted evidence showed that the identical cargo in each case was intended to be shipped from the initial point to the point of destination, and that its stoppage in transit was for some collateral purpose, and not to break the continuity of the through shipment to some other state or country. But in the case at bar the ties were not homogeneous, and could not therefore have been shipped on a through bill of lading from said various points in Missouri, to places in New York and other points beyond the limits of this state."

Under both the rules declared by the opinion and the dissenting opinion in that case, the shipment in the case at bar falls clearly within the class of interstate commerce.

Our search resulted in finding the case of *Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co.* (Case No. 6817) 34 Interst. Com. Com'n R. 271-277, wherein the question passed upon by Harlan, Commissioner, is very similar to that to be decided in our case. There, the shipper admitted that he was sniping oil from a point in Kansas to be distributed in the state of Oklahoma, and that for the purpose of gaining an advantage in rates he shipped to a point near the state line and had the cars rebilled. The commis-

sioner held, citing certain decisions of the Supreme Court of the United States hereinbefore referred to, that the intention being to ship from one state into another state made the shipment interstate. The commissioner discusses the case of *Gulf, C. & S. F. Ry. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, supra, and points out that in that case the original seller of the grain at Hudson in South Dakota who paid the freight charges for the movement of the grain to Texarkana did not know of its ultimate destination, nor did the Harroun Commission Company know of its ultimate destination beyond Texarkana until it arrived at Kansas City; and, further, that the Hardin Grain Company, when it contracted for the cars to be delivered at Texarkana, did not know where the grain would originate; and that the contract between the Hardin Grain Company and the Harroun Commission Company was completed in accordance with its terms when the grain was delivered to the Hardin Grain Company at Texarkana.

These facts are held by the commissioner to distinguish that case from the *Worthington Case*, supra, and other cases decided by the Supreme Court of the United States; and for the same reasons is the case of *Gulf, C. & S. F. Ry. v. Texas*, supra, to be distinguished from the case before us.

We therefore hold that the trial court erred in ruling that this shipment under the plaintiff's statement of the facts was intrastate, and erred in excluding the evidence offered by the defendant and in refusing its requested instructions.

The judgment is reversed, and the cause remanded to be tried on the theory that this was an interstate shipment, and therefore whether the defendant is to be held to the extent of the liability fixed under the rules and tariff for a negligent destruction of plaintiff's property.

ROBERTSON, P. J., and STURGIS, J., concur.

EUREKA FIRE HOSE CO. v. FURRY, City Treasurer. (No. 27.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. MUNICIPAL CORPORATIONS §147—CANCELLATION OF WARRANTS—"DE FACTO OFFICERS"—NOTICE.

Where the special act attempting to raise the city of Van Buren from a city of the second class to a city of the first class did not enlarge the city's rights to call in its outstanding warrants, its officers, participating in the affairs of the city as a city of the first class, under the color of an election, the special act not having been declared unconstitutional were at least "de facto officers," so that their notices for the calling in of warrants as authorized by Kirby's Dig. § 5508, were valid as against the holders thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 324, 325; Dec. Dig. § 147.

For other definitions, see *Words and Phrases*, First and Second Series, *De Facto Officer*.]

2. MUNICIPAL CORPORATIONS §903—CANCELLATION OF WARRANTS—ACTION.

Where the acts of de facto officers acting as officers of a city of the first class, in calling in the city's warrants, were valid as to the holder of such warrants, action on the warrants after the time allowed by the notice was barred.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1888; Dec. Dig. § 903.]

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Mandamus by the Eureka Fire Hose Company against P. W. Furry, Treasurer of the City of Van Buren. Heard on agreed statement of facts, decree for defendant, and plaintiff appeals. Affirmed.

This cause was heard below on an agreed statement of facts. The agreed statement of facts is as follows:

"It is agreed by counsel for the above-named parties that this cause be tried before this court, upon the pleadings, exhibits, and the following agreed statement of facts: (1) That the facts as alleged in the complaint and answer, with all exhibits thereto and proofs of publication attached, are true. (2) That the city of Van Buren, Ark., was a duly organized city of the second class prior to the passage of Act No. 112 of the General Assembly of Arkansas of 1913, entitled, 'An act declaring the city of Van Buren, Crawford county, Arkansas, a city of the first class,' approved March 1, 1913, and that said city prior thereto and still consists of three city wards. (3) That the following officers were elected as officers of Van Buren as a city of the second class, the first Tuesday in April, 1912, duly qualified and entered upon their respective offices, to wit: Mayor, J. D. Hawkins; recorder, F. H. Fennessy; marshal, H. G. Miller; aldermen, C. E. Norman, Carl Shibley, Edgar Covey, John Kohne, S. A. Pernot, and L. H. Johnson; treasurer, David Furry. That in June, 1913, the following officers were elected at a special election for a city of the first class, duly qualified, and the former officers, not re-elected, abandoned their offices, and said officers entered upon their respective offices, to wit: Mayor, J. D. Hawkins; city clerk, F. H. Fennessy; police judge, Park Crutcher; aldermen, C. E. Norman, P. H. Morris, W. J. Martin, Joe Jones, L. H. Johnson, and W. H. Hayman; treasurer, said P. W. Furry. That J. D. Hawkins has been holding the office of mayor since

April, 1912, said Fennessy was elected as city recorder in April, 1912, and has been elected successively to the office of city clerk under the elections held since said special act, and the office as styled in the proclamation of said elections was 'city clerk.' That he has been in constant possession of the records of ordinances, by-laws and proceedings of the city council since 1912, and acting as clerk to said city council. That Aldermen C. E. Norman and L. H. Johnson have been re-elected to office aforesaid continuously since April, 1912. At the time set forth in defendant's answer, the said F. H. Fennessy was acting as city clerk under the government as organized by the elections held since the passage of said special act of the Legislature. That no ordinance was passed prescribing his duties since the passage of said act, and he performed the same clerical duties as he did when acting as recorder in 1912. He signed and attested the minutes and records of the proceedings of the council, as 'F. H. Fennessy, City Clerk.'"

Covington & Grant, of Ft. Smith, for appellant. L. H. Southmayd, Jr., of Van Buren, for appellee.

HUMPHREYS, J. (after stating the facts as above). There can be no question as to the power of all municipalities to call in outstanding warrants for cancellation, reissuance, or classification, or for any lawful purpose whatever. Under section 5508, Kirby's Digest, this authority is given to any city or incorporated town in this state.

[1] After purchasing the hose from the appellant herein and issuing a warrant therefor, the city of Van Buren called in its warrants. The call was made by the officers elected at a special election held in 1913, under a special law enacted by the Legislature of Arkansas, raising the city of Van Buren from a city of the second class to a city of the first class.

It is contended by learned counsel for appellant that the special act attempting to raise the city of Van Buren from a city of the second class to a city of the first class is void, and that all proceedings by the officers of Van Buren as a city of the first class are void, including the call of the city's warrants for cancellation and reissuance. It is true that acts of this character were held void in the case of *Cotten v. Benton*, 117 Ark. 190, 174 S. W. 231, because it enlarged the powers of a municipality. The right to call in the outstanding warrants of the city was not enlarged by the special act in question.

In the special election the same mayor was re-elected, the recorder was elected city clerk, and two of the old aldermen were elected new aldermen, four of the old aldermen abandoned their offices, and the four newly elected aldermen served in their places on the city council as a city of the first class.

After looking into the authorities carefully, we are of the opinion that all the officers participating in the affairs of the city as a city of the first class were at least de facto officers in so far as they were exercising corporate powers of a city of the second class.

They were acting under the color of an election and at a time when the special act had not been declared unconstitutional. *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Keith v. State*, 49 Ark. 439, 5 S. W. 880; *Pierce v. Edington*, 38 Ark. 158.

The other questions presented are whether the notices were properly posted and the proofs thereof legally sufficient. The order, notices, proof of publications of notices for calling in the warrants appear in the record as exhibits to the answer and are quite lengthy. We have examined them carefully in connection with the statutes. Both the notice and the proofs thereof are sufficient in form and substance.

[2] The decree refusing the mandamus and declaring the warrants sued on barred was correct, and should be affirmed. It is so ordered.

LUND v. DICKINSON, State Auditor. (No. 36.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

STATES \S 130—APPROPRIATION OF PUBLIC MONEY—CONSTITUTIONAL PROVISIONS.

Const. art. 5, \S 28, provides that no money shall be drawn from the treasury except in pursuance of specific appropriations and that no appropriation shall be for a longer period than two years. Acts 1913, p. 1179, creating the state highway commission, provides for the appointment of a state highway engineer, whose expenses should be paid out of a special fund provided for the state under the act, and that the state treasurer shall pay out the money in such fund on voucher of the commissioner of state lands, highways, and improvements. *Held*, that the state auditor was not authorized to issue a warrant on voucher of the commissioner of state lands, highways, and improvements for petitioner's expenses as engineer of that department, issued more than two years after the passage of the act creating the state highway commission and for which expenses no specific appropriation had been made.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 128; Dec. Dig. \S 130.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Petition for mandamus by A. M. Lund against M. F. Dickinson, Auditor of State. From a judgment sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Appellant, pro se. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for appellee.

HART, J. On May 12, 1916, A. M. Lund filed his petition in the circuit court, for mandamus against M. F. Dickinson, auditor of state, to compel him to issue a warrant in his favor for services performed as assistant engineer in the Department of State Lands, Highways and Improvements. His petition alleges that on the 20th day of April, 1916, he was appointed as such assistant engineer and directed to make a survey of a proposed

road in Pike county; that he made the survey in accordance with his instructions, and submitted a statement of his expenses to the commissioner of state lands, highways, and improvements; that the commissioner approved his expense account and issued him a voucher therefor in the sum of \$34.70; that he presented this voucher to M. F. Dickinson, auditor of state, and requested him to issue a warrant for said amount on the state treasurer for the payment of his claim out of the highway improvement fund; and that the auditor refused to issue him a warrant therefor, and filed a demurrer to the petition which was sustained by the circuit court. The case is here on appeal.

Act 302 of the Acts of 1913 created the State Highway Commission and provided that the commissioner of state lands should have charge of the department and should hereafter be designated as the commissioner of state lands, highways, and improvements. Acts of 1913, p. 1179. The act provides for the appointment of a state highway engineer and his assistants, and provides that their expenses shall be paid out of a special fund collected by the state under the terms of the act. The act further provides that the state treasurer shall pay out the money in the highway improvement funds on warrants of the state, which shall be issued only on voucher of the commissioner of state lands, highways, and improvements. Hence it is urged by counsel for appellant that the act itself provides a method of payment and is a continuing or permanent appropriation which does away with the necessity of further legislative action. The doctrine of fixed or continuing appropriations has never been recognized or approved by this court.

Section 28, art. 5, of the Constitution of 1874, provides:

"No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years."

Under this section all money must be specifically appropriated and specifically applied. It contains the further limitation that no appropriation shall extend beyond two years. The purpose to be accomplished was to give to the Legislature, alone, the right, and to impose upon it, the duty of designating, periodically, the particular demands against the state, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each. This construction has already been placed upon this section of the Constitution by the court in the case of *Dickinson, State Auditor, v. Clibourn*, 187 S. W. 909. Therefore it is unnecessary for us to review the cases cited by counsel for appellant to the contrary. It is only necessary to state that the warrant in

question was issued more than two years after the passage of the act creating the state highway commission and that no specific appropriation has been made to pay the expenses for which the warrant in question was asked to be drawn. The case falls squarely within the rule announced in *Dickinson v. Clibourn*, supra, and it is not necessary to repeat here the reasons given there for the rule.

The judgment will be affirmed.

CHILDRRESS v. BOYETT, Sheriff. (No. 28.)
(Supreme Court of Arkansas. Dec. 4, 1916.)

1. BAIL —48—PROPER OFFICER TO RECEIVE—STATUTES.

Under Kirby's Dig. §§ 2179-2181, the proper officer to receive cash bail bonds is the county treasurer; no mention being made of the sheriff or his deputies.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 184-194; Dec. Dig. —48.]

2. BAIL —73—SUMMARY JUDGMENT—STATUTE—APPLICATION.

Kirby's Dig. § 4487, subd. 7, providing that judgment shall be rendered against the sheriff, coroner, or constable for failure to pay on demand to the party or officer entitled to receive it all money received by him in his official capacity, has no application to a motion for summary judgment against a sheriff by a party who gave cash bail for one charged with embezzlement, but later surrendered him in open court; the court ordering payment of the bail by the county treasurer or any other officer having the money.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 254-256; Dec. Dig. —73.]

3. APPEAL AND ERROR —554(3)—REVIEW—LACK OF AFFIRMATIVE SHOWING OF ERROR.

On motion by a party who gave cash bail for one charged with embezzlement, but later surrendered him in open court, for summary judgment against the sheriff for the amount of the bail, where there was no affirmative showing in the record as to whether the sheriff was able to take the party charged with embezzlement into custody, nor whether he was prohibited from returning the cash bond on account of other legal process in the absence of bill of exceptions showing what was done below, the Supreme Court must affirm the judgment overruling the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472, 2473, 2476; Dec. Dig. —554(3).]

Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

Motion by H. H. Childress to require R. A. Boyett, Sheriff of Hempstead County, to comply with an order of court and pay over \$500 deposited with him as bail for the appearance of one arrested on a charge of embezzlement whom Childress surrendered in open court. From an order overruling the motion, Childress appeals. Judgment affirmed.

On the 15th day of October, 1914, G. L. Mays was indicted by the grand jury of Hempstead county for embezzlement. A bench warrant was issued for him October 15, 1914, and served on him April 8, 1915.

When arrested, the appellant, H. H. Childress, deposited with the deputy sheriff of said county a \$500 cash bond. On November 10, 1915, Edward Gordon, agent and attorney for H. H. Childress, appellant herein, surrendered G. L. Mays in open court and demanded a return of the \$500 cash bond, which he had deposited for the appearance of said G. L. Mays in the Hempstead circuit court, and the court on said day entered the following order:

"It is therefore by the court considered, ordered, and adjudged that the county treasurer of Hempstead county or any officer holding said money be, and they are hereby, ordered by the court to turn over to the said Edward Gordon, agent and attorney for H. H. Childress, the sum of \$500 now held by them or either of them for the appearance of the said G. L. Mays, unless prohibited from so doing by the service of other legal process, and upon the release of said money to the said Edw. Gordon the sheriff is ordered to take into custody the said G. L. Mays unless he furnish bail in the sum of \$500."

For some reason not appearing in the record, the officers failed to return the money to said appellant or his agent, Edw. Gordon.

A demurrer was filed to the indictment, and the indictment quashed.

On the 3d day of February, 1916, appellant filed a motion for a rule on the sheriff of Hempstead county, the appellee herein, reciting the facts above stated in which he set out the order made by the court on the 10th day of November, 1915, and in effect moved for summary judgment against the sheriff, R. A. Boyett, in the sum of \$500 for the cash bond theretofore deposited by him with the deputy sheriff. The appellee waived notice of the filing of said motion, and agreed that same might be heard by the court at any time the court might deem proper, and on April 4, 1916, the following judgment or order was rendered and entered by the court in the case of H. M. Stephens et al., Plaintiffs, v. G. L. Mays, Defendant, and Ruff Boyett and Hope Savings Bank & Trust Company, Garnishees:

"Comes both parties hereto by their respective attorneys, and the motion of H. H. Childress to require R. A. Boyett, sheriff of Hempstead county, to pay over the sum of \$500 which has been deposited as bail for the appearance of defendant, G. L. Mays, in the Hempstead county circuit court at the October term, 1915, heretofore filed herein, coming on to be heard, the court is of the opinion that said motion should be overruled.

"It is therefore considered, ordered, and adjudged by the court that said motion should be, and the same is hereby, overruled. To which order and judgment of the court in overruling said motion the said H. H. Childress at the time excepted, and asked that his exceptions be noted of record, which was accordingly done; and said H. H. Childress prayed an appeal to the Supreme Court, which prayer was granted."

After the case had reached this court on appeal, appellee suggested a diminution of the record and obtained an order directing the circuit clerk to certify a full and complete transcript of all the proceedings in the

lower court to this court. The records certified up by the clerk in response to a writ of certiorari discloses the fact that the appellee, along with other parties, had been garnished by various creditors of G. L. Mays, after the cash bond in question had been deposited with the deputy sheriff. The transcript also shows that a forfeiture was ordered on the bond of G. L. Mays, but after the appeal in the cause had been taken to this court.

The transcript fails to disclose whether a motion for a new trial was ever filed by appellant. It also fails to show whether any bill of exceptions was signed and filed.

Edward Gordon, of Morrilton, and T. C. Jobe, of Hope, for appellant. O. A. Graves, of Hope, for appellee.

HUMPHREYS, J. (after stating the facts as above). [1] Sections 2179-2181, Kirby's Digest, read as follows:

"Whenever the defendant is admitted to bail in a specified sum, he may deposit said sum with the county treasurer in the county in which the trial is directed to be had, and take from the treasurer a certificate of such deposit; upon delivering which to the officer in whose custody he is, he shall be discharged.

"After bail has been taken a deposit may in like manner be made of the sum mentioned in the bail bond, which shall exonerate the bail.

"Where money is deposited the county treasurer shall hold and pay the same according to the orders of the court having jurisdiction to try the offense, and he and his sureties shall be liable for the same on their official bond."

It will be noticed in these sections that the proper officer to receive cash bonds is the county treasurer. No mention is made of the sheriff or his deputies, and we find no other provisions in the statute authorizing a sheriff to receive cash bonds.

[2] It is contended that subdivision 7 of section 4487, Kirby's Digest, covers this case. We see nothing in the subdivision applicable to a case of this character. Section 4485, Kirby's Digest, provides that:

"The motion shall be heard and determined without written pleadings, and judgment given according to law and rules of equity."

The judgment rendered in this case by the lower court simply states that:

The cause "coming on to be heard, the court is of opinion that said motion should be overruled."

It does not recite what evidence was heard, if any. The evidence is not brought into this record by a bill of exceptions. In McKinney v. Demby, 44 Ark. 74, the court said:

Where the record does not contain the evidence adduced at the trial, "every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided appellee's case was fully established. The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it was erroneous."

See, also, *Hempstead County v. Phillips*, 79 Ark. 267, 95 S. W. 133.

The declarations on this point in the case cited above were reaffirmed in the case of *Young v. Vincent*, 94 Ark. 115, 125 S. W. 658.

There is no affirmative showing that the cash bond ever reached the pocket of the sheriff. If it did come into the possession of the sheriff, we are left in doubt by this record as to whether he paid it to the treasurer of the county or whether it was recovered from him in the garnishment proceedings brought against him. In the first order made by the court, the county treasurer was ordered to pay the money to the appellant, or his agent, Edw. Gordon. The law provides for the county treasurer to hold the cash bond and pay the same according to the order of the court having jurisdiction to try the offense, and he and his sureties shall be liable for the same on their official bonds. It seems to us that the sheriff had no authority to take this money in his official capacity. In the first order, the county treasurer, or the other officers, without specifying any other officer in particular, were ordered to return this money to appellant, or his agent, unless prevented by other judicial proceedings, and upon the release of said money to the said Edw. Gordon, the sheriff was ordered to take into custody the said G. L. Mays, unless he furnished bail in the sum of \$500.

[3] There is no affirmative showing in the record as to whether the sheriff was thereafter able to take G. L. Mays into custody, nor whether he was prohibited from returning the \$500 cash bond on account of other legal process. In the absence of a bill of exceptions showing what was done in the trial below, we are constrained to affirm the judgment herein, and the judgment is accordingly affirmed.

BAILEY & CO. v. SOUTHWESTERN VENEER CO. et al. (No. 43.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. BILLS AND NOTES \S 70 — **BILL OF EXCHANGE—ACCEPTANCE—STATUTE.**

Although Acts 1913, p. 304, \S 137, provides that, if drawee of a bill of exchange destroys the bill, he will be deemed to have accepted it, an accidental destruction of a bill of exchange does not amount to an acceptance.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 120, 121; Dec. Dig. \S 70.]

2. BILLS AND NOTES \S 537(1)—**TRIAL—QUESTION FOR JURY.**

In view of Acts 1913, p. 304, \S 137, in an action against the drawee of a bill of exchange, where it appeared that the defendant threw the bill into the wastebasket, permitted it to burn, and refused to pay it without explanation after having orally accepted it, question as to why the bill was destroyed held for the jury.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1862, 1871-1875, 1891-1893; Dec. Dig. \S 537(1).]

Appeal from Circuit Court, Woodruff County; J. M. Jackson, Judge.

Action by Bailey & Co. against the Southwestern Veneer Company and another. From a judgment for defendants and an order overruling a motion for a new trial, plaintiff appeals. Reversed, and remanded for a new trial.

I. W. Saxon was indebted to appellant in the sum of \$84.96, and on the 22d day of March, 1915, gave an order drawn on appellees for said sum in payment of said indebtedness. This order was immediately presented to appellees for acceptance. They did not accept it in writing, but stated to the appellant that the order was all right. Subsequently thereto, and within a few days, they confirmed the oral acceptance of the order over telephone. Later they refused to pay the order. On the 12th day of April thereafter appellant demanded a return of the order. Appellees stated that the order had been thrown in the wastebasket and burned up. The return of the order was refused.

The record fails to disclose why the order was thrown into the wastebasket and burned. No explanation appears in the record as to why appellees refused to pay it. The order was never paid by either I. W. Saxon or appellees.

This cause was tried in the circuit court on appeal, and, after the evidence was closed, the court gave the following peremptory instruction to the jury:

"Gentlemen of the jury, under the law and testimony in this case, you are instructed to return a verdict for the defendant."

Thereupon the jury returned in open court the following verdict:

"We, the jury, find for the defendants.

"V. O. Richey, Foreman."

Appellant filed its motion for a new trial, which was overruled. Judgment was rendered on the verdict, and this cause was brought here on appeal.

Appellant pro se. Roy D. Campbell, of Cotton Plant, for appellees.

HUMPHREYS, J. (after stating the facts as above). Section 126 of Act 81 of the Acts of Arkansas 1913, known as the law of negotiable instruments, defines a bill of exchange: "An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

So far as disclosed in this record, the order in question in form and substance conforms to this definition and is an inland bill of exchange. By another section of the same act a written acceptance is necessary to bind the drawee. By still another section, if the drawee destroys the bill, he will be deemed to have accepted the same. Section 137, Act 81, Acts of Arkansas 1913.

The evidence in this case is undisputed that appellees destroyed this bill and are silent as to why they did so. No excuse is rendered by them for not paying the order. Certainly it is not the privilege of a drawee to put the holder to sleep by an oral acceptance, then afterwards to destroy the order or bill of exchange and refuse to pay same without rendering any kind or character of explanation or excuse.

[1, 2] An accidental destruction of the bill could not amount to an acceptance, but a willful destruction of the bill would. Under all the circumstances in this case, we are of the opinion that the question of fact as to why the order was destroyed should have been submitted to the jury under proper instructions. Throwing the order in the wastebasket and permitting it to burn and refusing to pay it without explanation, after having orally accepted same, indicates a negligent and reckless manner of handling bills of exchange. If willful, then appellee herein became responsible.

For this error this case must be reversed, and remanded for a new trial.

It is so ordered.

NEELY v. LEE WILSON & CO. et al.
(No. 42.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. JUDGMENT \S 461(3)—ACTION TO SET ASIDE—EVIDENCE—SUFFICIENCY.

In a suit to set aside a decree foreclosing a lien for drainage assessments, evidence held to sustain a finding that service was had upon plaintiff in the original foreclosure suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 895; Dec. Dig. \S 461(3).]

2. DRAINS \S 39—REVIEW OF ASSESSMENTS.

As it was the duty of the property owner when made a party to a suit to foreclose a lien for drainage assessments to at that time set up all his defenses against the organization of the drainage district, errors and irregularities in the original organization of the district will not be considered in a suit to set aside the foreclosure decree.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 54, 60; Dec. Dig. \S 39.]

3. JUDICIAL SALES \S 31(3)—FORECLOSURE OF LIENS—STATUTE.

In view of Kirby's Dig. \S 6236, providing that judicial sales of real estate "must be on terms of credit not less than three months," where a decree in suit to foreclose a lien for drainage assessments failed to specify the terms upon which the lands should sell, and the land was sold on three months' credit and the property owner failed to prosecute his appeal taken from the foreclosure decree, the defect being in no sense jurisdictional, was cured by confirmation of the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. \S 66; Dec. Dig. \S 31(3).]

Appeal from Mississippi Chancery Court; Chas. D. Frierson, Chancellor.

Suit by Baltimore Neely against Lee Wilson & Co. and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

On September 17, 1915, appellant brought this suit to set aside a decree of foreclosure, and a sale and deed made thereunder, alleging that appellant was not summoned in said cause; that the assessment, the basis of the suit, was void; that the county court did not sufficiently define the district; and that the decree was illegal on its face.

The decree of foreclosure failed to specifically order the land to be sold on a credit of three months, and it did not recite that service was had in accordance with law. It in substance found that the levy of the assessment was made in accordance with law, the amount of the assessment, declared it a lien on the land described as "northeast quarter, section 18, township 12 north, range 10 east," appointed a commissioner, and ordered him to sell the land after advertising the same for the length of time prescribed by law to satisfy said lien. This decree was rendered on October 8, 1908. The commissioner of the court sold said land on December 4, 1908, and the appellee purchased it. The sale was reported and confirmed by the court on October 6, 1909.

The deed recited that the original decree ordered the land sold to the highest bidder for cash. The report of the sale showed that it was sold on a credit of three months. The sheriff's return in the foreclosure suit showed that appellant was served.

On August 24, 1911, Lee Wilson & Co., the purchaser at the sale, filed application for a writ of assistance to obtain possession of said real estate. Notice of the motion of application was given to Baltimore Neely on August 25, 1911, and on September 20, 1911, the court ordered the writ issued. The writ was issued July 24, 1915, and on that date Baltimore Neely was dispossessed of the land by the sheriff.

The drainage district was established under sections 1414-1450, Kirby's Digest. The description of the land in the original proceedings for the establishment of the district failed to set out that it was in Mississippi county and failed to show that it was north township and east range, and the assessment was indicated by the figures "187.20," under the heading "Amount Assessed." In the original assessment "160" appears under the heading "Affected Ben. Assessed."

The chancellor at the February term, 1916, of the chancery court of the Osceola district of Mississippi county, Ark., found against appellant, and dismissed his bill seeking to cancel said judgment, and the appellant excepted and appealed the cause to this court.

Such other facts as may be necessary in passing upon the questions involved will be set out in the opinion.

H. N. Moon, of Memphis, Tenn., for appellant. Coleman & Lewis, of Little Rock, and C. A. Cunningham, of Blytheville, for appellee.

HUMPHREYS, J. (after stating the facts as above). It is strenuously insisted that the foreclosure decree should be canceled and appellant restored to the possession of his property, for the reason that no service was had upon him in the foreclosure suit.

[1] Appellant is confronted with a return by the sheriff, through his deputy, that he was served in this case. In addition, Mr. S. L. Gladish testified that Neely employed him in the case, and that he did represent him for a time. The decree itself recites that appellant at the time of its rendition excepted to the ruling of the court and prayed an appeal to the Supreme Court, which was granted. There are other circumstances tending to show that appellant had been served. The sheriff and his deputy are now dead and cannot testify. Neely himself denies service and is corroborated in his statement to some extent by Jennie Neely, who was his constant companion. In the case of *Holman v. Lowrance*, 102 Ark. 255, 144 S. W. 190, the court said:

"The officer's return of service is *prima facie* true, and the chancellor found, upon conflicting evidence, that appellant was duly notified of the pendency of the suit. * * *

We think on the question of service the instant case a stronger one than *Holman v. Lowrance*, supra. The finding of the chancellor that service was had upon him in the original foreclosure suit is sustained by the weight of the evidence.

[2] The insufficient description of the lands complained of by appellant relates to the original proceedings establishing the drainage district. It was appellant's duty when made a party to the foreclosure suit to set up all his defenses against the organization of said drainage district. The errors and irregularities in the original organization of the district are not matters for consideration in this bill of review.

We do not understand that any contention is made that the description of the land in the foreclosure decree is insufficient. The description of said real estate in said foreclosure decree is definite and certain.

[3] The statute of Arkansas provides that judicial sales must be on terms of credit, "not less than three months." Kirby's Digest, § 8236. The foreclosure decree failed to specify the terms upon which the land should sell. Counsel for appellant claims that *Fry v. Street*, 37 Ark. 39, is a case on all fours with the case at bar. That is a direct appeal from the decree of foreclosure before the sale was made, reported, and confirmed. In the case at bar, the land was sold on three months' credit, and the sale was reported and confirmed. The appellant appealed from the foreclosure decree, but failed to prosecute his appeal. The cases are quite different.

Jurisdictional errors in a decree ordering the sale of land cannot be cured by confirmation of the sale. The failure to set out

the terms of sale in a decree is in no sense jurisdictional. All irregularities not jurisdictional will be cured by confirmation of the sale. The confirmation of sale in the case at bar cured this defect. There being no error in the findings and decree of the chancellor, the decree is in all things affirmed.

SWEAT v. STATE. (No. 24.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. INDICTMENT AND INFORMATION §110(3)—LANGUAGE OF STATUTE—PANDERING.

An indictment for accepting earnings of a prostitute, substantially in the language of Acts 1913, p. 407, as to pandering, and reciting the facts constituting the offense with sufficient certainty to describe it and enable accused to plead acquittal or conviction thereunder in bar of subsequent prosecution for the same offense, is good.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. §110(3).]

2. PROSTITUTION §4—EVIDENCE.

Where one was accused of pandering for money, evidence of his receiving goods and a store order, for prostitution of a woman, was admissible.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. §4.]

3. PROSTITUTION §4—EVIDENCE.

In trial for pandering, testimony of a witness that he paid accused money, although he testified that after payment he had no intercourse with the woman, was admissible as showing the woman's business and accused's knowledge of and participation in it.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. §4.]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Oscar Sweat was convicted of accepting earnings of a prostitute, and appeals. Affirmed.

W. S. Coblentz, of Murfreesboro, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted under an indictment which charged that he "unlawfully, feloniously and knowingly did accept, receive, levy and appropriate four and 50/100 dollars in gold, silver and paper money of the value of four and 50/100 dollars, without consideration, from the proceeds of the earnings of Rettle Sweat, who was then and there a woman engaged in prostitution, against the peace and dignity of the state of Arkansas."

[1] To this indictment a demurrer was filed on the ground that it did not describe the offense with sufficient certainty to apprise him what charge he would have to meet. The indictment, however, employs substantially the language used in section

3 of Act No. 105, Acts 1913, p. 407, in relation to the crime of pandering, and recites the facts alleged to constitute that offense with sufficient certainty to describe it and to enable him to plead an acquittal or a conviction under this indictment in bar of a subsequent prosecution for the same offense. This meets the requirements of the law.

[2] The indictment alleges that appellant received from the earnings of the woman named in the indictment the sum of \$4.50 in money, and it is argued that the court erred in permitting proof of payments not made in money. A witness named Albert Hatch testified that he had twice had sexual intercourse with the woman, and that on one occasion he paid appellant \$1.50 in money, and on the other occasion gave him an order for \$2 in merchandise. A witness named Jesse Hatch testified that, for the same purpose, he gave appellant three yards of red serge, for which he had himself paid \$1.50. A witness named Huddleston testified that he paid appellant \$1.50 for this purpose, but did not have intercourse with the woman because of her uncleanness.

It is said that the proof of the receipt of other considerations than that of money constitutes a variance from the allegations of the indictment. It is unnecessary here to decide that question, for the court gave the following instruction:

"The indictment alleges property, gold, silver, and paper money. It would be necessary to prove the receipt of money. It doesn't have to be any certain amount. The evidence of the receipt of other things may be considered by the jury along with the other evidence in determining whether the defendant did, in fact, receive money for the purposes mentioned in the indictment. The evidence with reference to the serge and order is competent only for the purpose of determining whether the defendant was engaged in that sort of business of receiving money and profit out of the prostitution of his wife. That is a circumstance along with all the other evidence in the case as to whether or not he received money for that."

Appellant had denied all the material statements of the witnesses against him, and this evidence was competent as tending to show that he was receiving the earnings of a woman engaged in prostitution.

[3] It is said that the evidence of Huddleston should have been excluded because he testified that, although he had paid the price charged, he did not have intercourse with the woman. This and other evidence objected to tended to show the woman's business and appellant's knowledge of and participation in it, and it was therefore competent.

The jury has passed upon the conflicting questions of fact, and the evidence is legally sufficient to support the verdict, and, as no error of law appears, the judgment must be affirmed. It is so ordered.

PILLOW v. HODGE et al. (No. 31.)

(Supreme Court of Arkansas. Dec. 11, 1916.)
JUSTICES OF THE PEACE ¶191(2) — **APPEAL BOND.**

On a joint and several bond on appeal from justice court to circuit court, to perform the judgment of the court in action against two defendants on a claim of joint liability, a verdict against one of them and for the other does not release the sureties from their undertaking to perform any judgment rendered against the unsuccessful defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 741; Dec. Dig. ¶191(2).]

Appeal from Circuit Court, Poinsett County; S. T. Mays, Special Judge.

Action by J. C. Pillow against John Hodge and another. From judgment for plaintiff before a justice of the peace, defendants appealed to the circuit court. Judgment for plaintiff in circuit court against the named defendant, and plaintiff moved for judgment against sureties on supersedeas bond. From order overruling plaintiff's motion, plaintiff appeals. Reversed and remanded.

Mardis & Mardis, of Harrisburg, for appellant.

McCULLOCH, C. J. Appellant sued the appellee John Hodge and one Cross, asserting against them a claim of joint liability on an account for merchandise alleged to have been sold to them. The case was originally instituted before a justice of the peace, and appellant recovered judgment against both of the defendants. Both of the defendants took an appeal to the circuit court, and gave an appeal bond in statutory form, with R. Bailey and J. R. Stafford as sureties. The case was tried in the circuit court on appeal, and the jury returned a verdict in appellant's favor against Hodge, but in favor of the defendant Cross as to his liability for the debt. There was a garnishment in the case, and after the judgment was rendered by the justice of the peace the money was paid into court by the garnishee; but it appeared that the money belonged to defendant Cross, and the circuit court ordered it refunded to him. Appellant moved for a judgment against the sureties on the supersedeas bond, which motion the court overruled, and an appeal has been prosecuted to this court.

The appeal bond executed by appellee Hodge and his codefendant, with sureties, was a joint and several obligation and constituted an undertaking on the part of each of them to perform the judgment of the court. Hence the exoneration of Cross by the verdict of the jury did not release the sureties from their undertaking to perform any judgment rendered against Hodge on the appeal. *Porter v. Singleton*, 28 Ark. 483. The court erred therefore in refusing to give appellant judgment against the sureties.

The judgment is therefore reversed, and the cause remanded, with directions to enter judgment in appellant's favor on the verdict against appellee Hodge and the two sureties on the appeal bond.

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MEMPHIS, D. & G. RY. CO. v. RICHARDSON. (No. 32.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. RAILROADS ¶272—**FIRES—ENGINES EMITTING SPARKS—SUFFICIENCY OF EVIDENCE.**

In suit against two railroads for destruction of cotton by fire, evidence held sufficient to warrant the jury in drawing the inference that either of two engines, one owned by each road, emitted the sparks which communicated the fire to the cotton.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 867; Dec. Dig. ¶272.]

2. RAILROADS ¶260, 266—**FIRES—LIABILITY OF ROADS USING SAME TRACKS.**

Where fire was set to cotton by the engine of a railway using the tracks of another, both companies were responsible for the damage, but, if the fire was set by the engine of the road owning the tracks, it alone was responsible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 817-823, 854-858; Dec. Dig. ¶260, 266.]

3. RAILROADS ¶273—**FIRES—INCONSISTENCY OF VERDICT.**

In an action against two railroads operating over the same tracks for setting fire to cotton, verdict against one road was not inconsistent, because there was also a finding that the fire was set by the locomotive of the other road, since the jury might have concluded the fire was communicated from both engines.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. ¶273.]

4. RAILROADS ¶266—**FIRES—LIABILITY OF ROADS OPERATING ON SAME TRACK.**

Where fire was communicated to cotton from two engines, two roads operating over the same tracks each owning one, neither of the roads could escape liability on the ground that fire was also set by the locomotive operated by the other.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 854-858; Dec. Dig. ¶266.]

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Suit by Steve Richardson against the Memphis, Dallas & Gulf Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, wherein the latter defendant set forth a cross-complaint against the former. From a judgment for plaintiff against both defendants, the Memphis, Dallas & Gulf Railway Company appeals. Judgment against appellant affirmed.

E. B. Kinsworthy and R. E. Wiley, both of Little Rock, and J. W. Bishop, of Nashville, for appellant. McMillan & McMillan, of Arkadelphia, for appellee.

McCULLOCH, C. J. Appellant, the Memphis, Dallas & Gulf Railway Company, uses the tracks of the St. Louis, Iron Mountain & Southern Railway Company on a branch line of that company, on which the town of

Amity is a station. Appellee had a lot of cotton stored on a platform near the track at Amity, and on October 25, 1914, the cotton was destroyed by fire.

It is alleged that the fire was communicated to the cotton by sparks from an engine. Appellee instituted this joint action against both of the companies, alleging that the fire was set out from engines operated by each of the companies. Each of the defendants answered, denying liability, and specifically denying the allegation that the fire was communicated from engines which its servants operated. The St. Louis, Iron Mountain & Southern Railway Company also set forth in its answer a cross-complaint against the appellant, Memphis, Dallas & Gulf Railway Company, in which it alleged that the last-named company had executed a contract to hold the Iron Mountain Company harmless from liability for damage done by reason of the operation of its trains over the tracks of the latter, and a judgment over was asked against the appellant company in the event that it was found that the fire was communicated from the latter's engine.

[1] On the trial of the case before the jury, the plaintiff introduced testimony from which the jury might have inferred that the fire was communicated from engines operated by either one of the defendant companies. A local freight train operated by the Iron Mountain Company came to Amity shortly after 11 o'clock in the forenoon of the day named, and remained there doing switching for 35 or 40 minutes. A passenger train of the Iron Mountain had come in a short time before that and left on its journey. A short time after the Iron Mountain local freight left Amity—about 20 minutes, according to the testimony of the witnesses—the local freight train operated by appellant came into the station and stopped for a short while, and about 5 or 10 minutes after this train left the cotton was discovered to be on fire. The testimony is to the effect that the Iron Mountain engine stopped within two feet of the cotton stored on the platform, and that when it pulled out from the station the engine worked steam heavily and emitted sparks. There is proof to the same effect concerning the engine of appellant company; that is to say, that the engine stopped within a few feet of the cotton, and emitted sparks as it began to move away. There was no witness in the case who testified that he saw sparks from either of the engines fall upon the cotton, but there was enough to warrant the jury in drawing the inference that either of the engines emitted the sparks which communicated the fire to the cotton. *Cairo, etc., Ry. Co. v. Brooks*, 112 Ark. 298, 166 S. W. 167.

[2] Now, the court submitted the case to the jury upon correct instructions, to the

effect that, if the fire was set out by appellant company, then both companies would be responsible to appellee for the damage, but that, if the fire was set out by the Iron Mountain engine, that company alone would be responsible for the damage. At the request of one of the defendants the court submitted to the jury special interrogatories separately inquiring as to which of the engines emitted the sparks which communicated the fire to the cotton. In question No. 2 the jury were asked to state whether or not the fire was set out by a locomotive operated by the St. Louis, Iron Mountain & Southern Railway Company, and to their interrogatory the jury made answer in the affirmative. In question No. 3 the jury were required to state whether or not the fire was set out by a locomotive operated by appellant, and the jury also answered this interrogatory in the affirmative. The court rendered judgment in favor of appellee against both of the defendants, and the appellant has alone prosecuted the appeal.

The only contention made by counsel for appellant is that the verdict is not supported by sufficient evidence, so far as relates to the liability of this appellant, and that the verdict is inconsistent in that it constitutes a finding that the fire was set out by both of the locomotives. We are of the opinion, as before stated, that there is sufficient evidence to warrant the inference that the fire was set out by the locomotive operated by appellant. Witnesses who were near the cotton stated that they saw no smoke arising from the cotton until about 5 or 10 minutes after appellant's train left the station, and that they then saw the blaze, a number of the bales of cotton being on fire then. The inference was also justified that the fire was set out from the engine of the Iron Mountain train; for it was emitting sparks when it left its position near the cotton platform about 30 minutes before the fire was discovered.

[3, 4] We cannot say as a matter of law that there is any inconsistency in the verdict, or that the verdict against the appellant is necessarily wrong because there was also a finding that the fire was set out by the locomotive of the Iron Mountain. The jury might have concluded that the fire was communicated from both of the engines, and we cannot say that there is not testimony sufficient to warrant that inference. If that be true, neither of them can escape liability on the ground that fire was also set out by the locomotive operated by the other; for, if that be a sufficient excuse, then both could escape liability on that ground.

We are of the opinion, therefore, that the judgment against appellant ought to be affirmed; and it is so ordered.

DAVIS v. STATE. (No. 251.)

(Supreme Court of Arkansas. Nov. 13, 1916.)

1. STATUTES ~~64~~(2)—PARTIAL INVALIDITY—EFFECT.

Where a portion of a section of Acts 1915, p. 338, is unconstitutional in that it attempts a delegation of the legislative function to impose penalties for a violation of its provisions or of regulations thereunder, to the board of control of the Agricultural experiment station, is distinct and separable from the remainder of the act, it does not render the whole act void, but the remainder of the act is valid in enjoining the duty without prescribing a penalty for its violation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 59, 195; Dec. Dig. ~~64~~(2).]

2. ANIMALS ~~36~~—TICK ERADICATION—PENALTY.

Acts 1915, p. 338, in relation to cattle tick eradication, provided no penalty for a violation of its provisions. Kirby's Dig. § 2447, provides that where the performance of an act is prohibited and no penalty is imposed the doing of such prohibitive act shall be deemed a misdemeanor. Section 2448 provides that every person convicted of a misdemeanor for which the punishment is not defined shall be punished by imprisonment not exceeding one year or by fine not exceeding \$250, or both. Acts 1907, p. 1045, was enacted to prevent the introduction and spread of contagious and infectious diseases of animals, and section 5 provided a penalty for violation of any provision of the act. *Held*, that a penalty for violation of the act of 1915 was properly imposed under section 2448, and not under act of 1907, which did not contemplate tick eradication or a provision for punishment for failure to dip cattle for that purpose.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 95, 96; Dec. Dig. ~~36~~.]

3. ANIMALS ~~36~~—CONTAGIOUS DISEASES—EVIDENCE—ADMISSIBILITY.

In a prosecution for violation of provision of Acts of 1915, Act No. 86, and regulations thereunder requiring persons owning cattle exposed to or infested with ticks to bring them to a disinfecting station for dipping, proof on the part of defendant that his cattle were not infested with ticks, and that ticks had not been found in his neighborhood, was properly excluded.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 95, 96; Dec. Dig. ~~36~~.]

McCulloch, O. J., and Kirby, J., dissenting.

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

James Davis was convicted of a misdemeanor, and he appeals. Affirmed.

H. N. Smith, of Mansfield, and Roberts & Roberts, of Booneville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. This appeal questions the constitutionality of Act No. 86 of the Acts of 1915, page 338, and the ground of the attack is that the act is incomplete, in that it provides no penalty for a violation of its provisions, but attempts a delegation of the legislative function of prescribing the penalty to the board of control of the Agricultural experiment station. The section complained of is section 6, which reads as follows:

"Sec. 6. That the enforcement of the laws of this state in relation to cattle tick eradication and protecting the counties placed entirely or provisionally above the federal quarantine line in this district is hereby vested in the board of control of the Agricultural experiment station, with full power and authority to promulgate the necessary rules and regulations for that purpose and to provide penalties for the infraction or disobedience of any such rule or regulation, or order made by such board, and to enforce obedience to such rules and regulations."

Acting under the authority of this section the board of control prescribed rules for the enforcement of the provisions of the act, and, among others, enacted a rule numbered 7, which reads as follows:

"Cattle in area where systematic tick eradication is being conducted shall be disinfected under supervision of a duly authorized inspector when so ordered by said inspector. It shall be the duty of all persons owning or having in charge cattle that are exposed or infested with ticks to have all of their cattle at a regular disinfecting station for the purpose of having them properly dipped when so ordered by the inspector. Any person failing to comply with the provisions of this regulation shall be prosecuted as provided for in section 5 of Act 409, Acts of 1907."

[1] It is not contended in support of the judgment of the court below that the Legislature had the authority to delegate to the board of control the power of prescribing penalties for a violation of its rules; but it is said that the provision to that effect should be treated as a nullity, inasmuch as it is void, and when this has been done a complete and harmonious act remains. The rule of construction in such cases is stated in Cooley's Constitutional Limitations (7th Ed.) p. 246, as follows:

"Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

This rule has been frequently applied by this court. See *Cotham v. Coffman*, 111 Ark. 109, 163 S. W. 1183, and cases there cited.

We think under this rule that we may treat as void the provision that the board of control should prescribe penalties.

[2] Counsel for the state contend that if this is done, section 5 of Act 409 of the Acts of 1907, p. 1043, applies, and affords full authority for the imposition of the fine of \$25 which was assessed by the jury against appellant. We do not agree with counsel,

however, in this contention. While the act of 1907 was enacted "to prevent the introduction and spread of contagious and infectious diseases of animals in Arkansas," we think there is in this act no legislative thought of tick eradication or provision for punishment for the failure to dip cattle for that purpose, and therefore the penalties prescribed by the act of 1907 cannot be applied to the act of 1915. It is conceded by learned counsel for appellant that the Legislature had the right to delegate to this board the duty of promulgating rules in regard to dipping cattle, and that the Legislature could have prescribed penalties for the violation of such rules when made; but it is argued that, inasmuch as the Legislature has prescribed no penalty, none can be imposed. But we do not agree with counsel in this contention. The valid portion of the sections quoted imposes upon the board the duty of making necessary rules and regulations, and obedience to these rules is necessarily enjoined upon all persons coming within their scope. We have therefore the case of the state enjoining a duty without prescribing a penalty for its violation. Sections 2447 and 2448 of Kirby's Digest were enacted to cover such cases. These sections read as follows:

"Sec. 2447. Where the performance of any act is prohibited, or the performance of any act is required by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or requiring such act or duty, or in any other section or statute, the doing of such prohibited act or the neglect of such required act or duty, shall be deemed a misdemeanor.

"Sec. 2448. Every person who shall be convicted of any misdemeanor, the punishment of which is not defined in this or some other statute, shall be punished by imprisonment not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by fine and imprisonment both."

The fine imposed upon appellant was therefore warranted under section 2448. *State v. Greenlees*, 41 Ark. 353.

We think what is here said does not contravene the doctrine of *Rowe v. State*, 92 Ark. 155, 122 S. W. 626. There an act of the General Assembly provided that upon a fence law being adopted at an election it should thereafter be unlawful for certain animals to run at large. The act provided for the impounding of stock, and for the payment of damages done by them by their owners, and for their summary sale in satisfaction of these damages if not otherwise paid. The syllabus of that case is as follows:

"Under the rule that when an act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty, that penalty alone can be enforced, held that the penalty prescribed by the special stock law of May 23, 1901, applicable to certain counties, is the only punishment which

can be administered for a violation of its provisions."

Here there is no penalty. We have seen that a proper construction of the act requires us to strike out what is therein said about the penalty, and the result of that action is that no penalty is prescribed except such as exists under section 2448 of Kirby's Digest.

[3] It is insisted that the court erred in excluding proof on the part of appellant to the effect that his cattle were not infected with ticks, and that no ticks had been found in his neighborhood. But this testimony was properly excluded. The purpose of this regulation was to rid the area in which it was effective of the tick, and it had been determined that the proper way to accomplish this result was to dip all cattle in that area, and appellant should have complied with this regulation, his opinion to the contrary notwithstanding. If the actual presence of the ticks on an animal is to be established before the orders of the board are effective against that animal, then the resolutions are largely nugatory, and the eradication work would be greatly hampered. The court no doubt thought, and properly so, that it were better to dip some cattle which did not have ticks on them than to fail to dip others which were infected, and to thus afford the opportunity for further propagation of the ticks, and that certainty and safety required that all cattle in the prescribed area be dipped.

Other exceptions were saved at the trial, and are discussed in the brief, but we do not regard them as of sufficient importance to call for a discussion here.

Finding no prejudicial error, the judgment of the court below is affirmed.

McCULLOCH, C. J. (dissenting). The Legislature undertook to delegate to the board of control the power to prescribe penalties for violation of its regulations, and this court (properly, I think) holds that such attempted delegation of power is ineffectual and void, but it at least excludes the idea that the lawmakers intended to impose any other penalty. The effect of the court's decision is therefore to impose a penalty pursuant to the terms of another statute, which the lawmakers manifestly did not intend should apply. The court, in other words, disregards the expressed will of the lawmakers and substitutes something else instead. It seems to the writer that this violates all of the settled rules of construction, and constitutes legislation on the part of the court. *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030.

I dissent from the conclusion of the majority.

KIRBY, J., concurs.

SECOND DIVISION OF LACONIA LEVEE DIST. v. LACONIA LEVEE DIST.

(No. 33.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. LEVEES \Leftrightarrow 5—SEPARATION OF DISTRICTS—PRORATING INDEBTEDNESS STATUTE.

Judgment against two levee districts for damages to a contractor caused by their conduct in preventing him from completing his contract with the original district entered into before the passage of Acts 1913, p. 579, dividing such district into two, was not an indebtedness existing at the time of passage of the act, and therefore not to be prorated under it, where the damage accrued after division.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 14, 15; Dec. Dig. \Leftrightarrow 5.]

2. LEVEES \Leftrightarrow 11—DIVIDING DISTRICT—PRORATING INDEBTEDNESS—SUFFICIENCY OF EVIDENCE.

In suit between levee districts, evidence held sufficient to support finding that work for which the original district paid was done after passage of Acts 1913, p. 579, dividing it into the two and prorating indebtedness existing at time of the act's passage.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 20; Dec. Dig. \Leftrightarrow 11.]

3. LEVEES \Leftrightarrow 11—DIVIDING DISTRICT—PRORATING INDEBTEDNESS—BURDEN OF PROOF.

In suit by a levee district against the one from which it was formed by Acts 1913, p. 579; dividing the original district and prorating its indebtedness existing when the act was passed, to determine their liabilities for an amount that had accrued under a contract, burden was on plaintiff to show by a preponderance of evidence that warrants were issued and paid by the original district upon an indebtedness existing when the act was passed, in which case the original district was liable for its share.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 20; Dec. Dig. \Leftrightarrow 11.]

4. LEVEES \Leftrightarrow 5—DIVIDING DISTRICT—POWER OF LEGISLATURE.

Though it is within the province of the Legislature, dividing a levee district, to define the boundaries of the two districts and adjust their liabilities after separation, such adjustment must not be arbitrary, but must have just and reasonable basis.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 14, 15; Dec. Dig. \Leftrightarrow 5.]

5. CONSTITUTIONAL LAW \Leftrightarrow 290(1) — EMINENT DOMAIN \Leftrightarrow 2(11)—LEVEES \Leftrightarrow 5—DUE PROCESS—DIVIDING LEVEE DISTRICT.

In dividing a levee district, the Legislature could not make the property owners of the original district liable for levee work done in the new district, after the passage of the dividing act, under a contract made by the original district, as it would have been to take property without due process and without compensation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871, 874, 875; Dec. Dig. \Leftrightarrow 290(1); Eminent Domain, Cent. Dig. §§ 9-12; Dec. Dig. \Leftrightarrow 2(11); Levees, Cent. Dig. §§ 14, 15; Dec. Dig. \Leftrightarrow 5.]

Appeal from Desha Chancery Court; Z. T. Wood, Chancellor.

Suit by the Second Division of Laconia Levee District against the Laconia Levee District. From a judgment for defendant, plaintiff appeals. Affirmed.

Prior to the 7th of March, 1913, certain territory in Phillips and Desha counties had

been incorporated into the Laconia Levee District. See Acts of 1891, p. 169, and Acts of 1893, p. 253. On March 7, 1913, an act was passed creating an independent levee district, carved out of the Laconia Levee District, and designated as "Second Division of Laconia Levee District." The Second Division of the Laconia Levee District thus created comprised the levees that were located in Phillips county. This left in the original Laconia Levee District the levees situated in Desha county. At the time of the passage of the act of March 7, 1913, the original Laconia Levee District was under a contract with one Harry Adams for the placement of 100,000 yards of dirt as a banquet of the levee located in Phillips county, which contract was dated September 3, 1912. Up to the time of the passage of the act of March 7, 1913, Adams had done work under this contract, and continued to do work under such contract after the passage of the above act until the two districts refused to further pay him. After the passage of the act, the secretary of the original district issued to Adams warrants drawn on the treasurer of the district in payment of levee work done by him in Phillips county. Warrants had been issued for the work done before the passage of the act, and the secretary continued to issue warrants under the orders of the board of directors of the original levee district, and the treasurer of that district continued to pay those warrants until as late as July 7, 1913. The warrants that were thus issued and paid after the passage of the act of March 7, 1913, amounted in the aggregate to \$4,579.65. At the time of the passage of the act there was in the treasury of the original Laconia Levee District the sum of \$6,166.35. Upon the refusal of both districts to further pay Adams, he brought suit against them for breach of contract and recovered judgment against them in the sum of \$897.67. A controversy arose between the two districts as to their respective liabilities to each other under the act, and as to their respective liabilities for the amount that had accrued under the Adams contract. This suit was instituted by the appellant against the appellee to determine that controversy.

The chancery court, upon substantially the above facts, found, among other things:

"(1) That on the 7th day of March, 1913, there was in the treasury of the defendant the sum of \$6,166.35.

"(2) That under the terms of the act of March 7, 1913, the plaintiff was entitled to 20 1/4/45 of said fund, amounting to the sum of \$2,773.16.

"(3) That from and after the date of the passage of said act of March 7, 1913, defendant paid to Harry Adams the sum of \$4,579.65 for work done on the contract of September, 1912, in Phillips county, and is entitled to be reimbursed in that sum by the plaintiff; and that defendant is not liable, as between it and plaintiff, for any part of the judgment rendered in the Desha circuit court in favor of Harry Adams and against both plaintiff and defendant."

The court further found that defendant was liable to the plaintiff for its pro rata of the value of certain lands taken for levee purposes prior to the passage of the act, amounting to \$318.75, and that after crediting the plaintiff with such sum there was a balance due the defendant amounting, in principal and interest, to the sum of \$1,697.63, and entered judgment in favor of the appellee for such sum, and the appellant brings this appeal.

Such other facts as may be necessary will be stated in the opinion.

Moore, Vineyard & Satterfield and J. G. Burke, all of Helena, for appellant. F. M. Rogers, of Arkansas City, for appellee.

WOOD, J. (after stating the facts as above). A correct solution of the issue presented by this appeal involves a construction of Act No. 141 of the Acts of 1913, approved March 7, 1913. The first section of that act creates the appellant levee district. Other sections provide for the maintenance, construction, repair, and control of the levees already situated in the appellant district, and those thereafter to be constructed, and the levying and collecting of all taxes in such district, including those assessed in the year 1912 and collected in 1913, and the expenditure thereof, and place these matters under the exclusive control, supervision, and management of the board of directors of the appellant.

The fifth section of the act is as follows:

"Should there be any funds in the hands of the treasurer of the Laconia Levee District at the time of the passage of this act in excess of any legitimate indebtedness of said district, then such a part of said fund shall be paid over to the treasurer of the division herein created in the ratio as the mileage in said division bears to the total mileage of the levee in said Laconia Levee District. In the event the said Laconia Levee District, at the time of the passage of this act, is indebted in any amount whatever in excess of the funds on hand, then the division hereby created shall pay its proportional part of such indebtedness in the ratio as the number of miles of levee in said division bears to the total miles of levee in said Laconia Levee District. For the purpose of ascertaining such surplus or indebtedness, as the case may be, the directors of said division shall have access to the books and records of the Laconia Levee District."

Appellant contends that the court erred in holding that the appellee was not liable as between it and appellant for any part of the judgment rendered by the Desha circuit court against both appellant and appellee. But the appellant does not bring into its abstract any evidence to sustain this contention. The only reference to this judgment that is contained in the abstract is that recited in the answer, as follows:

"That the said Harry Adams filed suit in the Desha circuit court against the plaintiff and defendant districts, alleging therein that he had been prevented by defendant districts from completing said contract and prayed judgment for damages; that said suit resulted in a judgment

against defendant districts in the sum of \$897.67."

[1] It appears affirmatively from these recitals that the judgment rendered against the districts was not for any indebtedness due from the Laconia Levee District to Harry Adams at the time of the passage of the act, but, on the contrary, that the judgment was for damages caused by the conduct of the districts in preventing him from completing his contract. Since it appears from the testimony that Adams was still performing work under his contract after the passage of the act of March 7, 1913, the damages for which he recovered judgment accrued after the passage of the act, and therefore were not an indebtedness existing at the time of the passage of the act. The amount of the judgment therefore was not an indebtedness to be prorated under the act, and the court did not err in so holding.

It was the manifest purpose of the act, as shown by section 5, to prorate the funds in the hands of the original levee district at the time of the passage of the act, after deducting the indebtedness of the original district at that time, and to require the Second Division to pay its pro rata part of any then existing indebtedness after deducting the funds on hand.

Now, the proof shows that at the time and after the passage of the act the performance of the work contemplated by the contract was not complete, and the contract itself in express terms shows that the work which was being done was banquette work, comprising 100,000 yards, more or less. Although the work was done under a contract executed prior to the passage of the act, yet no indebtedness against the original levee district would accrue under the contract until the work was actually done, and if this work was done subsequent to the passage of the act of March 7, 1913, then the indebtedness therefor did not exist at the time of the passage of the act, but was an indebtedness accruing thereafter.

Since the act created the Second Division and gave its governing board exclusive control, supervision, and management of the work of constructing, repairing, and maintaining the levees of the Second Division, it is clear that the appellee, the original Laconia Levee District, after the passage of the act had no longer any duty to perform with reference to the levees situated in the appellant district. While the appellee was still liable under its contract with Adams for any indebtedness that accrued either before or after the passage of the act under said contract, yet, as between the appellee and the appellant, by the terms of the act, appellee was relieved of any indebtedness that accrued under that contract after the passage of the act, and appellant could not hold appellee even for a proportional part of such indebtedness.

The court found that the appellee paid Adams from and after the passage of the act \$4,579.65 for work done under the contract, and that appellee was entitled to be reimbursed in that sum by the appellant.

[2] While there is no express finding that the work for which this sum was paid was done subsequent to the passage of the act of March 7, 1913, yet the finding of the court was tantamount to that, and such was the effect of the judgment. It cannot be said that such a finding is clearly against the preponderance of the evidence.

The testimony of the secretary of the Laconia Levee District shows that at the end of the month the engineer estimated the work done during the preceding month and gave orders to the contractor on the secretary to cover those estimates, and that the secretary, upon such orders, would issue his warrant in favor of the contractor on the treasurer of the district for the payment of the money. The testimony shows that warrants covering the sum of \$4,579.65 were issued March 28, May 31, and July 1, 1913, and that these checks were paid by the treasurer respectively March 29, June 2, and July 7, 1913. True, the secretary of the appellee, when asked why these warrants were issued after March 7, 1913, if the work was done in Phillips county, answered:

"Because they had been issued before this time by the old members of the original district to honor Mr. Jordan's orders for work done, and I continued to give orders until I was instructed otherwise."

He also testified that the warrants he paid out to Mr. Adams were ordered by the board of the original Laconia Levee District.

Now, it must be remembered that, so far as this record shows, the board of the original Laconia Levee District was not changed by the act of March 7, 1913, creating the appellant district, and it was therefore literally true that the warrants issued by the secretary after the passage of the act were ordered by the board of the original Laconia Levee District. Taking the testimony of the secretary of the board as a whole, it shows that after the passage of the act creating the appellant district he continued to give warrants on the orders of the board of the Laconia Levee District in the same manner that he had done before the passage of the act, to wit, upon estimates made by the engineer at the end of the month for work done during that month.

[3] The burden was upon the appellant to show by a preponderance of the evidence that these warrants were issued and paid upon an indebtedness existing at the time of the passage of the act. It has not met that burden.

The proof shows that there were 45½ miles of levee in the original levee district, and that 20½ miles of this levee were in

Phillips county, and that all the work that had been done under the Adams contract was done on the levee situated in Phillips county.

[4] Appellant contends that it was within the exclusive province of the Legislature to define the boundaries of the two districts and to adjust the liabilities of said districts after their separation. While this is true, such adjustment must not be arbitrary; that is, without any just and reasonable basis for the legislative determination. *Moore v. Board of Levee Dist.*, 98 Ark. 113, 117, 135 S. W. 819.

[5] It was not within the power of the Legislature to make the property owners of the appellee liable for levee work done under the contract with Adams after the passage of the act of March 7, 1913, on the levee situated in Phillips county. To relieve the property owners of appellant of the cost of the levee work done under the Adams contract after the passage of the act, and to lay the burden of the cost of such work upon the property owners of the appellee without a hearing and without corresponding benefit to them, would be taking their property without due process and without compensation. If the act had to be so construed, it would be unconstitutional and void.

The chancery court correctly construed the act. Its findings of fact are in accord with the preponderance of the evidence, and its decree must therefore be affirmed.

CASE et al. v. CADDO RIVER LUMBER CO. et al. (No. 35.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

LIS PENDENS \S 25(7) — PURCHASER PENDING SUIT—PARTY HOLDING UNDER QUITCLAIM DEED.

Where a lumber company, when it purchased lands, had no notice by a lis pendens that affected its title, because it did not claim under any title derived from the party in whose hands the land was attached, the record title under which the lumber company claimed being in another, while inquiry as to the title of the party from whom the lumber company bought would have disclosed to it that he had a perfect record title to the lands by virtue of his quitclaim deed from the party holding record title, though it held under a quitclaim deed, the lumber company was entitled to protection as an innocent purchaser.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 64; Dec. Dig. \S 25(7).]

Appeal from Pike Chancery Court; Jas. D. Shaver, Chancellor.

Suit by Andrew J. Case and others against the Caddo River Lumber Company and others. From a decree for defendants, plaintiffs appeal. Decree affirmed.

Martin, Wootton & Martin, of Hot Springs, for appellants. McRae & Tompkins, of Prescott, J. C. Pinnix, of Murfreesboro, and W. P. Feazel, of Nashville, for appellees.

WOOD, J. The appellants instituted this suit against the appellees to remove clouds from their title. Appellants alleged, in substance, that they were the owners of certain lands in Pike county by having purchased same at a sale under a judgment rendered by the United States District Court of Arkansas in certain attachment proceedings therein pending in which the lands were levied upon and sold as the property of W. F. Davis and wife. They alleged that notice *lis pendens* was duly given of the attachment proceedings. They also alleged that the appellees were claiming title under deeds which were clouds upon appellants' title, and prayed that these deeds be canceled. The appellees set up that the writ of attachment was irregularly levied upon the lands, and that such levy was therefore void. They further set up that the Grayson-Nashville Lumber Company purchased the lands from the Grayson-McLeod Lumber Company in good faith and for value, and without any knowledge of the attachment and lien; that it conveyed the land to the Caddo River Lumber Company, which was also an innocent purchaser for value. The conclusion we have reached on the issue as to whether or not the Caddo River Lumber Company was an innocent purchaser for value makes it unnecessary to consider the other issues in the case. The facts concerning the issue as to whether or not the appellee Caddo River Lumber Company was an innocent purchaser for value are substantially as follows: On the 5th day of May, 1909, one Will Lawrence (who at that time was the owner of the land in controversy) conveyed the land by warranty deed to one H. H. Coffman. This deed was recorded on May 6, 1909. Lawrence testified that this deed was given to secure an indebtedness to Coffman of \$750, which he afterwards paid, and that Coffman deeded the land back to him. It appears that this deed was never placed on record. On the 16th day of July, 1909, Lawrence conveyed the land to W. F. Davis, and on the next day the land was attached by appellants, and on July 21, 1909, *lis pendens* notice of the attachment was filed with the clerk of Pike county. On August 30, 1909, W. F. Davis conveyed the land to W. B. Davis. On February 7, 1910, Coffman (who at that time held the record deed) conveyed the land by quitclaim deed to W. B. Davis. On February 8, 1910, W. B. Davis conveyed the land to the Ft. Smith & Gurdon Land & Timber Company, from whom by mesne conveyances it passed to the Caddo River Lumber Company.

The Caddo River Lumber Company at the time of its purchase of the lands in controversy had no notice by the *lis pendens* that affected its title, because it did not claim under any title derived from W. F. Davis. His title was not in the chain of title of the Caddo River Lumber Company. The record

title under which the Caddo Company claimed was in one Coffman, and not in W. F. Davis. The quitclaim deed was sufficient to put the lumber company upon inquiry as to the title of W. B. Davis, under whom the lumber company claimed; but inquiry as to this title would have disclosed to the lumber company that W. B. Davis had a perfect record title to the lands by virtue of his quitclaim deed from Coffman. Since inquiry would have discovered that W. B. Davis had a perfect record title and would not have disclosed any defects whatever in the title of its vendor, W. B. Davis, the defense of innocent purchaser set up by the lumber company was complete and must be sustained. Although holding under quitclaim deed, this was sufficient to entitle the lumber company to protection as an innocent purchaser. *Henry Wrape Co. v. Cox*, 122 Ark. 445, 183 S. W. 955; *Miller v. Fraley*, *Greenwood & Co.*, 23 Ark. 735.

The decree appealed from herein dismissed the appellants' complaint and quieted the title in the appellees, which decree, for the reasons stated, is correct, and is therefore affirmed.

WILSON v. STATE. (No. 34.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. CRIMINAL LAW §823(2)—INSTRUCTION—ASSUMING FACTS.

In a prosecution for murder by poisoning, or in any case of willful, deliberate, malicious and premeditated killing, such as to constitute only murder in the first degree, the abstract instruction that, the killing being proved, the burden of proving circumstances of mitigation justifying or excusing the homicide devolves on accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide, was not objectionable as assuming that the killing was proved, where the following instruction submitted that issue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. §823(2).]

2. CRIMINAL LAW §778(5)—INSTRUCTION—SHIFTING BURDEN OF PROOF.

In a prosecution for wife murder by poisoning, the instruction that, the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide devolves on accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide, merely told the jury that, if they found that the killing by defendant was proved, the burden of proof was on accused to establish self-defense, if the defense was set up, unless the proof introduced by the state showed it, and did not shift the burden to defendant to establish his innocence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1848, 1849, 1960, 1967; Dec. Dig. §778(5); *Homicide*, Cent. Dig. § 632.]

3. HOMICIDE §340(4)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for wife murder by poisoning, where the jury, by their verdict of guilty, must have found that defendant killed his wife

by administering strychnine, but nevertheless returned a verdict for murder in the second degree, error, if any, in giving an abstract instruction that, the killing being proved, the burden of proving circumstances of mitigation in justification or excuse devolved on defendant, was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. ¶340(4).]

4. CRIMINAL LAW ¶720(1) — TRIAL — REMARKS OF STATE'S COUNSEL.

In a prosecution for murder, the remarks of state's counsel in opening argument that a witness was there and had testified for the state, though he had been threatened and intimidated from so testifying, were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ¶720(1).]

5. CRIMINAL LAW ¶728(5)—IMPROPER REMARKS OF COUNSEL—DUTY OF COURT TO INSTRUCT JURY ON OWN MOTION.

In prosecution for murder, where, in opening argument, state's counsel stated that a witness for the state was there and had testified, though threatened and intimidated to prevent him, and defendant objected, and state's counsel withdrew the statement, and defendant did not ask the court to admonish the jury not to consider the improper remarks, and the court did not rule upon the objection, there was no error, since defendant cannot predicate error upon failure of the court to make a ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court to instruct the jury not to consider them, while the remarks were not so intensely prejudicial as to call for such ruling by the court on its own motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1691; Dec. Dig. ¶728(5).]

6. CRIMINAL LAW ¶699, 1154 — IMPROPER REMARKS OF COUNSEL — DISCRETION OF TRIAL COURT.

Trial courts have broad discretion in the matter of controlling the arguments of counsel, and, except in cases of a manifest abuse of discretion, the Supreme Court will defer largely to the conclusions of the trial court as to whether or not prejudice in any given case results from improper remarks, and as to whether or not the court has taken such affirmative action in the premises as might be necessary to remove possible prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656, 3059; Dec. Dig. ¶699, 1154.]

7. CRIMINAL LAW ¶719(1) — REMARKS OF STATE'S COUNSEL—WARRANTY BY EVIDENCE.

In a prosecution for wife murder, remarks of the prosecuting attorney that the first witness had testified that defendant stated to him "that he had never cared anything for the d—b—", and that he was going to get rid of her," held warranted by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. ¶719(1).]

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

Oscar Wilson was convicted of murder in the second degree, and he appeals. Judgment affirmed.

C. W. McKay and Walker Smith, both of Magnolia, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

WOOD, J. At the August term, 1916, of the Columbia circuit court, appellant was convicted of the crime of murder in the second degree, and sentenced to imprisonment in the state penitentiary for a period of ten years.

The indictment charged him with having committed the crime of murder by killing his wife, Maud Wilson, by giving her strychnine. It was a question for the jury, under the evidence, as to whether or not Maud Wilson died as the result of strychnine administered by the appellant for the purpose of killing her, or whether she died from Bright's disease, with which she had been afflicted for some two years. The evidence tending to prove that appellant poisoned his wife was circumstantial, but sufficient to sustain a verdict of guilty.

Among other instructions, the court gave the following:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide provided the burden of the whole case is on the state, to show the defendant guilty beyond a reasonable doubt."

Appellant specifically objected to the giving of the instruction on the ground, among others, that the instruction was abstract, and that it assumed that the killing by the defendant was proved, and that it cast the burden of proving circumstances of mitigation upon the defendant, and thus placed the burden upon him to show circumstances that justified or excused him in administering the poison.

The instruction is wholly abstract in a case where the killing is done by poison, or in any other case of willful, deliberate, malicious, and premeditated killing, such as to constitute only murder in the first degree. The case of *Easter v. State*, 96 Ark. 629-633, 132 S. W. 924, was such a case. There, as here, the court gave the instruction in connection with other instructions on the law of homicide, and of reasonable doubt, and the burden of proof in such cases. In that case, in commenting upon the ruling of the court in giving the instruction as set out above, we said:

"It is contended that this instruction is not applicable * * * where there was a conflict as to whether or not the defendant did the killing. It is true that this statute is applicable only * * * where the killing is claimed to have been done in self-defense, and is not applicable in cases of killing by lying in wait. There is no prejudicial error, however, in giving it in any case, for no harm could result in giving it as an abstract proposition of law. The danger of giving it in the exact language of the statute is that it might be construed as an assumption by the court that the killing had been done by the accused. The instruction was not, however, objected to on that ground, and that construction seems not to have been placed upon it by court or counsel."

[1] Here the instruction was specifically objected to on the ground that it assumed that appellant did the killing, and the very next instruction, given at the instance of the state, submitted the issue as to whether or not appellant did the killing, and told the jury that, unless they found that he did kill Maud Wilson beyond a reasonable doubt by unlawfully, willfully, and feloniously, after premeditation and deliberation, with malice aforethought, administering strychnine, they should find him not guilty. And in the first instruction given at the instance of the appellant the court told the jury, in substance, the same thing.

[2] The instruction is in the exact language of the statute, and when given in this form it could not be construed as an assumption by the court that the killing was proved, but is only tantamount to telling the jury that, if they found that the killing by the defendant was proved, then the burden of proof was upon the accused, where self-defense was set up, to establish such defense, unless the proof introduced by the state showed it. This, as we have often held, does not shift the burden to defendant of establishing his innocence, but the burden of proof to show guilt in the whole case still rests on the state. *Cogburn v. State*, 76 Ark. 110, 113, 88 S. W. 822; *Tignor v. State*, 76 Ark. 489, 493, 89 S. W. 96; *Thomas v. State*, 85 Ark. 357, 358, 108 S. W. 224; *Childs v. State*, 98 Ark. 430, 437, 136 S. W. 285; *Walker v. State*, 100 Ark. 180, 183, 139 S. W. 1139; *Brock v. State*, 101 Ark. 147, 154, 141 S. W. 756; *Scoggins v. State*, 109 Ark. 510, 514, 159 S. W. 211; *Johnson v. State*, 120 Ark. 193, 200, 179 S. W. 361.

While an instruction given in this form was criticized in the case of *Easter v. State*, supra, it was not expressly condemned as prejudicial error in this form in any case, and we now hold that the instruction, even when given in the language of the statute, does not assume that the killing has been proved, but, when so worded, the effect of it is to submit that issue to the jury.

[3] The contention that, inasmuch as the instruction was abstract, it was prejudicial is unsound, for the reason that the jury found a state of facts to exist which would make the instruction favorable rather than prejudicial to the interests of appellant. The jury, in other words, by their verdict of guilty, must have found that the appellant killed his wife, and they must also have found that he killed her by administering strychnine, for that is the only means which he employed to kill her if he committed the offense at all. Under the law, upon such a state of facts, the only correct verdict would have been murder in the first degree. Instead, the jury went beyond its province and extended clemency to the accused by returning a verdict for murder in the second degree.

Since the jury found the appellant guilty, he is in no attitude to complain, and was in

no manner prejudiced, by the giving of an instruction the only effect of which, if it had any effect at all, was to cause the jury to mitigate appellant's punishment, which, under their finding of guilty, might have been death or imprisonment for life instead of imprisonment in the state penitentiary for a shorter term. The instruction could not have misled the jury on the issue as to the guilt or innocence of the appellant.

[4-6] II. Counsel for the state, in his opening argument, stated to the jury that Charles Beeson, a witness for the state, was there and had testified in this case in behalf of the state, although he had been threatened and intimidated for the purpose of preventing him from so testifying, to which argument the defendant objected and asked the court to rule upon his objection, but counsel for the state immediately stated that he withdrew the statement. The court did not rule upon the same, and counsel excepted.

Counsel for appellant state that the court's refusal to rule on appellant's objection and to instruct the jury not to consider the statement could have caused the jury to believe that the prosecuting attorney was justified in making the statement.

The remarks were improper, because they were calculated to cause the jury to believe that appellant had threatened and intimidated a witness for the state, who gave damaging testimony against appellant, in order to prevent, if possible, his attendance at the trial. But, upon objection being made to the remarks, the counsel immediately withdrew the statement, and the appellant did not thereupon ask the court to admonish the jury not to consider the improper remarks. Counsel for appellant thus, in effect, treated the withdrawal of the statement as sufficient to remove the prejudice; at least, he did not ask the court to instruct the jury not to consider the remarks or to take any other affirmative steps to remove any possible prejudice that might have been created against appellant in the minds of the jury. Appellant cannot predicate error upon failure of the court to make a ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same. See *Kansas City Sou. Ry. Co. v. Murphy*, 74 Ark. 259, 85 S. W. 428; *Harding v. State*, 94 Ark. 65, 126 S. W. 90. The remarks were not so intensely prejudicial in their nature as to call for such ruling of the court sua motu.

The trial courts have broad discretion in the matter of controlling the arguments of counsel, and, except in cases of a manifest abuse of discretion, this court will defer largely to the conclusions of the trial court as to whether or not prejudice in any given case results from improper remarks, and as to whether or not the court has taken such

affirmative action in the premises as might be necessary to remove any possible prejudice. See *Thompson on Trials*, 964; *Railway Co. v. Murphy*, supra; *Cravens v. State*, 95 Ark. 321, 326, 128 S. W. 1037.

[7] The prosecuting attorney in his closing argument also, in effect, stated that witness O'Dell had testified that the appellant stated to him "that he had never cared anything for the damned bitch, and that he was going to get rid of her." When this statement was made by the prosecuting attorney and objected to by counsel for appellant, the court told the jury that he did not know whether counsel was misstating the evidence or not, but that they were the judges of the evidence and as to whether or not the prosecuting attorney had misstated same.

While the witness O'Dell did not testify in the exact language as stated by the prosecuting attorney, he did testify that the appellant had said to him that he (appellant) "did not care a G— d— about that woman." And witness Chas. Beeson testified that appellant stated to him on the day he procured his license to marry that he was not going to live with her, and that if he did, "By G—, you will hear what I am going to do with her."

While the prosecuting attorney failed to designate the witness who testified to the statement contained in his remarks, yet it appears from the record that substantially these remarks were testified to by a witness. Therefore the remarks of counsel were warranted by the evidence, and the court ruled correctly in holding that the jury were the sole judges of the evidence, and as to whether or not the prosecuting attorney had misstated the same.

There is no reversible error in the record, and the judgment is therefore affirmed.

JAMES, HOLCOMBE & RAINWATER v. FURR et al. (No. 41.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

REFORMATION OF INSTRUMENTS § 45(5)—EVIDENCE—MUTUALITY OF MISTAKE.

To authorize reformation of a conveyance to include land not described therein, evidence must be clear, convincing, and satisfying that its omission was contrary to the intention, not of one, but of both parties.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 162; Dec. Dig. 45(5).]

Appeal from Desha Chancery Court; Z. T. Wood, Chancellor.

Suit by James, Holcombe & Rainwater against Hubert Furr and another. From decree for defendants, plaintiffs appeal. Affirmed.

X. O. Pindall, of Little Rock, for appellants. J. Bernhardt, of Arkansas City, and T. D. Crawford, of Little Rock, for appellees.

SMITH, J. This suit was brought to enforce the specific performance of a contract to convey land, but is in effect, and in fact, a suit to reform a description contained in a deed, and the suit is so treated by the parties. The tract of land in controversy is known by the parties as the "Medford Landing field," and contains 18½ acres, and is further described as that part of the northwest quarter, northeast quarter, section 1, township 9 south, range 3 west, east of the bayou. Each of the parties to this litigation owned other lands besides those conveyed in the deed here sought to be reformed, and in the negotiations which led to the trade evidenced by the deed various propositions and counter propositions were made.

It is reasonably certain that appellants understood that these negotiations were terminated by an agreement to sell the land in controversy for the consideration of \$1,400, and various circumstances are testified to which corroborate them in this contention. Principally among such circumstances is the location of this land with reference to their other lands and to the river, and it is said by them that the acquisition of this land was the chief object in making the trade. A memorandum of the trade was prepared by appellee, and to this an addition was made by appellant Holcombe which is indicated by the italics. This memorandum is as follows:

"\$1,400.00.

"½ Henry James, J. N. Holcombe ¼, Loid Rainwater ¼.

"N. E. N. E. Sec. 1-9-3-40 A. All of that part of the E. ½ Sec. 36-8-3, lying E. of bayou leading from Davis Lake and emptying into Ark. River west of Medford Ldg., containing 75 acres, more or less.

"\$1,400.00 & James H. & R. to receive rent notes for 1914. J. N. Holcombe."

Appellants insist that appellee assured them the description employed embraced the land in controversy, and that they relied upon this representation.

Appellee testified, however, that no mistake was made in the description employed in the memorandum. He says he proposed to sell the disputed tract, but only on condition that appellants buy certain other lands not included in the trade finally made. He testified that he could not get to Medford Landing or to the county road without going over this disputed tract of land, and that he would not have sold that land at the price paid him. He also says that, if the land had been described as lying east of a creek or bayou, as appellants contend, such description would have included 30 additional acres instead of 18½. A deed was drawn to conform to the descriptions in the memorandum, and thereafter a survey of the lands there described was made, which disclosed the fact that the land in controversy was not included in the description employed. It is undisputed that, when appellants called attention to the alleged mistake, appellee offered to rescind the

contract; but appellants refused and demanded a deed conforming to their version of the trade.

Counsel do not disagree about the rule governing in cases of this character, but it is very earnestly insisted for appellants that the testimony meets this requirement. But we do not think so. It may be conceded that appellants intended to buy, and supposed they had bought, this land; but it is not so certain that appellee intended to sell it. A mere preponderance of the evidence is not sufficient, and, while it is not required that the proof be undisputed, it is required that the proof be clear, convincing, and satisfying, so that, in ordering a reformation made, a reasonable certainty may be entertained that the real intention of both parties is being executed. *Parsons v. Russ*, 189 S. W. 1052; *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52.

The decree of the chancellor is therefore affirmed.

ADAIR v. ARENDT. (No. 89.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. HUSBAND AND WIFE \S 232(3) — ACTION FOR NECESSARIES FURNISHED WIFE — EVIDENCE—SUFFICIENCY.

In an action for groceries sold a married woman living with her husband which were used by the family, in which plaintiff testified that he sold the goods to defendant upon her promise to pay, evidence held to support a verdict for plaintiff for the full amount of the account.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 848, 981; Dec. Dig. \S 232(3).]

2. HUSBAND AND WIFE \S 83—WIFE'S SEPARATE ESTATE CONTRACTS—LIABILITY.

Under the Married Woman's Act (Acts 1915, p. 684), giving married women the right to acquire and hold property, a married woman may bind herself personally on contracts for household supplies and necessities.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 825; Dec. Dig. \S 83.]

3. HUSBAND AND WIFE \S 235(3) — ACTION FOR NECESSARIES—INSTRUCTIONS.

In an action against a married woman for groceries furnished for the use of the family of herself and husband, an instruction: "The old common law is that a husband is absolutely liable for all necessities for both his wife and family; but the law has been changed, and, where a wife makes a contract to purchase goods on her own credit, then she is liable for those goods and not her husband. The last Legislature went so far as to put that into the form of an act, giving a married woman power to sue and be sued the same as if she were a single woman. That was only in furtherance of a decision of the Supreme Court which had been previously rendered"—although argumentative in form and unhappily phrased, was not erroneous in substance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 851, 982; Dec. Dig. \S 235(3).]

4. TRIAL \S 296(2) — INSTRUCTION — ERROR — CURE BY OTHER INSTRUCTIONS.

In an action against a married woman for groceries furnished for the use of herself and husband, where the court by a written instruc-

tion narrowed the issues to the disputed question of fact whether the goods were furnished on defendant's promise to pay, an oral instruction on the liability of married women argumentative in form and referring to a statute passed subsequent to the purchase was not prejudicial error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 708; Dec. Dig. \S 296(2).]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Geo. H. Arendt against Mrs. T. C. Adair. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Gulley, of Little Rock, for appellant. E. B. Buchanan, of Little Rock, for appellee.

SMITH, J. Appellant, who is a married woman living with her husband, was sued for a bill of groceries which were used by the family of herself and her husband. She interposed two defenses: First, that the account was that of her husband and not of her own making by express contract or otherwise; second, that at the time the groceries were furnished she was a married woman living with her husband and family, and for this reason she could not be responsible for necessities furnished the family, or for her husband's debt. A verdict was returned by the jury against her for the full amount of the account, and by this appeal she questions both the sufficiency of the evidence to support the verdict and the correctness of the instruction under which it was returned.

[1] Upon the first question it may be said that the evidence is sharply conflicting; but appellee testified that he sold the goods to appellant and upon her promise to pay, and this evidence, which was accepted by the jury, is legally sufficient to support the verdict upon the first proposition.

[2] The second defense presents the real question in the case, and in its solution counsel for the respective parties have evinced much industry in their research as evidenced by the number of cases they cite bearing upon the question. We shall attempt no review of these cases, as we think the question involved presents no difficulty since the passage of our Married Woman's Act. The effect of this legislation was reviewed by Mr. Justice Riddick with his usual clearness in the case of *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529. In that case it was said:

"Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not. (Citing cases.) To hold otherwise would be to say that, although the statute gives a married woman the right to acquire and hold property, yet, if she undertakes to acquire it by contract, the law

will treat such contract as of no validity. Under that view of the statutes, a married woman who had no separate estate could make no valid contract for the acquisition of property, however desirable and beneficial the ownership of it might be to her. If she was a seamstress and need a sewing machine, or a music teacher and needed a piano, she could make no contract for a purchase upon credit. If she borrowed money with which to purchase property, her note given for the money would be void. This was her condition before the passage of the enabling acts. Such a construction, it seems to us, would, to a large extent, nullify the statutes which were intended to emancipate married women from many of the trammels of the common law, and permit them to contract for, acquire, and hold property."

A portion of this language was quoted with approval in the case of *Arnold v. McBride*, 78 Ark. 275, 93 S. W. 989, and the quotation was followed by the statement that:

"It is unimportant what use she made of the money after she received it, as the lender was not bound to see that she actually used it for her own purposes and benefit. All that is necessary is that the money shall have passed to her as her own property to do with it as she pleased. The evidence shows that this was done in this case."

These quotations make it appear that authority was given the wife to buy what she pleased for herself and, after it had been acquired, to dispose of it as she pleased, and she might buy on credit as well as for cash. But the right to buy on credit would avail nothing if it was not accompanied with the obligation to pay, for without this obligation credit is impossible.

A great many cases on this subject are cited in the article on Husband and Wife in 13 Ruling Case Law, and we quote from section 209 of that article as follows:

"209. *Credit Extended to Wife*.—If purchases, though of ordinary household supplies, are made by the wife on her sole credit and not as agent for or on the credit of her husband, the husband is not as a general rule held liable therefor; in such a case the question of the agency of the wife is not involved; still, if a wife purchases ordinary household supplies without indicating that she does so on her personal credit, the presumption is that the purchase was on the credit of the husband, and the mere fact that a tradesman charges the articles to the wife does not show that the purchase was on the sole credit of the wife, and will not necessarily relieve the husband from liability therefor on the ground of the implied agency of the wife to bind her husband. It has been held that the fact that a wife gave her own note for the price of supplies bought by her for her husband's farm is not conclusive evidence that the indebtedness was incurred by her individually; that the questions of her agency and her husband's liability are for the jury. Under the statutes enlarging the powers of married women to make contracts and transact business, it is competent for a wife to bind herself personally on contracts in relation to household matters and necessities. These statutes, however, do not alter the common-law rule that she is presumed to have authority to act for her husband in such matters, and that she is presumed to act in pursuance of such authority and not on her own account. * * *

[3] After having given certain written instructions, the court gave an oral charge which it is now earnestly insisted was erroneous, and that the giving of this oral charge was a prejudicial error which calls for the reversal of the case. This oral charge was as follows:

"Gentlemen of the jury, the old common law is that a husband is absolutely liable for all necessities for both his wife and family; but the law has been changed, and, where a wife makes a contract to purchase goods on her own credit, then she is liable for those goods and not her husband. The last Legislature went so far as to put that into the form of an act, giving a married woman power to sue and be sued the same as if she were a single woman. That was only in furtherance of a decision of the Supreme Court which had been previously rendered." Acts 1915, p. 684.

It may be said that this charge was unhappily phrased, in that it is somewhat argumentative in form; but we think it contained no erroneous statement of the law as it existed even prior to the passage of the act of 1915 referred to, which greatly enlarged the rights of married women. The bill of goods sued for was purchased before this act went into effect.

[4] We think no prejudicial error could have resulted from this charge, because the court had narrowed the issues in one of the written instructions by the following statement of the law:

"8. You are instructed that, if you find from the evidence that the plaintiff sold these groceries in reliance upon the credit of defendant's husband, then you will find for defendant; if, however, you find the fact to be that the credit was extended to the defendant herself and at her request, then you will find for the plaintiff."

Under this instruction, the jury had only to pass upon the disputed question of fact, and, as we have said the testimony was sufficient to support the verdict, we think no prejudicial error could have resulted.

The judgment is affirmed.

HUTCHINS et al. v. GLOBE LIFE INS. CO.
et al. (No. 40.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

1. INSURANCE ⚡668(15)—ACTION—QUESTION FOR JURY—WAIVER OF WARRANTY.

Whether the examining physician of an insurance company knew that the answers he wrote down in the application of an illiterate insured were false was for the jury; the evidence being conflicting.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1743, 1748, 1761, 1767, 1770; Dec. Dig. ⚡668(15).]

2. INSURANCE ⚡379(4) — WAIVER OF WARRANTY.

Where the examining physician of an insurance company knew that the application answers he wrote down for an illiterate insured were false, the company cannot set up their falsity as breach of warranty; the physician's knowledge being imputed to it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1011-1015; Dec. Dig. ⚡379(4).]

3. INSURANCE — 668(8)—ACTION—QUESTION FOR JURY.

On conflicting evidence, whether an insurance company authorized its soliciting agent to accept a note payable to himself for the premium, and whether he was authorized to and did extend time for payment thereof, was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1787-1740, 1742, 1758-1760; Dec. Dig. —668(8).]

4. INSURANCE — 358—AUTHORITY OF AGENT TO EXTEND PREMIUM NOTE.

Where insurance company authorizes an agent to take note for premium in his own name, the company looking to him for the cash, the company is bound by his extension of the note.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 915, 1034; Dec. Dig. —358.]

Appeal from Circuit Court, Woodruff County; J. M. Jackson, Judge.

Action by Nora Hutchins and another against the Globe Life Insurance Company and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Dunaway & Chamberlin, of Little Rock, for appellants. Hawthorne & Hawthorne, of Jonesboro, and D. K. Hawthorne, of Little Rock, for appellees.

SMITH, J. This is a suit to collect a policy of insurance on the life of Charles H. Hutchins, who died February 4, 1914. The issuance and delivery of the policy by the company is admitted; but it denies any liability therefor, for the reason, first, that the insured had failed to state that he was afflicted with epilepsy at the time of his examination for his insurance, and for the reason, second, that the insured failed to pay his note given in payment of the first annual premium. At the conclusion of the evidence the court directed a verdict in favor of the insurance company, and this appeal has been prosecuted from that judgment.

[1, 2] It is admitted that the answers contained in the application for the insurance did not disclose the fact that the applicant had epilepsy and that these answers were made warranties. The insured was an illiterate man who could neither read nor write, and there was proof to the effect that the examining physician for the insurance company had attended and treated him for epilepsy and knew of his condition. While this testimony was not undisputed there was testimony sufficient to support a finding to that effect, and the jury might have so found had the determination of that question been submitted. If, in fact, the doctor had this knowledge when he wrote down a false answer, his knowledge is imputed to the company, and it cannot now be heard to say there was a breach of the warranty. *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; *Gray v.*

Stone, 102 Ark. 146, 143 S. W. 114; *Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Peebles v. Eminent Household of Columbian Woodmen*, 111 Ark. 433, 164 S. W. 296; *People's Fire Ins. Co. v. Goyne*, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373.

It is admitted that the note given for the premium was past due and unpaid at the time of the death of the insured, and that the policy provided that the contract of insurance should be void in this event. It is said, however, that this failure to pay the note, which would ordinarily have avoided the policy, did not have that effect here, for the reason that the company's agent had agreed to an extension of the time of payment to a date beyond that on which the insured died. It is said for appellee that upon the maturity of the note its collection was attempted, but, failing to collect it, a letter was written to the insured that the policy was canceled and the policy was entered upon the record of the canceled policies. It is further insisted that the agent had no authority to extend the time of payment of a past-due note, and that he had not, in fact, done so.

The secretary of the insurance company testified that he entered the cancellation of the policy upon the company's record provided for that purpose, and on January 20, 1914, wrote the insured advising him of that fact. There was no proof, however, that the letter was mailed, and there is affirmative proof by a brother of the insured that he read for his brother all letters received by him, but this brother had never seen the letter in question, and no such letter was found among the insured's effects.

Appellant offered in evidence a contract between the insurance company and the Globe Agency Company, a corporation organized for the purpose of writing insurance for appellee, whereby the agency company was given an exclusive contract to write insurance for the company, and in consideration therefor agreed to write a stated amount of insurance and to receive as compensation a fixed per cent. of the first annual premium, all of which it was to collect, and, after deducting its own per cent., to pay the balance to the insurance company. The secretary of the appellee insurance company testified that the agency company received the moneys and credits and required the agents of the agency company to pay the net amount to carry their actuary insurance at Little Rock for the year; this amount the agent was required to pay into the life insurance company, and "the balance of the premium could be handled in a way that would be satisfactory to all concerned; that we were anxious for the agents to do well, and if an agent got short the agency company would finance him, but we invariably required the agent to pay the net insurance." He further stated that he also knew

that one Riddle, a soliciting agent, had taken this premium note in his own name, and this was done in accordance with the rule of the insurance company, and that, as Riddle had authority to take the note in his own name, he was liable to the company for its part of the premium when he had done so. He also testified that this note showed on its face that it was given for insurance, but did not state the particular insurance; while another agent of the appellee who had the note for collection testified that the note did not recite the consideration for which it was given; but both agree it was payable to Riddle's order. The note was last accounted for as being in the hands of an agent of the insurance company for collection, but it was not produced at the trial. Riddle was agent for both the insurance company and the agency company, and had taken the application upon which the policy in suit was issued and the note given in payment thereof.

Appellants offered to prove by four witnesses that Riddle, in soliciting their applications for insurance, and by way of inducement to witnesses to become policy holders, had assured them that he had extended the time for the payment of the note given him by Hutchins until the fall of 1914; but the court excluded this evidence.

An agent of the Globe Agency Company named Morgan testified that the insurance company sent him the note for collection, and that he advised Hutchins of that fact, whereupon Hutchins brought the policy and offered to surrender it for his note, and made the statement at the time that he was not able to pay the note. Witness advised the insurance company of this offer and asked instructions, and received a letter from the insurance company directing him to refuse to accept the policy and press collection of the note, and that the company would send Riddle down to adjust this matter, and that Riddle called upon him and secured the note and upbraided him for writing the company about it, telling him that he owned the note and had paid the company its portion thereof, and Riddle took the note to a Mr. Gardner, who was also an agent of the agency company, and left it with him for collection, making the statement at the time that he had extended time for payment until the fall of 1914 when the insured would pay with his cotton. These conversations occurred after the maturity of the note, and, while they were not all admitted in evidence by the court, appellant offered to make this proof, and in view of the fact that there was a directed verdict in favor of the insurance company we must give this evidence its highest probative value.

[3] We think the evidence recited entitled appellant to go to the jury upon the question of the extension of the time by Riddle for the payment of this note and his authori-

ty so to do. Cooley's Briefs on Insurance, vol. 1, p. 345; Queen Ins. Co. v. Cooper, 81 Ark. 160, 98 S. W. 694; Shawnee Mutual Fire Ins. Co. v. Cannedy, 36 Okl. 733, 129 Pac. 865; American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

[4] This testimony presents a state of facts similar to those in the case of Mutual Life Ins. Co. v. Abbey, 76 Ark. 328, 88 S. W. 950, in which case it was said:

"Mr. Rummel, the general agent, was clothed with authority to transact generally the company's business in this state, and to collect the premiums, and was permitted by the company to accept notes to himself in lieu of cash to the company; the company looking to him instead of the policy holder for the cash in such cases. This general power gave him authority to bind the company by accepting notes in lieu of cash; and, whether he paid the company or not, when he accepted a note and waived cash payments, the company was bound by his act, for it was within the apparent scope of his agency. See Miller v. Life Ins. Co., 12 Wall. 285 [20 L. Ed. 398], and long line of decisions following and approving it collected in 7 Rose's Notes on U. S. Reports, pp. 546-549."

We conclude, therefore, that the court should not have directed a verdict for the insurance company upon either of the theories upon which that action is defended by learned counsel for appellee, and the judgment of the court below will therefore be reversed, and the cause remanded for a new trial.

DIGGS v. STATE. (No. 55.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. HOMICIDE \S 237—INSANITY—TESTS OF.

Upon trial of an indictment for murder, when the killing is admitted, the defense of insanity cannot avail, unless a preponderance of the evidence shows: First, that at the time of killing, defendant was under such defect of reason from mental disease, as prevented him from knowing the nature and quality of his act; or, second, if he did not know it, that he did not know it was wrong; or, third, if he knew the nature and quality of his act, and that it was wrong, that his mental disease incapacitated him from choosing between right and wrong as to the act done, and from resisting the doing of the wrong act which was the result of his mental disease.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 500; Dec. Dig. \S 237.]

2. HOMICIDE \S 294(1)—INSTRUCTIONS—INSANITY.

Upon trial of indictment for murder, when the killing is admitted, and the defense of insanity offered, after the court in his instructions had declared the tests for insanity and announced the burden of proof, it would be better to simply instruct that if the jury believed from a preponderance of the evidence that appellant was insane, they should acquit him, but otherwise should convict him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 605; Dec. Dig. \S 294(1).]

3. CRIMINAL LAW — 814(1)—INSTRUCTIONS—APPLICATION TO CASE.

Upon trial of indictment for murder, the instructions given the jury ought to be responsive to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1980; Dec. Dig. 814(1).]

4. HOMICIDE — 294(1) — INSTRUCTIONS — INSANITY.

Instructions on the issue of insanity, interposed as a defense to a charge of murder, held correct and applicable and responsive to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 606; Dec. Dig. 294(1).]

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Tom Diggs was convicted of murder in the first degree and appeals. Affirmed.

W. P. Strait, of Morrillton, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HUMPHREYS, J. Appellant was indicted, tried, and convicted of murder in the first degree in the Conway circuit court, on the 12th day of October, 1916. Sentence was imposed, and the case is here on appeal.

Appellant's only defense was insanity. For a thorough understanding of the case, it will only be necessary to make the following résumé of the facts: On June 29, 1916, about noon, appellant, a negro man, shot and instantly killed Mrs. Hoggard, a feeble white woman 78 years of age. This old lady was passing through appellant's horse lot when he fired the fatal shot. He forbade her coming in. She either did not hear him, or hearing, heeded not his command, and he shot her down. Some five years before this time, he had bought a portion of the 40-acre tract of land upon which he lived at the time of the killing, from Mrs. Alice Rogers, a daughter of Mrs. Hoggard. In the contract, or deed for the sale of a portion of her land to appellant, Mrs. Rogers reserved the right for her mother to occupy the house in which she then lived on said tract, for her mother's lifetime. Differences grew up between Mrs. Hoggard and Tom Diggs, the appellant. Tom Diggs had tried to procure the arrest of Mrs. Hoggard for threatening to kill him. Mrs. Hoggard had prosecuted Tom Diggs for trespassing on her portion of the land. On this account, at one time he was put in jail, but was afterwards discharged. He had, on various occasions, consulted officers and lawyers as to how he could get Mrs. Hoggard off the land. He had prevented her from getting water at his well.

F. H. Hammett was the first to arrive on the scene after the killing. Mr. Hammett had seen the negro lower the smoking gun from his shoulder and return to the house. Not knowing that the negro had killed Mrs. Hoggard, he went in to get a drink of water and first talked to the negro about working

for him. He finally noticed that the negro had buckshot in a shell, and asked him in a casual way, "What in the devil are you shooting at this time of the day? there is nothing out." The negro answered, "Well, I just shot a thief." The following conversation was had: "That so, Tom?" "I just shot a thief; been bothering my chickens and eggs." "Have you killed that old spotted dog that has been bothering around?" "No, sir; wasn't a dog; it was down there by the corner of the barn." While drinking, Hammett looked over in the lot and said, "Tom, what is that over there?" He said, "That is old lady Hoggard." "Negro, did you shoot her?" "Yes, sir." "You sure played hell now." "Well, I reckon maybe I did." "How bad is she shot?" "I don't know." "Do you know whether she is dead?" "No." "I am going to see." "All right, help yourself." "Tom, she is dead." "I don't know; I aimed to do it, and did it."

Appellant then told Hammett that she had been disturbing him a great deal and trespassing on his premises; that he tried to get along with her and couldn't. Hammett then asked him to surrender, but he declined, and in answer to Hammett's question as to whether he intended to fight it out, said he guessed that was what it amounted to. Through the advice of Hammett, he sent his children away from home, so that they might not get killed in any subsequent encounter.

In a short time thereafter, Dr. J. B. Eddy, Sterling Garrett, and F. H. Hammett went to the home of the negro, and, through a promise of protection until the officers came, persuaded the appellant to surrender to them. He told them that, "It seems that was the only way to get rid of it." He admitted the killing when he reached Blackville, the nearest town, and said that he did it "just to get rid of it."

Until two years before the killing, this negro had been a church member, a trustee therein, and superintendent of the Sunday School. At about that time he changed his whole attitude toward the church and claimed that churches and everybody connected with them were all wrong. He circumcised himself, claiming he did it under the direction of God. He asserted a belief in the doctrine of free love, and attempted to form an association among his people of that kind. He became obstinate, and declined to reason on questions with his friends, except in the way he thought. He would at times brood and spend much of his time reading. He was not as sociable with the community as before. His relatives testified that his uncle was supposed to have been insane, and that their cousin Liddy on appellant's father's side was insane. Some of the lay witnesses, basing their opinion upon appellant's change of attitude towards the church, on moral

questions, and in temperament, expressed the opinion that he was insane at the time he did the killing. The only physician who testified in the case was Eddy, who had practiced in appellant's family and had known him and was familiar with his conduct. In his testimony he said:

"I think that Tom Diggs was sane upon the issue involved in this killing. Under the circumstances surrounding this case, I think the defendant was sane in the matter."

He said that he had heard that Diggs was off, and watched him all the time he was in his custody to see if he could detect the least feature to lead him to believe that he was insane, but that "he was seemingly just as correct as he had ever seen him." Eddy said on cross-examination that:

"Independent of any general knowledge of circumstances, and on a statement of facts as detailed in the evidence, I would think that a negro that would kill a white woman would be a fool, and would be foolish to kill anybody unless they were more or less insane. Without any excuse a negro man who would take a gun and go kill an old white woman, that itself would be an act that ordinarily would indicate a want of intelligence and realization of the consequences and effect of the act."

Appellant conducted his business in the usual way, and made a living for himself and family.

The court gave 25 instructions defining murder, malice, express and implied, the effect of the admission of the killing, the distinguishing essentials between murder in the first and second degree, the punishment for murder in the first and second degrees, defining manslaughter, the punishment for manslaughter, the manner of weighing evidence, and the usual instructions on questions of reasonable doubt and presumption of innocence. On the questions of sanity or insanity, the court gave the following instructions:

"(15½) Gentlemen of the jury, counsel for defendant interposes the defense of insanity, and this is a defense which the law recognizes. Where an accused is on trial for murder in the first degree and the state proves the killing under circumstances that would constitute murder in the first degree, if the homicide was committed by a sane person, then if the killing is admitted and insanity is interposed as a defense, such defense cannot avail, unless it appears from a preponderance of the evidence: First, that at the time of the killing that the defendant was under such a defect of reason from disease of the mind as to not know the nature and quality of the act he was doing; or, second, if he knew it, that he did not know he was doing what was wrong; or, third, if he knew the nature and quality of the act and knew it was wrong, that he was under such distress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act, which act was the result solely of his mental disease.

"(16) You are instructed that one who, in the possession of a sound mind, commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone his reason, or for the time control his will, cannot be shielded from the consequence of his act by the plea of insanity; that insanity will only excuse the commission of a criminal act when it is made

to appear affirmatively, by evidence fairly preponderating, that the person committing the act was insane.

"(17) On the question of sanity or insanity of the defendant you will consider all the evidence offered in the case, the homicide itself, the manner in which it was committed, and the attending circumstances, the life, habits, and conduct of the defendant, as well as his mental capacity or perverseness, if any, from his birth up to the present time, to determine whether or not the defendant was of sound or unsound mind at the time of the commission of the crime charged."

"(20). The court instructs you that before you can convict the defendant, you must find from the testimony, both as to the commission of the offense and the condition of defendant's mind, beyond a reasonable doubt, that he is guilty of the charge upon which he is being tried; and, if upon a fair consideration of all the testimony, you entertain a reasonable doubt as to his guilt or innocence, then it would be your duty to give him the benefit of the doubt and acquit him."

"(22) The court further instructs you that in order to constitute a homicide, murder in the first degree, according to these instructions, the killing must have been willful, deliberate, malicious, and premeditated; and there must have been an intent in the mind of the defendant to take the life of the deceased at the time the act was committed, and this intent must have been formed after deliberation and premeditation, and premeditation as used in these instructions means, thought of beforehand; deliberation means a weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon a sudden impulse without the exercise of the reasoning powers. It is immaterial how long the premeditation existed, so that it did exist and precede the homicide.

"(23) You are instructed that the opinions of both expert and nonexpert witnesses as to the mental condition of the defendant both before and since the killing of Mrs. R. L. Hoggard, has been put in evidence in this case and is proper and competent to be considered by you along with all the other evidence in the case in determining whether or not Tom Diggs at the time and in the killing of Mrs. R. L. Hoggard was sane or insane as described, and within the meaning of the instructions given you by the court. These opinions do not, as a matter of law, supplant your duty and province of determining this question, but is to be considered by you and weighed by the same rules applicable to any other testimony; and, like all other testimony, given just such weight, as you gentlemen, seeking to find and disclose the truth, may think it justly deserves."

[1] The defendant asked 13 instructions, most of them touching upon the question of insanity. They range from mere delusions to total incapacity. The testimony is so meager and general on the question of insanity, that it is rather hard to frame specific instructions on that question. This court said in the case of *Beil v. State*, 120 Ark. 530, 180 S. W. 186, that when the killing was admitted, the defense of insanity—

"cannot avail unless it appears from a preponderance of the evidence: First, that at the time of the killing that the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it, that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable,

because of the disease, to resist the doing of the wrong act, which act was the result . . . of his mental disease."

[2] Our court further said in that opinion, on page 556, in substance, that after the court had declared the above tests and announced the burden of proof, it would be better for him simply to instruct the jury that if they believed from the preponderance of the evidence that the appellant was insane, they should acquit him, otherwise they should convict him of the crime charged.

We think instruction No. 15½, given by the court, covers each of the tests of insanity laid down by the court in the case of *Bell v. State*. That instruction, together with other instructions given by the court on the question of insanity, certainly covered every test of insanity under the evidence in this case necessary to give an impartial trial to the appellant, such as is guaranteed to him by the Constitution and laws of our state. It seems to us that the rule laid down in the *Bell Case*, *supra*, was strictly adhered to in the trial of this cause.

[3, 4] Instructions ought to be responsive to the evidence. As far as we are able to observe, the instructions given in this case are peculiarly applicable and responsive.

There being no error in the instructions submitting the question of insanity to the jury, and ample evidence of a substantial nature to support the verdict of the jury, the judgment is, in all things, affirmed.

CLEMENTS v. FERRELL. (No. 37.)

(Supreme Court of Arkansas. Dec. 11, 1916.)

REPLEVIN \S 72—EVIDENCE—SUFFICIENCY.

In a suit to recover a mule, in which it appeared that a note retaining title to the mule was found among the papers of defendant's testator (original defendant in the suit), evidence held to warrant verdict for defendant.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. \S 292-295; Dec. Dig. \S 72.]

Appeal from Circuit Court, Hempstead County; Geo. R. Haynle, Judge.

Suit by J. M. Clements against T. J. Cottingham. From a judgment for plaintiff before the justice of the peace, defendant appealed to the circuit court. Before trial in the circuit court defendant died, and the case was revived in the name of Mrs. Sallie Ferrell, executrix. From a judgment of the circuit court for defendant, plaintiff appeals. Affirmed.

D. B. Sain, of Nashville, and T. D. Crawford, of Little Rock, for appellant. McRae & Tompkins, of Prescott, for appellee.

HART, J. J. M. Clements brought this suit against T. J. Cottingham before a justice of the peace to recover a mule alleged to be worth \$150. Clements recovered judgment before the justice of the peace, and Cotting-

ham appealed to the circuit court. He died before the trial in the circuit court, and the case was revived in the name of Mrs. Sallie Ferrell, the executrix of his estate. The case was tried before a jury in the circuit court, which returned a verdict in favor of the defendant, and the plaintiff, Clements, has appealed.

The only ground urged for a reversal of the judgment is that the evidence is not legally sufficient to warrant the verdict. The material facts are as follows:

In 1912, J. B. Sheffield lived on the farm of T. J. Cottingham in Hempstead county, Ark. He bought a mule and a pony from Cottingham. On the 7th day of August, 1912, he executed a note to Cottingham for the mule in the sum of \$150. The note was payable on or before the 15th day of October, 1913, and in the note it was recited that the title to the mule should remain in Cottingham until it was paid for. In the fall of 1912, Sheffield went to Sevier county, and Cottingham permitted him to carry the mule with him. In December, 1913, Sheffield mortgaged the mule to A. P. Floyd for supplies to be furnished him in 1914. Sheffield failed to pay his indebtedness to Floyd, and sold him the mule in payment therefor. Some time during the first part of 1915, Floyd sold the mule to Clements, the plaintiff, in this action. Floyd stated that Cottingham came by his place, and that he told him that he had purchased the mule from Sheffield, and had traded it to Clements; that he had heard that there was a claim against the mule, and that he asked Cottingham if he knew of anybody that had a claim against the mule, and that he replied that he did not. He does not state the time that this conversation with Cottingham occurred, but he said that it was about three weeks after the mule had gotten out of Clements' pasture. From Clements' testimony it appears that the mule got out and went to Cottingham's a short time before the present suit was instituted in September, 1915. He was asked if he testified in the justice court that Cottingham said that he had no claim to the mule, and he said that he thought he did.

Charley Hollerman testified that he owned a farm in Sevier county, and that Sheffield lived on his farm in 1913; that he saw T. J. Cottingham in the spring of 1913; that he was hunting the way to where John Sheffield lived; that he asked him if he had anything against Sheffield's team, and he replied that he had not. Sheffield was married when he lived on the farm with Cottingham. After he went to Sevier county his wife died, and he married again. His second wife testified that Cottingham came to their house on a visit in August, 1915, and that he had a conversation with her, in which he stated that he never expected to collect of Sheffield for what he owed him, because Sheffield and

his first wife had been so kind to him while they lived on his place.

Sheffield testified in favor of the plaintiff, and admitted that he executed the note for the mule, in which Cottingham retained the title until the mule was paid for. The witness further stated that afterwards he executed a new note for the mule, in which Cottingham did not retain the title to the mule, and that this note was executed in lieu of the one in which Cottingham did retain the title. He further testified that he never sold the mule to Floyd until he made this second trade with Cottingham. On cross-examination Sheffield stated that when the note came due he wrote to Cottingham and told him he could not pay the note without selling the team, and that Cottingham said, "You keep the team and go ahead and I can wait;" that when the next February came the mule got out, and that his mother also had a cow to get out, that they both went back down where Cottingham lived; that he went down there, and said to Mr. Cottingham, "If you expect pay for this mule now, you will have to take it, because I can't pay you;" that Cottingham said, "I know your condition; you just take the mule and go on, and if you can pay me, it is all right, and if you don't, it is all right;" that Cottingham said, "I guess you want your other note;" that he replied, "Yes;" that Cottingham went into his room and looked into his trunk, and came back and said: "'John, I can't find the note; the children keeps everything ransacked; I will bring it over to you in April.' He never did bring it to me."

Hillery Nowlen, a half-brother to Sheffield, testified, that he was with Sheffield when he went down to Cottingham's in August, 1913, for a mule and cow, and that at that time Sheffield executed a new note for the mule, and that Cottingham went in the house to get the old note and came back and said, "The kids ransacked the place so he couldn't find it; I will bring it up there in April." On cross-examination he admitted that he had testified in the justice court, and did not testify to this fact, but stated that the reason he did not do so was because he never thought of it.

Mrs. Sallie Ferrell testified that she was executrix of the will of T. J. Cottingham, deceased: that she found the note in question among the papers of Cottingham after his death; that she found no other note signed by J. B. Sheffield. The note was introduced in evidence.

Another witness testified that Mr. Cottingham was sick when the case was tried before the justice of the peace, and that he went there at Cottingham's request to represent him; that the note in which the title to the mule was retained in Cottingham was introduced in evidence by him in that trial as the basis of Cottingham's claim to the mule.

As we have just seen, the note retaining the title to the mule until it was paid for

was found among Cottingham's papers after his death. Possession by the payee of a promissory note is prima facie evidence of title. *Winship Bros. v. Merchants' National Bank*, 42 Ark. 22; *Bank of Paris v. Pearson*, 68 Ark. 310, 50 S. W. 692. This was conceded by counsel for the plaintiff, but they contend that the evidence for the plaintiff overcomes it. We do not agree with counsel in this contention. It will be noted that Sheffield was an interested party. He states that Cottingham took a new note, in which he did not retain title to the property in place of the old note, in which the title to the mule was retained until it was paid for. On cross-examination he admitted that he knew the first note fell due in October, 1913, and that he wrote Cottingham about it after it fell due. Again he says that in the following February he went down to Cottingham's after his mule and his mother's cow, and that the new note was given then. This would place the giving of the new note some time in the first part of 1914. In this he is contradicted by his half-brother, who states that he was with him, and that the transaction took place in August, 1913. This was before the first note became due.

According to the testimony of Floyd, Sheffield had mortgaged the mule to him in December, 1913, and this was before Sheffield says the second note was executed. So having mortgaged the mule, the title to which was in another person, without stating that fact to his mortgagee, he was interested in showing that his vendor had taken the second note in lieu of the first one, or at least the jury might have so inferred.

Again, according to the testimony of Hollerman, Cottingham told him, in the spring of 1913, that he did not have any claim to the mule. This was at the time before the first note became due, and when Sheffield concedes that the second note had not been executed.

In response to a question Floyd testified that he thinks that Cottingham told him that he had no claim to the mule, and that this conversation was had after he had sold the mule to Clements. On cross-examination he admitted that he does not remember whether this question was asked him in the justice court or not, and that he does not remember whether he testified to that fact or not in that court.

The contradictory statements made by witnesses for the plaintiff and their evasive manner of testifying, coupled with the fact that the note retaining title in the mule was found among the papers of Cottingham after his death, and that the other note was not, warranted the jury in finding for the defendant. The evidence adduced in favor of the plaintiff was not consistent in itself, and did not overcome the prima facie case in favor of the defendant arising from the possession of the note.

Therefore the judgment will be affirmed.

STATE ex rel. NICHOLSON v. BUSH.

(Supreme Court of Tennessee. Dec. 23, 1916.)

PARDON ~~¶~~9—PAROLE—ARREST.

Under Acts 1913, c. 8, providing for indeterminate sentences and for parole of convicts, section 3 of which provides that the convicts, while on parole, shall remain in the custody of the board of parole and under its control, subject at any time to be returned to the penitentiary, a convict on parole is still within the custody of the state, and cannot be confined in the county workhouse under a former conviction for a petty offense, any more than he could while he was still within the penitentiary.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 16-22; Dec. Dig. ~~¶~~9.]

Certiorari to Court of Civil Appeals.

Habeas corpus proceedings by the State, on relation of Bass Nicholson, against N. P. Bush. A judgment of the Criminal Court, dismissing relator's petition, was reversed by the Court of Civil Appeals, and defendant brings certiorari. Judgment of Court of Civil Appeals affirmed.

George W. Chamlee, of Chattanooga, for plaintiff. Neal L. Thompson, of Chattanooga, for defendant.

EVANS, Special Justice. This is a habeas corpus case, instituted in the criminal court of Hamilton county by relator, Bass Nicholson, against N. P. Bush, sheriff of that county, for the purpose of obtaining his liberty or procuring his release from the custody of defendant. On the trial in the criminal court relator's petition was dismissed, and an appeal was taken to the Court of Civil Appeals, where the judgment of the lower court was reversed and the prayer of the petition granted. Thereupon the case was brought to this court by the writ of certiorari.

It appears from the record that in November, 1913, Nicholson was convicted in the criminal court of Hamilton county of assault with intent to commit murder in the second degree, and was sentenced to the penitentiary for a period of not less than one nor more than five years; and at the same term of said criminal court he was also convicted of the charge of carrying a pistol, and upon the latter conviction was sentenced to the county workhouse for a period of 11 months and 29 days. From neither of these judgments did Nicholson appeal. He was therefore sent to the penitentiary at Nashville, upon the felony conviction, and, after being confined there for about two years, was, on account of satisfactory behavior and good conduct, granted a certificate of parole.

In this certificate it was recited that the board of parole for the state of Tennessee, having confidence in Bass Nicholson, and desiring to test his character and ability to refrain from crime and lead an honorable life, had granted said parole under certain specified conditions therein set out. Some of these conditions were that the prisoner

should proceed to a place of employment provided for him at Chattanooga, Tenn. (designating the place); that on the first day of each month he should report certain facts to the parole officer upon blank forms to be furnished him; that these reports must be certified by his employer; that he "shall while on parole, remain in the legal custody of the board of parole"; and that he "shall be liable to be retaken and again confined within the state penitentiary for any reason that shall be satisfactory to the board of parole, and at their sole discretion." He was then advised how he should live and conduct himself, and was admonished against bad habits and evil associations. This certificate was accepted in writing by the prisoner, and he pledged himself to comply with all of its conditions.

Thereupon the relator returned to Chattanooga, took up the specified employment, and was living in good faith in conformity to the conditions of his certificate of parole. Soon thereafter, in November, 1915, a capias was issued for his arrest and confinement in the county workhouse upon the old pistol case, in which he was convicted in May, 1913. The sheriff, defendant, Bush, arrested him under said capias, and had him under arrest, when the petition for habeas corpus, now before us, was filed.

The case therefore requires a construction of chapter 8, of the Acts of 1913, which is an act to provide for the indeterminate sentence of persons convicted of crime, and to authorize and regulate the paroling of prisoners so sentenced. This act was held constitutional in *Woods v. State*, 180 Tenn. 100, 169 S. W. 558, L. R. A. 1915F, 531. The question here presented is whether relator, while on parole, was still in the custody of the state so as to preclude his arrest and confinement upon the above-mentioned conviction for carrying a pistol. We think he was in such custody, and that his attempted confinement in the workhouse was unauthorized by law.

In contemplation of law, relator was in the custody of the penitentiary authorities to the same extent as if he had remained in actual confinement. In section 8 of the act it is specifically provided:

"Such convicts, while on parole, shall remain in the lawful custody and under the control of said board, subject at any time to be returned to the penitentiary," etc.

If relator had remained within the physical confines of the penitentiary, it would not be contended that he could be taken therefrom, under the old conviction for carrying a pistol, and placed in the county workhouse. And yet, under the act of 1913, a prisoner on parole is still, to all intents and purposes, in the penitentiary and subject at any time to physical confinement therein. He is still in the custody of the penitentiary officials, the board of parole.

We are of opinion that the Court of Civil Appeals was correct in releasing relator from the custody of defendant sheriff, and the judgment of that court is therefore affirmed.

STATE v. FREELS.

(Supreme Court of Tennessee. Dec. 23, 1916.)

STATUTES \S 110 $\frac{1}{2}$ (1) — VALIDITY — TITLE — "AUTOMOBILES."

Acts of 1905, c. 173, the title to which refers only to automobiles, but the body of which regulates the use of motorcycles, locomobiles, and other vehicles of like character, excepting street cars, does not violate Const. art. 2, § 17, providing that no bill shall embrace more than one subject, that subject to be expressed in the title, since "automobile" is defined to be a vehicle or mechanism, especially a self-propelled vehicle suitable for use on a street or roadway, and the term is broad enough to include the other vehicles mentioned in the body of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 139; Dec. Dig. \S 110 $\frac{1}{2}$ (1).]

For other definitions, see Words and Phrases, Second Series, Automobiles.]

Error to Circuit Court, Grainger County; A. M. Paine, Judge.

Roy Freels was convicted of violating the statute regulating the use of automobiles, motorcycles, and similar vehicles, and he brings error. Affirmed.

Anderson & Thomason, of Knoxville, for plaintiff in error. Wm. H. Swiggart, Jr., Asst. Atty. Gen., for the State.

EVANS, Special Judge. The plaintiff in error, Roy Freels, was convicted in the circuit court of Grainger county upon an indictment charging that the said Freels "unlawfully ran and drove a certain vehicle for conveying persons, to wit, a certain motorcycle on a public road of said county, where and when one James Nance was driving a team of horses, which it became and was apparent same had become and were frightened by the approach of said motorcycle, which was being operated at a higher rate of speed than 20 miles per hour, and defendant failed and refused to come to a full stop until said horses could pass, but frightened said horses in said road as aforesaid," etc. Plaintiff in error filed a motion for a new trial in the court below, which was overruled, and he has appealed to this court.

The sole question raised before us is that of the constitutionality of an act of the General Assembly of the state of Tennessee, being chapter 173, of the Acts of 1905. This act is assailed upon the ground that it contravenes article 2, § 17, of the Constitution, which provides that:

"No bill shall become a law which embraces more than one subject; that subject to be expressed in the title."

It is insisted that the caption of the act refers to the regulation of "automobiles,"

while the body thereof attempts to regulate the operation of any automobile, locomobile, motorcycle, or any other vehicle of like character other than street railway cars, and that therefore the body of the act contains more than one subject and is in violation of the constitutional provision above quoted. The caption of the act is:

"An act to require owners of automobiles to register and number the same; to regulate the operation thereof; to provide for the recovery of damages for injuries caused by the unlawful running thereof; and to fix the penalty for the violation of the provisions of this act."

The portion of section 1, upon which plaintiff in error bases his contention, is as follows:

"Be it enacted by the General Assembly of the state of Tennessee, that before any owner of any automobile, locomobile, motorcycle, or any other vehicle of like character, other than street railway cars hereinafter termed 'automobile,' used for the purpose of transporting or conveying persons or freight, or for any other purpose, whether such automobile is propelled by steam, gasoline, or electricity, or any other mechanical power, shall operate or permit to be operated any automobile upon any street, road, highway, or any other public thoroughfare, such owner shall register such automobile with the secretary of state, giving the motive power," etc.

We are of opinion that the term "automobile," used in the caption of the act, is a generic term, intended by the Legislature to mean self-propelled vehicles. This is in accordance with the etymology of the word. In Webster's New International Dictionary, "automobile" is thus defined:

"An automobile, vehicle or mechanism; especially a self-propelled vehicle, suitable for use on a street or roadway."

The cases in our books construing and applying article 2, § 17 of the Constitution are very numerous, and are collected in *Hardaway v. Lilly* (Ch. App. 1898) 48 S. W. 712, *Malone v. Williams*, 118 Tenn. 488, 103 S. W. 798, and *Palmer v. Express Company*, 129 Tenn. 116, 165 S. W. 236. In the last-mentioned case, this court, quoting from *Hardaway v. Lilly*, supra, used this language:

"Very few instances, if any, can be found among the cases cited where the body of the act was declared to be repugnant to the title, unless such repugnancy was in fact clear and unmistakable."

In *Railroad v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921, this court said:

"All intendments are in favor of the constitutionality of an act passed with requisite form and ceremony, as was true in this instance; and where one of two reasonable constructions would render the law obnoxious to the Constitution and the other would not, the latter would be adopted by the courts. Suth. Stat. Con. § 332; *Cooley's Const. Lim.* (5th Ed.) 218; *Black's Const. Law*, § 28; *Brown v. Maryland*, 12 Wheat. 436 [6 L. Ed. 678]; *State v. Yardley*, 95 Tenn. 560 [32 S. W. 481, 34 L. R. A. 656]; *Cole Mfg. Co. v. Falls*, 90 Tenn. 469 [16 S. W. 1045]; *Ellis v. State*, 92 Tenn. 93 [20 S. W. 500]; *Railroads v. Crider*, 91 Tenn. 507 [19 S. W. 618]."

To the same effect, see *Henley v. State*, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126; *Austin v. State*, 101 Tenn. 562, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703; *State ex rel. Astor v. Schiltz Brewing Company*, 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

In the present case we are of opinion that the word "automobile" is used in the act as a generic term, and is sufficiently broad to embrace the vehicles mentioned in the body of the act. We think this is the reasonable construction of the language of the caption, and, being so construed, the act is constitutional.

It results that there is no error in the judgment of the circuit court, and the same is therefore affirmed.

GUGGENHEIMER v. QUEEN BEE FLOUR MILLS CO. et al.

(Supreme Court of Tennessee. Nov. 18, 1916.)

BANKS AND BANKING §127—PURCHASE OF DRAFT—ATTACHMENT.

The Q. Company drew its draft on D. in favor of the S. Bank, with bill of lading attached covering a carload of flour, and same was deposited by the U. Company in such bank to the credit of the U. Company. Thereafter it was forwarded to the H. Bank for collection. Though the sale of the flour to D. was made in the name of the Q. Company, it appeared that it was merely the selling agent of the U. Company. It further appeared that the deposit was made in the regular course of business between the two companies, which business averaged 150 similar drafts during each month, and that on the drafts being deposited a credit was entered by the U. Company on its books in favor of the Q. Company. *Held*, that the reception of the draft by the S. Bank and the entry of a credit therefor in favor of the U. Company constituted a purchase of the draft, not a deposit for collection, and that therefore the proceeds of the draft belonged to the S. Bank and were not subject to attachment in the hands of the H. Bank as the property of the Q. Company.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 804, 310; Dec. Dig. § 127.]

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Suit by S. F. Guggenheimer against the Queen Bee Flour Mills Company and others. From decree for defendants, complainant appeals. Affirmed.

Coleman & Frierson, of Chattanooga, for appellant. Cantrell & Moon, for appellees.

NEIL, C. J. On the 1st of March, 1915, the Queen Bee Flour Mills Company drew its draft in Minneapolis, Minn., on F. M. Daniel, at Chattanooga, Tenn., in favor of the Security National Bank of Minneapolis, for \$1,591.74. This draft, with bill of lading attached covering a carload of flour, was deposited by an agent of the United Flour Mills Company in the aforesaid Security National Bank to the credit of the said United Flour

Mills Company. The draft, with its bill of lading attached, was then forwarded to the Hamilton National Bank, at Chattanooga, Tenn., for collection. On the 11th of March, 1915, the complainant, Guggenheimer, by his original bill of attachment, filed in the chancery court of Hamilton county, caused to be attached the proceeds of this draft in the hands of the Hamilton National Bank, as the property of the Queen Bee Flour Mills Company, to secure the payment of a debt claimed by him in excess of \$1,300. The Queen Bee Flour Mills Company filed its plea in abatement denying ownership of the draft. The aforesaid Security National Bank of Minneapolis filed its intervening petition claiming that it owned the draft, and hence its proceeds. An answer was filed to this petition by the complainant in which such ownership was denied. Evidence was filed in the form of depositions, and, on consideration of this evidence, and the pleadings, the chancellor was of the opinion that the complainant was not entitled to recover, and so dismissed his bill. The case was then appealed to this court.

We are of the opinion that the chancellor reached the correct conclusion. The evidence shows that, while the sale to Daniel was made in the name of the Queen Bee Flour Mills Company, the latter was the regular selling agent of the United Flour Mills Company, and the draft was deposited to the credit of the latter in the bank before it was sent forward for collection. This deposit was made in the regular course of business between the Queen Bee Flour Mills Company and the United Flour Mills Company, averaging 150 similar drafts during each month. The custom of business between the two concerns was the sales were made in the name of the Queen Bee Flour Mills Company, the drafts deposited in the Security National Bank to the credit of the United Flour Mills Company, and a credit entered by the latter on its books in favor of the Queen Bee Flour Mills Company. It is not shown in the evidence the amount of the charge entered upon the books of the United Flour Mills Company against the Queen Bee Flour Mills Company when flour was turned over to the latter; but, inasmuch as it does appear that the Queen Bee Flour Mills Company was simply the selling agent of the United Flour Mills Company in these dealings, and was itself a solvent concern, there is no reason to doubt that the transaction was an honest one, and that the form of crediting on the books of the United Flour Mills Company the amount of the drafts deposited to the credit of the said company in the Security National Bank by the Queen Bee Flour Mills Company was adopted for purposes of settlement between the two companies; the difference between the debit and credit on the books of the United Flour Mills Company showing the

compensation of the Queen Bee Flour Mills Company. The bill does not charge that the transaction was fraudulent, and so there is no issue of that kind. We assume it therefore to be bona fide. This being true, the deposit of the draft in the Security National Bank to the credit of the United Flour Mills Company, the reception of such draft by the bank payable to itself, and the entry by it of credit therefor in favor of the United Flour Mills Company, under the recognized course of business between the three parties, resulted in a cashing of the draft by the bank in favor of the United Flour Mills Company, and an out and out purchase by the bank, thus making the bank the owner of the draft. Under the peculiar facts stated it was not a deposit for collection. It is true the bank did not discount the draft, but it received deposits of a similar character from the United Flour Mills Company, during the year amounting to hundreds of thousands of dollars, and the account shows that there were always large balances to the credit of the United Flour Mills Company during each month. Thus the bank received compensation for its risk, in the business of a valued customer, and the use of its money on deposit. So that, when the draft was sent forward to the Hamilton National Bank for collection, it was the property of the Security National Bank of Minneapolis, and not of the Queen Bee Flour Mills Company, or of the United Flour Mills Company. It is true, as a general rule, that where a draft is deposited in a bank without being discounted, but the amount of it is credited to the depositor, nothing more appearing, such draft is deposited for collection simply, and in case there be no collection it may be charged back to the customer. *Implement Co. v. Bank*, 128 Tenn. 320, 324, 160 S. W. 848; *Banking Co. v. Hall*, 119 Tenn. 548, 564, 108 S. W. 1068; *Milling Co. v. Bank*, 120 Tenn. 225, 250, 111 S. W. 248, 18 L. R. A. (N. S.) 441; *St. Louis & San Francisco R. R. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683. The case before us, however, does not present such a state of facts, but one from which the necessary conclusion, it seems to us, is that the purpose all around was that the bank should appropriate the draft and account for its proceeds to the United Flour Mills Company, and permit the latter to use the funds as its own, and, as shown by the course of business, the account made up of many drafts similar to the one appearing in this case was used by the United Flour Mills Company, at its pleasure.

We need not, therefore, consider the status where a collecting bank sends drafts to its correspondent, and the funds are seized by a creditor of the depositing customer before they reach the aforesaid collecting bank while in the hands of its correspondent. The law upon this latter phase of the case is well settled. *Implement Co. v. Bank*, supra;

Commercial National Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Manufacturers' Bank v. Continental Bank*, 148 Mass. 555, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Freeman's Bank v. National Tube Works Co.*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *Armstrong v. Boyertown National Bank*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553.

The result is that the decree of the chancellor must be affirmed.

DELAP v. NATIONAL BANK OF LA FOLLETTE.

(Supreme Court of Tennessee. Nov. 18, 1916.)

1. COURTS ⇐487(1)—TRANSFER OF APPEAL TO SUPREME COURT.

A case appealed to the Court of Civil Appeals may either be brought to the Supreme Court by order of the Court of Civil Appeals transferring the case on the ground that it is without jurisdiction, or on petition for writ of certiorari filed after the Court of Civil Appeals has acted upon the merits filed its opinion and entered judgment; but there is no process justifying removal of a case from the Court of Civil Appeals before action taken by that court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1307, 1311, 1313-1315; Dec. Dec. ⇐487(1).]

2. COURTS ⇐246 — APPELLATE COURTS — TRANSFERRING CASE TO COURT OF CIVIL APPEALS.

Where an appeal was prayed and granted to the Court of Civil Appeals, but the appeal bond indicated that the appeal was prayed to the Supreme Court, and the transcript was removed to the Supreme Court on writ of certiorari, the Supreme Court properly transferred the case to the Court of Civil Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 743, 747, 748; Dec. Dig. ⇐246.]

3. COURTS ⇐246—JURISDICTION OF APPEAL—AMOUNT IN CONTROVERSY.

In a suit for injunction to restrain sale of complainant's property under an order of condemnation, where a decree dismissed the bill and as an incident thereto, because execution of a judgment for money had been enjoined, rendered judgment against the principal and sureties on the injunction bond for the amount of the judgment, the Supreme Court did not, for the reason that such incidental judgment exceeded \$1,000, have jurisdiction of a general appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 743, 747, 748; Dec. Dig. ⇐246.]

Certiorari to Court of Civil Appeals.

Suit for injunction by W. H. Delap against the National Bank of La Follette. From a judgment dismissing the bill and rendering a money judgment, plaintiff was granted an appeal to the Court of Civil Appeals. The appeal bond being executed to Supreme Court, defendants were awarded a writ of certiorari, ordering the transcript, which had been unduly delayed, sent up; but on discovering the facts the Supreme Court ordered the case transferred to the Court of Civil Appeals. Defendants again petition for certiorari to bring the case from the Court

of Civil Appeals, which was treated as a request for a rehearing of the previous order of transfer. Petition for writ of certiorari refused.

E. H. Powers, of Jacksboro, and M. H. Hollingsworth, of La Follette, for plaintiff. W. A. Owens, of La Follette, for defendant.

NEIL, C. J. This case was before us at a former day of the term on a petition for the writ of certiorari to have removed to this court the transcript, which it was alleged had been unduly delayed by the clerk and master of the Chancery Court, himself a party in interest. It was also asked that when the transcript should reach the court there should be an affirmance. The counsel for the petitioner seems to have been misled by the fact that the appeal bond indicated that the appeal had been prayed to this court, and the court, obtaining the same impression from the petition, made the order for the writ of certiorari. In obedience to this order, the transcript was sent up. When it reached us, and was examined, we discovered that, while the appeal bond was executed in the manner already stated, still the appeal had been prayed and granted to the Court of Civil Appeals. We thereupon held that we had no jurisdiction of the case, except to transfer it to the Court of Civil Appeals and made an order to that effect. Now another petition has been filed asking for the writ of certiorari to bring the case from the Court of Civil Appeals and to dispose of it here on the ground that the appeal really lay to this court not to the Court of Civil Appeals.

[1] Let us assume that the case was of such a character as that it should have been properly appealed to this court instead of the Court of Civil Appeals, still there are only two ways that we obtain jurisdiction of cases appealed to that court. One of these is by an order of that court transferring the case to the Supreme Court on the ground that the Court of Civil Appeals is without jurisdiction; the other is on petition for the writ of certiorari filed after the Court of Civil Appeals has acted upon the merits of the controversy and filed its opinion and entered its judgment. It is probable, of course, that in case the Court of Civil Appeals were exceeding its jurisdiction in any manner by some affirmative act, and this were brought to our attention in the proper way, we would have the power, under the general statutes giving us control of inferior courts, to issue the writ of certiorari to bring up the record, and also a writ of supersedeas to stay further action. We know of no process, however, which would justify us in removing the case from the Court of Civil Appeals before action taken by that court.

[2] Indeed, the petition for certiorari now filed in this case is another form of asking a rehearing of our previous order. We shall

now consider the application from that standpoint. Was the action in this court correct in transferring the case to the Court of Civil Appeals, when the transcript was filed in the Supreme Court? We cannot doubt that our action was correct, because the appeal was prayed to the Court of Civil Appeals; but it is suggested in the present petition that the amount involved exceeds the jurisdiction of the Court of Civil Appeals, and for that reason we should take immediate jurisdiction. That is another form of saying that we should assume control of a case appealed to the Court of Civil Appeals by means other than those already mentioned, and we know of no law that justifies this.

[3] But if there is nothing in the case other than as already stated, it may be that the petitioner could get the case into this court by filing the record for writ of error. However, two difficulties are in the way of such action. The first is that assuming that this court had jurisdiction of the controversy there is no error of which the petitioner can complain, because it was completely successful in the trial court; hence there is nothing on which to base an application for a writ of error. Another reason is that the jurisdiction is really with the Court of Civil Appeals from the very nature of the case. The petition says that the amount of the judgment exceeded \$1,000, and for this reason the Court of Civil Appeals had no jurisdiction. The judgment of the trial court does exceed \$1,000, but that judgment was merely incidental to the main issue. The bill was filed, not to recover a money judgment, but simply to obtain an injunction restraining the sale of the complainant's (Delape's) property under an order of condemnation issued by one of the trial courts of Campbell county. The Chancery Court tried the case on bill, answer, and proof, and found that there was no just ground for enjoining the execution, and entered a decree dismissing the bill, and as an incident thereto, since the execution of a judgment for money had been enjoined, rendered judgment under the statute against the principal and sureties on the injunction bond for the amount of the judgment. The prayer for appeal was general, and, of course, questioned not merely the incidental judgment on the injunction bond, but also the main controversy on which the latter depended, to wit, the propriety of the chancellor's action in dismissing the bill.

From the foregoing observations it is perfectly evident that this court is without power to afford the petitioning bank any relief at this time. It is truly unfortunate that, by the tardiness of the clerk and master in forwarding the transcript to the Court of Civil Appeals, the petitioning bank is compelled to lose practically a year's time in the trial of its case; but, as stated, the Supreme Court, in the present situation of the case,

is unable to take charge of it because it is without jurisdiction.

It results that the petition for the writ of certiorari from the Court of Civil Appeals to this court, filed on the 30th of October of this year, must be refused.

**REED v. CINCINNATI, N. O. & T. P.
RY. CO.**

(Supreme Court of Tennessee. Dec. 23, 1916.)

LIMITATION OF ACTIONS — 130(2) — SUCCESSIVE SUIT — STATUTE.

Shannon's Code, § 4446, declares that if the action is commenced within the time limited, but judgment or decree is rendered against plaintiff upon any ground not concluding his right of action, or where judgment or decree is rendered in favor of plaintiff, and is arrested, or reversed on appeal, plaintiff may from time to time commence a new action within one year after the reversal or arrest. In December, 1911, plaintiff filed a suit against defendant for personal injuries, and in April, 1913, after trial and a mistrial, plaintiff entered a voluntary nonsuit instituting within a few days thereafter suit in the federal district court. In May, 1915, again taking a voluntary nonsuit. Thereafter, within a few days, plaintiff instituted a third suit. *Held*, that the third suit, limitations having run, was barred, not falling within the exception of the statute for the bringing of an indefinite number of actions within a year after nonsuit in the last previous action is not authorized.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 554; Dec. Dig. 130(2).]

Certiorari to Court of Civil Appeals.

Action by N. D. Reed against the Cincinnati, New Orleans & Texas Pacific Railway. A judgment of dismissal was affirmed on appeal to the Circuit Court of Appeals, and plaintiff brings certiorari. Affirmed.

J. B. Swafford, of Dayton, and W. B. Miller, of Chattanooga, for Reed. Allison, Lynch & Phillips, of Chattanooga, for Cincinnati, N. O. & T. P. Ry. Co.

EVANS, Special Justice. On December 5, 1911, plaintiff below filed a suit at Dayton in the circuit court of Rhea county against defendant railroad company for damages for personal injuries. On April 19, 1913, after the case had been tried and a mistrial had, plaintiff entered a voluntary nonsuit. Within a few days thereafter he instituted another suit upon the same cause of action in the District Court of the United States, at Chattanooga, where there were two trials. The first resulted in a mistrial, and at the conclusion of the second, on May 10, 1915, plaintiff took a voluntary nonsuit.

Thereafter, on May 20, 1915, the plaintiff instituted the present suit in the circuit court at Chattanooga.

It will thus be seen that all three of plaintiff's actions were filed in different courts, and that the present suit was instituted more than four years after the injury complained of, and more than two years after

the voluntary nonsuit was entered in the circuit court of Rhea county, at Dayton.

The defendant railway company filed a plea setting up the statute of limitations, to which the plaintiff filed a replication relying upon the facts above stated and setting up section 4446 of Shannon's Code, which is as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

To this replication the defendant filed a demurrer, which was sustained by the circuit court, and plaintiff's suit dismissed. Upon appeal to the Court of Civil Appeals the judgment of the circuit court was affirmed, and the case has been brought to this court by the writ of certiorari.

Under the first assignment of error it is insisted that section 4446 of Shannon's Code, above quoted, gives a plaintiff the right to file any number of successive suits upon the same cause of action; that a new action may be commenced by a plaintiff within one year after voluntary nonsuit entered in the next preceding case, without regard to lapse of time or the number of actions previously filed, or the number of courts in which those actions have been instituted, just so long as each new action is commenced within one year from the date of the previous nonsuit.

The statute relied on by plaintiff in error has been considered by this court in the following cases: *Cole v. Mayor*, 5 Cold. 639; *Railway Company v. Pillow*, 9 Heisk. 248; *Parke v. Cliff*, 9 Lea, 524; *Iron Co. v. Broyles*, 95 Tenn. 612, 32 S. W. 761; *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480; *Sweet v. Electric Co.*, 97 Tenn. 252, 36 S. W. 1090; *Hooper v. Railroad*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; *Hooper, Adm'r, v. Railroad*, 107 Tenn. 715, 65 S. W. 405; *East Tennessee Coal Co. v. Daniels*, 100 Tenn. 65, 42 S. W. 1062; *Coal Co. v. Minton*, 117 Tenn. 415, 101 S. W. 178; *Swift v. Warehouse Co.*, 128 Tenn. 102, 158 S. W. 480; *Fox v. Smith*, 130 Tenn. 611, 172 S. W. 317; *Railroad v. Bolton*, 134 Tenn. 447, 184 S. W. 9; and *Anderson v. Bedford*, 4 Cold. 464, distinguished in *Coal Co. v. Minton*, *supra*.

The exact question here presented has not been decided in any of the cases above cited, but we cannot agree that it was the purpose of the statute to perpetuate litigation indefinitely in the manner contended for by plaintiff in error.

In *Railway v. Pillow*, 9 Heisk. 248, the statute was held to apply to a case in which plaintiff had entered a voluntary nonsuit, but the court there said:

"The new action in such case must be brought within one year after the termination of the action, which was commenced within the time limited by law for the bringing of such action, so that the indefinite succession of suits on the same cause of action cannot result from the construction given to the act, as suggested by counsel."

We agree that the act should be given a liberal construction in furtherance of its purpose, and this court so held in *Railroad v. Bolton*, 134 Tenn. 450, 184 S. W. 9, but, as above stated, we do not think its purpose was to provide a means for a continuous and unending litigation upon the same cause of action, wholly at the option of the plaintiff.

The statute was clearly intended for the benefit of a plaintiff whose case had for some reason, for which he should not be made to suffer, been dismissed without a hearing on the merits, and we think the true construction of the act is, as stated in *Railroad v. Pillow*, supra, that the new suit, or any subsequent suit, must be instituted within one year after the termination of the action that was brought "within the time limited" by the statute of limitations.

It is, of course, possible for a case to arise where the new action authorized by the statute, after remaining on the docket without a hearing for more than a year from the termination of the original suit, might be dismissed at the trial by the court itself upon some ground not involving the merits, and under circumstances which would work a great hardship upon the plaintiff if he had no right to institute still another action. The court has considered the possibility of such a situation arising, but that case is not before us for determination. We are content to rest our decision upon the facts of the case before us, and we hold that the third action filed by plaintiff in error on May 20, 1915, was barred by the statute of limitations.

It is unnecessary to discuss in detail the other assignments of error made in the case. We have considered them and think they are without merit.

It results that there is no error in the judgment of the Court of Civil Appeals, and same is affirmed.

DAVIS v. DAVIS et ux.

(Supreme Court of Tennessee. Dec. 23, 1916.)

1. INSURANCE \S 784(1)—FRATERNAL INSURANCE—CHANGE OF BENEFICIARY.

The by-laws of the fraternal order in which deceased was insured provided that a change of beneficiary would not be effective until the old certificate was surrendered and a new one issued and that any attempt to change the beneficiary by will, contract, assignment, or otherwise than by strict compliance with the by-laws shall be absolutely null and void. Deceased, holding a certificate in which his mother was named as beneficiary, stated soon after his

marriage, subsequent to the issuance of the certificate, and two years before his death, that he desired to have the certificate changed and name his wife as beneficiary, but made no effort to comply with the by-laws, beyond taking the policy on one occasion to the meeting place of the local lodge, at which time no meeting was to be held, and thereafter delivered the certificate to his wife. Held, that the acts of deceased were not a sufficient attempt on his part to comply with the rules of the order to permit equity to decree an effective change.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1950-1952; Dec. Dig. \S 784 (1).]

2. INSURANCE \S 782—FRATERNAL INSURANCE—CHANGE OF BENEFICIARY.

Where the insured in a certificate of fraternal insurance has the right to change the beneficiary in a manner set forth in the by-laws of the order, while the beneficiary in such certificate does not have a vested interest, he does have a contingent right and an expectancy in the nature of an inchoate interest, subject to be defeated by an exercise of the power of substitution substantially in the manner provided by the laws of the order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1843; Dec. Dig. \S 782.]

3. INSURANCE \S 784(1)—FRATERNAL INSURANCE—ASSIGNMENT OF CERTIFICATE.

Where the by-laws of a fraternal order provided for change of beneficiary by surrender of the old certificate and issuance of a new one and that any attempt by a member to change the beneficiary by will, contract, assignment, or otherwise shall be null and void, the deceased did not, by delivery of his certificate to his wife with the intention that she should have the benefit of it, vest in her the right to take its proceeds as assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1950-1952; Dec. Dig. \S 784 (1).]

Appeal from Chancery Court, White County; A. H. Roberts, Chancellor.

Suit by Rachael Davis against James Davis and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Anderson, of Sparta, for appellant. Robinson & Fancher, of Sparta, for appellee Davis.

WILLIAMS, J. This is a suit by Rachael Davis, the widow of C. E. Davis, to recover \$2,000, the proceeds of a benefit certificate in the Modern Woodmen of America, issued to her husband, which proceeds were paid to Lottie Davis, the mother of the insured, who was named as beneficiary in the face of the policy.

The theory of the bill is: (a) That the insured, a single man at the time the certificate was issued to him in July, 1907, intermarried with the complainant in May, 1911, and at once set about to have the beneficiary changed so as to substitute the name of complainant, his wife, for that of his mother; and that he did all in his power to effect this, but failed though on account of no fault or neglect on his part. (b) That the policy was assigned and delivered to complainant, thus, it is claimed, vesting in her the right to take

its proceeds, regardless of any failure to change the beneficiary.

The chancellor held against complainant, and she has appealed and assigned errors raising these questions for review by this court.

It appears that, soon after the marriage of complainant with the insured, he stated that he desired to have the certificate changed to name her as beneficiary. The couple remained in White county, where the local camp of the order to which insured belonged was located, until October, 1911, at which time they removed to Atlanta, Ga., where her husband took employment as a street car conductor, and where he died in October, 1913. Between the last two dates, the insured visited his old home twice, and on the first visit he brought with him the benefit certificate for the purpose of effecting the change, but failed to do so. On the last visit, thinking it was necessary that some step or action be taken in open lodge, he took the policy to the meeting place, but found the door locked, and that no meeting was to be held. On returning to his home in Atlanta, he handed the certificate to his wife, intending at the time that she should have the benefit of it, the chancellor found, and it remained in her possession at the date of his death. She surrendered it to James Davis, the father of insured, in order that it might be realized on, under a promise from him that the proceeds would be applied to the payment of the funeral expenses and certain indebtedness of insured, and the remainder turned over to her, the complainant.

The insured made no effort to formally comply with the by-laws of the order respecting the changing of a beneficiary by surrendering the certificate and designating a new beneficiary in the surrender clause on the back of the certificate, or by the payment of the required fee. The by-laws provide that a fee shall be paid and the method of so designating a substitute beneficiary. They further provide:

"No change in the designation of beneficiary or beneficiaries shall be effective until the old certificate shall have been delivered to the head clerk and a new certificate issued during the lifetime of the member, and until such time the old certificate shall remain in force. * * * Any attempt by a member to change the payee of the benefits of his benefit certificate by will or other testamentary document, contract, agreement, assignment or otherwise than by strict compliance with the provisions of this section, relating to change of beneficiary, shall be absolutely null and void."

The chancellor held the insured did not do all that he reasonably could have done to execute his purpose, which was formed more than two years before his death; and we think he was correct in so ruling.

[1] Undoubtedly, the rule is that when a member of a benefit association, in efforts to make a change in the beneficiary of his certificate, has done all that was reasonably in his power to comply with the rules of the or-

der, but fails to do so and dies before the change is formally effected, a court of equity will treat the substitution as complete on the principle that in equity that will be deemed done which ought to have been done. But in this case the facts show no sufficient attempt on the part of the insured to make the change, which effort must be one to comply with the rules of the order. The failure was due to the insured's neglect, and certainly he was not prevented from doing so by any happening over which he had no control. In such a case, the intent will not be treated as consummated in equitable contemplation. *Ancient Order of Gleaners*, 165 Mich. 1, 130 N. W. 191, 34 L. R. A. (N. S.) 277, and note; *Johnson v. New York L. Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868; *Modern Woodmen v. Headlee*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580, and note.

There is nothing in the case of *Schardt v. Schardt*, 100 Tenn. 276, 45 S. W. 340, to the contrary. There the formalities had, to the satisfaction of the order, been so far substantially complied with that a new certificate had actually been issued in the name of the substitute beneficiaries.

In *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506, it was said:

"The change of the beneficiary is an important matter, for it transfers the right to receive the death benefit, amounting in this case to \$1,000, from one person to another. The right of the member to make the change is absolute, and the beneficiary can neither prevent it by objecting, nor promote it by consenting. Obviously such a transaction requires some formalities for the protection of the company, the member, and the beneficiary. The formalities required by the association before us, through its by-laws, were very simple; but, unless they were substantially complied with, the change could not be made. Mere intention to make a change is not enough, for the acts prescribed to carry the intention into effect are forms imposed upon the execution of a power, and they must be observed or the change cannot be effected. As a condition precedent to effectuate the change, the member was required to ask the association for a new certificate and to pay it the fee exacted by the by-laws. The association could not make the change unless he requested it, and even then, as it stipulated in its contract with him, 'only on the payment of 25 cents.' While it could have waived payment during his life, it did not do so, and it could waive nothing after his death, for by that event the rights of the beneficiary became fixed and unalterable."

[2] While the mother did not have a vested interest in the certificate during the life of the insured, she did have a contingent right—an expectancy in the nature of an inchoate interest, subject to be defeated by an exercise of the power of substitution substantially in the manner set forth in the laws of the order.

[3] But it is urged by the appealing complainant that the delivery of the policy to her by the insured gave her the right as his assignee to take its proceeds despite the failure to effect the substitution of complainant's name as beneficiary; that the parol assign-

ment and delivery left the mother without any sort of interest.

This argument must proceed upon the predicate that the insured had the power to make any disposition of the certificate contract that he saw fit, in disregard of the above quoted provision to the effect that "any attempt by a member to change the payee of the benefits by assignment shall be void," as well as of the principles underlying the ruling already made in respect of the effort made to change the beneficiary.

Nearly all of the decisions involving certificates in which a third person is named as beneficiary (as distinguished from those made payable to the insured or his estate or personal representative) are to the effect that, although there be a provision for the assignment of the certificate in a particular mode, an assignment relied upon which is not made in substantial accordance with the provisions regulating assignments is without avail to defeat the right of the named beneficiary. The cases are collated in the annotation of *Johnson v. New York L. Ins. Co.*, L. R. A. 1916A, 877. A fortiori is this true when, as here, there is a positive inhibition against the right of such beneficiary "otherwise than by strict compliance with the provisions relating to a change of beneficiary."

It was held in *Schardt v. Schardt*, supra, that it was not in the power of a member of such an order to defeat the rights of beneficiaries named in the certificate by a disposition of it in his will. We hold that he may not do so by an assignment.

The chancellor's decree is affirmed.

LOUISVILLE & N. R. CO. v. HOBBS.

(Supreme Court of Tennessee. Dec. 23, 1916.)

1. CARRIERS §158(1)—LIMITING LIABILITY—INTERSTATE SHIPMENT.

Where alternate rates, fairly based on valuation, are offered for an interstate shipment, the carrier may limit its liability by special contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 663; Dec. Dig. §158(1).]

2. CARRIERS §30—INTERSTATE SHIPMENT—SCHEDULES—NOTICE—LIMITATION OF LIABILITY.

A shipper suing on an interstate shipment contract for injuries to a shipment of horses is chargeable with notice of the contents of schedules filed by the carrier with the Interstate Commerce Commission and duly published, where the shipment contract refers to alternating rates established by the carrier and sets forth the shipper's acceptance of the lower rate because of embodied limitations on the carrier's liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 81; Dec. Dig. §30.]

3. CARRIERS §30—INTERSTATE SHIPMENT—SCHEDULES OF RATES.

In an action for injuries to an interstate shipment of horses, a provision of the shipment contract limiting the carrier's liability and referring to alternative rates established prima facie that the carrier had complied with the

requirements of the act of Congress respecting the filing and publication of its schedules of rates.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 81; Dec. Dig. §30.]

Appeal from Circuit Court, Willson County; Jno. E. Richardson, Judge.

Action by J. R. Hobbs against the Louisville & Nashville Railroad Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals, and defendant appeals. Reversed and remanded for new trial.

Lillard Thompson and J. H. Campbell, both of Lebanon, and Jno. Bell Keeble, Ed. T. Seay, and Albert W. Stockwell, Jr., all of Nashville, for appellant. W. R. Chambers, of Nashville, for appellee.

WILLIAMS, J. This is an action instituted by Hobbs against the railroad company to recover damages for alleged injuries to several horses shipped by him from East St. Louis, Ill., to Lebanon, Tenn.

Hobbs recovered a judgment in the circuit court, and that judgment was affirmed by the Court of Civil Appeals. The company petitions this court for a writ of certiorari in order to its relief.

The live stock was transported under a through bill of lading, the terms of which are to govern the decision of the case.

The bill of lading provided for limited liability on the part of the carrier—\$100 for each horse—and for a release of the carrier from all liability for loss or damage sustained to said animals from any cause or thing whatever not resulting from the negligence of the agents or servants of said carrier.

The other clauses usually incorporated in such limited liability contracts appear. Among them are the following:

"The carrier will carry live stock at the rate established by it therefor, and where certain risks, duties and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates.

"In the present instance the shipper elects to avail himself of said reduced rate, etc. * * *

"The carrier agrees that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of \$70 per car 20,000 pounds."

[1] The determination of liability under this contract of shipment is to be governed by the federal decisions which are to the effect that where alternate rates, fairly based upon valuation, are offered, a railroad may limit its liability by special contract. *George N. Pierce Co. v. Wells, F. & Co.*, 236 U. S. 278, 283, 35 Sup. Ct. 351, 59 L. Ed. 576, 581; *Louisville & N. R. Co. v. Montgomery*, 136 Tenn. —, 188 S. W. 1146.

Hobbs testified in the trial below that he had shipped live stock over the company's railroad from East St. Louis to Lebanon for two years; that he estimated that he had shipped from 20 to 25 carloads of stock dur-

ling that period; that the agents of the company had never notified him that it had more than one rate for the transportation of live stock; and that he had always paid the same rate, never having heard of but one rate.

The insistence for Hobbs is that he is by the federal decisions left the right to show by this proof that the attempted limitation in the contract was ineffectual and that the shipment contract is one of common-law liability on the part of the carrier. The ruling of the Supreme Court of the United States in the recent case of *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 38 Sup. Ct. 555, 60 L. Ed. 1022, is relied upon by counsel of both parties, and the proper construction of the opinion in that case will determine the disposition of this case.

The bill of lading refers to alternate rates established by the carrier, and sets forth the shipper's acceptance of the lower rate granted because of the embodied limitations on the carrier's liability. We construe this to refer to an establishment of rates in accordance with law in schedules filed by the carrier, and to mean that the shipper was notified thereby that there were two rates applicable in the alternative.

[2] May a plaintiff suing on such contract be heard to say that he did not know what was contained in the schedules, if such are found to be filed with the Interstate Commerce Commission and published as the laws of the Congress require?

We construe the Rankin Case not to have the meaning assigned it by the Court of Civil Appeals. We think its ruling did not save to the plaintiff the right to contradict what is proved, or must be presumed, to be in such schedules by showing that he was not in fact offered a choice of rates, and of contracts responding thereto.

The court in that case said:

"We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no federal question unless there is affirmative proof showing actual compliance with the interstate commerce act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium*."

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability; and, as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove

its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him."

In *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 38 Sup. Ct. 391, 57 L. Ed. 683, it was said:

"The valuation declared or agreed upon, as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. * * * The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse."

[3] Since the recitals of the contract here involved made a *prima facie* case that the carrier had complied with the requirements respecting the filing and publishing of its schedules of rates, the lower courts should have proceeded on the basis that such filing and publication was a fact. What then was the effect of that fact in respect to importing notice to the shipper that he has a choice as between rates and grades of contractual liability on the carrier's part?

We must assume that the published schedules showed the relation of the two rates to the two kinds of contract—common-law and limited-liability. In other words, the schedules in showing the rates necessarily disclosed to the shipper the choice as between the two kinds of contract; and it was not open to the shipper to prove that he did not know or understand what the schedules contained in reference to the rates applicable to the respective liability contracts. We understand the ruling in the Rankin Case to save to the shipper the right to show that there was in fact no filing or publication, any contract recitals on his part to the contrary notwithstanding, the burden of proof in doing so being upon him; not that he may show that there was no offer of choice of contracts, as against the showing of the schedules, so established *prima facie*. The shipper's knowledge of the contents of the schedule is conclusively presumed. *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665.

If the contrary view be the correct one, an easy way is open for evasion and preferential treatment of shippers by means of a withholding, as a matter of fact, from some of them the existence or offer of alternate rates and contracts, while disclosing same to others; whereas, it was the purpose of the acts of Congress "to have but one rate, open to all alike, and from which there could be no departure." *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 110-113, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593.

The gist of the decision in the Rankin Case is, we think, found in the sentence, "Such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice," in that the schedules are presumed to have been filed rendering it unnecessary for the carrier "to prove its schedules in order to make out the requisite choice." The burden cast by the recitals upon plaintiff was in respect of a distinct matter—that of proving, in case he wished to contradict them, that the carrier had not complied with the law by filing and publishing the schedules of rates, etc.

Bound as we are by this federal decision, construed as we think it must be in fairness to the ultimate tribunal which announced it, we are constrained to reverse the judgment of the Court of Civil Appeals, and to remand the case for a new trial.

GULF REFINING CO. OF LOUISIANA v. CITY OF CHATTANOOGA.

(Supreme Court of Tennessee. Dec. 23, 1916.)

1. LICENSES \S 16(9)—PRIVILEGE TAX—CONSTRUCTION OF STATUTE.

The Revenue Act (Acts 1915, c. 101) \S 2, authorizes each county and municipality to levy a privilege tax on merchants and such other vocations as are named in the act and declared to be privileges. Section 3 requires merchants to pay an ad valorem tax and a privilege tax of 15 cents on each \$100 worth of taxable property. Section 4 declares that each vocation, occupation, and business named therein is a privilege, and fixes the amount of privilege tax to be paid by each of a long list of various kinds of business among which is dealers in coal, illuminating, or lubricating oil. In connection with some of the named occupations, but not with oil dealers, there is a provision that they shall also pay the tax as merchants. *Held*, that the act did not make oil dealers liable to the general merchants' tax in addition to the special privilege tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 36; Dec. Dig. \S 16(9).]

2. TAXATION \S 58—STATUTES—CONSTRUCTION—DOUBLE TAXATION.

The presumption is always against an intention to assess double taxes, and a statute will not be construed to impose such tax unless such construction is clearly required by its language.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 134, 135; Dec. Dig. \S 58.]

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Suit for injunction by the Gulf Refining Company of Louisiana against the City of Chattanooga. Judgment for complainant, and defendant appeals. Affirmed.

F. S. Carden, of Chattanooga, for appellant. Williams & Lancaster, of Chattanooga, for appellee.

EVANS, Special Justice. This bill was filed in the chancery court of Hamilton county by the Gulf Refining Company of Louisiana to enjoin the city of Chattanooga from issuing distress warrants against complainant to

compel the payment of a merchant's privilege tax for the year 1916.

The bill alleges that complainant is a foreign corporation, having complied with the laws of Tennessee, and is doing business, among other places, in the city of Chattanooga; that it sells and distributes oils and gasoline to its customers; that as such oil company it is required by the laws of Tennessee and by the ordinances of the city of Chattanooga, made pursuant thereto, to pay to the city the following taxes, namely: (a) An ad valorem tax upon all its property including its stock of oils, gasoline, etc., located within the corporate limits, same being its property tax; (b) a privilege tax of \$500 per annum for the privilege of doing business in said city as such oil company, same being its privilege tax.

After averring that complainant was ready and willing to pay all its just taxes, the bill alleges that the city of Chattanooga is threatening to collect from complainant by distress warrants an additional tax for the year 1916, to wit, a merchant's privilege tax based upon the average value of its stock of oils on hand during the year 1916.

A temporary injunction was issued, as prayed for in the bill, and defendant filed a motion to dissolve. Upon the hearing of said motion both parties agreed that it should be treated by the court as a demurrer to the bill, in order to enable the court, at that time, to pass on the merits of the case, there being no dispute about the facts.

The chancellor held that complainant was entitled to the relief prayed for, and entered a final decree making the injunction perpetual, and taxing the costs against the defendant. Thereupon, the city of Chattanooga appealed to this court, and has assigned error.

It is insisted in behalf of appellant that appellee is a merchant within the meaning of said act, under the authority of the following cases: *American Steel & Wire Co. v. Speed*, 110 Tenn. 524, 75 S. W. 1037, 100 Am. St. Rep. 814, *American Book Co. v. Shelton*, 117 Tenn. 745, 100 S. W. 725, and *Chattanooga Plow Co. v. Hays*, 125 Tenn. 148, 140 S. W. 1068.

It is also insisted that it is within the power of the Legislature to require of merchants three taxes, to wit: (1) An ad valorem or property tax imposed upon all property; (2) a merchant's tax under the constitutional power to tax merchants; and (3) a privilege tax under its power to tax privileges. And *Kelly v. Dwyer*, 7 Lea (75 Tenn.) 180, is cited as authority.

[1] But, without entering into a discussion of the above propositions insisted upon by appellant, the first question to be determined, and the one which in our opinion is decisive of the case, is whether, in the Revenue Act of 1915, the Legislature has, in fact, imposed two privilege taxes upon oil companies in

addition to the ad valorem tax; that is to say, whether the Legislature, in addition to the ad valorem tax, has imposed upon complainant a special privilege tax for selling oils and gasoline, and also a privilege tax as a merchant.

Chapter 101 of the Acts of 1915, known as the Revenue Act, in section 1 provides for a property tax.

In section 2 it is provided that each county and municipality "is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or business as are named in this act and declared to be privileges, not exceeding in amount that levied by the state for state purposes." It is further provided in said section 2 that "the imposition of a privilege tax under this act shall not be construed as a release or exemption from an ad valorem tax unless otherwise expressly provided."

Section 3 of the act relates to merchants, and requires that they shall pay an ad valorem tax, and a "privilege tax of 15 cents on each \$100 worth of taxable property."

Section 4 provides that each vocation, occupation, and business named in this section "is hereby declared to be a privilege," and fixes the amount of privilege tax to be paid. Then follows a long list, in alphabetical order, of various kinds of business, with a certain sum as a privilege tax set opposite the name of each; and on page 272 appears "coal oil, illuminating oil, or lubricating oil, or petroleum products, \$500.00," etc.

Even if it be true, under the authorities cited by appellant, that appellee's business may be classed as that of a merchant, we are of opinion, from the terms of the Revenue Act construed as a whole, that the Legislature did not intend to impose upon any business enumerated in section 4 a merchant's privilege tax in addition to the special privilege tax, except where it is expressly so provided. There are a number of instances in section 4 where it is provided that one who is engaged in the designated business shall pay a merchant's tax in addition to the special privilege tax. Thus in the case of "Victrolas," a special privilege tax is imposed, and then the following provision is added: "In addition they shall pay a tax as other merchants." This is true of several other vocations set out in section 4. But there is no express provision that oil companies shall pay a merchant's privilege tax in addition to the \$500 special privilege tax.

A great many of the vocations declared in

section 4 to be privileges and taxed as such are particular instances of merchandising, as for example, bicycles, cigar stands, ranges, and clocks, coal and coke, coal oil, or petroleum products, florists, fruit stands, sewing machines, etc.

We cannot assume that the Legislature intended to impose what in substance and in fact is a double privilege tax in the absence of an express intention to do so. As said by the learned chancellor in the court below, call the taxes what we may, we cannot close our eyes to the fact that to require a merchant to pay the merchant's privilege tax, based upon the amount of property or capital in the business, and also to pay a gross sum upon the privilege, is to require him to pay two taxes for the same privilege—that of selling (in case of appellee) oils and gasoline in the state of Tennessee.

[2] The presumption is always against an intention to assess double taxes. In *Bell v. Watson*, 3 Lea (71 Tenn.) 330, this court said:

"Whatever power the Legislature may have to levy double taxes, the presumption always is against such an intent. The statute will not be construed so as to impose duplicate taxation, unless the construction is required by its express words or necessary implication."

In the same case it is further said that:

"The safe and sound rule of construction of revenue laws is to hold, in the absence of express words plainly disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege."

And in *Plow Co. v. Hays*, 125 Tenn. 155, 140 S. W. 1069, this court said:

"It is also a settled rule of interpretation in this state that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy. All questions of doubt arising upon the construction of the statute will be resolved against the government, and in favor of the citizen, because burdens are not to be imposed beyond what the statute expressly imports."

We are of opinion that in the Revenue Act of 1915 the Legislature has not manifested a clear intent that oil companies should pay a merchant's privilege tax in addition to the privilege tax of \$500 for selling oils and gasoline.

It results from the views above expressed that the decree of the chancellor will be affirmed, with costs.

BOARD OF EDUCATION FOR JEFFERSON COUNTY et al. v. LITTRELL et al.

(Court of Appeals of Kentucky. Jan. 5, 1917.)

**1. SCHOOLS AND SCHOOL DISTRICTS —65—
REVERTER ON CONDITION—USE OF PROPERTY
AS SCHOOL.**

Where a deed conveyed property to trustees of a school district providing that it should revert when it ceased to be used for public school purposes, the use of the property as a storage place for school materials or as a meeting place for the division board was not sufficient to prevent a reversion.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. —65.]

2. DEEDS —100—CONSTRUCTION.

A deed should be interpreted in the light of the character, situation, and purposes of the parties, and of the law in force when it was executed and delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. —100.]

**3. SCHOOLS AND SCHOOL DISTRICTS —65—
GRANT TO SCHOOL TRUSTEES—REVERTER.**

Where a deed to trustees of a school district provided that the property should revert when it ceased to be used for public school purposes, "which will be determined when the aforesaid district # 56 of said county and state shall by its lawful, proper authorities select, locate, and establish a public school house elsewhere," and the grantor and grantees were whites, while the grantees had no control whatever over colored schools, and no power to use white school property for colored school purposes, the purpose of the grantor was to convey a site for white school purposes, and to provide for a reversion in case it ceased to be used for such purposes, so that the property reverted to the grantor's heirs when the site ceased to be used as a school for white children and was used solely by colored children.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. —65.]

**4. DEEDS —180—REVERSION—ESTATE OF
GRANTOR.**

Where a party conveyed land to the trustees of a school district by deed providing that it should revert to the grantor, his heirs or assigns, when it ceased to be used for public school purposes, the estate which the grantor and his heirs had in the property conveyed, to become effective on the happening of the condition expressed in the deed, was a present vested interest of the nature of a reversion.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366, 374; Dec. Dig. —130.]

5. CONTRACTS —167—CONSTRUCTION—LAW.

The law which subsists at the time and place of making a contract enters into and forms a part of it as if it were expressly referred to or incorporated in its terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 750; Dec. Dig. —167.]

**6. CONSTITUTIONAL LAW —121(2)—SCHOOLS
AND SCHOOL DISTRICTS —65—OBLIGATION
OF CONTRACTS—STATUTE.**

Ky. St. § 4437, providing that reversion of any land now used as a site for schoolhouse shall not deprive the district of a schoolhouse or other improvements thereon, enacted subsequently to execution of a conveyance conditioned on reversion on cessation of use for school purposes, if construed to give the right, not existing when the deed was made, to remove an improvement, is invalid as impairing the ob-

ligations of a contract, though the improvement was made after enactment of said section.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 342-348; Dec. Dig. —121(2); Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. —65.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit by R. E. Littrell and others against the County Board of Education for Jefferson County and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Edward C. Wurtale, of Louisville, for appellants. Curwell K. Marshall, of Louisville, for appellees.

CLAY, C. On November 1, 1888, John N. Littrell, in consideration of \$1 in hand paid, and the further consideration that the property was to be used for public school purposes, conveyed a tract of land containing about one acre to D. H. Wilhoite, D. S. Taylor, and P. G. Williams, trustees of school district No. 56 of Jefferson county. After describing the land, the habendum clause of the deed reads as follows:

"To have and to hold for aforesaid school purposes and to revert to the said first party, his heirs or assigns, when it ceases to be used for public school purposes, which will be determined when the aforesaid district No. 56 of said county and state shall by its lawful, proper authorities select, locate and establish a public school house elsewhere."

The original grantor, John N. Littrell, and his wife, are now dead. This suit was brought by R. E. Littrell and others, the only children of John N. Littrell, against the county board of education of Jefferson county, to recover the land, together with the schoolhouse thereon, on the ground that the property had ceased to be used for public school purposes and the title thereto had reverted to plaintiffs. From a judgment in favor of plaintiffs, the county board of education appeals.

There is no dispute as to the material facts, which are as follows: When the deed was made the law provided for the election of colored school trustees for colored schools, and white trustees for white schools. No tax could be levied on the property of white persons for colored schools, or on the property of colored persons for white schools. White children could not attend the colored schools, nor could colored children attend the white schools, and it was not lawful to use for one class money collected for the other class. Section 4524, Kentucky Statutes 1894. The original grantor was a white person, and the trustees of school district No. 56 were also white. These trustees had no supervision nor control over the colored schools. When the lot was conveyed, there was on it a small house, which was at first used as a public school. In 1899 the school district erected the present school building. The county board of education of Jefferson

county is the successor in title of the trustees of school district No. 56. Section 4426a, Kentucky Statutes. In the year 1915 the county board consolidated school district No. 56 with other districts and sent the pupils thereof to a new schoolhouse located in school district No. 56 and about a mile from the old schoolhouse. At the same time it converted the Littrell property into a school for colored children and began to use it for that purpose. It also used the property as a storage place for school materials for white children and as a meeting place for the division board acting in behalf of white children. However, the county board claims that this arrangement was not a permanent one, but was to be discontinued in the event it was found to be unsatisfactory.

[1-3] The county board takes the position that the condition on which the estate was to revert has never happened, but that the property, which is now used as a storage place for school materials for white children and as a meeting place for the division board acting in behalf of white children, and also for colored school purposes, is still being used for public school purposes within the meaning of the deed. Clearly, the property was conveyed for the purpose of conducting a school thereon, and not as a storage place for school materials, or a meeting place for the division board. Hence the use of the property for these purposes would not be sufficient to prevent a reversion. Under the deed, the property was to revert when it ceased to be used for public school purposes. The reversion was to take effect when the district should select, locate, and establish a public school elsewhere. The deed should be interpreted in the light of the character, situation, and purposes of the parties and of the law then in force. The grantor was white. So were the grantees. The grantees had no control whatever over colored schools and no power to use white school property for colored school purposes. Under these circumstances, we conclude that the purpose of the grantor was to convey a site to be used for white school purposes and to provide for a reversion in case it ceased to be used for those purposes. It is admitted that a new site for a schoolhouse in the district in question has been located and established elsewhere, and that the white pupils of that district are now required to attend the new school. Not only so, but the school site conveyed by the grantor has ceased to be used as a school for white children and is now used solely by colored children. It follows that the chancellor did not err in holding that the property had reverted to the plaintiffs.

The next question is whether the chancellor erred in holding that the county board did not have the right to remove the schoolhouse. The county board insists that the right of removal is authorized by section

4437 of the Kentucky Statutes, which provides:

"Any reversionary interest in any land now used as a site for a schoolhouse shall not deprive the district of the schoolhouse or other improvements thereon."

The deed of contract under which the trustees of school district No. 56 acquired title was executed in the year 1888. The statute in question was not enacted until the year 1893.

[4] The estate which the grantor and his heirs had in the property conveyed, and which was to become effective on the happening of the condition expressed in the deed, was a present vested interest of the nature of a reversion. 2 Washburn (6th Ed.) § 968. Under the law as it stood when the deed was executed, the right of reversion retained in the deed carried with it the right to the improvements erected on the land, in the absence of an agreement to the contrary. *Union Bethel Church v. Thomas G. Gaylord*, 1 Ky. Law Rep. 403.

[5] It is the well-established rule that the law which subsists at the time and place of making a contract enters into and forms a part of it, as if it were expressly referred to or incorporated in its terms. 6 R. C. L. p. 325, § 314; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397. The contractual rights of a citizen are protected by article 1, § 10, of the federal Constitution, providing that no state shall pass any law impairing the obligation of contracts. Prohibition being absolute, the amount and the extent of the impairment is immaterial. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. Any act which changes the expressed intention of the parties to a contract, or such as results from their stipulations, is held to impair its validity, and it is immaterial as to the degree or nature of the change, whether it relates to its validity, construction, duration, discharge, or the evidence of the contract; in all cases the conclusion is the same. 6 R. C. L. p. 329, § 319; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357.

[6] Since under the law which entered into and formed a part of the contract the grantor and his heirs had the right to the improvements on the land whenever the title thereto reverted, it is clear that the act in question, giving to the school authorities the power to remove the improvements, materially lessens the value of the rights acquired by the contract, and therefore impairs its obligations. *Evans v. Cropp*, 141 Ky. 515, 133 S. W. 221. The fact that the schoolhouse was erected after the act took effect is immaterial. The case turns on the grantor's rights when the contract was made and on whether those rights have been impaired. Having the right under the contract, in case of a reversion, to retain the improvements without regard to the time of their erection, it is clear that the statute, if

construed so as to give the grantees, or their successors in office, the right to remove the improvements, erected after its enactment—a right which did not exist when the contract was made—would also impair the obligations of the contract as effectually as if it gave the right to remove the improvements erected prior to its enactment. We therefore conclude that the statute is invalid as to reversionary interests created by contracts executed prior to its enactment.

Judgment affirmed.

HILLMAN LAND & IRON CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 5, 1917.)

1. APPEAL AND ERROR \S 359—AMOUNT IN CONTROVERSY—MONEY JUDGMENT.

Under Ky. St. \S 950, as amended by Laws 1914, c. 23, providing that appeals from the circuit court to the Court of Appeals for money judgments under \$500 can only be granted by the Court of Appeals, an appeal granted by a circuit court from such a judgment is void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1936-1940; Dec. Dig. \S 359.]

2. APPEAL AND ERROR \S 86—SUBJECT-MATTER—REVENUES.

A judgment under \$500 for the recovery of a license tax, from which an appeal was granted by the circuit court, does not give the Court of Appeals jurisdiction, under Ky. St. \S 950, as amended by Laws 1914, c. 23, providing that appeals from money judgments under \$500 can only be granted by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 114-116, 175; Dec. Dig. \S 36.]

3. APPEAL AND ERROR \S 21—APPELLATE JURISDICTION—CONSENT OF PARTIES.

The parties cannot confer jurisdiction on the Court of Appeals by consent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 88-97; Dec. Dig. \S 21.]

Appeal from Circuit Court, McCracken County.

Action by the Hillman Land & Iron Company against the Commonwealth of Kentucky. Judgment for defendant, and plaintiff appeals. Appeal dismissed, without prejudice.

Berry & Grassham, of Paducah, for appellant. M. M. Logan, Atty. Gen., for the Commonwealth.

MILLER, J. The Hillman Land & Iron Company is a Missouri corporation, with its chief office and place of business in St. Louis. It has an authorized capital stock of \$1,000,000, of which \$750,000 has been issued. The stock thus issued is represented by farm and timber lands in the state of Kentucky worth \$400,000, which yielded an income of \$17,462.83 in 1915. The corporation carried on no business during the year 1915, except what was carried on by its tenants, in Ken-

tucky. It has no property, or business, or income therefrom in any other state.

Section 4189a of the Kentucky Statutes requires domestic and foreign corporations to pay an annual license tax based upon its authorized capital stock; and, by section 4189c, the license tax is fixed at 30 cents on each \$1,000 of that part of the authorized capital stock represented by property and business transacted in this state. There are other provisions of the statute which need not now be considered.

The commonwealth contends that the appellant must pay a license tax of 30 cents on each \$1,000 of its authorized capital stock of \$1,000,000, while the appellant insists that it should only be required to pay a license tax of 30 cents on each \$1,000 of the \$400,000 valuation of tangible property owned, and the \$17,462.83, income on business transacted for the year 1915. The parties filed this agreed case, asking the circuit court for a full construction of the law involved upon the facts submitted.

The circuit court sustained the contention of the commonwealth, and adjudged that the Hillman Land & Iron Company "is liable and should be required to account for and pay to the commonwealth of Kentucky a license tax of 30 cents on each \$1,000 of its authorized capital stock" of \$1,000,000. From that judgment the Hillman Land & Iron Company prayed and was granted an appeal in the circuit court.

[1] The judgment is somewhat irregular in form, in that it does not specifically award a recovery of a definite amount, and we do not now pass upon the question of its validity. At most, it is a judgment for only \$300; and, under section 950 of the Kentucky Statutes as amended by the act of 1914 (Laws 1914, c. 23), an appeal from a money judgment for less than \$500 can only be granted by the Court of Appeals. An appeal granted by a circuit court from a judgment for less than \$500 is a nullity. *Childers v. Ratliff*, 164 Ky. 123, 175 S. W. 25. The practice in such cases is pointed out in *Oman-Bowling Green Stone Co. v. L. & N. R. R. Co.*, 169 Ky. 832, 185 S. W. 118, and *City of Covington v. Sullivan*, 172 Ky. 537, 189 S. W. 709, and the cases therein cited.

[2] The fact that the judgment is for a license tax does not change the rule or give this court jurisdiction, since it is the amount in controversy, under a money recovery, and not the nature of the cause of action that governs the right of appeal. *Thompson Straight Whisky Co. v. Commonwealth*, 157 Ky. 393, 163 S. W. 201; *Goodrum v. Flowers*, 162 Ky. 724, 172 S. W. 1062.

[3] Neither can the parties confer jurisdiction upon this court by consent, where it is not authorized by law. *Lindsey v. McClelland*, 1 Bibb, 262; *Ormsby v. Lynch*, Litt. Sel. Cas. 303; 7 R. C. L. p. 1039. Appeal dismissed, without prejudice.

TODD'S EX'R et al. v. FIRST NAT. BANK et al.

(Court of Appeals of Kentucky. Jan. 4, 1917.)

1. APPEAL AND ERROR ⇨154(1)—RIGHT OF APPEAL—WAIVER.

One voluntarily acquiescing in or recognizing the validity of a judgment, order, or decree, or otherwise taking a position inconsistent with the right to appeal therefrom, thereby waives such right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 958, 961, 962; Dec. Dig. ⇨154(1).]

2. APPEAL AND ERROR ⇨154(1) — RIGHT OF APPEAL—ACQUIESCENCE.

Acquiescence must be clear and unconditional, voluntary and absolute, to bar the right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957, 958, 961, 962; Dec. Dig. ⇨154(1).]

3. INFANTS ⇨115—RIGHT OF APPEAL—ACQUIESCENCE.

Where, in suit where claimants sought to subject an estate in remainder to decedent's debts, the judgment subjected the estate to debts for which it was not liable, and more land was sold than was necessary to pay the debts for which the estate in remainder was liable, the remaindermen contesting the proceedings did not lose their right of appeal by purchasing one of the tracts ordered to be sold, in order to protect their interests; one of the remaindermen being an infant.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 305, 326-332; Dec. Dig. ⇨115.]

4. LIFE ESTATES ⇨20 — DUTIES OF LIFE TENANT.

The ordinary expenses of the care and management of life estates must be paid by the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 41, 42; Dec. Dig. ⇨20.]

5. PRINCIPAL AND AGENT ⇨109(1)—IMPLIED AUTHORITY OF MANAGER OF FARM.

Where mother and son were life tenants of a farm, he being given sole charge thereof by her, she was liable on notes representing money borrowed by him to purchase stock and other supplies and pay the running expenses of the farm.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318, 361; Dec. Dig. ⇨109(1).]

6. PRINCIPAL AND AGENT ⇨109(1)—AUTHORITY OF MANAGER OF FARM.

A mother intrusting the management of a farm to her son was not liable on notes on which the manager was surety, given for a colt and buggy for his son; neither purchase being connected with the farm business.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318, 361; Dec. Dig. ⇨109(1).]

7. LIFE ESTATES ⇨16 — PAYING INCUMBRANCE.

Where a life tenant pays off a mortgage or other debts and incumbrances outstanding against the entire estate, he is entitled to reimbursement from the remaindermen and to a lien on the property for the remaindermen's share.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 86; Dec. Dig. ⇨16.]

8. LIFE ESTATES ⇨16 — LIFE TENANTS — DUTY TO PAY INTEREST.

It is the duty of a life tenant of property to keep down the interest accruing on incumbrances on the entire estate during the continuance

of his estate, at least to the extent of the income or rental value of the property.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 86; Dec. Dig. ⇨16.]

9. LIFE ESTATES ⇨16 — RIGHTS OF CREDITORS.

Where the life tenant discharges the principal of an incumbrance outstanding against the entire estate, and thereby acquires a lien on the property as against the remaindermen, his creditors will be subrogated to his rights.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 86; Dec. Dig. ⇨16.]

10. LIFE ESTATES ⇨18—DUTY OF LIFE TENANT.

It is the duty of the life tenant to pay the taxes on the entire property during the continuance of the life estate, without reimbursement from the remaindermen therefor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 89, 91; Dec. Dig. ⇨18.]

11. SUBROGATION ⇨23(3)—PERSONS MAKING ADVANCES.

Where life tenants, believing they owned the fee, mortgaged their supposed interest to pay an incumbrance on the fee, the mortgagee was entitled to subrogation to the lien of the life tenants on the estate of the remaindermen for reimbursement to the extent of the principal debt so discharged, but not for interest accruing after the life estate began.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 63; Dec. Dig. ⇨23(3).]

12. USURY ⇨57—COMMISSION TO AGENT.

Commission paid by mortgagors to their agent for procuring the loan is not usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 128, 129; Dec. Dig. ⇨57.]

13. WILLS ⇨837—PAYMENT OF DEBTS.

A will devising personal property and household goods to testator's wife and his real estate to his wife and his son for life, with remainder to his son's bodily heirs after payment of just debts, gives testator's debts precedent over both life estates and remainders.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2146; Dec. Dig. ⇨837.]

14. EXECUTORS AND ADMINISTRATORS ⇨330—SALE OF LAND—AMOUNT TO BE SOLD.

In an action to settle the estate of decedent in which infants are interested, a judgment directing sale of more land than necessary to pay decedent's debts will be void as to the interest of the infants, unless the case is prepared as provided in the sections of the Code relating to the sales of infants' real estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1365, 1366; Dec. Dig. ⇨330.]

15. EXECUTORS AND ADMINISTRATORS ⇨358(4)—SALE OF LAND—REVERSAL OF JUDGMENT.

Where a judgment directing the sale of infants' lands for their ancestor's debts is void because including more land than necessary to pay the debts, the reversal of the judgment of sale for such reason will not affect the title of the purchaser of the tract which it was necessary to sell.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1475-1477, 1479; Dec. Dig. ⇨358(4).]

16. HOMESTEAD ⇨82—LIFE ESTATE.

One in the occupancy of land in which he has an estate for life is entitled to a homestead therein.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 108; Dec. Dig. ⇨82.]

17. HOMESTEAD ~~66~~—EXEMPTION—LIFE ESTATE—VALUE.

Where a debtor has a life estate only in land occupied as a homestead, the debtor is entitled to a homestead exemption only in such part of the land as is worth \$1,000, and not such quantity of the land that the life estate therein would be worth \$1,000.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 85; Dec. Dig. ~~66~~.]

Appeal from Circuit Court, Owen County.

Suit by S. J. Todd and another against Fred H. Todd and others, in which the First National Bank and others filed claims. From judgment for claimants, plaintiffs appeal. Reversed and remanded.

Vallandingham & Alexander and W. A. Lee, all of Owenton, for appellants. Botts & Perry, of Owenton, Tomlin & Vest, of Walton, and J. L. W. Slaughter, of Owenton, for appellees.

CLAY, C. J. S. Todd, a resident of Owen county, died on June 29, 1904, leaving the following will:

"I, J. S. Todd, being of sound mind and able-bodied enough to write, do will and bequeath to my dearly beloved wife, Sophia J. Todd, all of my personal property and household goods to have and to hold. The real estate I will jointly to my wife, S. J. Todd, and my dearly beloved son, O. K. Todd, after my just debts are paid. The farm to be run mutually. My wife, S. J. Todd, is to have a maintenance out of the proceeds of the farm, if it requires one-half of it.

"Power is hereby given to my wife, S. J. Todd, and son, O. K. Todd, to sell or convey all or any part of the real estate if they mutually agree so to do, and the proceeds, if reinvested, to be subject to the conditions of the will.

"Should O. K. Todd die before my wife, S. J. Todd, the lands revert back to S. J. Todd as guardian for the bodily heirs of O. K. Todd.

"At the death of my wife, S. J. Todd, the property is to go to O. K. Todd.

"I hope this will and desire of mine will be carried out without them having to give bond.

"If S. J. Todd and O. K. Todd should both die before the bodily heirs of O. K. Todd become of age, the court is requested to appoint a guardian and require him to give a gilt-edge bond.

"The only regret I have is that I have not ten times as much to leave as I have. It would be a feeble way to show the appreciation of their devoted love they have shown to and given me.

"I appoint S. J. Todd and O. K. Todd as the executor of my will."

At the time of his death J. S. Todd left surviving him his widow, S. J. Todd, and one son, O. K. Todd. The latter's family consisted of his wife, Ella Todd, and two children, Fred H. Todd and Mary Todd. The testator, J. S. Todd, owned certain personal property, and two farms, one of 61 acres and the other of 281 acres. Prior to his death the testator and his wife and their son and his family occupied the home farm as one family. Upon the probate of J. S. Todd's will, his wife, S. J. Todd, and son, O. K. Todd, qualified as executors. From that time on the farming business was conducted in their joint names through O. K. Todd, who

seems to have assumed charge thereof. In 1912 O. K. Todd died intestate, leaving surviving him his widow and two children, Fred H. Todd and Mary Todd. His mother, S. J. Todd, and wife, Ella Todd, qualified as his administrators.

This suit was brought by S. J. Todd and Ella Todd, administrators of O. K. Todd, and by S. J. Todd, surviving executor of J. S. Todd, against O. K. Todd's infant children, Fred H. Todd and Mary Todd, and others, to construe the will of J. S. Todd and to settle both his and O. K. Todd's estates. The case was referred to the master commissioner to hear and report on claims, and numerous claims against the estate of O. K. Todd were filed and allowed. Fred H. Todd and Mary Todd, the infant children of O. K. Todd, answered through their guardian and set up the claim that under the will of J. S. Todd S. J. Todd and O. K. Todd took only a life estate with remainder to them, the answering defendants. The chancellor rejected this contention, and held that S. J. Todd and O. K. Todd took the fee. On appeal the judgment was reversed, this court holding that the widow and son of J. S. Todd took only a life estate, with remainder to the children of O. K. Todd. Todd's Guardian et al. v. Todd's Adm'rs et al., 155 Ky. 209, 159 S. W. 702. Upon the return of the case the creditors who had filed claims against the estate of O. K. Todd filed the same claims against the estate of the testator, J. S. Todd.

Prior to the death of the testator, J. S. Todd, he executed to H. D. Barker a note for \$3,000, secured by a mortgage on the testator's land. At the time of the testator's death there remained due on this note about \$2,700. Thereafter certain payments of principal and interest were made on the note by O. K. Todd. In the month of November, 1911, S. J. Todd and O. K. Todd applied to D. B. Wallace for a loan to discharge the balance of the Barker debt, agreeing to pay Wallace \$100 for his services. Wallace arranged to obtain the loan from S. C. Hicks. Thereupon a new mortgage was executed by S. J. Todd and O. K. Todd to secure the loan of \$2,100. Of this sum \$1,912.20 was applied to the payment of the balance of the Barker debt. Wallace retained \$100 for his services in securing the loan, and paid the balance to the mortgagors. The mortgage was executed in the belief that the mortgagors owned a fee in the land. The Barker mortgage was released.

In the claim of the Citizens' Bank of New Liberty for \$1,123.60 there is included the amount of two notes executed by the testator, J. S. Todd, and O. K. Todd, aggregating, at the time of the testator's death, the sum of \$727.

It further appears that O. K. Todd paid the testator's undertaking bill. It may be that, in addition to the balance of the Barker

debt and the sum of \$727 included in the claim of the Citizens' Bank of New Liberty and the undertaker's bill, there were other small debts owing by the testator at the time of his death. On this question we express no opinion at present.

On final hearing the chancellor rendered judgment against S. J. Todd and the estate of O. K. Todd in favor of the various claimants. He further adjudged in substance that under the will of the testator the executors were authorized to conduct the farm; that upon the death of O. K. Todd the debts due for the management of the farm did not exceed those due by the testator at his death; that the farm was not self-sustaining, and that certain banks supplied the excess to run the farm; that, as against the remaindermen, the executors were entitled to compensation for managing the estate; that in discharging the debts of the testator they were subrogated to the lien of his creditors; and that the executors' creditors who supplied the money to discharge, not only the testator's debts, but the debts incurred by the executors in the management of the farm, were subrogated to the rights of the executors as against the estate in remainder. He also held that all the debts incurred by the executors in the management of the farm were debts against the estate in remainder. The claimant Hicks was given a prior lien, not only on the life estate of S. J. Todd, but also on the estate in remainder. Thereupon the chancellor ordered the testator's land, or so much thereof as was necessary, sold for the purpose of paying the various claims allowed. From this judgment S. J. Todd, in her own right and as executor of J. S. Todd, and Fred H. Todd and Mary Todd, by their guardian, appeal.

1. After the rendition of the judgment of sale the land was sold in two tracts. F. A. Taylor became the purchaser of the 61-acre tract at the price of \$3,873.50. Mrs. S. J. Todd, the life tenant, and Fred H. Todd and Mary Todd, the remaindermen, became the purchasers of the 281-acre tract at the price of \$3,747.76. Thereafter the sales were confirmed, and bonds for the purchase price executed by the purchasers. Mrs. Todd and the remaindermen also took possession of the land which they purchased, paid two of the purchase bonds, and executed a mortgage on the land to J. P. Sidebottom and others. It is insisted on behalf of the appellee that because of the above acts by appellants they have ratified the judgment of sale, and are now estopped to assert its invalidity, and that appellees' motion to dismiss the appeal should be sustained.

[1-3] If a person voluntarily acquiesces in, or recognizes the validity of, a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or

decree reviewed by an appellate court. But, in order to bar the right of appeal on the ground of acquiescence, the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute. 3 C. J. 665; Robinson v. Hays, 186 Fed. 295, 108 C. C. A. 373; James v. James, 55 S. W. 193, 21 Ky. Law Rep. 1401; Madden v. Madden, 169 Ky. 367, 183 S. W. 931. In the case under consideration the judgment of sale, as will hereafter be shown, subjected the estate in remainder to debts for which that estate was not liable. More land was sold than was necessary to pay the debts for which the estate in remainder was liable. One of the remaindermen was an infant. Every step in the proceedings leading up to the judgment of sale was contested by the appellants. With their entire estate ordered to be sold, the appellants were not in a position to supersede the judgment. The only way to protect their own interests was to purchase one of the tracts of land ordered to be sold. The circumstances of the parties affected have not been so changed that their rights may not be protected in case of a reversal. We therefore conclude that the acts relied on do not show such an unconditional and voluntary acquiescence in the judgment as to bar the right of appeal.

2. With respect to the various errors relied on for a reversal, our conclusions may be summed up as follows:

[4] A. Under the will of J. S. Todd, as heretofore construed by this court, S. J. Todd, his widow, and O. K. Todd, his son, took a mere life estate with remainder to O. K. Todd's children, Fred H. and Mary Todd. Therefore in managing the farm the life tenants acted solely in their own interest. That being true, they were without authority to incur any new debts for which the estate in remainder would be liable, since the ordinary expense of the care and management of a life estate must be paid by the life tenant. Peirce v. Burroughs, 58 N. H. 302; Perrine v. Newell, 62 N. J. Eq. 14, 49 Atl. 724; Relf's Estate, 124 Pa. 145, 16 Atl. 636; Bates v. Rider, 44 S. W. 666, 19 Ky. Law Rep. 1768; 16 Cyc. 636.

[5] B. The life estate of S. J. Todd is liable for all debts created by O. K. Todd in the conduct of the farming business, whether represented by notes or otherwise. While it may be true that she did not give specific authority to O. K. Todd to sign her name to certain contested notes, the evidence clearly shows that, although she was equally interested with him in the conduct of the farm, she permitted him to take sole charge of the farms and conduct them for their joint benefit. This arrangement she acquiesced in for a number of years. The contested notes represent money borrowed by him to purchase stock and other supplies and to pay the running expenses of the farms. Bor-

rowing for these purposes is an ordinary incident of the farming business. She received the benefit of the loans in question. Having intrusted her son with the sole management of the farms, and having impliedly authorized him to do what was reasonably necessary to carry on the business in a successful manner, and having received the benefit of the sums which he borrowed on the contested notes, we conclude that she is now precluded from saying that their execution was not authorized by her.

[6] O. The life estate of S. J. Todd is not liable for the debts which were not incurred by O. K. Todd in the conduct of the farming business. Hence judgment should not have been rendered against S. J. Todd on the note for \$51.50 in favor of the Citizens' Bank of New Liberty, or on the note for \$130 in favor of the Owenton Bank. On both of these notes Fred H. Todd was principal and O. K. Todd surety. The first note was given for a colt; the second for a buggy for Fred H. Todd. Neither had any connection with the farming business.

[7, 8] D. Where the life tenant pays off a mortgage or other debts or incumbrances outstanding against the entire estate, he is entitled to reimbursement from the remainderman and to a lien on the property for the remainderman's share. *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Whitney v. Salter*, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656; *Tindall v. Peterson*, 71 Neb. 160, 98 N. W. 688, 99 N. W. 659, 8 Ann. Cas. 721; *Kocher v. Kocher*, 58 N. J. Eq. 545, 39 Atl. 535; *Barnum v. Barnum*, 42 Md. 253; *Peck v. Glass*, 6 How. (Miss.) 195; *Callicott v. Parks*, 58 Miss. 528; *Davies v. Myers*, 13 B. Mon. 511. However, it is the duty of the life tenant of property to keep down the interest accruing on such incumbrances during the continuance of his estate, at least to the extent of the income or rental value of the property. *Parish v. Ross*, 103 Ky. 33, 44 S. W. 134, 19 Ky. Law Rep. 1676; *Bowen v. Brogan*, 119 Mich. 218, 77 N. W. 942, 75 Am. St. Rep. 387; *Jones v. Sherrard*, 22 N. C. 179.

[9] E. Where the life tenant has discharged the principal of an incumbrance outstanding against the entire estate, and thereby acquired a lien on the property as against the remaindermen, his creditors will be subrogated to his rights.

[10] F. It is the duty of the life estate to pay the taxes levied and assessed on the property during the continuance of the life estate, and for such payments neither he nor his creditors are entitled to reimbursement from the remainderman. *Creutz v. Hell*, 89 Ky. 429, 12 S. W. 928, 11 Ky. Law Rep. 652; *Johnson v. Smith*, 5 Bush, 102; *Arnold v. Smith*, 3 Bush, 163.

[11] G. With respect to the claim of S. C. Hicks, the following facts appear: The loan was applied for to pay the balance due on the mortgage debt incurred by the testator.

The note to Hicks was for \$2,100, and was secured by a mortgage executed by the life tenants and purporting to cover the fee. Wallace, who obtained the loan, was the agent of the life tenants. He charged \$100 for his services. \$1,912.20 was applied to the discharge of the Barker mortgage. The balance of the loan was applied to other purposes. It is insisted that the doctrine of subrogation does not apply, and that Hicks should not have been awarded a preference over the other creditors. Clearly the life tenants were not mere volunteers, but had an interest in the property which they had the right to protect. When, therefore, they discharged the mortgage lien, they were entitled to reimbursement from the remaindermen and to a lien on the property to the extent of the principal of the debt so discharged. All the parties believed in good faith that the life tenants owned a fee. That being true, Hicks, who furnished them the money to discharge the indebtedness, and took in lieu of the original mortgage a new mortgage which proved defective, is clearly entitled to be subrogated to the lien of the life tenants. *Connor v. Home & Sav. Fund. Co. Bldg. Ass'n*, 80 S. W. 797, 26 Ky. Law Rep. 109; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Boevink v. Christlaanse*, 69 Neb. 253, 95 N. W. 652; *Berry v. Stigall*, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. (N. S.) 489, Ann. Cas. 1915C, 118. To the extent, however, that his money was applied to the payment of interest accruing after the life estate began, he is not entitled to any lien on the property as against the remaindermen, and to that extent the judgment is erroneous.

[12] Since Wallace, who procured the loan, acted as the agent of the life tenants, the compensation paid to him cannot be regarded as usury. *Sidway v. Harris*, 68 Ark. 387, 50 S. W. 1002. It follows that Hicks is entitled to a first lien on the life estate of S. J. Todd to secure the whole amount of his mortgage debt.

[13] H. As before stated, there is included in the claim of the Citizens' Bank of New Liberty for \$1,123.60 the amount of two notes executed by the testator, J. S. Todd, and the life tenant, O. K. Todd, aggregating, at the time of the testator's death, the sum of \$727. The testator devised all of his personal property and household goods to his wife, S. J. Todd. He then devised his real estate to S. J. Todd and O. K. Todd for life, with remainder to O. K. Todd's bodily heirs after his just debts were paid, thus clearly showing that he intended that his debts should be paid out of his real estate. Both the life tenants and remaindermen acquired title burdened with the testator's debts. To the extent, therefore, of \$727, the Citizens' Bank of New Liberty has a preferred claim, for which the estate in remainder is liable.

[14, 15] I. The chancellor allowed debts against both the life estate and estate in re-

mainder, aggregating about \$7,000, when, as a matter of fact, the claims for which the estate in remainder was liable do not exceed \$3,500 or \$3,600. The 61-acre tract of land brought \$3,873.50, or apparently more than enough to pay the debts for which the estate in remainder was liable. Notwithstanding this fact, the other tract of 281 acres was sold. It is clear, therefore, that more land was sold than was reasonably necessary to pay the debts for which the estate in remainder was liable. When the judgment was rendered one of the remaindermen was an infant. In an action to settle the estate of a decedent in which infants are interested, a judgment directing a sale of more land than is necessary to pay the debts will be void as to the interest of the infants, unless the case is prepared as provided in the sections of the Code relating to the sales of infants' real estate. *Barry v. Fain's Adm'r et al.*, 172 Ky. 309, 189 S. W. 220; *Clay's Guardian et al. v. Rice*, 172 Ky. 184, 189 S. W. 11; *Elliott v. Fowler, etc.*, 112 Ky. 376, 85 S. W. 849. Here the case was not so prepared, and the court should not, upon the showing made, have ordered the sale of any portion of the 281-acre tract of land. Since it was necessary to sell the 61-acre tract of land, the reversal of the judgment of sale will not affect the title of the purchaser of that tract.

[16] J. One in the occupancy of land in which he has an estate for life is entitled to a homestead therein. *Robinson v. Smithey*, 80 Ky. 636; *Suter v. Quarles*, 58 S. W. 990, 22 Ky. Law Rep. 1080.

[17] K. On the return of the case the court will allot to Mrs. S. J. Todd a homestead in the 281-acre tract of land of the value of \$1,000, and not such a quantity of land that her life estate therein would be worth \$1,000. *McDowell v. Grubbs*, 116 Ky. 751, 76 S. W. 846. He will then order her life estate in the rest of the land sold for the purpose of paying her debts. He will not order the estate in remainder in said tract belonging to Fred H. and Mary Todd sold, except upon a clear showing that it is necessary to do so to discharge obligations for which such estate in remainder is liable.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

R. BURLEIGH & SONS, Inc., v. OVERTON.
(Court of Appeals of Kentucky. Jan. 5, 1917.)

1. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — BREACH — MEASURE OF DAMAGES — UNCUT TIMBER.

Where defendant buyer refused to accept timber still uncut from plaintiff seller, the measure of damages is the difference between the contract price and what it would cost plaintiff to complete the work, the defendant not being entitled to have deducted therefrom the value of the standing timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

2. DAMAGES — 62(4) — REDUCTION OF LOSS — DUTY OF INJURED PARTY — BREACH OF CONTRACT.

One injured by violation of an agreement to do a specific act is not ordinarily required to seek and perform other contracts and thereby reduce the loss to the original contract breaker.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 128-131; Dec. Dig. 62(4).]

3. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — SELLER'S REMEDIES — ADMISSIBILITY OF EVIDENCE.

In action for breaching a contract to purchase timber, plaintiff's testimony that defendant's manager admitted the logs conformed to the contract requirements is admissible.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

4. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — SELLER'S REMEDIES — SUFFICIENCY OF EVIDENCE.

Evidence of plaintiff and admissions of defendant's agent, held sufficient to sustain findings for plaintiff in suit for breach of a contract to purchase timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

5. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — BREACH BY PURCHASER — MEASURE OF DAMAGES — TIMBER DELIVERED.

The measure of damages for refusal of purchaser to accept timber delivered, is the contract price, less any amount paid thereon.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

6. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — BREACH BY PURCHASER — MEASURE OF DAMAGES — UNDELIVERED TIMBER.

Where defendant buyer breached a timber sales contract by refusing to permit performance, the measure of damages is the difference between the contract price and the reasonable cost to plaintiff of performance.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

7. APPEAL AND ERROR — 1068(4) — HARMLESS ERROR — INSTRUCTIONS — CURE BY VERDICT.

An erroneous instruction on the measure of damages for breaching a timber purchase contract did not prejudice defendant buyer, where the verdict was no more than the uncontradicted proof and the correct measure of damages authorized.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. 1068(4).]

8. LOGS AND LOGGING — 3(15) — SALE OF TIMBER — BREACH BY PURCHASER — MEASURE OF DAMAGES — EXPENDITURES.

Where defendant buyer breached a timber purchase contract by refusing to permit plaintiff to cut the timber, plaintiff cannot recover for expenditures made on logs cut, but not delivered, in addition to the difference between contract price and the reasonable cost of performing the contract.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; Dec. Dig. 3(15).]

9. APPEAL AND ERROR — 1140(4) — AFFIRMANCE — REMISSION OF PART OF AMOUNT RECOVERED.

Where items constituting the damages recovered are separable and plaintiff recovered the full amount claimed, the court may eliminate the item improperly included and direct a judgment for the proper amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4466; Dec. Dig. 1140(4).]

Appeal from Circuit Court, Hopkins County.

Action by C. B. Overton against R. Burleigh & Sons, Incorporated. Judgment for plaintiff and defendant appeals. Reversed and remanded, with instructions.

Luke A. Teague and Chas. G. Franklin, both of Madisonville, for appellant. J. A. Jonson, of Madisonville, for appellee.

MILLER, J. The appellant, R. Burleigh & Sons, Incorporated, is engaged in manufacturing axe and pick handles from ash, oak, and hickory timber, at its factory at Dawson Springs, Ky. The petition alleges that on or about March 25, 1915, the plaintiff, Overton, orally sold to the appellant all the ash timber suitable for making axe handles, on a tract of 80 acres of land in Christian county, known as the Bass land. The timber was to be straight grained and free from knots, and 5 inches and over in diameter, to be cut into blocks and delivered on the railroad at Bakersport, Ky., where they were to be received, inspected, and paid for by appellant, at \$3 per cord. The petition further alleges that plaintiff cut into blocks and placed on the railroad at Bakersport 25 cords of the timber; that he had 359 logs cut and in the river, leaving 650 trees standing upon the Bass land and yet to be cut and delivered, under the contract, but that the appellant refused to accept or pay for the 25 cords, and repudiated the contract as to the logs and trees. The petition also alleges that the timber in the logs would make 42 cords, while the timber in the standing trees would make 152 cords, or a total of 194 cords of timber undelivered. Some time in April, 1915, Overton requested the appellant to have its inspector inspect and receive the 25 cords which had been delivered at Bakersport; and he alleges that Dockery, appellant's inspector, did inspect the timber and approved it, but that under his instructions from appellant, Dockery declined to receive any part of the timber which was under 8 inches in diameter, claiming that its contract with Overton called for timber 9 inches or more, in diameter, although he was willing to relax that provision of the contract and receive all timber that was 8 inches and over in diameter. The proof shows that about one-third of the 25 cords of timber delivered at Bakersport was under 8 inches in diameter. Consequently, as each party stood upon his own interpretation of the contract—the appellant refusing to accept any timber under 8 inches in diameter, and Overton refusing to deliver any of the timber unless appellant should take all that was 5 inches and over in diameter—no part of the 25 cords of timber was accepted by the appellant. Overton brought this action for damages, claiming (1) \$200, the purchase price of the 25 cords delivered at Bakersport; (2) the net profits on the 194 cords contained in the

logs in the river and in the standing trees, at \$2.85 per cord, aggregating \$552.80; and (3) 50 cents per cord (\$21.00), which he alleged he had expended on the 359 logs (42 cords) in the river, making a total claim of \$773.80.

It will thus be noticed that the petition presents the following three items of damages:

(1) 25 cords delivered, at \$8.00 per cord	\$200 00
(2) 359 logs (42 cords) cut and in the river, and 650 standing trees (152 cords), making a total of 194 cords, at \$2.85 per cord, profit.....	552 80
(3) 50 cents per cord expended on 42 cords	21 00
Total	\$773 80

After traversing the allegations of the petition, the answer alleges that under the contract with Overton, defendant agreed to buy all the ash timber on the Bass land which was not less than 9 inches in diameter, 3 feet long, free from knots and straight grained, to be delivered at Dawson Springs, and that defendant reserved the right to stop accepting, receiving, or paying for said timber at any time it saw fit to do so, and that it notified plaintiff to stop cutting and delivering the timber before any of it had been cut. And the answer further alleged that the timber was not up to the contract grade. The reply traversed the affirmative allegations of the answer; and, by an amended petition, Overton alleged that he had made diligent efforts to sell the cut timber within a reasonable time after appellant's refusal to accept it, but that it was worthless and unsalable by reason of the fact that it had, in the meantime, become water-soaked and worm-eaten. Upon a trial before a jury, Overton recovered a verdict and judgment for \$773.80. The defendant appeals.

For reversal, it is insisted (1) that the verdict is not supported by the evidence; and (2) that instruction No. 5, fixing the measure of damages, was erroneous.

As to the first ground, while appellant concedes that the plaintiff's case is sustained by the testimony of the plaintiff alone, it insists that plaintiff's proof, when considered as a whole, fails to sustain the amount of the verdict. This is true in part, although the criticism cannot be said to apply to the principal items of plaintiff's claim, as appellant contends.

[1] Overton testified that the price of the timber, the cutting of the trees, and the sawing and delivery would cost him \$5.15 per cord, which would leave him a profit of \$2.85 per cord. He further testified that the ash timber in the 650 standing trees (152 cords) was worth \$1.25 per cord. From this it is argued that Overton's loss was only the difference between \$2.85 and \$1.25, or \$1.60 per cord, while the jury allowed him \$2.85 per cord. Under this view of the case, appellant contends that according to Overton's

own testimony, his recovery should have been limited to \$677.20. This argument, however, rests upon the theory that since Overton still owns the 650 trees, the defendant should be given credit for their value. This argument, however, is unsound, since the measure of damages in a case of this character is the reasonable profit which the plaintiff might have made under his contract, to be ascertained by fixing the difference between the contract price and what it would cost the plaintiff to complete the work, according to the contract. *Horn v. Carroll*, 90 S. W. 559, 28 Ky. Law Rep. 839; *Hollerbach & May Contract Co. v. Wilkins*, 130 Ky. 54, 112 S. W. 1126; *Stearns Lumber Co. v. Inman*, 154 Ky. 253, 157 S. W. 23; *Owensboro Shovel & Tool Co. v. Moore*, 154 Ky. 431, 157 S. W. 1121; *Langstaff-Orm Mfg. Co. v. Wilford*, 160 Ky. 733, 170 S. W. 1.

[2] This is not a case involving personal services, where the party injured in person or property is required to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage. On the contrary, the damages in a case of this character may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independently of, and totally disconnected from, the loss, and from the party occasioning it. As a general rule, one who is injured by a violation of an agreement to do a specific act, not necessarily involving personal services, is not required to seek and perform other contracts for the benefit of one who, by breaking faith with him, has caused the injury. 8 R. C. L. p. 445; *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239; *Cameron v. White*, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 495; *Harness v. Kentucky Fluor Spar Co.*, 149 Ky. 65, 147 S. W. 934, Ann. Cas. 1914A, 803, and note.

[3] Furthermore, the declaration of Dockery, appellant's inspector, to the effect that the 25 cords delivered at Bakersport were satisfactory and complied with the contract, was competent evidence to show that the 25 cords were satisfactory and complied with the contract. *Worthington v. Gwin*, 119 Ala. 44, 24 South. 739, 43 L. R. A. 385. The fact that Dockery contradicted Overton and two other witnesses upon this point goes only to the effect of his statement, not to its competency.

[4] The testimony of Overton and the admissions of Dockery sustained plaintiff's case.

The first four instructions presented to the jury the respective claims of the plaintiff and the defendant as to what the contract was, directing them to find for the plaintiff in case they should believe the plaintiff's version was the true one; otherwise, to find for the defendant.

The fifth instruction, which is the only one complained of, reads as follows:

"The court instructs the jury that if they find their verdict for the plaintiff, they will award him such sum in damages as they may

believe from the evidence will reasonably and fairly compensate plaintiff for such loss, if any, as he sustained by defendant's breach, not exceeding what would have been the reasonable value, at the contract price, of all the ash timber contracted for and not taken, less the reasonable expense of cutting, preparing, and delivering at Bakersport, in all respects according to the contract, and not to exceed \$773.80, the sum claimed in the petition; but the jury cannot award plaintiff any sum on account of the timber not actually delivered at Bakersport, unless you should further believe from the evidence that the plaintiff was ready, willing, and able to deliver same at Bakersport, in all respects according to the agreement."

[5, 6] It will be noticed that this instruction places all of the timber, the uncut as well as the cut timber, upon the same basis, by directing the damages to be calculated at the contract price, less the reasonable expenses of cutting, preparing, and delivering the timber at Bakersport. In this respect we think the instruction was erroneous, since the measure of damages applicable to the timber not cut differs from that applicable to the timber that had been cut and delivered at Bakersport. If the contract was, as claimed by Overton, and he complied with it in so far as it related to the 25 cords delivered at Bakersport, the measure of damages as to that portion of the timber was the contract price, less any sum which the defendant may have paid thereon. But, if the jury adopted plaintiff's version of the contract, and the defendant breached it by refusing to permit the plaintiff to carry it out, though plaintiff was ready, willing, and able to do so, the measure of damages upon the undelivered timber was the difference between the contract price and the reasonable cost to Overton of carrying out the contract. *Langstaff-Orm Mfg. Co. v. Wilford*, 160 Ky. 737, 170 S. W. 1, and cases supra.

[7] But the instruction, although it was erroneous in so far as it applied to the 25 cords that were delivered at Bakersport, was not prejudicial to appellant, since the appellee recovered only \$200 upon that item, and under the uncontradicted proof and the law upon the measure of damages, he was entitled to recover that amount, if anything.

[8] The item of 50 cents per cord, alleged to have been expended on 42 cords contained in the 359 logs, cut but not delivered, was not proved, and, if proved, it has no proper place in this case, under the contract. Nowhere in the pleadings or in the proof is this charge explained, or justified, although it amounted to \$21 and was carried into the verdict. For breach of contract the measure of damages is the net value of the contract, or what would have been realized had the contract been performed. This, in full, covers actual outlay and anticipated profits. When profits are sought, a recovery for outlay is included, and something more. That something is the profits. If the outlay equals or exceeds the amount to be recovered, there

can be no profits. *U. S. v. Behan*, 110 U. S. 345, 4 Sup. Ct. 81, 28 L. Ed. 168. So when the court told the jury that plaintiff's measure of damages was the difference between the contract price and what it would cost the plaintiff to perform his contract, it necessarily included this claim of 50 cents per cord as a part of that cost, and the separate allowance thereof by the jury constituted double damages, to that extent.

[9] It is, however, a well-established rule in this jurisdiction that where the items constituting the damages recovered are separable, so that the court may eliminate those improperly recovered, it may do so, and direct a judgment for the proper amount. *Lexington Ry. Co. v. Johnson*, 139 Ky. 323, 122 S. W. 830; *Louisville Water Co. v. Scholtz*, 140 Ky. 436, 131 S. W. 192; *O. & O. Ry. Co. v. Meyers*, 150 Ky. 841, 151 S. W. 19; *Sturgeon's Adm'r v. McCorkle*, 168 Ky. 11, 173 S. W. 149. As the plaintiff recovered the full amount claimed under the three items of damages set forth in the petition, this item of \$21 is clearly separable and will be eliminated as improperly recovered.

Judgment reversed, and cause remanded, with instructions to the circuit court to enter a judgment in favor of the plaintiff for \$752.80, with interest thereon from October 16, 1915, the day the verdict was rendered. *Lexington Ry. Co. v. Johnson*, supra.

Since costs follow the judgments, the defendant will pay all costs in the circuit court, and the plaintiff will pay all costs in this court.

WEST KENTUCKY COAL CO. et al. v. HEADY'S ADM'R.

(Court of Appeals of Kentucky. Jan. 4, 1917.)

1. MASTER AND SERVANT §187(2)—NEGLIGENCE OF MASTER—OPERATING COAL CARS.

A coal mining company was not negligent in bringing empty railroad coal cars down an inclined track for loading at the tippie at a rate of some six miles an hour by having its employé start them, up the incline, with a pinch bar; gravity bringing them down.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278; Dec. Dig. §187(2).]

2. MASTER AND SERVANT §236(15)—DUTY OF SERVANT—ORDINARY CARE.

The employé of a coal mining company, whose work was to move with a pinch bar loaded railroad cars from under the tippie and to put empty cars in place for loading as they were sent to him down an inclined track by another employé, was required, in the exercise of ordinary care for his own safety, to keep a lookout for the movement of the empty cars coming down the incline.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 739; Dec. Dig. §236(15).]

3. MASTER AND SERVANT §217(26)—ASSUMPTION OF RISK—INJURY BY CARS.

Where the employé of a coal mining company, whose work was to move loaded railroad

cars from under the tippie and place for loading empty cars sent to him down an incline, must have heard the noise of a collision between cars coming down the incline and a car standing on the track, but nevertheless went between two cars on the track and was crushed, he assumed the risk of injury, and the coal company was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 595; Dec. Dig. §217(26).]

Appeal from Circuit Court, Webster County.

Suit by Ross H. Heady's administrator against the West Kentucky Coal Company and another. From a judgment for plaintiff against both defendants, they appeal. Judgment reversed, with directions to grant new trial, and to direct verdict for defendants if the evidence is the same.

Barret, Allen & Attkisson and Eugene R. Attkisson, all of Louisville, Allen & Allen, of Morganfield, and Baker & Baker, of Dixon, for appellants. O'Doherty & Yonts, of Louisville, for appellee.

CARBOLL, J. At a tippie at one of the appellant company's mines at Wheatcroft, in Webster county, Ross Henry Heady, while engaged at work for the coal company, was crushed to death between the couplings of two railroad coal cars, and in this suit by his administrator to recover damages for his death there was a judgment for \$3,200 against the coal company and the appellant William Owens, through whose negligence, as alleged, the accident happened.

On this appeal several grounds for a reversal are relied on; but, as we have reached the conclusion that the peremptory instruction asked by counsel for the coal company and Owens should have been given by the court, we may confine this opinion to a statement of the reasons that induce us to believe that the administrator, as plaintiff below, failed in his evidence to make out a case for the jury.

At the time of the death of Heady, a bright, intelligent, capable young man who had been working at and about the tippie in work of various kinds for a year or more, he was employed to move cars, after they had been loaded, from under the tippie and to put in place of the loaded cars empty cars. This work he performed with an implement known as a pinch bar, which he placed on the rail under the wheel and by pressure on the handle started the standing car or cars in motion, and the cars, after being put in motion by this effort, ran of their own momentum to the place it was desired they should stop, as the track was on a downgrade in the direction in which the cars were moved.

Some half a dozen men, or probably a few more, were engaged in work about the tippie, and each of these men had separate duties to perform. The tippie into which

the coal was dumped after being brought from the mine in little cars was elevated above the railroad track, and the coal when dumped into the tippie from the mine cars was, by a process not necessary to explain, emptied into the railroad cars standing on the track immediately underneath the tippie. The tippie and tracks were so arranged that three cars could be loaded at the same time, but at the time of the accident, only one car was being loaded, and the loading of this car was in charge of a man named Walker. Standing on the track and immediately east of and against the car being loaded there was an empty coal car to take the place of the one being loaded when it had been loaded, and standing in this empty car at the east end of it was Buck Heady, the father of Ross Henry Heady, whose duty it was to bring the empty cars from a siding several hundred yards off down to the tippie as they were needed. Between 50 and 75 feet east of the empty car in which Buck Heady was standing and that will be designated as car 2, there was another empty coal car standing on the same track, and this car will be designated as car 3. About 350 yards east of car No. 3 and on the same track, there were standing two empty coal cars.

At the time, however, that young Heady was killed, William Owens, the appellant, acting as he claims for and at the request of Buck Heady, undertook to and did bring these two empty coal cars down to the place at which it was intended to stop them near the tippie. To bring these two cars down the track towards the tippie it was only necessary to release the brakes and give them a little start with a pinch bar, whereupon they would roll of their own momentum on the downgrade from the place where they were started to the tippie. It might here be said that Buck Heady denies that he gave Owens any directions or instructions whatever to bring these two cars down, although Owens says he did.

The case for the administrator was put upon the ground that Owens was acting in the capacity of tippie foreman, or, at any rate, was an employé of the company superior in authority to Ross Henry Heady, and that the death of Heady was caused by his negligence in failing to exercise ordinary care to keep the cars as they came down the track under control and to keep a reasonable lookout for persons on the track; and it was upon this theory that the case for the plaintiff went to the jury.

The evidence upon the subject whether Owens was superior in authority to or a fellow servant of Ross Henry Heady and the other men working at the tippie is very conflicting; but, in the view we have of the case, the relation he occupied is not important, and so we may assume that he was superior in authority to Ross Henry Heady.

On what some of the witnesses say was the left side of the track and near the east end

of car 2, there was a large rock situated about eight feet from the track, and on this large rock Ross Henry Heady was seen sitting a few moments before he was killed by being crushed between the coupling on the east end of car 2 and the coupling on the west end of car 3, when car 3, which had been standing some 50 or 75 feet from car 2, was pushed against car 2 by the two cars that Owens brought down when these two cars struck the east end of car 3. There is some dispute in the evidence as to the speed at which the two cars Owens brought down were running when they struck car 3 and shoved it against car 2, and also the speed at which car 3 was running when it bumped into car 2. Some of the witnesses say that these two cars came down the track at a speed of about six miles an hour, while others say about two miles an hour; but that these cars at no time were running at a high rate of speed is made plain by the physical fact that the car being loaded, and which was held in place by a wooden chock placed on the rail under the wheel, was not removed from its position when car 3 struck car 2, which was coupled to, or, at any rate, was standing against, the car being loaded. It might also be here noticed that Owens testified that he did not see Ross Henry Heady at any time while he was bringing down the cars, nor did he give any warning of their movement. He says that he was standing on the platform between the two cars he was bringing down, as the brakes for each car were at that place, while Buck Heady says he was on the rear end of the last car. But where he was situated on the cars is not so material unless he was under some duty to give notice of the approach of the cars to any person who might be on or about the track.

For what purpose Ross Henry Heady left the rock on which he was sitting and went between cars 2 and 3 just a moment before they came together, the record does not disclose. He may have gone between the cars for the purpose of closing the knuckle pin on the east end of car 2, as it was a part of his duty to do, or he may have started across the track to get his pinch bar, which was lying on the opposite side of the track from where he had been sitting. But, whatever his purpose was, he unfortunately happened to be in the middle of the track when car 3 struck car 2 and was caught between the couplings of these two cars and instantly killed. His father, Buck Heady, who was standing on the east end of car 2, almost directly over the place where his son was killed, in testifying for the administrator, related what happened at the time of and immediately preceding the accident as follows: He said that the car underneath the tippie that was being loaded was about two-thirds full, and that there was an empty car (car two) just east of and against this car that was being loaded, and

that 50 or 75 feet east of car 2 was an empty coal car (car 3).

"Q. Where was your boy the last time you saw him before he was killed? A. Sitting on a rock on the left-hand side of the track. Q. How far was that rock from the track? A. Never measured it. About eight feet, I would think. Q. Did you see him move after that until he was crushed? A. No, sir. Q. I will ask you whether, after this car under the tippie was loaded, your boy had any duties to perform? A. Yes, sir; he put the next one under. Q. Before putting the next one under, did he have any duty with reference to the empty car? A. Yes, sir; when this one was loaded, I would drop one down, and the boy would get behind this empty and pinch both the cars through. Q. Did he have any duty with reference to closing the knuckles of the cars? A. It was his duty to keep the knuckles closed in order to keep the knuckles from coupling. Q. Did you notice where your boy's pinch bar was lying just before the accident? A. No, sir; I noticed it afterwards on the right-hand side of the track lying on a tie. Q. Where were you at the time of the accident? A. On the car right over the boy, the car against the one they were loading. Q. In which direction were you looking just before the accident? A. Down towards the man that was loading the cars, George Walker. Q. Did you know that Owens was going to bring down any cars? A. No, sir. Q. I will ask you what first directed your attention to Owens that he was bringing them down? Did you hear or see anything that would call your attention to them? A. Not until he struck the car (car 3) 50 or 75 feet away. That attracted my attention. Q. Was the noise of the striking of the two cars much or a small noise? A. It was right smart noise. Q. Where was Owens at the time the two cars collided with this empty car you say was 60 feet from you? A. On the back end of the two cars he was bringing down. Q. When he collided with this empty car, what happened to the car? A. He brought it on down. Q. How fast were the cars traveling between the time the two cars struck the one car and the time he collided with them? A. I should think six miles an hour. Q. Did you know your boy was anywhere on the track? A. No, sir. Q. Had you seen him at all? A. No, sir. Q. If your face had been towards Owens and you had been looking east on the track, could you have seen your boy? A. Sure, I could; nothing to hinder me. Q. What was it directed your attention to the fact that your boy was hurt? A. He holloed. Q. Where did the outcry come from? A. Came from under my feet. Q. Up to that time did you know where your boy was? A. I did not. Q. Considering the distance the cars ran, and the manner in which they came down the incline, and the speed at which you say they came, could a person of ordinary hearing have heard the cars approach? A. I think not. Q. Did you hear them? A. Not until they struck the car. Q. Are you a person of good hearing? A. Not extra good hearing."

Walker, the only other witness for the plaintiff except Key and Oakley, whose evidence it is not important to notice in describing what happened when the accident occurred, said he was on a car which was just about loaded at the time of the accident, and that it was a part of his duty to notify Ross Henry Heady to "pinch down" cars; that, realizing that he would need another car in a few minutes, he turned around so that his face was in the direction of Ross Henry Heady, to whom he intended to give a signal to bring on another car; that when he turned

around he saw Buck Heady sitting on the east end of the empty car (car two) with his hands on the brakes, and at the same time saw Owens coming down the incline with the empty cars. He further said that Owens, when he started down the incline with the cars, could have seen Ross Henry Heady; but when he (Walker) looked he did not see him, although he knew he was at his post of duty.

Mrs. Black, a witness for the coal company, said that she was standing on the porch of a house and had a full view of the premises where the accident occurred and saw the cars in charge of Owens coming down the track faster than usual, but that they slowed down.

"I saw the boy get up, and he seemed to rush out of my sight behind the car, and his father holloed he was killed. Q. How fast were they going at the time you saw this boy get up? A. They were running about like they usually do. Q. In what direction did this boy go when he got up? A. He went towards the cars. Q. Did you see him go between the cars? A. No, sir. Q. Could you say how far the cars were away at the time he got up and started towards the track? A. No, sir. Q. How soon was it after you saw him get up and you heard his father holloa? A. Didn't seem very long to me."

J. W. Mitchell, an employé of the company, in testifying for it, was asked and said:

"Q. Where were you at the time the accident happened? A. Up in the tippie. Q. When did you see Ross Henry Heady just prior to the accident? A. I saw him sitting on the well rock. Q. About how far from the track? A. Some seven or eight feet. Q. At the time you saw him there at the rock, did you see his father, Buck Heady? A. No, sir. Q. Where was he? A. Sitting on the empty car next to the loaded car. Q. Did you see Mr. Owens? A. Yes, sir; he was bringing two empties down. Q. Did you see him when he connected with the empty car (car 3)? A. Yes, sir. Q. At the time, or about the time the two cars Owens was bringing down bumped into the third empty car (car three), did you see Ross Henry Heady, and, if so, what became of him? A. He got up from off the well rock. Q. In which direction did he start? A. Towards the car that Mr. Buck Heady was on. Q. How far had the three cars traveled toward the tippie before he got up and started in that direction? A. When Mr. Owens bumped into the other empty car (car three), he got up and started toward the other cars. Q. I believe you said he was going towards the car on which Buck Heady was sitting? A. Yes, sir. Q. Did you see Ross Henry Heady after he started toward the car on which his father was standing? A. No, sir. Q. What character of noise did the cars make when they came in contact with the third car (car 3)? A. Right smart noise. Q. Did you hear that? A. Yes, sir. Q. Then, if I understand you correctly, when those cars Mr. Owens was bringing bumped into this car (car 3) is when you saw Ross Henry Heady get up off the rock and start in this direction? A. Yes, sir."

These two witnesses, Mitchell and Mrs. Black, were the only persons who saw Ross Henry Heady leave the rock on which his father saw him sitting and go towards the track about the time the cars Owens was bringing down bumped against car three.

[1] It is further shown that empty cars were brought down this incline in the manner

that Owens was bringing them down many times each day while the tippie was in operation, and, while there is some evidence that these cars were running about six miles an hour, it is manifest that under the circumstances the operation of the cars at this rate of speed, assuming they were traveling that fast, was not negligence. There is also some evidence tending to show in a vague, unsatisfactory manner that the tracks at this place were crossed by the people about the tippie quite often during the day. But there is no evidence that the tracks at this place were used by such a large number of persons as to put on men bringing the cars down the duty of anticipating the presence of persons on the tracks, or to take the usual precautions required to protect persons on tracks when the conditions require that a lookout shall be kept and warning given.

[2] Nor is there any evidence that it was customary to give any notice of the movement of cars on this incline, or to have a person stationed on the front end for the purpose of warning any person who might happen to be on or near the track in a place of danger, or that Ross Henry Heady had any right to depend on any warning or signal of the movement of the cars. On the contrary, the work in which he was engaged required him, in the exercise of ordinary care for his own safety, to keep a lookout for the movement of the empty cars coming down the incline.

The record is entirely silent on the subject whether Ross Henry Heady saw these cars that Owens was bringing down as they approached car 8; but, whether he saw them coming or not, he could not help hearing the collision between these cars and car 3, as all the witnesses who were inquired of on this point said they heard the noise when these two cars struck car 3, and several of these witnesses were much farther off from the place of collision than Heady was. And yet after being advised of the presence of these cars by the noise of the collision, if in no other way, he went, for some unexplained reason, between cars 2 and 3 and evidently close to the east end of car 2, and also, for some unexplained reason, failed to get out of the way before car 3 ran the distance of 50 or 75 feet and came in contact with car two.

[3] Under the facts as we have stated them, we think a peremptory instruction should have been given for two reasons: First, because no negligence was shown on the part of Owens or in the movement of the cars down the incline; and, second, because Ross Henry Heady, who should have taken notice of the movement of cars on this incline, voluntarily left a place of safety and went into a place of danger at a time when he knew, or should have known, that car 3 would bump into car 2.

Therefore, the judgment is reversed, with directions to grant a new trial, and if there

is another trial, and the evidence is substantially the same as appears in this record, the court will, at the conclusion of all the evidence, direct the jury to find a verdict for the defendants.

CITY OF LOUISVILLE v. CLARK et al.
(Court of Appeals of Kentucky. Jan. 4, 1917.)

TAXATION ¶589 — **CORRECTION OF ASSESSMENT—TIME FOR CORRECTION.**

Ky. St. § 2991, provides that if property is assessed in other than the owner's name the city assessor shall make the correction for current or preceding years, and the remedies of sections 2997 and 3009, inclusive shall attach. Section 2986 provides that no omission of the owner's right name shall impair the assessment if the land is designated in assessment books by its corresponding number and block on the map. Section 2991 also provides that when any lands are not assessed in any one year, they may be assessed retrospectively not later than five years thereafter, but the lien accruing to the city shall not prejudice the right of purchasers acquired in the meantime, and that any person retrospectively assessed may within thirty days file complaint, which under section 2992 is to be investigated by the board of equalization, which must approve or reduce the assessment. Section 4021 gives the taxing district a lien for five years for taxes due and provides for retrospective assessment within five years of an omission to assess. Section 4021a provides that no action to enforce tax lien or to recover possession of property sold for taxes shall be maintained unless commenced within five years from the date of arrearage of such taxes. Certain property was assessed for the years 1906, 1907, and 1909 in one name, but designated in the assessor's books by number and block. Taxes were not paid, and the city attorney within the statutory period of limitations sued to collect taxes as assessed in the name of such person. After the period of limitation expired, on learning that the person in whose name the property was assessed was dead at the time of making the assessments, the suit was dismissed without prejudice and new bills made out and suit filed as an original action on the corrected assessments. *Held*, that such suit, being an original and not amendatory suit, came too late, since to permit maintaining such action as contended for within five years after any correction would be contrary to public policy as practically removing any statutory limitation on an action to recover taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1202; Dec. Dig. ¶589.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the City of Louisville against Emma A. Clark and others. Judgment for defendants, and the City appeals. Affirmed.

George Cary Tabb, Pendleton Beckley, and Laurence S. Poston, all of Louisville, for appellant. Blakey, Quin & Lewis, of Louisville, for appellees.

THOMAS, J. This appeal calls for the construction of that part of section 2991 of the Kentucky Statutes, which is a part of the charter of cities of the first class, with reference to the correction of tax lists where the property was assessed "in a name other

than that of the owner or holder." The taxes involved are municipal taxes for the city of Louisville, and are for the years 1906, 1907, and 1909, which are assessed as of September 1st in the years preceding. That part of the section involved provides that:

"Whenever, by any complaint of the party assessed, or otherwise, it appears that any property has been assessed in a name other than that of the owner or holder, the city assessor shall, after notice through the mail to the owner or holder, at the time of the notice, make the correction, whether for the current or any preceding year, in his books, and certify such correction to the tax receiver; and to the corrected assessment and to the retrospective assessment hereinafter authorized, the remedies of sections two thousand nine hundred and ninety seven, and three thousand and nine, both inclusive, shall attach, beginning with the first of May after the correction of retrospective assessments is certified to the receiver."

In section 2986 of the Kentucky Statutes, which is also a part of the charter of cities of the first class, among other things it is provided that:

"No mistake in, or omission of, the right name of the owner or holder of lands or improvements liable to be assessed under the provisions of this act shall impair any assessment thereof, if such land be designated in said (assessment) books by its corresponding number and block on said map; or if such improvement be there designated by the number and block of the land on which it rests."

Other sections of the statute fix the time when the municipal taxes shall become due and payable, and when suit may be maintained to collect them. The limitation within which property may be retrospectively assessed after the assessing date is five years (latter part of section 2991), and that within which suit may be maintained after the right to do so has ripened is also five years. Sections 4021 and 4021a. With the limitation periods as thus fixed for the retrospective assessment of property and the maintenance of a suit for the collection of taxes it has been many times determined by this court that the time within which a suit might be maintained did not begin to run until the assessment of the property had been made, although retrospectively, and it would be competent for the suit to be filed at any time within five years after the taxes became due under such an assessment.

The property involved in this suit was assessed at the assessing periods for the years involved in the name of Emma A. Clark, and it was designated in the assessor's books and upon his lists by its number and block, thus conforming to the provisions of section 2986, supra. The taxes were not paid and the tax bills were, according to the provisions of the law relating thereto, turned over to the city attorney of the city of Louisville, who, within the statutory period of limitation, filed suit to collect the taxes as assessed in the name of Emma A. Clark. After the statutory period of limitation had expired for the filing of such suit, it was discovered for the first time that Emma A. Clark, although

once the owner of the property, was dead at the time of the making of the assessments for each of the years, whereupon the suit was dismissed without prejudice, and new and corrected tax bills were made out by the assessor under the authority claimed to be given by the first part of section 2991 quoted above, and this suit was filed as an original and new one, based upon such corrected assessments. The corrected assessments were made by the assessor against the appellees, who are the heirs at law of Emma A. Clark, and who inherited the property from her, she having died intestate. Claiming that the correction of the assessment as provided in the section, supra, could not be made after the expiration of five years from the time the taxes became due under the original assessment, appellees relied upon the statute of limitations as a bar to the suit, which contention was upheld by the trial court and the suit dismissed, from which judgment the city prosecutes this appeal.

It will be observed that the portion of section 2991 relative to the correction of the name of the owner of the assessed property as quoted above fixes no limit of time within which such correction may be made by the assessor, and it is argued by appellant that whenever the mistake is discovered the correction may be made "whether for the current or any preceding year," as stated in the statute, and without any limitation whatever, while it is the contention of appellees that such correction must be made within five years after the taxes are due under the original but erroneous assessment, or, at any rate, during the pendency of the suit brought for the purpose of enforcing the collection of the taxes, and before final termination thereof.

According to what has been stated, the correction of the tax list now under consideration was neither made within five years from the time the property should have been assessed, nor during the pendency of any suit brought for the collection of the taxes.

It will be noticed that two things are provided for by section 2991—one being the correction of the name of the person owning the property assessed, or the true owner, and the other for the retrospective assessment of property which had not been assessed at all; but no such retrospective assessment shall be made after five years from the time the property should have been assessed. It is therefore argued that inasmuch as the section provides for a limitation period for making retrospective assessments, and in the first part provides that the correction of an assessment in the particulars herein mentioned may be made "for any preceding year," that there is no limitation against making such corrections.

We do not find ourselves able to agree with the learned counsel for appellant in this contention, nor do we find anything in sections

2986 and 4021 of the Kentucky Statutes to which we are referred, or in the case of *Joyes v. City of Louisville*, 82 S. W. 432, 28 Ky. Law Rep. 713, relied upon by counsel, supporting the argument. Section 2986, as we have seen, provides that the assessment shall not be impaired because of a mistake in or omission of the right name of the owner or holder of the property assessed, and section 4021 provides for the taxing authority to have a lien upon the property to secure the payment of taxes, but it does not necessarily follow from these provisions that the correction being considered may be made at any time without limitation, or that the lien may in this manner be protracted so as to last forever.

The construction contended for would enable the assessor by assessing the property in the wrong name, although correctly describing it as provided in section 2986, to thereby create a lien upon the property for the payment of taxes, and to postpone indefinitely the time within which such lien might be enforced by reviving it from time to time without limit through the means of correcting the assessment. Such power is not given to any other tax collecting authority within the state, not being possessed by the state itself, and it cannot be conceived that the Legislature intended to select the cities of the first class, alone, upon which to bestow such a favorable advantage. Indeed such a construction runs counter to the public policy of the law as manifested in the various statutes of limitation now and for a long time prevailing in this, if not quite all other jurisdictions. If it be contended that the correction of the assessment is not an action or proceeding to which the statute of limitation applies, yet it is a step looking to the perfection of the right to maintain a suit, and is a condition precedent to a judgment binding the true owner of the property, and has for its ultimate purpose the establishment of a right to enforce the collection of money from another. The general public policy at the bottom of statutes of limitation would suggest that there be a time limit within which such step, fraught with such consequences, shall be taken or made. This interpretation does no violence to the language of section 2991, inasmuch as at any time during the pendency of the suit based upon the original but incorrect assessment the correction may be made and the true owners of the property brought into the case by appropriate amendments and the cause thus proceed, not as a new and original suit, but as an amended or corrected one. In this way the correction could be made even beyond five years from the time the property was originally assessed, and no violence would be done to any of the limitation statutes applicable to such matters, as a *lis pendens* will already have been created against the property by the

suit based upon an assessment describing it, as provided by section 2986. At the same time, the public policy of the state as found in the general limitation laws will be held intact.

There is nothing in the case of *City of Louisville v. Courier-Journal Co.*, 140 Ky. 664, 131 S. W. 509, s. c., 84 S. W. 773, 27 Ky. Law Rep. 263, in conflict with these views. On the contrary, the right to amend the original proceeding based upon an incorrect assessment as specified in section 2991 by having a corrected assessment made during the pendency of the suit is upheld, although in that case the correction was made within five years from the time the property should have been first assessed.

It is argued, however, by attorneys for appellees, that previous to 1910 section 3005 of the Kentucky Statutes provided for the listing of unpaid tax bills by the tax receiver with the city attorney, and that after this was done the correction provided for by the first part of section 2991 could not be made by the assessor, and to support this contention the cases of *City of Louisville v. Louisville Railway Co.*, 111 Ky. 1, 63 S. W. 14, 23 Ky. Law Rep. 390, 98 Am. St. Rep. 387, and *Underwood v. Wilhite*, 189 Ky. 116, 129 S. W. 548, are relied upon. The question involved in those cases was entirely different from the one here. It was there contended and determined that after the placing of the tax bills, under the provisions of section 3005, in the hands of the city attorney that the city council could not compromise the taxes with the owner of the property, nor could the council control any suit which the city attorney may have brought for the purpose of collecting the taxes. Nothing is said in any of those cases militating in the least against the authority of the city attorney to have the tax assessor correct an incorrect tax list after it had been delivered to him for collection. It was not the intention, from anything that was said in either of those cases, to take away the right of the city attorney to do anything looking to the perfecting of the city's cause of action, even though in doing so he would be compelled to ask the aid of some other department of the city government in furnishing the data upon which he should thereafter proceed. Such action does not have for its purpose the final disposition or termination of the suit over his protest, but, on the contrary, looks to its continuation, but in perfected form.

Our conclusion is, then, that the present suit, based upon the corrected tax list made more than five years after the property should have been assessed, being an original one, and not amendatory of an existing one, comes too late, and that the court properly dismissed it, and the judgment is affirmed.

CARTER COAL CO. v. LOVE.

(Court of Appeals of Kentucky. Jan. 4, 1917.)

1. APPEAL AND ERROR ~~499~~(1), 501(1)—RECORD—RESERVING GROUNDS FOR REVIEW—OBJECTIONS—SELECTION OF JURORS.

Alleged error in selecting a jury is not available where the record does not show any objection raised or exception taken at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295, 2300, 2302; Dec. Dig. ~~499~~(1), 501(1).]

2. APPEAL AND ERROR ~~714~~(5)—RECORD—RESERVING GROUNDS FOR REVIEW—SELECTION OF JURORS.

Failure of the record to show alleged error of the court during a jury selection is not excused by affidavits in the briefs stating that the court refused to permit a motion raising the question to be put on the order book of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2962; Dec. Dig. ~~714~~(5).]

3. EXCEPTIONS, BILL OF ~~54~~—BYSTANDERS' BILL—NECESSITY.

If the trial court arbitrarily refuses to permit counsel to save exceptions to alleged error in the selection of a jury, the proper method is to prepare a bystanders' bill and file it in the Court of Appeals as part of the record, as provided by Civ. Code Prac. § 337, covering cases where the court refuses to sign a bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 89; Dec. Dig. ~~54~~.]

4. APPEAL AND ERROR ~~230~~ — RESERVING GROUNDS FOR REVIEW—JURY SELECTION—NEW TRIAL—MOTION.

Alleged error occurring during a jury selection is not saved for review when first presented in a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ~~230~~.]

5. MASTER AND SERVANT ~~95~~ — INJURIES — EMPLOYMENT OF MINORS—EFFECT.

Under Ky. St. § 331a, subsec. 9, prohibiting employment of children under 16 years in mines, a verdict for the death of a minor employed by a mining company may properly be rested on a finding that he was under such age.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 141, 160; Dec. Dig. ~~95~~.]

6. MASTER AND SERVANT ~~287~~(4)—INJURIES—SUFFICIENCY OF EVIDENCE—FELLOW SERVANT'S NEGLIGENCE.

Evidence held to sustain a verdict against a mining company for the death of a minor employé, where another employé drove a car through a door without waiting for plaintiff's intestate to open it, killing plaintiff's intestate who was standing in front thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1045, 1060; Dec. Dig. ~~287~~(4).]

7. DEATH ~~57~~—PLEADING—FATHER'S CONSENT TO MINOR'S EMPLOYMENT.

A defense that the father of a boy under 16 years permitted him to work in a coal mine contrary to Ky. St. § 331a, subsec. 9, prohibiting such employments, is not available to defendant employer, in an action for the minor's death, although the father would receive any damages recovered, unless pleaded in the answer.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. ~~57~~.]

8. DEATH ~~99~~(3) — DAMAGES — EXCESSIVE DAMAGES FOR MINOR'S DEATH.

Five thousand dollars damages held not excessive for the death of a minor about 16 years of age, working in a coal mine.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128; Dec. Dig. ~~99~~(3).]

9. APPEAL AND ERROR ~~1068~~(5)—HARMLESS ERROR—FAILURE TO INSTRUCT—MORTALITY TABLES.

Failure to instruct that mortality tables are admitted only to show the probable duration of life, etc., is not prejudicial error, where \$5,000 damages were awarded for the death of a coal miner about 16 years of age.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. ~~1068~~(5); Trial, Cent. Dig. §§ 475, 553.]

Appeal from Circuit Court, Knox County. Action by James Love, administrator, against the Carter Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Black, Black & Owens, of Barbourville, for appellant. J. D. Tuggle and J. B. Campbell, both of Barbourville, for appellee.

CARROLL, J. David Love, a boy under 16 years of age, was killed while working as a trapper in the mine of the appellant company, and in this suit by his administrator to recover damages for his death, there was a judgment for \$5,000.

The grounds relied on for reversal will be stated in the order in which they are set out in the brief of counsel for appellant.

[1] (1) It is urged that reversible error was committed by the trial court in putting 13 bystanders on the panel of 18 persons from whom the jury were to be selected. But the error in this respect committed by the trial judge, assuming the statements in the brief of counsel to be correct, is not available here because we do not find in the record that any objection was raised or exception taken at the time the jury was being selected to the fact that the panel offered counsel contained 13 bystanders.

[2] Counsel, however, in their brief excuse the failure of the record to show what occurred when the jury was being selected by the statement that the trial judge refused to permit counsel to put on the order book of the court a motion, supported by affidavit, raising the question that the panel offered contained 13 bystanders, and this charge in the brief is accompanied by the affidavit of counsel filed with the brief in which there is set out what occurred between the court and counsel when objection was made to the number of bystanders on the panel before the jury was selected.

[3] Counsel have the right, not as a matter of favor on the part of the trial judge, but as a privilege conferred by law and sanctioned by practice, to make objections and save exceptions in proper form to every material ruling of the trial judge which in the opin-

lon of counsel affects the substantial rights of his client and have the same appear in the record. And it is hardly necessary to say that the trial judge, in the exercise of the functions of his office, has no discretion or right to refuse to permit counsel to make, in proper time and manner, such objections as are not plainly frivolous as he desires to make, and to save, in proper time and manner, such exceptions as he desires to save to the rulings of the court. And if the trial judge arbitrarily refuses to permit counsel to make a part of the record or put on the order book his objections to the manner in which the jury is selected, or to make a part of the bill of exceptions or put on the order book, whichever may be the appropriate place, his timely objections or exceptions to any other action or ruling, the proper course for counsel to pursue is to prepare a bystander's bill setting out the manner complained of in the manner provided in section 337 of the Civil Code and bring it to and file it in this court with and as a part of the record. Otherwise the error complained of will not be available on appeal, because it is manifest that in the regular and due course of procedure we cannot take cognizance of questions of practice that appear only in the brief of counsel.

We had before us in *Trosper Coal Co. v. Rader*, 166 Ky. 797, 179 S. W. 1023, the question as to the proper practice when a motion to discharge a jury panel for error in its selection was made, and in disposing of the matter said:

"The defendant made a motion to discharge the jury panel, on the ground that the sheriff, in violation of section 2274, Kentucky Statutes, summoned 15 bystanders to try the case. The motion was overruled and defendant insists that this was error. The facts on which the motion is predicated appear only in the motion itself. No affidavit accompanies the motion. There is no order of court showing that 15 bystanders were summoned by the sheriff; nor are the facts certified to in the bill of exceptions. This court cannot assume that facts appearing only in a motion are true. For aught that the record shows, the trial court may have overruled the motion because the facts stated were not true. Unless the facts relied on to obtain the discharge of a jury panel are supported by an affidavit which is made a part of the record, or are verified by an order of court, or are certified to in the bill of exceptions, the action of the trial court in refusing to discharge the jury panel is not subject to review."

[4] It may also be noticed that in the motion and grounds for a new trial we find as one of the grounds that:

"The court erred to the prejudice of the substantial rights of defendant in refusing to sustain its motion made to discharge the panel, which motion was made and presented to the court in writing before the jury was sworn, and the court erred in refusing to permit defendant to file said motion and in refusing to permit the clerk of the court to make any order showing said motion was offered by defendant."

But this is the only place in the record in which mention is made of this matter, and while it is the correct practice to point out

in the motion and grounds for a new trial an alleged error such as this, the proper time to raise objection to the manner in which a jury is selected, or to the character of panel offered, is at the time the panel is presented to counsel for acceptance or rejection. Nothing else appearing, it will be too late to raise the question for the first time in the motion and grounds for a new trial.

(2) The petition sought a recovery on the ground that David Love, at the time he was killed, was under 16 years of age, and on the further ground that his death was caused by the negligence of the mine foreman in failing to instruct him properly as to his duties, and by the negligence of the motorman under whose car he was crushed to death.

[5] The evidence as to the age of the boy is conflicting, but this issue was submitted to the jury in an appropriate instruction, and there was sufficient evidence to warrant the jury in finding that David Love was under 16 years of age, if the jury rested their verdict against the company upon this ground, as they were properly instructed they might do, because subsection 9 of section 331a of the Kentucky Statutes peremptorily forbids the employment of a child under 16 years of age "in any capacity in, about, or in connection with any mine, coke oven or quarry."

[6] But aside from this ground upon which a recovery might be predicated, there is ample evidence in the record that this boy was not properly instructed concerning his duties as trapper, and that his death was caused by the negligence of the motorman. The accident happened in this way: The entries in the mine are equipped with doors called trapdoors, which are kept closed for the purpose of preventing the air forced into the mine from escaping before it performs the functions intended; but the doors were necessarily opened for a few minutes at times to permit trains of cars, empty or loaded, propelled by motor power, to pass through the entries that were obstructed by these trapdoors.

This boy on the day he was killed was put in charge of three trapdoors that closed the openings in the sixteenth straight, the fifth left, and the fourth right entries. And in addition to his duties in connection with opening and closing these doors to permit the passage of trains of cars, he was also charged with the duty of attending to switches worked by levers. The doors were hung on hinges and opened back from and not toward the mouth of the entry. When a motorman on his way out to the mouth of the entry with a train of cars approached one of these doors, it was his duty to signal the trapper to open the door so that he might pass through, but if for any reason the door was found closed when the motorman ap-

proached it, it was his duty to stop his motor before reaching the door. But on this occasion when the motorman, Hobbs, who was bringing out a train of cars, came to the trapdoor on the sixteenth entry, he found it closed, and in place of stopping, as he should have done, until the door was opened, he drove his motor through the closed door and ran over David Love who happened to be sitting or standing in the entry close to the door on the opposite side of the door from the approaching motor, thereby killing him instantly. It may therefore safely be said that the jury had ample evidence to justify them in finding, if they put their finding upon this ground, that the death of the boy was directly caused by the gross negligence of the motorman, Hobbs.

[7] (3) It is further urged that as David Love did not leave surviving him a widow or child, the recovery of damages, if any, for his death would go under section 6 of the Kentucky Statutes, to his father; the evidence not disclosing whether he had a mother living or not, and that the father should not be permitted to reap the benefit of the recovery because he consented to the employment of his son David as a trapper in the mine.

Without going into a discussion of the conflicting evidence upon the subject of the father's consent or approval, it is a sufficient answer to the argument of counsel to say

that the right of the father to have all or a part of the amount recovered was not put in issue by the answer of the coal company, and therefore if it should be assumed that the father, because of his consent, should be denied any right to recover, this defense, to be available, should have been presented in the answer. *Kentucky Utilities Co. v. McCarty's Adm'r*, 169 Ky. 38, 183 S. W. 237; *Id.*, 170 Ky. 543, 188 S. W. 150.

[8] (4) It is claimed that the damages were excessive and the instructions erroneous and prejudicial, but there is no merit in either of these contentions.

[9] (5) On the trial counsel for the administrator offered in evidence a table showing the life expectancy of David Love, and it is insisted that the failure of the court to admonish the jury as to the probative value and effect of this table was prejudicial error.

It was held in *L. & N. v. Irby*, 141 Ky. 145, 132 S. W. 393, that when the life tables are admitted as evidence and neither party requests it, the court should at the time admonish the jury that they are admitted for the purpose only of showing the probable duration of life and may be considered with all other testimony on this point. But the failure to so admonish the jury did not in this case prejudice the substantial rights of the coal company. *Proctor Coal Co. v. Price's Adm'r*, 172 Ky. 627, 189 S. W. 923.

Wherefore the judgment is affirmed.

WHITCOMB v. STATE. (No. 4249.)

(Court of Criminal Appeals of Texas. Nov. 8, 1916. On Motion for Rehearing, Dec. 20, 1916.)

1. CRIMINAL LAW \S 1076(4)—APPEAL—RECOGNIZANCE.

Under the express provisions of Code Cr. Proc. 1911, art. 920, an appeal in a misdemeanor case tried in the county court can only be perfected by entering into a recognizance in open court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2711-2713; Dec. Dig. \S 1076(4).]

2. CRIMINAL LAW \S 1076(4)—APPEAL—JURISDICTION—RECOGNIZANCE.

An appeal bond will not answer the purpose of the recognizance required by Code Cr. Proc. 1911, art. 920, to perfect an appeal in a misdemeanor case tried in the county court, nor will it confer jurisdiction on the Court of Criminal Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2711-2713; Dec. Dig. \S 1076(4).]

3. CRIMINAL LAW \S 1076(4)—APPEAL—JURISDICTION—RECOGNIZANCE.

An instrument in the form prescribed for a recognizance, but which, instead of being taken in open court and made a matter of record, is signed by the obligors, approved by the judge, and signed by the clerk, is not a recognizance such as is required by Code Cr. Proc. 1911, art. 920, to confer jurisdiction on the Court of Criminal Appeals on appeal in a misdemeanor case tried in the county court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2711-2713; Dec. Dig. \S 1076(4).]

On Motion for Rehearing.

4. COURTS \S 116(2) — MINUTES—ALTERATION BY CLERK.

After adjournment of the county court, the county clerk had no authority without permission to add to or take from the minutes approved by the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 371; Dec. Dig. \S 116(2).]

5. CRIMINAL LAW \S 1076(4)—APPEAL—RECOGNIZANCE—ENTRY NUNC PRO TUNC.

The county judge is without authority after adjournment to order that a recognizance, taken but not entered in the minutes for the term, shall be entered nunc pro tunc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2711-2713; Dec. Dig. \S 1076(4).]

Appeal from Anderson County Court; E. V. Swift, Judge.

Mrs. Lacy Whitcomb was convicted of vagrancy, and appeals. Affirmed, and motion for rehearing overruled.

Kay & Seagler, of Palestine, for appellant. J. J. Strickland, Co. Atty., of Palestine, and C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of vagrancy in the county court, from which judgment she prosecutes this appeal.

There are several bills of exception in the record, but the Assistant Attorney General has filed a motion to dismiss this appeal on the ground that this court is without juris-

diction, and attaches to said motion the following certificate of the county clerk of Anderson county:

"I, J. I. Hopkins, clerk of the county court in and for Anderson county, Tex., do hereby certify over my official signature and seal that in cause No. 7009, styled State of Texas v. Mrs. Lacy Whitcomb in the county court of Anderson county, Tex., and now on appeal in the Court of Criminal Appeals of Texas, do hereby certify that the appeal bond filed was never recorded in the minutes of the court; said bond is dated April 21, 1916, and is signed by Mrs. Lacy Whitcomb as principal and C. M. Kay, F. E. Dublin, and R. V. Snaer as sureties; that this said appeal bond is the only bond ever filed by the said Mrs. Lacy Whitcomb and is the bond that the case was appealed on, and is the bond that was filed in my office and placed with the papers and copied into the transcript; that said bond was never recorded on the minutes of this court, and no bond in her case was ever recorded on the minutes of this court, and no recognizance in her case was ever copied on the minutes of this court; and the above appeal bond dated April 21, 1916, was the only bond or recognizance tendered me, and the only bond of any description filed in this court after her conviction."

[1-3] An appeal in a misdemeanor case, tried in the county court, can only be perfected by entering into a recognizance in open court. Article 920, Code of Criminal Procedure; Maxey v. State, 41 Tex. Cr. R. 556, 55 S. W. 823; Quarles v. State, 37 Tex. Cr. R. 362, 39 S. W. 668; Koritz v. State, 27 Tex. App. 54, 10 S. W. 757. An appeal bond will not answer the purpose of a recognizance, nor confer jurisdiction on the Court of Criminal Appeals. Palmer v. State, 63 Tex. Cr. R. 614, 141 S. W. 109; Herron v. State, 27 Tex. 337; Cook v. State, 8 Tex. App. 671; Arnold v. State, 3 Tex. App. 437; Bacon v. State, 10 Tex. 98; Saufly v. State, 83 S. W. 710. In Jones v. State, 1 Tex. App. 436, an instrument of the character and kind shown by this record to have been executed by appellant is held to be an appeal bond and conferred no jurisdiction on this court. For other decisions so holding, see Bennett v. State, 192 S. W. —, decided at the last sitting of this court.

The appeal is dismissed.

On Motion for Rehearing.

[4, 5] Appellant has filed a motion asking that the order dismissing this case be set aside, and attached to said motion is the certificate of the county judge of Anderson county in which he certifies that he in fact took a recognizance, but that it was not entered in the minutes of the court for the term. The term of court at which appellant was tried adjourned the 1st day of last July, and after this court had dismissed this appeal, copying therein the certificate of the county clerk of date November 4, 1916, appellant or her counsel goes to the clerk, and without any order of the court, so far as the record discloses, has the clerk to copy the instrument filed, and so certify on the 14th day

of November, 1916. The clerk after the adjournment of court, without permission, had no authority to add to or take from the minutes as approved by the court; but, had the court ordered the bond entered nunc pro tunc, he would have no authority to do so, as has been frequently decided by this court.

The questions here presented have heretofore been passed on by this court, and we do not deem it necessary to discuss them again. In *Maxey v. State*, 41 Tex. Cr. R. 556, 55 S. W. 823, this court held:

"The Assistant Attorney General has filed a motion to dismiss the appeal, because there is no recognizance in the record, nor a certificate that appellant is confined in jail. In reply to this, appellant has filed an affidavit of the county judge to the effect that a recognizance was actually taken in open court. This is not sufficient. The recognizance should have been entered of record in the final minutes of the court. A 'recognizance' is an undertaking entered into before a court of record in session by a defendant in a criminal action and his sureties, by which they bind themselves, etc. The requisites * * * are prescribed by our statutes. Articles 303, 306, 886-888, Code Crim. Proc. From an inspection of these articles it is evident that, whatever the court may have done in the way of taking recognizance, it is not perfected until this recognizance is entered of record in the final minutes of the case. 20 Am. & Eng. Enc. of Law (1st Ed.) 471. In *Quarles v. State*, 37 Tex. Cr. R. 362 [39 S. W. 668], it was held that the entry of this recognizance could not be made nunc pro tunc, so as to give this court jurisdiction. In *Thompson v. State*, 35 Tex. Cr. R. 505 [34 S. W. 124, 612], it was held it was the duty of appellant to see that this recognizance was entered of record before the adjournment of the court, and that such recognizance could not afterwards be amended. And see *Dement v. State*, 39 Tex. Cr. R. 271 [45 S. W. 917]. We accordingly hold that, in order to give this court jurisdiction, it is necessary not only that the recognizance be taken, but that such recognizance be entered of record during the term at which the appeal was taken."

For list of authorities of recent date, see *Knowlton v. State*, 169 S. W. 674.

The motion for rehearing is overruled.

EMERSON v. STATE. (No. 4295.)

(Court of Criminal Appeals of Texas. Nov. 29, 1916. On Motion for Rehearing, Dec. 27, 1916.)

WEAPONS §10 — MANNER OF CARRYING — "ABOUT THE PERSON."

A pistol carried in the box of a buggy seat is carried "about the person" of the driver.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 9; Dec. Dig. §10.

For other definitions, see *Words and Phrases*, First and Second Series, *About the Person*.]

Appeal from Nacogdoches County Court; J. F. Perritte, Judge.

Robert Emerson was convicted of unlawfully carrying a pistol and appeals. Affirmed.

S. M. Adams, of Nacogdoches, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully carrying a pistol and assessed the lowest punishment.

The only question is as to the sufficiency of the testimony to sustain the conviction. We have read it carefully, and we think it is sufficient. *Leonard v. State*, 56 Tex. Cr. R. 84, 119 S. W. 98; *Mayfield v. State*, 170 S. W. 308, and cases there cited.

The judgment is affirmed.

HARPER, J., absent.

On Motion for Rehearing.

PRENDERGAST, P. J. Appellant insists that under the statute and decisions of this court, the evidence did not establish his guilt, and that the cases cited in the opinion were inapplicable. This court, in the very recent case of *Wagner v. State*, 188 S. W. 1001, 1002, expressly quoted and approved the contention and argument of the state, as follows:

"The information alleged that the pistol was carried on and about the person, and we * * * submit that the weight of authority is with the proposition that a pistol under or behind the cushion of a vehicle on which the driver sits is carried about the person. The Legislature must have meant something when it used the words, 'or about the person,' and, on principle, using the word 'about' in its ordinary meaning, taking into consideration the context and subject-matter relative to which it is employed, the word, not being specially defined, must, as we believe, be held to mean, within the pistol statute, near by, close at hand, convenient of access, and within such distance of the party so having it as that such party could, without materially changing his position, get his hand on it; otherwise every person having a vehicle would be authorized to keep prohibited weapons in his vehicle and within reach of his hand, ready for action, and thus fill our streets and highways with armed men, while peaceful pedestrians and passengers or guests in such vehicles would not be so exempt from the law."

We also quoted and approved the propositions from the authorities laid down by Mr. Branch, in his An. P. C., § 974, as follows:

"A pistol in a basket on one's arm is carried 'about the person.' *Johnson v. State*, 51 Tex. Cr. R. 648, 104 S. W. 902."

"A pistol on the wagon seat or under the buggy cushion on which defendant sat is carried 'about his person.' *Garrett v. State*, 25 S. W. 285; *Leonard v. State*, 56 Tex. Cr. R. 84, 119 S. W. 98; *Mayfield v. State*, 170 S. W. 308."

"A pistol in the bottom of the buggy in which defendant rode is 'about' his person. *De Friend v. State*, 69 Tex. Cr. R. 329, 153 S. W. 881."

"A pistol under a buggy seat is 'about' the person. *Hill v. State*, 50 Tex. Cr. R. 619, 100 S. W. 884."

The uncontroverted testimony, we think, brings this case clearly within these decisions and statute, both in spirit and in letter.

Mr. Castleberry, the deputy sheriff, testified: That on the day he arrested appellant for carrying a pistol, he received information that he had a pistol out at Mr. Hodges'. That he went from town out there about

ten miles, and found appellant in a buggy, out in front of the house, with Mr. Hodges' daughter. He called him off away from the girl and buggy and told him of his information. He denied that he had a pistol, and told the officer he could search him. The officer did search him, and found no pistol on his person, yet did find on his person four pistol cartridges. That he then stepped back towards the buggy and the defendant also started back, but he told him to stay back. That he went to the buggy, raised the cushion, and found a pistol in the box of the seat. That he could see it through the cracks in the box of the seat, the lid of which was made of slats. That he took the pistol out. It was a .38 caliber and had three snapped and two loaded shells in it. The four cartridges he had gotten off of defendant's person were of the same caliber and character as those in the pistol. He names two, and says that there were one or more persons present at this time.

Appellant himself testified, and did not deny anything that the officer had testified, but testified that on the Monday before his arrest at the time on Saturday, he had said pistol out at the lot at his father's where he lived, and snapped it three times at an owl, and that the pistol fired once; that after taking the empty from the chamber, he put in one shell, placed the pistol under the buggy seat in the box of the seat, where it was found by the officer; that the pistol remained there from that time until he was arrested, as stated; that he never saw or handled it after he had so placed it on Monday evening; That he rode from his home to Mr. Hodges' in the buggy, several miles, with the pistol therein, as stated.

The motion is overruled.

SAMPLES v. STATE. (No. 4304.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916. Rehearing Denied Dec. 27, 1916.)

1. CRIMINAL LAW §1099(6)—APPEAL—TIME OF APPEAL—STATEMENT OF FACTS.

Appellant has 90 days from the date of sentence in which to file statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2877; Dec. Dig. §1099 (6).]

2. CRIMINAL LAW §1092(9)—APPEAL—TIME FOR APPEAL—BILL OF EXCEPTIONS.

To authorize the filing of bills of exception, an extension order should be made before the expiration of 30 days from the date of sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2857-2860; Dec. Dig. §1092(9).]

3. CRIMINAL LAW §1038(1)—APPEAL—OBJECTIONS BELOW.

Where the first objection to a charge of the court is in accused's motion for new trial, it is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. §1038(1).]

4. CRIMINAL LAW §1083—NEW TRIAL — LOSS OF TRIAL COURT'S JURISDICTION BY APPEAL.

Where trial court has lost jurisdiction by sentence being pronounced, notice of appeal given and appeal recognizance entered into, motion for new trial cannot be considered; appellant's remedy being to surrender himself, withdraw the notice of appeal, and ask an opening of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. §1083.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

F. S. Samples was convicted of receiving stolen property, knowing it to have been acquired by means of theft, and appeals. Affirmed.

S. O. Jones, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of receiving stolen property, knowing it to have been acquired by means of theft.

[1, 2] The court lasted over eight weeks; sentence was pronounced upon appellant on the 12th day of August; court adjourned on the 4th day of September. Under the law, as announced by the recent decisions, appellant is allowed 90 days from the date of sentence in which to file statement of facts. There was an order of the court entered, extending the time in which to file statement of facts and bills of exception, on the 29th day of September, which was more than 30 days after final judgment. The order of the district court did not authorize the filing of bills of exception, which occurred in the early part of November. In order to authorize the filing of bills of exception, the extension order should have been made before the expiration of 30 days from the date of the sentence. This eliminates the bills of exception. The statement of facts was filed within the 90 days, authorizing such filing, and shows that appellant received the property, knowing it to have been stolen. This is the state's case. Appellant denies this, and introduced evidence showing that Miller, the accomplice from whom he received the property, left it with him, and finally gave some of the stolen property to him with the statement that he had won it in the oil field in a poker game. In other words, under appellant's theory and evidence, Miller did not steal the property, but won it in a game and gave it to appellant. These issues were submitted to the jury, and the case went against appellant.

[3] The court's charge is defective in submitting the issue of accomplice testimony. No exception was taken to this, however, at the time, and the first notice was taken by appellant in his motion for a new trial and then in a very general way. He asked a charge, which the court refused, which would

have corrected one of the errors in the court's charge on that question. To this he reserved no exception, but brought it in his motion for new trial. It seems that under our recent statute and decisions construing it this would be too late. Those matters, therefore, cannot be revised.

[4] There is another question which will be noticed. Appellant's motion for new trial was overruled and sentence pronounced, notice of appeal given, and an appeal recognizance entered into. The recognizance was entered into on the 19th day of August, 1916; the sentence was pronounced on August 12, 1916, 7 days prior to entering into recognizance, and the motion for new trial was overruled on the 12th of August. So appellant, under these dates and this condition of the record, had been sentenced and recognizance entered into and all these matters disposed of by the 19th of August. On the 23d of August he filed what he denominates his "extraordinary motion for new trial." This contains an affidavit as to newly discovered evidence of the accomplice, Miller, substantially that his testimony on the main trial was false. On the trial of the case he testified he did not tell appellant that he had won the property in a poker game on the oil field, but that he told appellant, at the time he let him have the property, he had stolen it, and appellant received it, knowing it to have been stolen. Miller's affidavit, attached to this "extraordinary motion for new trial," states his testimony was false, and that he did inform appellant at the time he turned over the property to appellant, and finally gave it to him he did win it in a poker game on the oil field, and that his testimony on the original trial was all false, and that he made up that story to convict appellant on agreement with the officers that he (Miller) was to be released, but he did not believe they were going to release him, and therefore he concluded that, as defendant was innocent, he had better tell the truth about it, and made this affidavit in direct opposition to his testimony on the trial. If presented so this court could consider it, this would be a very serious question, and which, in the judgment of the writer, ought to entitle appellant to a new trial below or a reversal on appeal; but he presents it in such shape from the record that it cannot be considered. The court on motion of the district attorney struck it out and would not hear or consider it, because appellant had been sentenced, and had entered into a recognizance several days before his "extraordinary motion for new trial" had been filed, and had gone from the court in the custody or in charge of his bondsmen or cognizors. If appellant had desired to obtain jurisdiction of the trial court, it still being in session, he could have surrendered himself to the court, withdrawn his notice of appeal, and asked an opening of his

case again on the showing made, but none of this occurred so far as this record is concerned. Under this view of the case the court had lost jurisdiction. The general proposition may be correctly stated that the trial court has jurisdiction of its cases during its term, yet where appellant has ousted that jurisdiction, or rather attached the jurisdiction of this court in the manner here indicated, in order to invoke the jurisdiction of the district court again, he must surrender himself, or, in other words, he must place himself in such condition as to reinstate the trial court's authority to act. This is in accordance with the decisions of this court.

Finding the record in this condition, we are of opinion, while these questions are of a serious nature, yet appellant has not placed himself in position to invoke the revisory power to this court.

The judgment therefore will be affirmed.

HARPER, J., absent.

OWENS v. STATE. (No. 4299.)

(Court of Criminal Appeals of Texas. Dec. 13, 1916.)

1. LIBEL AND SLANDER — 152(5) — EVIDENCE — INDICTMENT AND PROOF — VARIANCE.

Since the facts of the alleged slander must be proved and must correspond with the allegations in the indictment, the offense of slander alleged to have been committed by communicating certain words to certain persons is not made out by a showing that such words were communicated to one of such persons apart from the others.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 426, 427; Dec. Dig. § 152(5).]

2. LIBEL AND SLANDER — 152(5) — EVIDENCE — INDICTMENT AND PROOF — VARIANCE.

An indictment for slander alleging that accused said of a certain girl that he had had sexual intercourse with her, will not support a conviction where the only evidence was that of certain witnesses that he told them that he had got a piece from her, since the language of an indictment for slander must be proved as laid or substantially so.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 426, 427; Dec. Dig. § 152(5).]

3. CRIMINAL LAW — 678(1) — TRIAL — ELECTION OF OFFENSES — WHEN NECESSARY.

Where, in a prosecution for slander, evidence of alleged slanderous statements on several occasions is introduced, it is error to refuse to compel the state to elect upon which occasion it will rely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1580; Dec. Dig. § 678(1).]

Appeal from Bell County Court; W. S. Shipp, Judge.

Grover Owens was convicted of slander, and he appeals. Reversed and remanded.

A. W. Gibson, of Rogers, and W. W. Hair, of Temple, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of slander, his punishment being assessed at a fine of \$500.

The information, omitting formal parts, charges:

That appellant did "unlawfully, orally, maliciously, and wantonly impute to a female in this state, to wit, Ethel Ford, a want of chastity, the said Ethel Ford being then and there an unmarried female, in this, to wit: The said Grover Owens did then and there in the presence and hearing of Joe Lawhorn, Lester Lawhorn, Lester Mays, and divers other parties say that he had had sexual intercourse with her, the said Ethel Ford, against the peace and dignity of the state."

It will be observed that there is but one count in the information, and it charges the imputation of slander in the presence of the three above-named parties. Lester Mays testified that about a year before he testified defendant and himself were returning from prayer meeting at night; "no other person was with us; on that occasion defendant stated to me that he had had sexual intercourse with Ethel Ford." Upon cross-examination, however, he makes this statement:

"Defendant did not say that he had had sexual intercourse with Ethel Ford; what he did say was, that he had gotten a piece of _____ from Ethel Ford. No one was there except defendant and myself, and the defendant never has at any time made that or any like statement to me when Joe Lawhorn or Lester Lawhorn, or any other person was present."

Lester Lawhorn testified:

"Some time last fall while myself and Jim and Olan Bean were engaged in constructing a fence on my brother's place, defendant came to where we were, and in the presence and hearing of myself and the two Bean boys said that on the road near Mr. Kinsey's house that he had had sexual intercourse with Ethel Ford."

On cross-examination, however, he said:

That he "did not use the language 'sexual intercourse'; what he did say in the presence of myself and the two Bean boys was, that he had gotten a piece from a girl on the way from church. Defendant did not say what girl it was in the presence of myself and the two Bean boys, but left us to surmise or guess who it was, but a little later after the defendant and I had separated from the Bean boys and were out of their hearing, I guessed it was Ethel Ford that he had been alluding to, and he admitted that it was."

He further testified:

"Joe Lawhorn and Lester Mays were not there on that occasion, nor was there any person present on that occasion except myself and the two Bean boys and the defendant. Defendant never did at any other time say anything about his relations with Ethel Ford, except the time I am telling about, and no one was present except the defendant and myself at the time I guessed it was Ethel Ford he had reference to."

There is a lot of testimony in the record that is thought to be material, in fact most of it, that brings in review the character and reputation of the girl, affirmed to be good by the state and denied by appellant's evidence. There were several questions presented of rather vital importance on the testimony quoted.

Appellant contended, and contends here, that there was a variance between the proof

and the allegation; second, that it brought in review several statements made at different times by appellant not in the presence of the parties set out in the information when they were together; third, that appellant objected to the testimony of these different witnesses because at variance with the allegations in the information; fourth, that if the testimony is admissible, then there being different transactions and only one count in the information, the state should have been required to elect upon which transaction it would rely for a conviction. These matters were presented by bills of exception to the introduction of the testimony, to the failure of the court to charge in accordance with the same idea and theory, to the overruling of his exceptions to the admission of testimony, and the rulings of the court refusing to require he state to elect. These matters are presented not only by bills of exception, but by special charges requested and refused, and by special exceptions to the court's charge properly taken and verified.

[1] Wherever the state sets out slander, the facts as stated must be proved and must correspond with the allegations in the information. Where the information, as in this case, alleges that the slanderous words were uttered in the presence of three named parties, the proof must show that the imputation was made under the circumstances set out. It is a variance to allege that the imputed slander was uttered in the presence of two or more parties, when the state's evidence shows that it was not so uttered, but was uttered at different times and to only one when the others were not present. These cases are well known. Some of them may be found in Mr. Branch's Criminal Law, § 608. That author uses this language:

"If words are alleged to have been uttered to two persons at the same time, they must be proved as alleged, and proof that they were made to each of the parties at different times is a variance." Knight v. State, 49 S. W. 383.

Again he states the rule:

"If the indictment unnecessarily names more than one person as having been present when the slander was uttered, the allegation must be proved as laid, being descriptive." Neely v. State, 32 Tex. Cr. R. 370, 23 S. W. 798.

This seems to be well settled.

[2] Another variance urged by appellant is well taken. The language used in the information is not the language to which the witnesses testified. While on direct examination they used the expression "sexual intercourse," yet upon cross-examination they testified that such language was not used. The language that was used on these different occasions has been set out above and unnecessary here to repeat. It is a well-settled rule in Texas by the decisions that the language must be proved as laid, or substantially so. The language set out in the information is not sustained by the language used by the witnesses. The writer does not care to follow or elucidate this question. One of the

later opinions was rendered by Judge Harper in the case of *Golden v. State*, 72 Tex. Cr. R. 19, 160 S. W. 957. See *Simer v. State*, 62 Tex. Cr. R. 515, 138 S. W. 388. This opinion was also written by Judge Harper. Again, when the testimony was introduced from the witnesses Mays and Lawhorn, the objection of the defendant should have been sustained on the theory of variance, if for no other reason; not only as to the directness of the slander in the presence of these parties together, but also as to the language used by defendant as they testified compared with that set out in the information. In addition to the decisions already cited see *Collins v. State*, 39 Tex. Cr. R. 33, 44 S. W. 846; *Franklin v. State*, 53 Tex. Cr. R. 550, 110 S. W. 909. Also see Mr. Branch's Crim. Law under head of "Slander."

[3] The court having admitted this testimony, it was error then to refuse to require an election between these offenses, but that will pass out by reason of the variance above discussed. There were other charges asked along the same line submitting these matters which were refused by the court. We are of opinion they should have been given, but they are not discussed because upon another trial, should further prosecution be had, the case will be tried in accordance with what has already been said. The information must correspond to what has been above said as found in a long line of cases discussing this and kindred questions. We are not discussing a case where there are several counts in the information. This information had but one count. There were also some exceptions to the charge because it was on the weight of the evidence and shifted the burden of proof. These matters will be avoided upon another trial. As the record is presented to this court it is thus briefly disposed of, because it is thought unnecessary to write at length.

The judgment is reversed, and the cause remanded.

HARPER, J., absent.

SAPP et al. v. STATE. (No. 4241.)

(Court of Criminal Appeals of Texas. Nov. 15, 1916. On Motion to Revise and Reform Opinion, Dec. 20, 1916.)

1. HOMICIDE \S 156(2)—EVIDENCE—MOTIVE.

In a prosecution of brothers for the murder of the one who had killed the wife of one of defendants, deceased's repeated declarations that defendant had hired him to kill defendant's wife and was to pay him money therefor, where the circumstances tended to show that such declarations were brought to defendant's knowledge, and that he thereupon induced the other defendant to join in killing deceased, were admissible against defendants to show motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 287; Dec. Dig. \S 156(2).]

2. CRIMINAL LAW \S 673(2)—MOTIVE—EVIDENCE.

It is neither necessary nor proper to limit the evidence which goes to prove motive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1874; Dec. Dig. \S 673(2).]

3. CONSPIRACY \S 41—EVIDENCE—CONSPIRATORS—COMMENCEMENT OF CONSPIRACY.

One who enters into a conspiracy to commit a crime before the ultimate object of it is completed is deemed a party to it from its inception, and adopts as his own all the preceding acts of the others.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. \S 74; Dec. Dig. \S 41.]

4. CRIMINAL LAW \S 423(2)—EVIDENCE—DECLARATIONS OF CONSPIRATORS.

The declarations or statements by conspirators, even if made before a conspirator entered into the conspiracy, are admissible against him, as well as against those who originally entered into the conspiracy, even though what was said or done by any of the others was done in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 990; Dec. Dig. \S 423(2).]

5. WITNESSES \S 379(3) — IMPEACHMENT — STATEMENTS OF WITNESS—PROOF.

In a prosecution for the murder of one who was alleged to have been hired by one of defendants to kill such defendant's wife in pursuance of a conspiracy to marry and get her money, where a witness for defendant, in contradiction of the state's testimony, stated that defendant soon after his marriage was very attentive to his wife, and that the relations between them were affectionate, testimony of witnesses that when defendant's wife was lying dead the defendant's witness had said that defendant had had her killed, and that it was a cold-blooded murder, and that defendant ought to be arrested, and that everybody knew defendant married his wife for her money, was inadmissible to impeach defendant's witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1209, 1247; Dec. Dig. \S 379(3).]

6. WITNESSES \S 379(1)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In such case, the state might impeach defendant's witness by proving that she had made declarations prior to her testimony different from what she made along the same line at any other time prior thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1209, 1247; Dec. Dig. \S 379(1).]

7. CRIMINAL LAW \S 450—EVIDENCE—OPINION EVIDENCE.

Testimony of a witness that there was not any doubt but that defendants were guilty was a conclusion or opinion, and inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1036; Dec. Dig. \S 450.]

8. HOMICIDE \S 169(1)—ADMISSIBILITY OF EVIDENCE—CIRCUMSTANCES.

A train conductor's testimony that there was no doubt that deceased and one of the defendants got off his train at a certain time and place and took an automobile driven by the other defendant was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 841; Dec. Dig. \S 169(1).]

9. WITNESSES \S 398(3) — IMPEACHMENT — CHARACTER.

Where a state's witness was asked on cross-examination by defendants' attorney whether or not she was a common prostitute, and she denied it, none of the officers could testify that her reputation was that of a common prostitute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1275; Dec. Dig. \S 398(3).]

10. HOMICIDE — 289 — INSTRUCTION — EVIDENCE.

In a prosecution of two for murder of a named person, a charge that defendants were indicted for the murder of such person and were on trial for that offense only, and could not be convicted of the killing of the wife of one of the defendants, or of another, but that the jury should consider the evidence as to the killing of those parties only on the question whether defendants killed the named deceased, should be omitted on defendants' objection; but if necessary to caution the jury on another trial on that point the charge should not tell the jury directly that defendants killed either of those other parties, but should state that if the "testimony so shows or tends to show," etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 594; Dec. Dig. — 289.]

11. CRIMINAL LAW — 783(1) — INSTRUCTIONS — EVIDENCE.

In a trial for murder of one whom the state claimed had been hired by one of defendants to kill such defendant's wife, a charge that the jury for no other purpose than passing on the question whether defendants or either of them killed the deceased, should consider the testimony offered with regard to the relationship of one defendant and his wife after their marriage should not be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1872-1874, 1876; Dec. Dig. — 783(1).]

12. WITNESSES — 337(5) — IMPEACHMENT — CONVICTION.

It is always permissible to impeach an accused to show by him on his cross-examination that he had been indicted or convicted of any felony if not too remote.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1132, 1140-1142, 1146-1148; Dec. Dig. — 337(5).]

13. WITNESSES — 337(5) — IMPEACHMENT — EXAMINATION — CONVICTION OF FELONY.

It was not permissible to require an accused in testifying to state whether he had committed any other offense, and whether he had been arrested on complaint therefor, if sufficient time had in fact elapsed to show that the grand jury had had an opportunity to investigate and had not found the bill of indictment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1132, 1140-1142, 1146-1148; Dec. Dig. — 337(5).]

14. CRIMINAL LAW — 792(8) — TRIAL — INSTRUCTION — PRINCIPALS.

In an instruction defining who are principals, the court should only quote that part of the statute relating to principals, omitting the part not applicable to principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. — 792(8).]

On Motion to Revise and Reform Opinion.

15. CRIMINAL LAW — 423(2) — EVIDENCE — DECLARATIONS OF CONSPIRATORS.

Declarations of a coconspirator are admissible against all the parties to the conspiracy whether they heard it or had it communicated to them or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 990; Dec. Dig. — 423(2).]

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

E. E. Sapp and Lou Sapp were convicted of murder, and they appeal. Reversed and cause remanded.

F. J. & C. T. Duff, of Beaumont, Mantooth & Collins, Denman & Thomas, and I. D. Fairchild, all of Lufkin, J. J. Collins, of Huntington, and Howth & Adams, of Beaumont, for appellants. W. R. Blain, of Beaumont, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellants were indicted and tried jointly for the murder of Dick Watts. They were found guilty, and their punishment assessed at 40 and 20 years, respectively, in the penitentiary. The record, statement of facts, and briefs for both sides are very voluminous. There are apparently, however, but few questions necessary to be decided. In view of the disposition we make of the case, we will not state at any length nor discuss the testimony.

The testimony was wholly circumstantial. The theory of the state substantially was that appellant E. E. Sapp originally entered into a conspiracy with others by which it was contemplated and intended that he should marry a rich old widow, he being a young man, manage to get possession of her property, and then make way with or kill her so as to get rid of her and ultimately to divide the property with the other conspirators. It also embraced the making way with or killing the witnesses to the murder of his wife. In fact, it embraced doing any and everything that was necessary not only to kill the woman, but prevent conviction therefor—all to accomplish the end of getting her property and dividing it between the conspirators. That Lou Sapp entered the conspiracy with his brother E. E. after the killing of E. E.'s wife, and included making way with by killing the deceased Watts, who killed E. E.'s wife, and Havard, who was a companion of him at the time and knew all about it, thereby preventing the conviction of E. E. Sapp for murdering his wife, or having it done, and to succeed later in securing her property through a will she had executed in E. E. Sapp's favor and dividing her property as stated. There was an abundance of proof introduced by the state circumstantially tending to prove the theory of the state.

Appellant has a very large number of bills of exception, some to the introduction of testimony, others to the exclusion of it, and others to charges given and charges refused. Many of them raise the same or kindred questions.

[1] It was established without controversy that the deceased, Dick Watts, killed the wife of E. E. Sapp by shooting her in the back. Appellants claimed this was accidental. The state's theory was that appellant E. E. Sapp hired Watts to kill her, and that Havard knew all this and was a companion of Watts in this matter. The state introduced the testimony of several witnesses, who testified substantially to Watts' repeated declarations,

and also some by Havard, to the effect that E. E. Sapp had hired him to kill said Sapp's wife and was to subsequently pay him a considerable sum therefor. The circumstances would tend strongly to show that this was brought to the knowledge of E. E. Sapp, and that thereupon he induced his brother Lou to aid him, and that his brother did aid him, in corraling Watts and Havard, getting them drunk, or while drunk, enticed Watts at least away from Beaumont, where they all then were, taking him on the train and in an automobile into the big thicket in Hardin county where they murdered and buried him, and his body was a few weeks thereafter found and identified. All this testimony objected to, as shown by appellant's bills, was clearly admissible against both appellants to show motive. It has always been held by this court that such testimony was admissible for that purpose. *White's An. C. C. P. art. 796, §§ 1070, 1072, 1074, subd. "c."* Judge White collates many cases under these sections. See, also, *Belcher v. State*, 71 Tex. Cr. R. 653, 161 S. W. 459; *Lane v. State*, 73 Tex. Cr. R. 268, 164 S. W. 378.

[2] It is also well established that it is neither necessary nor proper to limit testimony which goes to prove motive. 2 Branch's An. P. C. § 1885, p. 1047, where he collates some of the authorities.

[3, 4] It is also well established that every one who enters into a conspiracy to commit a crime before the ultimate object and purpose of it is completed is deemed a party to it from its inception, and that he adopts as his own all the preceding acts of the others, and that their declarations or statements made before he entered into it are admissible as against him, as well as those who originally entered into it, even though what was said or done by any of the others was done in his absence. The principles applicable to this question and the authorities of this state establishing them are so plainly and clearly laid down in 1 Branch's An. P. C. §§ 603, 694, that we deem it unnecessary to elaborate them. We have recently in some cases restated and applied these principles.

[5, 6] Mrs. Corley was a witness for appellants, and from their standpoint gave material testimony in their favor substantially to the effect, in contradiction of some of the state's testimony, that E. E. Sapp soon after he married Mrs. Sapp, who was killed, was very attentive to her, and she was very much attached to him and frequently stated to her and wrote her letters, all tending to show that the relations between E. E. Sapp and his said wife were cordial, affectionate, and that she had confidence in him, etc. For the purpose of impeaching her, the court permitted several witnesses to testify in substance that at the time Mrs. Sapp was lying a corpse soon after she was killed, Mrs. Corley said: "Poor old thing, Sapp had you killed;" and that she said: "It is a cold-blooded

murder, and Sapp ought to be arrested right now; that everybody knew Sapp married her for her money, and that was a poor way to get rid of her." Clearly all this testimony by these several witnesses was inadmissible and has uniformly been held so by this court since the rendition of the opinion in *Drake v. State*, 29 Tex. App. 270, 15 S. W. 725. The state, if it could, would be permitted to impeach Mrs. Corley by proving that she made declarations prior to her testimony herein different from what she made along the same line at any other time prior thereto, whether at the time Mrs. Sapp was lying a corpse or not, but the proof by the witnesses objected to should have been excluded. It was wholly inadmissible under the line of authorities stated.

[7, 8] Another of appellants' bills shows that A. Hard, who was conductor on the Santa Fé train from Beaumont to Lumberton, testified in substance that persons answering the description of Lou Sapp and Dick Watts did not travel on his train from Beaumont to Lumberton on January 7th. The state, by its witness Jarvey, was permitted in impeachment of Hard, to prove that Hard at Cleveland in February or March told him that "there was not any doubt that the Sapps were guilty," and that "there was not any doubt but that Lou Sapp and Dick Watts got off that train on January 7, 1915, at Lumberton and became passengers in an automobile driven by E. E. Sapp." The first part of Jarvey's testimony to the effect as just stated above that there was not any doubt but that the Sapps were guilty was also wholly inadmissible, and the court erred in admitting that part of Jarvey's testimony. The other part just above stated, we think, was admissible; that is, that Hard on this occasion said to him there was no doubt but that Lou Sapp and Dick Watts got off that train on January 7, 1915, at Lumberton, etc.

[9] None of the testimony of the officers shown by appellants' bill of exceptions No. 22 was admissible. The most that the state's witness Mary Keith could have been asked on cross-examination by appellants' attorneys was whether or not she was a common prostitute. This was asked her, and she denied she was. This concluded the inquiry into this subject, and none of the officers could testify that her reputation was that of a common prostitute; nor was any of the other testimony by these officers, as shown by this bill, admissible. *McCray v. State*, 38 Tex. Cr. R. 609, 44 S. W. 170, and other authorities cited in *Willson v. State*, 71 Tex. Cr. R. 428, 160 S. W. 967.

[10] In appellants' bill No. 10 they complain of that paragraph of the court's charge to the effect that appellants were indicted for the murder of Watts, and were on trial for that offense only, and they could not be convicted for the killing of Havard or Mrs. Sapp, but they could consider the evidence touching

on the killing of these parties, Havard and Mrs. Sapp, for the purpose of enabling them to pass on the question of whether or not defendants, or either of them, killed Watts, and for no other purpose. Appellants' objection to this charge was that the court ought to have told the jury that they could consider the testimony of the killing of Havard and Mrs. Sapp only for the purpose of showing motive on the part of defendants to kill Watts. As shown above, it would be improper for the court to charge on any testimony which would tend to show motive for the crime charged in this case. The idea of the court in giving that charge seemed to be to prevent the jury from convicting the appellants for killing Dick Watts, because they had killed Havard or Mrs. Sapp. If appellants object to any such charge on another trial, the court should omit it. We cannot see how the jury could be misled to convict appellants for the killing of Havard or Mrs. Sapp on a trial under an indictment charging them with the killing of Watts only. If it becomes necessary to caution the jury on another trial, on this point then such charge should be so worded as not to tell the jury directly that appellants killed either Havard or Mrs. Sapp, but that if the testimony so shows or tends to show.

[11] Appellants objected to another charge of the court, which in substance was that they could consider for no other purpose than passing on the question of whether or not defendants, or either of them, killed Watts that testimony introduced with regard to the relationship of E. E. Sapp and his wife Ellen as to how they got along as man and wife after their marriage. This charge should be omitted on another trial.

[12, 13] It is always permissible for impeachment of an accused to show by him on cross-examination that he has been indicted or convicted of any felony, if not too remote, but it is not permissible to require an accused when testifying to show by him that he has committed any other offense, whether arrested on complaint therefor or not, if as a matter of fact sufficient time has elapsed thereafter to show that the grand jury has had an opportunity to investigate and act upon it and have not found a bill of indictment. *Wright v. State*, 63 Tex. Cr. R. 420, 140 S. W. 1105. The court, therefore, committed an error in permitting the state to have Lou Sapp testify on cross-examination to the effect that he had before that killed a man in Louisiana, for which, it seems, he had not been indicted, and also by requiring E. E. Sapp to testify to shooting his brother-in-law, for which he had not been indicted, as shown by appellants' bills Nos. 41 and 42.

[14] Complaint is also made by appellants of the charge in that in defining who are principals, the court in substance quoted that part of the statute to the effect that one is

a principal who not being actually present keeps watch so as to prevent the interruption of those engaged in the commission of the offense. And also those are principals who endeavor at the time of the commission of the offense to secure the safety or concealment of the defendants. It seems the court merely in substance quoted the statute in these respects and did not submit any issue of that kind to the jury for a finding. However, only that part of the statute applicable should be stated in the charge, and that part of it relating to principals which is inapplicable should not be quoted. This, we think, would not have presented reversible error. But for the very purpose of preventing objections to the charge, such matters which are inapplicable should not be included therein.

We have carefully considered all of appellants' assignments, but have deemed it unnecessary to take them up and discuss them separately. None of them present any reversible error, except as shown above. Some questions are assigned which doubtless will not arise on another trial. It is unnecessary to discuss them.

For the errors above pointed out, the judgment is reversed and the cause remanded.

On Motion to Revise and Reform Opinion.

Appellant has filed a motion asking the court to revise and reform its opinion herein. It is unnecessary to state the particulars thereof.

We think the appellants have misunderstood the opinion. In the first part of it we merely stated the theory of the state, so as to try to show the application of the questions determined and decided thereby—not that that theory is a fact. It may or may not be.

We think it cannot be gathered from the opinion that we held that the deceased Watts and Havard were at first parties to the original conspiracy between E. E. Sapp and another at the time it was made, if it was. And certainly not that they were parties to any conspiracy to have themselves killed to prevent their testifying or otherwise as to their being hired to kill, and killing Mrs. E. E. Sapp. Nothing of the kind was meant or intended by the opinion. If they became parties thereto, it was when E. E. Sapp hired them, if he did, to kill Mrs. Sapp. The killing of Watts and Havard, or either of them, if by appellants, was a later incident to and made necessary in order to carry out, under the theory of the state, the original conspiracy entered between E. E. Sapp and another or others, which was, to the effect, as claimed by the state, that E. E. Sapp would marry a rich widow, manage to get her property by a will or otherwise, then make way with her by killing her, or otherwise, and divide the property acquired from her between the conspirators. Under the state's theory, the original conspiracy has never yet been ended or

consummated. It cannot, and will not, be until E. E. Sapp gets the balance of his wife's estate under her will and divides it with his conspirator. It would not be essential to make Watts and Havard parties to said claimed original conspiracy, that they should get any specific portion of Mrs. Sapp's property for killing her; the fact, if so, that they were hired by E. E. Sapp, and to be paid by him, to kill her, might be sufficient to make them parties thereto, to carry out one essential part—kill her.

Nor do we think it can be gathered from the opinion that we held that Lou Sapp was a party to said alleged original conspiracy before or at the time Mrs. Sapp was killed. His entry into the conspiracy, if he ever did, was at the time he assisted E. E. Sapp, if he did, in corraling Watts and Havard, taking them into the big thicket, and killing them, or helping E. E. Sapp to do so. The testimony might show that he did not know that Mrs. Sapp was to be or had been killed until some short time after she was killed, and perhaps prior to that time he did not even know that E. E. Sapp had married her. It may be that Lou Sapp was not to get any of Mrs. Sapp's property, nor any special pay, or specific amount, for what he did, if anything, in the killing of Watts or Havard. However, according to the theory of the state, he became a party to the conspiracy by entering into an arrangement with his brother, E. E. Sapp, and aiding and assisting him, if he did, to kill Watts or Havard, and thereby enable E. E. Sapp to consummate his original conspiracy and succeed in ultimately getting his wife's property and dividing it, and it was on this theory that the opinion was predicated.

We cannot understand how the opinion of this court can ever get to a jury. It is intended for the guidance of the judge in the trial, and should be for his guidance, so far as the questions decided are concerned. As stated in the original opinion, we have not discussed nor commented on the evidence. We have merely stated the different theories, where applicable. Of course, we understand that appellants deny any and all conspiracies at any and all times, and they deny the killing of Mrs. Sapp other than as an accident, and they deny that they killed either Watts or Havard at any time or for any purpose, but the state contends otherwise, and it is the duty of this court, so far as it can, to decide the legal questions on the various contentions of the different parties, and this, and only this, is what we have undertaken to do.

[15] As we understand, it has never been held and is not necessary that an admission or declaration of a coconspirator had to be communicated to the other conspirator against whom it is introduced before such admission or declaration would be admissible. The

law is, as we understand it, that such declarations of a coconspirator are admissible against all parties to the conspiracy, whether they heard it or it had been communicated to them or not.

The testimony of the various witnesses as to the declarations Watts and Havard made to them as they testified, which appellants objected to, shown by their bills, was held admissible on two grounds; one, particularly, to show motive by appellants for killing Watts; the other, as admissions or declarations as coconspirators to that part of the conspiracy, if so, to the killing of Mrs. Sapp.

We refrain from discussing or even stating the testimony which would tend to show and authorize the jury to believe that both E. E. Sapp and Lou Sapp knew of the statements by Watts and Havard at different times that they or Watts had been hired by E. E. Sapp to kill Mrs. Sapp, etc. The many different times and places and circumstances where they are shown to have made such statements and the supervision and control of them by the Sapps about this time and shortly and immediately before Watts was killed seems to form a chain of circumstances that would authorize a jury to find they did know and had notice of the declarations by Watts and Havard, notwithstanding appellants both denied any such knowledge or notice. All that was for the jury. It is unnecessary for us at this time to say whether or not all this evidence was of sufficient force to establish their knowledge or notice, as claimed by the state. The jury must pass upon that question.

The opinion might not have made it clear that the theory of the state was that E. E. Sapp hired not only Watts but Havard too to kill Mrs. Sapp, although the shot that killed her was fired by Watts alone. We take it that the contention of the state was that both of these parties were hired by Sapp to kill her, and both of them as to killing her would have been principals. However, we do not state that that is a fact. We merely state what we understand the contention of the state to be. Of course, appellants deny all of this, and a jury may believe their side ultimately, and not that of the state.

We have thought it proper to thus explain, because of appellants' motion. It is overruled.

WAGGONER v. STATE. (No. 4291.)
(Court of Criminal Appeals of Texas. Dec. 6, 1916. On Motion for Rehearing, Dec. 27, 1916.)

1. INTOXICATING LIQUORS §—238(2)—PROSECUTION—SALE—QUESTION FOR JURY.

In a prosecution for selling intoxicants in a county where prohibition was in force, whether defendant sold intoxicating liquors to the state's witness, and did not deliver the liquor to him under an agreement that he should order

it for him, held for the jury on conflicting evidence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 324; Dec. Dig. ¶238(2).]

2. CRIMINAL LAW ¶1159(4)—TRIAL—CREDIBILITY OF WITNESSES.

The credibility of witnesses was a question for the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077; Dec. Dig. ¶1159(4).]

3. CRIMINAL LAW ¶829(4)—TRIAL—INSTRUCTIONS.

Where the court's main charge, and that specially requested by defendant, which was given, submitted every issue in favor of defendant raised by the testimony, the court properly refused others requested by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829(4).]

4. WITNESSES ¶344(2) — IMPEACHMENT — SINGLE SALE OF INTOXICANTS.

In a prosecution for selling intoxicants in a county where prohibition was in force, the trial court properly excluded the proposed impeaching testimony by defendant that the state's main witness had made a single sale of intoxicants; the offense being merely a misdemeanor, and the witness having been neither indicted nor prosecuted therefor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1125; Dec. Dig. ¶344(2).]

5. CRIMINAL LAW ¶1099(5)—NEW TRIAL—NEWLY DISCOVERED TESTIMONY—TIME FOR FILING.

Where defendant moved for new trial for newly discovered testimony, and the court heard testimony on the motion during term time, but the testimony was not filed during term time, but nearly 20 days later, the ruling denying a new trial cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2876; Dec. Dig. ¶1099(5).]

6. CRIMINAL LAW ¶938(3)—NEW TRIAL—NEWLY DISCOVERED TESTIMONY.

In a prosecution for illegally selling intoxicants, where a party was present when defendant claimed he made an agreement with the prosecuting witness to order the liquor for him and some additional for himself, testimony of such party who was present was not newly discovered, and so not ground for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2308; Dec. Dig. ¶938(3).]

On Motion for Rehearing.

7. CRIMINAL LAW ¶1144(19) — APPEAL — PRESUMPTION.

Where, in a bill of exception, defendant recites testimony heard on his motion for new trial on the ground of newly discovered evidence, and that the bill was filed on the day the court adjourned, the Court of Criminal Appeals will presume that it was filed before actual adjournment, so that defendant is entitled to the benefit of the testimony, though his statement of facts was filed after the adjournment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2774-2781, 2901, 3037; Dec. Dig. ¶1144(19).]

8. CRIMINAL LAW ¶829(4)—INSTRUCTIONS.

In a prosecution for illegally selling intoxicants, the court instructed that if defendant agreed to order the whisky in connection with the prosecuting witness, and such witness paid him money at the time the order was made, and, after the whisky came, defendant delivered half to the witness, and requested him to keep defendant's part of the whisky until he returned home, defendant was not guilty. Held, that such charge clearly embraced the issue that if defendant ordered the whisky, and at the time

the order was made the prosecuting witness paid him \$5 on the order, or if the jury had a reasonable doubt as to whether such was the case, they should acquit, so that another charge on the issue was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829(4).]

Appeal from Nacogdoches County Court; J. F. Perritte, Judge.

Johnnie Waggoner was convicted of selling intoxicating liquors in a county where prohibition was in force, and he appeals. Judgment affirmed.

King & Seale, of Nacogdoches, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the misdemeanor offense of selling intoxicating liquors in Nacogdoches county, where prohibition was in force, and assessed the lowest punishment.

[1, 2] The testimony by the state's witness was positive and unequivocal to the effect that appellant, at the time alleged, sold to him, in said county, intoxicating liquors, and that he did not deliver it to him under an agreement before then that he ordered it for said witness and merely delivered it to him without making any sale. The testimony on the appellant's side disputes this, and he had other testimony corroborating his own. This was a question for the jury and the lower court. They had all the witnesses before them, heard them testify, and saw them while testifying, and their credibility was a question for the lower court, and not this. We cannot, therefore, disturb the verdict.

[3] The main charge of the court, and that specially requested by appellant which was given by the court, submit every issue in favor of appellant that was raised by the testimony, and the court properly refused others requested by appellant. Nor do appellant's objections to the court's charge show any error.

[4] The court properly excluded the proposed testimony by appellant to the effect that the state's main witness had made a single sale of intoxicating liquor, for the purpose of impeaching him. The offense, if any, was merely a misdemeanor. He had neither been indicted nor prosecuted therefor. The law is well settled, and needs no citation of cases, to the effect that no witness can be thus impeached.

[5, 6] Appellant complains that the court erred in not granting him a new trial on the ground of claimed newly discovered testimony. The record shows that the court heard testimony on this during term time in ruling on his motion for new trial. This testimony was not filed during term time, but nearly 20 days later. Hence, under the uniform decisions, and many of them, of this court, such matter cannot be reviewed. How-

ever, to take appellant's motion and the affidavit of the witness whose testimony was claimed to be newly discovered, it would clearly show that it was not newly discovered, for the affidavit in substance shows that he was present at the time when appellant claims he made an agreement with the prosecuting witness to order for him, and some additional for himself, the liquor the state's witness testified had been sold to him by appellant, and his whole affidavit would exclude the idea that his testimony was newly discovered.

There was no error in the trial, and the judgment is affirmed.

HARPER, J., absent.

On Motion for Rehearing.

PRENDERGAST, P. J. [7] Appellant claims that we were mistaken when stating in the original opinion that a statement of facts of the testimony heard by the court on his motion for a new trial on the ground of newly discovered evidence was not filed during term time, but nearly 20 days later. Upon a re-examination of the record, we find that our statement was correct. The court adjourned on August 5th; the statement of facts of the testimony heard on his motion for new trial was not filed in the court below until August 23d, 18 days after adjournment. However, in one of appellant's bills of exceptions, he recites this testimony, and that bill was filed on the day the court adjourned, and we will presume it was filed before actual adjournment; so that appellant is entitled to the benefit of that testimony, although his statement of facts was filed after adjournment, as stated.

We have read that testimony carefully, and we think it emphasizes against appellant the fact that the court was justified in denying him a new trial on the ground of claimed newly discovered testimony.

Our statute prescribing the causes which authorize the trial court to grant a new trial (Code Cr. Proc. 1911, art. 837, subd. 6), in even felony cases only, as one of the grounds, enacts: "Where new testimony material to the defendant has been discovered since the trial." This statute has been construed and the principles applicable so many times stated by our decisions as to settle practically all the questions relating thereto. Judge White, in section 1149, under said provision of the statute, has laid down these principles and many of the decisions establishing them. So has Mr. Branch, in his Ann. P. C. §§ 192-205, Inc. As a matter of convenience, and because Mr. Branch's work is more recent and cites later cases, we will state some of these principles applicable to this question:

(1) Applications for new trial upon this ground will be scrutinized by the appellate court with much strictness. They are addressed much to the discretion of the trial court, and, where that court has refused such

an application, the appellate court will not reverse unless it shall appear that the trial court has abused its discretion, and that thereby injustice may have been done the defendant. He cites as authority for this principle eight cases from this court, from the first report down to almost the last, specifically in point and sustaining his proposition.

(2) Where it appears that defendant knew that the proposed new witness was present when the transaction occurred, or where the alleged new testimony is of such a character that defendant must necessarily have known of its existence prior to the trial, and the trial court in the exercise of its sound discretion has refused a new trial, the judgment will not be reversed to permit him to take advantage of his own negligence and to obtain a new trial to obtain testimony which he should and could have had at the trial. For this principle he cites 42 cases, one from the Supreme Court when it had criminal jurisdiction, and all of the others from this court, from its creation down to the present time.

(3) The defendant must satisfy the court that the new testimony has come to his knowledge since the trial, and that it was not owing to the want of due diligence that it was not sooner discovered, citing 19 cases from the Supreme and this court from its organization down to this date.

(4) A new trial will not be granted for testimony claimed to be newly discovered which could have been obtained at the trial by the use of ordinary diligence, citing 23 cases from the Supreme and this court from its organization down to this date.

Many other propositions are laid down by Mr. Branch which have more or less bearing in this case, but it is unnecessary to state them.

The sale by appellant in this case is alleged to have occurred on March 8th. The complaint and information against him charging this were filed just one week later. His trial occurred on July 27th following.

Appellant swore on his trial that he met the complaining witness in the town of Nacogdoches on or about the time alleged, and that that witness and he then and there agreed to buy whisky together and send off for it; that the ordering of it was to be made by appellant, and it was to be shipped in his name and delivered to him; that the complaining witness at the time paid him \$5, which was the amount that he was to pay for one-half of said whisky; that he then went to a certain person, naming him, and ordered the whisky, as agreed between them; that it came later, and when it came he delivered half of it to the complaining witness under their said contract, and did not sell him the whisky. The complaining witness swore that no such trade or arrangement was made by him with appellant at said time, or any other time, but that he bought the whisky

direct from appellant and paid him \$5 for the quantity that he then bought from him, which was then and there delivered to him by appellant. Now, the witness, whose testimony appellant claimed to be newly discovered, as developed before the trial judge when he heard the testimony on appellant's ground of newly discovered testimony, swore that he knew both appellant and said complaining witness well and had known each of them for years; that, on the day and at the time and place which appellant swore he made said trade and arrangement with said complaining witness, he came up to the parties; that they all spoke to each other; that he shook hands with appellant; that he then and there heard the whole of said arrangement or trade between appellant and said complaining witness; and that it occurred just as appellant swore it did. This witness lived but a few miles in the country and in an adjoining neighborhood to that of appellant, and that they had so lived a long time before, and ever since, the said alleged sale. Appellant did not testify at all on this hearing. He introduced the affidavit of his claimed newly discovered witness, which he had attached to his motion for a new trial. The substance of this affidavit was stated in the original opinion and was briefer than the testimony of this witness heard on the motion for new trial. The testimony of this witness heard by the trial judge at the time is given in question and answer form, comprised in more than three typewritten pages, and was in substance what we have given above. It therefrom clearly appears, and the trial judge unquestionably was authorized to believe, and did believe, that said testimony could not have been, and was not, newly discovered. If it was true, appellant had positive knowledge of it before his trial as well as after, and the court did not err in refusing him a new trial on that ground.

[8] The only other ground complained of in the motion for a rehearing is that the court should have given his other special charge, as follows:

"You are instructed as a part of the law in this case that if you believe from the evidence that said whisky was ordered by the said Johnnie Waggoner, and that at the time said order was made the witness Rodriguez paid said defendant \$5 on said order, or if you have a reasonable doubt as to whether this is a fact, you will acquit defendant."

The court refused this charge, giving as his reason that this issue was already covered in the charge that he had given. The court was correct in refusing the charge. He did give, at appellant's special request, the following charge, which embraces clearly the said issue, to wit:

"You are instructed as a part of the law in this case that, if the defendant Johnnie Waggoner agreed to order said whisky in connection with the witness Rodriguez, and that said Rodriguez paid in money at the time said order was

made, and that after said whisky came the defendant delivered one-half of said whisky to said Rodriguez and requested said Rodriguez to keep his (defendant's) part of said whisky until he returned home, then the defendant has violated no law, and you will acquit him."

The motion is overruled.

FLORES v. STATE. (No. 4226.)

(Court of Criminal Appeals of Texas. Oct. 25, 1916. Dissenting Opinion Nov. 22, 1916.)

1. CRIMINAL LAW \S 980(2)—PLEA OF GUILTY—INTRODUCTION OF EVIDENCE—WAIVER.

Introduction of evidence, under Code Cr. Proc. 1911, art. 566, providing that on plea of guilty, where the punishment is not unvarying, a jury shall be impeached to assess it, and evidence submitted to enable them to decide thereon, may be waived under article 22, providing that defendant may waive any right secured to him by law, except right of jury trial in a felony case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2494, 2495; Dec. Dig. \S 980(2).]

2. CRIMINAL LAW \S 980(2)—PLEA OF GUILTY—INTRODUCTION OF EVIDENCE—WITHDRAWAL OF WAIVER.

Express waiver of introduction of evidence under Code Cr. Proc. 1911, art. 566, to enable the jury to assess the punishment on a plea of guilty, cannot be withdrawn after verdict, though the jury do not suspend sentence, as prayed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2494, 2495; Dec. Dig. \S 980(2).]

Davidson, J., dissenting.

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Clemente Flores was convicted, and appeals. Affirmed.

Pope & Sutherland, of Corpus Christi, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with violating the prohibition law. When the case was called for trial he entered a plea of guilty, but filed a prayer, asking a suspension of sentence during good behavior. The jury refused to suspend the sentence, and returned a verdict, assessing the penalty at one year's confinement in the penitentiary. On the next day he employed the attorneys who prosecute this appeal, and they filed a motion, asking that the judgment be set aside because no evidence had been adduced on the trial tending to show him guilty of the offense; and when the motion for new trial was overruled, a bill of exceptions was reserved to the action of the court in overruling the motion. In approving the bill, the court approves it with the following qualification:

"That when the indictment was read to the jury, the defendant, in person, pleaded guilty, after being admonished by the court, and, in open court and before the jury, expressly waived the introduction of affirmative proof by the state."

The motion for a new trial, alleging such grounds, was not sworn to by appellant nor any other person; consequently it would not have properly raised the question that no evidence was adduced on the trial, that not being a matter shown by the record, the judgment record evidencing that evidence was heard; it reciting:

"A jury was duly impaneled and sworn, who, having heard the indictment read, the defendant's plea of guilty thereto, and having heard the evidence submitted," etc., returned into open court a verdict finding appellant guilty.

But when appellant reserves a bill of exception to the action of the court in overruling his motion for a new trial, the trial judge certifies, over his signature, that no evidence was heard, saying the appellant in open court in person waived the introduction of evidence. So the sole question presented is, Could a person who is on trial, being sane, waive the introduction of proof? It has often been held that an admission by the person on trial in open court of a fact renders it unnecessary to prove that fact. *Kearse v. State*, 68 Tex. Cr. R. 689, 151 S. W. 827.

[1, 2] Appellant relies on article 566 of the Code of Criminal Procedure, which provides that when a plea of guilty is entered and the punishment is not absolutely fixed by law and beyond the discretion of the jury to graduate, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereon. It is true there are many cases holding that the provisions of this article are mandatory; that it is not intended solely for the benefit of the defendant, but is also intended to protect the interests of the state by preventing aggravated cases from being covered up by a plea of guilty, and so allow the criminal to escape with the minimum punishment. *Josef v. State*, 33 Tex. Cr. R. 251, 26 S. W. 213, and cases cited in *Vernon's Procedure* under this article on page 289. But in none of those cases is the question of "waiver" raised, discussed, or decided.

While article 566 reads as above stated, yet we have another article of the Code (article 22), which provides:

"The defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case"

—and the provisions of this article of the procedure are as binding upon courts as is article 566. They were both enacted as a part of the original Code of this state, and brought forward in each codification.

If the appellant could waive the introduction of evidence, the record discloses he did so in person specifically when his attention was called to the matter, for the court says in the same paragraph where he certifies no evidence was introduced:

"The defendant in person in open court expressly waived the introduction of affirmative proof by the state."

He is now in no position to complain, for the jury assessed the lowest penalty authorized by law, and the state's attorney must be held to have also waived the rights of the state in this proceeding. We might question the propriety of the trial court accepting such waivers, but when the court has done so and the record discloses that the appellant waived his rights under Article 566, as he was specifically authorized to do by article 22 of the Code, he cannot thereafter, after verdict is rendered, because the jury did not suspend his sentence, withdraw a waiver he solemnly entered into in open court. In *Hancock v. State*, 14 Tex. App. 401, Judge White says:

"Defendant agreed to the admission of the testimony, and but for his agreement, doubtless it would never have been offered in this shape. He cannot be heard to complain where he was a party to, and where his own action brought about, the very matter of which he complains. He could waive the presence of the witnesses if he so desired, and agree that if present they would swear as they had previously done. In fact, he could waive any right guaranteed him by the Constitution and laws, except the right of trial by jury."

The facts in the *Antonio Diaz Case*, 190 S. W. 498, are the same as in this case, the record being in the same condition, and for the reasons here stated it should also be affirmed.

DAVIDSON, J. (dissenting). In this as in the *Antonio Diaz Case* the condition of the record is substantially, if not exactly, the same. My Brethren put their affirmance on the ground that appellant expressly waived the introduction of testimony on the merits of the case, and cites the *Kearse Case*, 68 Tex. Cr. R. 689, 151 S. W. 827, as authority. The *Kearse Case* is not in point and has no bearing on the question here involved, nor does the case cited by Judge Harper in 14 Tex. App. 401, opinion by Judge White. I do not care to review those cases.

It will be noticed that in the case of *Diaz v. State* I wrote the opinion reversing it, following the statute and decisions in regard to pleas of guilty and the introduction of testimony in felony cases. This rule has been heretofore held mandatory, and the reasons are assigned in the authorities there cited. My Brethren wrote the opinion in the *Flores' Case* directly contradictory to what I wrote in the *Diaz Case*. I let the opinion as I had written it stand in the *Diaz Case*, but put at the bottom a short statement there found that I could not agree to the affirmance, but followed the decision in *Flores' Case* in the affirmance. The statute Judge Harper cites, that defendant may waive any matters guaranteed him by the Constitution except the right of trial by jury, is but an act of the Legislature. It ought not to be questioned that the Legislature cannot set aside any constitutional guaranties accorded the defendant, unless the Constitution expressly authorizes that body so to do. That the ac-

cused cannot waive other rights accorded him besides the trial by jury has been so long settled that it is not the subject of debate. I shall make only one suggestion: The Constitution guarantees in a felony case no man shall be tried for his life or liberty without an indictment having been previously presented by a grand jury. No court has held that a citizen of Texas can be tried without presentment of indictment by a grand jury in a felony case. Not only so, but it has been universally held that citizens convicted of crime have been released from the penitentiary because there was no indictment preferred; that is, the indictment presented was by a grand jury composed of more or less than 12 men; and it has also been held that such is not an indictment. It is also the law that an indictment is not a valid one unless it concludes "against the peace and dignity of the state." This, too, where the question was not raised until it reached the appellate court. The cases supporting this proposition are well understood, and have been in Texas, and everywhere, so far as the writer is aware, where the constitutional provision in regard to that matter is the same as it is in our Constitution. This came for thorough adjudication in *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 748. The statutes with reference to pleas of guilty in felony cases have been closely adhered to and strictly enforced. These statutes change several rules under our procedure with reference to ordinary cases. The general rule is that every citizen of Texas is presumed to be sane until appellant proves by a preponderance of evidence that he is insane. Under the statute pleas of guilty in felony cases the rule is reversed, and all the authorities hold that, where the statute so provides, the presumption shifts, and the accused is presumed insane, the state must show his sanity in order to sustain the plea of guilty. This statute travels upon the idea that no rational man would deliberately admit that he was guilty of a felony. Under such circumstances the law assumes he would be insane. Not only is this so, but the judgment must show his sanity as an adjudicated fact, and that he has not been induced to make this confession of guilt by any hope of pardon or other matters that would look to an infamous punishment. These statutes with reference to pleas of guilty under such circumstances do not stop here. They most solemnly provide that in all cases under such plea the evidence shall be introduced, unless it is one of those instances

where the punishment is fixed absolutely without graduation or gradation. The majority admit this has always been held mandatory, but because the defendant may waive any right accorded him except trial by jury, therefore the waiver of his right covered everything, except trial by jury; therefore he can be sent to the penitentiary under graduated punishment by waiving the introduction of testimony. I cannot agree with this proposition. It is not only in the face of the jurisprudence and adjudicated cases, but contrary to the statute. I do not care to follow this matter further. I have said this much in addition to what I wrote in the *Diaz Case*. The judgment ought to be reversed and remanded.

For these reasons I respectfully enter my dissent in this case and apply it as well to the *Diaz Case*.

DIAZ v. STATE. (No. 4225.)

(Court of Criminal Appeals of Texas. Oct. 25, 1916.)

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Antonio Diaz was convicted, and appeals. Affirmed.

Pope & Sutherland, of Corpus Christi, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was under a plea of guilty for violating the local option law, the jury awarding the maximum penalty of three years' confinement in the penitentiary.

No evidence was introduced during the trial of the case except with reference to the suspended sentence plea. The failure of the state to introduce evidence in regard to the merits of the case is shown by a bill of exceptions. The trial judge signs this bill with the statement that the defendant waived the introduction of testimony. This does not meet the requirements of the statute. This statute is held to be mandatory and evidence must be introduced unless the penalty is fixed in a definite and in certain amount or number of years. Wherever the punishment is graduated from a minimum to a maximum term, evidence must be introduced. This statute was enacted as well for the benefit of the state as for the defendant. This question has been discussed so often we deem it unnecessary to go into it further. The authorities will be found collated in Mr. Branch's *Crim. Law*, § 677; Branch's *Ann. Penal Code*, p. 325, and Vernon's *Ann. Statutes*, vol. 2, p. 289.

The judgment is affirmed.

I wrote this opinion, but my Brethren do not agree and write their reasons in *Flores' Case*, 190 S. W. 496 (No. 4226), this day decided. I cannot agree with them, but do not care to write at length in either case. I dissent in *Flores' Case*, and write this on authority of *Flores' Case*.

MARION v. STATE. (No. 4284.)

(Court of Criminal Appeals of Texas. Nov. 29, 1916. On Motion for Rehearing, Dec. 27, 1916.)

1. RAPE \Leftrightarrow 52(1)—EVIDENCE.

Evidence of complaint and condition of victim, a child of eight, held sufficient to sustain conviction of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76; Dec. Dig. \Leftrightarrow 52(1).]

2. CRIMINAL LAW \Leftrightarrow 814(10)—QUESTION FOR JURY—INSANITY.

In rape trial, refusal to submit to the jury accused's insanity from use of drugs was proper; there being no evidence thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. \Leftrightarrow 814(10).]

3. CRIMINAL LAW \Leftrightarrow 814(17)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

In rape trial, requested instruction on circumstantial evidence was properly refused, although victim did not herself testify, where there was *res gestæ* testimony of condition and complaint of the victim, this being positive testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833, 1979; Dec. Dig. \Leftrightarrow 814(17).]

4. CRIMINAL LAW \Leftrightarrow 665(1), 713—SEGREGATING WITNESSES.

In trial for rape of accused's daughter, it was proper for the court to place all his children in custody of an officer, and allow no communication with them, nor comment to the jury by accused's counsel on such action; it all occurring out of the presence of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520, 1535, 1663, 1678; Dec. Dig. \Leftrightarrow 665(1), 713.]

5. WITNESSES \Leftrightarrow 244—LEADING QUESTIONS.

In trial for rape of accused's daughter, it was not error to permit the prosecutor to ask other children of accused leading questions and call their attention to their written and signed testimony before the grand jury and also before the county attorney; these witnesses being hostile to the state and very favorable to accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 848; Dec. Dig. \Leftrightarrow 244.]

6. CRIMINAL LAW \Leftrightarrow 1169(5)—HARMLESS ERROR—ADMISSION OF EVIDENCE—EFFECT OF WITHDRAWAL.

In rape trial, error in admitting answer to question whether the victim had ever been mistreated before as she was on the occasion of the crime was not reversible, where the court later expressly withdrew all such testimony and charged the jury to entirely disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8141; Dec. Dig. \Leftrightarrow 1169(5).]

7. RAPE \Leftrightarrow 48(2)—EVIDENCE—RES GESTÆ.

In statutory rape trial, testimony of a neighboring woman, called in after the commission of the crime, that the victim told her who the party was who caused her injury, but not stating who this was, was proper; the declaration of the victim at that time not being *res gestæ*.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 68; Dec. Dig. \Leftrightarrow 48(2).]

8. WITNESSES \Leftrightarrow 340(3)—CHARACTER—EVIDENCE.

In rape trial, evidence of misconduct of witness for the state was irrelevant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1121; Dec. Dig. \Leftrightarrow 340(3).]

9. CRIMINAL LAW \Leftrightarrow 726—COMMENT OF COUNSEL.

In trial for rape of accused's young daughter, where accused's counsel commented on failure to make the victim a witness, the prosecutor was justified in stating that the jury could see why she was not called from the fact that her little brother, as witness for the state, was caused to change his testimony and swear falsely by his father's influence; it appearing that the victim was under the same influence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. \Leftrightarrow 726.]

On Motion for Rehearing.

10. CRIMINAL LAW \Leftrightarrow 366(1)—EVIDENCE—RES GESTÆ.

Where victim of rape does not herself testify, testimony of *res gestæ* statements by her are not inadmissible, as being secondary or inferior evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 811; Dec. Dig. \Leftrightarrow 366(1).]

11. WITNESSES \Leftrightarrow 370(2)—HOSTILITY—EVIDENCE.

Upon trial for rape of accused's daughter, testimony not tending to show hostility of a daughter, testifying for the state, against accused, but merely such witness' hostility to another daughter, was irrelevant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. \Leftrightarrow 370(2).]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Hodge Marion was convicted of rape, and appeals. Affirmed.

W. H. Fears and Geo. Hines, both of Waxahachie, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the rape of his own little daughter, Lella, 8 years of age, and his penalty was assessed by the jury at death.

[1] The uncontradicted testimony shows that appellant lived in a small house in Waxahachie with three of his children, a daughter Nellie, who was about 12 years of age, his son Carl, about 10 years old, and Lella, the assaulted girl, about 8 years old. The two little sisters slept in a bed in one room, and appellant and his little boy in another bed in an adjoining room. He had been separated from his wife for several years. On the morning of June 21, 1916, Nellie got up about 5:30, leaving Lella in the bed, went into the kitchen and made a fire in the stove to cook breakfast. Appellant sent his little boy to town to get bread. As soon as he left, appellant called Lella to him. Nellie said, as she was not in the room, she didn't know that Lella went to her father, but she thought she did. In a few minutes thereafter Lella came to Nellie, crying; told Nellie to get her clothes for her, which she did, and put them on her. When putting them on, she saw blood running from the privates of Lella down her leg clear onto the floor. She saw that the blood was coming from her privates. She asked Lella who had done that, and Lella told her her papa. The

child bled profusely, saturating her own clothes, so that Nellie had to change them a time or two. She put her in bed, and the blood from her saturated the sheet. Fresh blood was also found on the sheet on appellant's bed that morning. As soon as appellant and his son got their breakfast, they hitched up a buggy and left the house. Soon afterwards Nellie called in some of the neighbor ladies to help her with the child. They did help her. One of them testified that in bathing the child's private parts, she found on the outside of her privates other substance than blood. It was colored white (evidently semen). They had Nellie to phone for a doctor. The doctor soon arrived, and, making a hasty examination, saw that the little child had been raped, and he testified she bled from her privates profusely. Later, in connection with another physician, he examined her thoroughly, and found that her privates had been horribly ruptured. He had to take eight stitches in sewing her up. Shortly after the rape was perpetrated, appellant was arrested. Fresh blood was found on the front of his drawers and his front shirt tail. The state introduced appellant's written confession, in which he denied raping his daughter, stating she "came to my bed this morning and told me she hurt herself on the picket fence. She had not been out there this morning that I know of." He said he did not know how the blood got on his bed nor on his drawers and shirt tail; that he was not drinking the night before when he went home. The evidence unquestionably was sufficient to without doubt establish appellant's guilt. He himself did not testify. Neither did the assaulted girl, Lella, testify.

[2] Appellant complained that the court should have given his charge submitting the question of his insanity to the jury, caused, as he claimed, by the continued and recent use of cocaine or of cocaine with whisky. The court refused the charge, on the ground that the evidence raised no such issue. We think the court was correct. The evidence raised no such issue which would have authorized or required the court to submit such issue to the jury. In fact, there was no evidence that he had recently taken any cocaine or whisky so as in any way to make him insane therefrom at the time.

[3] Neither did the court err in refusing to give a charge on circumstantial evidence. The testimony of Nellie to the *res gestæ* of the transaction was positive testimony, taking the case out of the rule of depending solely on circumstantial evidence. *Kenney v. State*, 79 S. W. 817, 65 L. R. A. 316; *Croomes v. State*, 40 Tex. Cr. R. 675, 51 S. W. 924, 53 S. W. 882; *Thomas v. State*, 47 Tex. Cr. R. 534, 84 S. W. 823, 122 Am. St. Rep. 712; *Neely v. State*, 56 S. W. 625; *Flores v. State*, 79 S. W. 809; *Hunter v. State*, 54 Tex. Cr. R. 226, 114 S. W. 124, 130 Am. St.

Rep. 887; *Cook v. State*, 22 Tex. App. 525, 3 S. W. 749. And this notwithstanding Lella, the assaulted girl, did not herself testify. In addition, we think the positive facts proven by Nellie were in such close juxtaposition, showing that appellant raped Lella, as to be equivalent to direct testimony, so as to make it unnecessary to charge on circumstantial evidence. *Holt v. State*, 9 Tex. App. 582; *Crews v. State*, 34 Tex. Cr. R. 543, 31 S. W. 373; *Cabrera v. State*, 56 Tex. Cr. R. 141, 118 S. W. 1054; *Bass v. State*, 59 Tex. Cr. R. 191, 127 S. W. 1020; 2 Branch's An. P. C. pp. 1039, 1040; White's An. C. C. P. § 813, subd. 3, and authorities collated by Judge White.

[4] Appellant has some complaints to the action of the trial judge in placing appellant's small children, Nellie, Carl and Lella, into the custody of one of the officers of the court, during the trial with instructions to permit no one to talk to either of them about the case except in the presence of an officer, and in not permitting appellant's counsel, in argument to the jury, to state and comment on this action of the court, it all occurring out of the presence and hearing of the jury. As explained by the court in allowing his bills, this action by the court presents no error. On the contrary, the action of the court was commendable.

[5] Appellant has some other bills, complaining of the action of the court in permitting the county attorney to ask Nellie, and Carl also, what might be termed "leading questions" and in calling their attention to their testimony in writing, and signed by them before the grand jury and also before the county attorney. All these matters, as explained by the court in his qualification of appellant's bills, which were accepted by him and about which there seems to be no question, show no error. Each of these witness'es, as explained, was hostile to the state, and very much in favor of their father—so much so that it is clear each of them did all they could to avoid testifying to the facts when against their father and in favor of the state. It is unnecessary to cite the authorities on this question.

[6] The state asked Nellie, in substance, whether or not Lella had ever been mistreated before in the way she was on this occasion. It seems the state was undertaking to show that this was a fact, and that appellant was the cause thereof on the previous occasion. At the time this question was asked Nellie, appellant objected to it, and, after she testified, moved to strike it out, but the court declined to do so at that time, in effect holding that, unless later connected up, he would exclude it. After the testimony was concluded, the court expressly withdrew all of it from the jury, and charged them positively to consider it for no purpose whatever. As explained by the court in the bills, this matter presents no reversible error, as this

court has many times held. *Miller v. State*, 31 Tex. Cr. R. 636, 21 S. W. 925, 37 Am. St. Rep. 836; *Hatcher v. State*, 43 Tex. Cr. R. 239, 65 S. W. 97; *Robinson v. State*, 63 S. W. 809; *Trotter v. State*, 37 Tex. Cr. R. 468, 36 S. W. 278; *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793; *Morgan v. State*, 31 Tex. Cr. R. 1, 18 S. W. 647; *Sutton v. State*, 2 Tex. App. 342; *Roberts v. State*, 48 Tex. Cr. R. 210, 87 S. W. 147; *Miller v. State*, 185 S. W. 38.

[7] The court did not err in permitting Mrs. Franklin, the neighbor lady whom Nellie called in to assist her with Lelia, to testify that Lelia told her who the party was who had caused her injury. The court did not permit the witness to tell who Lelia said this was, because her declaration at that time was not *res gestæ*. See cases collated in 2 Branch's An. P. C. p. 1001.

[8] Appellant complained of the action of the court in refusing to permit Nellie's older sister, Genie, to detail at considerable length, as shown by the bill, Nellie's conduct with one Feray. This, as we think, was irrelevant to any legitimate issue in the case. It is unnecessary to further state or discuss it.

[9] The record in many ways shows that the assaulted girl Lelia would neither testify nor talk to nor tell the attorneys, for either defendant or the state, the facts, or anything she would testify; in effect that she would not testify at all. Neither side introduced her or placed her on the stand. Under the circumstances, the statement by the county attorney in argument to the jury, to the effect that they could see the reason why he did not put her on the stand, as the jury easily saw, when he put the little boy on the stand, how he, owing to the influences of his father, was caused to change his testimony and attempt to clear his father by swearing falsely, presents no reversible error. An examination of the boy's testimony clearly justified such an inference as the county attorney stated shown above as to him, and, as stated by the county attorney, the jury doubtless could not help but see the reason she was not placed on the stand. The appellant attempted to make capital of the fact that the state did not place the girl Lelia upon the stand.

We have thoroughly considered the record in full and all of appellant's assigned errors. We are forcibly impressed with the fact that appellant had a fair and impartial trial; that his guilt was established without any doubt, and that his outraging his little innocent 8 year old daughter, horribly mangling her person in ravishing her, justified the jury to assess the death penalty; and, as the matters are presented, we cannot do otherwise than affirm this judgment, which is ordered.

The judgment is affirmed.

HARPER, J., absent.

On Motion for Rehearing.

PRENDERGAST, P. J. [10] Appellant now contends that the *res gestæ* statements of Lelia, testified to by Nellie, was secondary evidence, and inadmissible because the child Lelia herself did not testify, contending that her testimony would have been the best and primary evidence, and that Nellie's was secondary or inferior. He is mistaken in his contention. *Res gestæ* testimony is not secondary or inferior testimony. Presiding Judge White, in *Cook v. State*, 22 Tex. App. 526, 3 S. W. 749, says: "This rule as to *res gestæ* overrides all other rules known to the law governing the admissibility of testimony;" and in that case held that the *res gestæ* declarations of the wife were admissible against her husband, notwithstanding the statute which prohibits the wife from testifying against the husband. *Robbins v. State*, 73 Tex. Cr. R. 367, 166 S. W. 529; *Shamblin v. State*, 75 Tex. Cr. R. 498, 171 S. W. 718. The reason the child Lelia did not testify was explained in the original opinion.

[11] The offered testimony of Genie Marion which was excluded by the court did not show, or tend to show, any hostility, bias, or otherwise, affecting Nellie against her father. It would only have tended to have shown that she may have had some animosity against her sister Genie, but under no phase of the case was it admissible to show that Nellie had any feeling at all against her sister Genie. That had nothing to do with any issue in the case.

We have again examined the case thoroughly; and, as explained in the original opinion, the argument of the county attorney objected to, we are still of the opinion, showed no error against appellant, and we are of the opinion still that the testimony was not of sufficient force to show, or tend to show, that appellant was insane at or about the time he committed the alleged act. Therefore the court's action in refusing to charge on insanity was undoubtedly correct, and we think there can be no question but that under the law it was neither necessary nor proper for the court to have given a charge on circumstantial evidence.

The motion is therefore overruled.

CITY OF FT. WORTH v. REYNOLDS. (No. 8454.)

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 28, 1916. Rehearing Denied
Dec. 2, 1916.)

1. MUNICIPAL CORPORATIONS — §865(2)— DEBTS—PROVISION FOR PAYMENT—CONSTITUTION—"DEBT."

Where a city, to secure lands for a reservoir, contracted to pay the owner a fixed price per acre, and, if another owner secured a fixed price or more in condemnation proceedings, to pay an additional price per acre, but it failed to do so, and the landowner sued, if his petition

presented only an action on the contract to recover the excess price, the sum sued for was a "debt," within the meaning of Const. art. 11, §§ 5, 7, providing that no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest and create a sinking fund.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1837; Dec. Dig. ¶ 865(2).]

For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. PLEADING ¶ 212—DEMURRER—WAIVER.

In a landowner's suit against a city to recover the price of land sold the city for reservoir purposes and to foreclose an implied lien, where the petition did not affirmatively show that no provision had been made by the city, to provide for plaintiff's debt, when it was created, as required by Const. art. 11, §§ 5, 7, and the city's general demurrer was not called to the attention of, or acted upon by, the court below, the demurrer will be held to have been waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 521-524; Dec. Dig. ¶ 212.]

3. PLEADING ¶ 433(2)—CONSTRUCTION AFTER VERDICT AND JUDGMENT.

After verdict and judgment for plaintiff, defendant having waived its demurrer to plaintiff's petition, the petition should receive the most liberal construction, and should be held sufficient if its terms are broad enough to support recovery on any theory of facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1454, 1455; Dec. Dig. ¶ 433(2).]

4. ESTOPPEL ¶ 62(6)—VENDOR'S LIEN—ENFORCEMENT AGAINST CITY.

Where a city, to acquire lands for a reservoir, purchased certain lands from plaintiff, but failed to pay part of the purchase money as agreed, the city could not keep and use the land for its own benefit and profit, and yet repudiate its obligation on the ground that its promise to pay was illegal, because, in creating the debt, it did not provide for its payment as required by Const. art. 11, §§ 5, 7.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 153; Dec. Dig. ¶ 62(6); Municipal Corporations, Cent. Dig. §§ 682, 917.]

5. CONTRACTS ¶ 138(3) — ILLEGALITY—RECOVERY OF PROPERTY.

Where property, real or personal, has been acquired by means of a contract forbidden by constitutional or legislative enactment, or otherwise unauthorized, the vendor, while he will be denied an enforcement of the illegal contract, may recover the specific property, in all cases where it can be clearly identified, by a return of all, if anything, that he may have received by virtue of the contract of sale.

[Ed. Note.—For other cases, see Contracts, Century Dig. §§ 688, 689; Decennial Dig. ¶ 138(3).]

6. VENDOR AND PURCHASER ¶ 280(1)—ENFORCEMENT OF LIEN—PLEADING—PRAYER FOR RELIEF.

In a landowner's suit against a city to recover the unpaid portion of the price of land sold it for reservoir purposes and to foreclose an implied lien, where plaintiff's petition, in addition to the prayer for specific relief, prayed "for all other and further relief, both legal and equitable, to which he may be entitled, both general and special," the prayer was broad enough to cover any relief, both legal or equitable, to which the plaintiff was entitled under the facts alleged and proven.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 784, 785, 789; Dec. Dig. ¶ 280(1).]

7. VENDOR AND PURCHASER ¶ 254(1)—IMPLIED LIEN.

In the absence of distinct waiver, equity raises a lien by implication in favor of a vendor to secure unpaid purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 634, 641, 648, 649, 651; Dec. Dig. ¶ 254(1).]

8. MUNICIPAL CORPORATIONS ¶ 1038—FORCED SALE OF PROPERTY—CONSTITUTION.

Where a city purchased land for a reservoir, failed to pay part of the price, foreclosure of a vendor's lien on part not used was not in conflict with Const. art. 11, § 9, providing that all property owned by a city for public purposes shall be exempt from forced sale, since, as between the city and the vendor, the beneficial title in equity never passed, and the legal title, if any, acquired by the city, was held in trust for the benefit of the vendor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2211; Dec. Dig. ¶ 1038.]

9. VENDOR AND PURCHASER ¶ 98—RESCISSI—TENDER BACK OF CONSIDERATION—PARTIAL RESCISSI.

Ordinarily a vendor of land cannot rescind the contract in whole or in part without tendering back all paid him by the buyer, and ordinarily a partial rescission and recovery of part of the land cannot be had.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163-165; Dec. Dig. ¶ 98.]

10. VENDOR AND PURCHASER ¶ 285(3)—PARTIAL RESCISSI—VENDEE'S RIGHT TO COMPLAIN.

Where a city purchased land for a reservoir, but failed to pay part of the price and to use part of the land, so that the lands subject to the seller's lien were not in the city's actual use and could be detached from the lands in actual use without material injury to the uses originally designed, the city could not complain of judgment foreclosing the seller's implied lien on such part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 803; Dec. Dig. ¶ 285(3).]

11. EMINENT DOMAIN ¶ 75—CONDEMNATION OF LAND FOR RESERVOIR—PAYMENT.

Private lands cannot be taken from the owner by a city for public use as a reservoir by an exercise of the right of eminent domain without paying therefor at the time of taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199; Dec. Dig. ¶ 75.]

12. VENDOR AND PURCHASER ¶ 280(1), 285(2)—FORECLOSURE OF LIEN—DESCRIPTION OF LAND.

In suit by the vendor of lands to a city, which failed to use part of them for a reservoir and to pay part of the price, to foreclose his implied lien on the lands not used, the description of the lands, in the petition and judgment foreclosing lien, as all "above high-water mark," was sufficient, the surveys being named and the approximate number of acres in each given; the term being well understood and easily ascertainable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 784, 785, 789, 800-802; Dec. Dig. ¶ 280(1), 285(2).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Suit by George T. Reynolds against the City of Ft. Worth. From a judgment for plaintiff, defendant appeals. Judgment affirmed, with modification.

T. A. Altman and B. L. Agerton, both of Ft. Worth, for appellant. Stephens & Miller and Sidney L. Samuels, all of Ft. Worth, for appellee.

CONNER, C. J. Briefly stated, George T. Reynolds instituted this suit on July 6, 1915, seeking to recover \$6,637.20, with interest at 6 per cent. per annum from January 20, 1914, and to foreclose an implied vendor's lien upon parts of certain tracts of land located in Tarrant county, Tex., which it was alleged the city had purchased from the plaintiff on November 22, 1911. The plaintiff alleged that he and one D. H. Lucas were the owners of the parcel of land composed of a number of different surveys aggregating 663.72 acres, which the city desired to acquire for the purpose of using and appropriating the same in the establishment of a reservoir to supply the inhabitants of the city of Ft. Worth with water, and that on said November 22, 1911, the plaintiff and D. H. Lucas, joined by the wife of D. H. Lucas, executed a conveyance to the city of Ft. Worth to said 663.72 acres of land for a recited consideration of \$26,584.80, or \$40 per acre, which was paid in cash at the time; that at the time of this conveyance plaintiff and Lucas were insisting that the land was worth \$50 per acre, but that it was finally agreed in writing, contemporaneously with said deed of conveyance, that \$10 per acre additional should be paid for said land, in event that one Nettie Morgan should secure, on the final termination of a condemnation suit instituted by the city against her, \$50 per acre or more for the land involved in said condemnation suit. It was further alleged that Nettie Morgan secured a final award in the condemnation suit against her of \$65 per acre for her land on June 20, 1914, whereupon, by the terms of the agreement stated, the said additional sum of \$10 per acre became at once due and payable, and that the plaintiff had, by due assignment, acquired all interest of said Lucas in the agreement referred to. The plaintiff further alleged that a part only of the land conveyed by himself and Lucas to the city was covered by the waters of the defendant's public reservoir, and the plaintiff sought judgment for his debt with a foreclosure of an implied vendor's lien upon such parts of the land so conveyed as are not covered by water.

The defendant in answer presented a general demurrer and a general denial, and pleaded specially that the lands described in plaintiff's pleadings had been purchased for the purpose of use for public municipal purposes, and were essential and necessary for the erection, maintenance, and protection of the reservoir and system of public waterworks for the city of Ft. Worth. This special answer, among other things, was denied by the plaintiff in a supplemental petition,

and a contrary allegation was made, to the effect that the lands upon which the plaintiff sought to foreclose the vendor's lien are not in any way used by the defendant for the purposes set out in the answer, and that there is no necessity for the defendant to have owned or used said lands for the maintenance of its reservoir, and that the foreclosure of the lien will not, in any way, interfere with the maintenance of the reservoir or system of waterworks in the city.

The case was tried before the court without a jury, and on October 14, 1915, the court rendered a judgment in favor of plaintiff against the defendant for the sum of \$7,177.02, and decreed a foreclosure of the vendor's lien upon all portions of the tracts of land described in the plaintiff's petition which lie above the high-water mark of the reservoir known as Lake Worth, comprising approximately 250 acres.

The court filed his conclusions of fact and of law, from which it appears that the conveyance from the plaintiff, Reynolds, and Lucas to the city, dated November 22, 1911, is a deed of general warranty, reciting as the total consideration the sum of \$26,584.80, cash in hand paid. The deed does not contain any provision reserving a vendor's lien, and makes no reference to the agreement which was made contemporaneously with it. It was admitted that the plaintiff's allegations relating to the outcome and final disposition of the Morgan case were true, and the evidence is without contradiction to the effect that the defendant city erected a dam near the land purchased from the plaintiff, and that the same was completed in July, 1914; that the work of construction thereon had been in continuous progress for two or three years prior to that date; that the lands described in the plaintiff's petition were acquired by the defendant city for a reservoir to be used in connection with the general water supply for all purposes of the city; that water from the reservoir covered part of the land on June 20, 1914, and perhaps as early as 1913. The testimony is also without contradiction that the plaintiff knew, when he conveyed the land to the defendant city that the defendant was purchasing it to be used for the purpose of erecting, maintaining, and protecting a reservoir and water system for the city of Ft. Worth. All of the land purchased by the defendant from the plaintiff is either covered by the waters of the reservoir, or drains directly into it, and is adjacent and contiguous thereto. Among other things, however, the court specially found that the portions of land upon which plaintiff was awarded the vendor's lien (about one-third of the whole) "lie entirely above the high-water mark of said reservoir as the said reservoir now exists," and that the foreclosure of the lien as prayed for by the plaintiff "will not materially interfere with the use by the city of Ft.

Worth of Lake Worth as a reservoir to supply water to the inhabitants of said city and for the extinguishment of fires."

Appellant's first assignment of error is to the alleged action of the court in refusing to sustain appellant's general demurrer to the appellee's petition, in that, as alleged, the cause of action appears to be based upon a contract made by a municipal government to pay money, and the petition does not allege a compliance upon the part of the city with sections 5 and 7 of article 11 of the Constitution of the state, nor is it alleged that the money to be paid under said contract had been provided for, or was for a current expense of the city government. The sections of the Constitution mentioned in the assignment (sections 5 and 7, article 11) provide, among other things, that:

"No debt shall ever be created by any city * * * unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon."

[1] And if the plaintiff's petition must be construed as presenting alone an action upon the contract mentioned in the petition to recover the sum due by force of its terms, we would feel impelled, contrary to appellee's contention, to hold that the sum sued for was a debt within the meaning of the cited sections of the Constitution, and that hence the plaintiff's petition was subject to a general demurrer, for the want of necessary allegations bringing the case within those constitutional provisions. See *McNeal v. Waco*, 89 Tex. 83, 33 S. W. 322; *Biddle v. City of Terrell*, 82 Tex. 335, 18 S. W. 691; *Kuhls v. City Laredo*, 27 S. W. 791; *Rogers National Bank v. Marion County*, 181 S. W. 884; *City of Austin v. McCall*, 95 Tex. 565, 576, 68 S. W. 791; *Ault v. Hill County*, 102 Tex. 335, 116 S. W. 359; *Berlin Iron-Bridge Co. v. City of San Antonio*, 60 S. W. 408.

[2] But in this particular case, and as presented, we are of opinion that the assignment must be overruled. The record fails to show that the general demurrer was called to the attention of, or acted upon by, the court below. Ordinarily, at least, under such circumstances, it is held that the demurrer is waived. See *Chambers v. Miller*, 9 Tex. 236; *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572; *Railway v. Rollins*, 89 S. W. 1099; *Hales v. Peters*, 162 S. W. 386; *Texas Co. v. Earles*, 164 S. W. 28; *Railway v. Owens*, 166 S. W. 412. No sufficient reason occurs to us why this application of the doctrine of waiver should not be given effect. The petition on its face does not affirmatively show that no provision had been made by the city to provide for the debt of the plaintiff at the time the debt was created, as required by the Constitution. There is a mere absence of allegations to such effect. The fact may have existed notwithstanding such want of allegations. If so, the petition could have been perfected

by amendment, which, had the court's attention been called to the demurrer, the plaintiff might have done. The case, therefore, is distinguishable from those where the vice or illegality which is sufficient to defeat the action is shown to exist by the very terms of the pleading. In such later case it doubtless should be held that the defect in the pleading is fundamental in character, and can be urged at any stage of the trial.

[3] But if it must be said that the error complained of in the assignment is fundamental, and one that cannot be waived, it must certainly be true, in view of the waiver and after verdict and judgment, that the plaintiff's petition should receive the 'most liberal construction, and if its terms are broad enough to support a recovery in behalf of the plaintiff upon any theory of the facts, it should be held to be sufficient. See *Townes' Texas Pleading*, pp. 402-405, and cases cited.

[4] So construed, we think the plaintiff's petition shows facts entitling the plaintiff to a recovery, even though insufficient to entitle him to the precise relief specifically sought in his prayer. It therefrom appears that the defendant city, seeking to acquire lands for the purpose of establishing city waterworks, purchased from the plaintiff certain lands later occupied and used by the city in the accomplishment of its purpose; that a part of the purchase money as agreed upon at the time has not been paid, and that the lands upon which plaintiff sought to enforce a lien are not materially necessary to the establishment or maintenance of the city waterworks. Under such circumstances, it seems manifestly inequitable and unjust to permit the city to keep and use for its own benefit, and to its own profit, property not necessary for a municipal purpose and secured by a promise to pay therefor, and at the same time extend to the city the right to repudiate its obligation on the ground that its promise to pay was illegal.

[5] The obligation to be just and to do right rests upon all persons, natural or artificial, and hence there is a well-recognized line of authorities, which we approve, holding that in cases where property, real or personal, has been acquired by means of a contract forbidden by some constitutional or legislative enactment, or otherwise unauthorized, the vendor, while he will be denied an enforcement of the illegal contract, may recover the specific property in all cases where it can be clearly identified, by a return of all, if anything, that he may have received by virtue of the contract of sale. Thus, it was held by the Supreme Court of the United States, in the case of *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378, that where land was conveyed to a county for a poorhouse and farm under an agreement made by the county commissioners in excess of their authority to pay for it at a definite time, the

grantor on default of payment was entitled to a decree that the county surrender possession and reconvey to him, unless payment should be made of the amount due therefor within such reasonable time, to be fixed by the court, as would be necessary to raise the same by taxation. Numerous authorities were cited in support of the decision. In the case of *Municipal Security Co. v. Baker County*, by the Supreme Court of Oregon reported in 39 Or. 396, 65 Pac. 369, a like ruling in principle was made. While it was held in the later case that any voluntary agreement, entered into by a county involving certain liabilities after the boundary of its power to make contracts had been reached, was *ultra vires*, and that the receipt of benefits under the contract afforded no ground for invoking even an implied liability to pay any compensation therefor, yet that:

"Notwithstanding the incapacity of a municipal corporation, under such circumstances, renders its contracts unenforceable, those who have parted with their property in dealing with it during its interval of quiescence are not wholly remediless; for, when such property can be identified, the party entitled thereto may recover it by placing the other in statu quo; the rule being that neither party will be heard to allege the invalidity of a transaction which is simply *ultra vires*, while holding the fruits thereof."

This case also cites numerous authorities, to which may be added *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; *Rankin v. Emigh*, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915; *Railway v. Railway*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; 7 R. C. L. para. 679, 680.

[6] The able city attorney, who appeared for appellant in this case, on submission substantially conceded the law as last above stated, but it was insisted that the plaintiff sought no such relief, and that in no event was a court authorized to foreclose a lien because of section 9, art. 11, of the Constitution, which declares, among other things, that all property owned and held by a city for public purposes only, or devoted exclusively to the use and benefit of the public, "shall be exempt from forced sale." But in addition to the prayer for the specific relief sought, the plaintiff's petition concluded with a prayer "for all other and further relief, both legal and equitable, to which he may be entitled, both general and special." The prayer, therefore, is broad enough to cover any relief, legal or equitable, to which the plaintiff is entitled under the facts alleged and proven.

[7] Under our law, in the absence of a distinct waiver, and none is shown in this case, equity raises a lien by implication in favor of a vendor to secure unpaid purchase money, and a special provision in the charter of the appellant city authorizes the city to create mortgage liens.

[8] As to the effect of section 9, art. 11, of the Constitution above cited, as will be

seen by reference thereto, it is to be observed that it only applies to property owned by the city and devoted exclusively to the use and benefit of the public. And the theory of the cases holding that a corporation may be required to restore property acquired by virtue of a contract it was forbidden to make is that, until paid for, as between the city and the seller, the beneficial title in equity never passes, and that the legal title, if any, thus acquired is held in trust for the benefit of the vendor. If, therefore, a vendor in a given case is shown to be entitled to recover the whole property, a mere foreclosure of a lien on the whole, or a part thereof, cannot make any material difference, for it is, in effect, but an indirect way of divesting the title and possession out of the unauthorized holder. When this effect can be given a decree of foreclosure, as we think it can here, as will hereinafter more fully appear, then no substantial or prejudicial conflict with section 9, art. 11, can reasonably be affirmed. We, therefore, are in no event inclined to say that no relief whatever can be granted the plaintiff under the allegations of his petition.

[9] It remains, however, to be determined whether the relief actually adjudged can be supported, for the judgment of the trial court is assailed on much the same grounds as has been the plaintiff's petition. It is clear, however, that the agreement on the part of the city was made as alleged, and that the city received and retained the land conveyed without the payment of \$10 per acre as promised. Ordinarily, the plaintiff would not be entitled to rescind the contract, in whole or in part, without tendering back all that was paid by the city, and no such tender or offer was made by the plaintiff. Ordinarily, too, a partial rescission and recovery would not be upheld. *Grady v. Pruitt*, 111 Ky. 100, 63 S. W. 283; *Berlin Iron-Bridge Co. v. City of San Antonio*, 50 S. W. 408.

[10] But in the case before us we fail to see that the city can justly complain of the judgment on these grounds. The court clearly finds that the lands originally conveyed are severable, and that the lands subjected to the plaintiff's lien are not in the actual use of the city, and may be detached from the lands in actual use without material injury to the uses originally designed, and there is evidence to support these findings. It is not pretended that the lands so segregated and applied to plaintiff's uses exceed in value the unpaid purchase money that the city contracted to give. Nor has the city offered to return the entire tract upon the return of the money paid, nor does the city pretend that the lands actually under water and actually devoted to necessary public use are worth less than the amount paid at the time of the purchase. Moreover, the rights of the city are fully guarded. Upon the submission, appellee offered to waive, as will be

herein adjudged, any right to an execution against the property of the city generally, consenting to look alone to the property upon which the lien was foreclosed. If, therefore, the said property is worth more, and shall sell for more, than is due from the city by the terms of its agreement, the excess, under the form of the decree, will be paid to the city. Or the city may prevent the sale altogether by paying off the judgment below. And in this connection it may not be amiss to observe that while the plaintiff's pleadings, as already stated, fail to affirmatively so show, it is nowhere insisted by the city, either in its pleadings, evidence, or briefs, that at the time of its original purchase no fund existed out of which it could have paid, or could yet pay, all that it had promised, as required by sections 5 and 7 of the Constitution. The record rather suggests that such a fund did exist, for the city was at the time engaged by condemnation suits and otherwise in acquiring lands upon which to erect a reservoir sufficient to hold all the water necessary for the use of a large city.

[11] Such lands, under our Constitution and laws, could not be so taken for public use, at least by an exercise of the right of eminent domain, without paying therefor at the time of the taking, and it is hardly reasonable to suppose that the city had not made provision for the necessary funds before undertaking so large a work.

We also wish to further observe that, while it would, perhaps, have been on this phase of the case technically more regular under the authorities to have given the plaintiff a proportional part of the land, the method adopted by the court, so declaring and foreclosing a lien, is in the interest of the city, as hereinbefore shown, and at most but an indirect method of accomplishing the same thing, particularly in view of appellee's offer to restrict his recovery to the lands upon which the lien was foreclosed.

There is a further contention that the lands upon which the court foreclosed the lien are insufficiently described, both in the plaintiff's petition and in the judgment. In both, however, it appears that the lands are composed of several different surveys which are named; that the approximate number of acres of each survey is given; and all declared to be above "high-water mark."

[12] We do not feel willing to state that the description so given will be insufficient to enable an identification of the lands. The "high-water mark of lands" is a term well understood and easily ascertainable. Many of the large engineering structures and maritime questions require a determination of high water and tide lines, and in the case of the construction of reservoirs the high-water mark of impounded waters may be

determined by mathematical processes with at least approximate accuracy.

On the whole, we have concluded that the errors, if any, pointed out are more technical than substantial, and that all assignments of error should therefore be overruled, and the judgment affirmed upon the trial court's findings, which we approve, with the modification that no execution or other process for the enforcement of the judgment shall issue except such is necessary in the enforcement of the lien declared by the court below.

Affirmed.

LOESCH v. SUPREME TRIBE OF BEN HUR. (No. 8473.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 25, 1916. Rehearing Denied
Dec. 16, 1916.)

1. INSURANCE — BENEFIT INSURANCE — CONTRACT — CONSTRUCTION.

The ordinary rules and principles governing the construction of contracts would apply to the construction of a contract of benefit insurance, unless changed, modified, or abrogated by statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. ¶726.]

2. INSURANCE — FRATERNAL INSURANCE — WARRANTIES — FAMILY HISTORY.

As statements made with reference to family history cannot be held to be warranties and an insurance policy is to be construed most liberally in favor of the insured, where an applicant for a certificate of benefit insurance believes statements as to family history to be true, their falsity will not necessarily vitiate a certificate, stipulating that the truth of each shall be a condition precedent to any recovery issued on the faith of the answers.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶723(7).]

3. INSURANCE — FRATERNAL INSURANCE — WARRANTIES.

Where the constitution of a fraternal benefit society provided that the executive committee shall have full power and authority to revoke any beneficial membership and to cancel any certificate for fraud or misrepresentation in its procurement, or for any false answer made by an applicant, on notice to the applicant and hearing of charges in this respect, the warranties regarding family history, in an application for certificate, were intended to protect the society only against misrepresentation of facts material to the risk assumed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶723(7).]

4. INSURANCE — FRATERNAL INSURANCE — STATEMENT IN APPLICATION — NOTICE.

The fact that an applicant for a certificate of benefit insurance stated in her application that she had one sister dead would put the society, through its medical examiner, on notice as to the cause of said deceased sister's death.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ¶723(7).]

5. INSURANCE — FRATERNAL INSURANCE — EVIDENCE — SUFFICIENCY.

In an action on a certificate of benefit insurance, evidence held insufficient to show that it was not the family history that the insured's mother died of typhoid fever, that the applicant willfully concealed any knowledge with refer-

ence to the death of her sister, or to establish the suicidal death of the sister, or to show that the real facts, as disclosed by the evidence, would have been material if disclosed by insured or affected the risk assumed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2007; Dec. Dig. ¶819(2).]

6. INSURANCE ¶817(2)—BENEFIT INSURANCE—EVIDENCE—BURDEN OF PROOF.

In an action on a certificate of benefit insurance, the burden of proof was on the defendant to establish the alleged falsity of the answer of the insured in her application as to the cause of her mother's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2001; Dec. Dig. ¶817(2).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Suit by H. F. Loesch against the Supreme Tribe of Ben Hur. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Stanley Boykin, of Ft. Worth, for appellant. Ocie Speer and Marvin H. Brown, both of Ft. Worth, for appellee.

BUCK, J. The appellant sued the appellee upon a beneficiary certificate in the sum of \$2,000, issued on the life of his wife, deceased, Dollie Loesch. The beneficiary under the original policy was the son of Mrs. Loesch, Lester Lee Harris, but subsequently the appellant was made beneficiary instead. Upon suit being filed upon said policy, the defendant denied liability, and specially pleaded that certain alleged false statements had been made by the said Dollie Loesch in the application for said policy in answer to questions propounded by the medical examiner, and that such answers and representations were in the nature of warranties, and that, being false, they vitiated and made void any obligation based thereon entered into by defendant.

The application containing these questions and answers thereto was not attached to, and made a part of, the policy. The alleged false answers were: (1) To the effect that the applicant's mother had died at the age of 47 of typhoid fever, and was sick one month, and that her previous health was good; whereas, defendant alleged the truth to be that the mother of deceased died of cancer, and that she was an invalid for more than six months prior to her death. (2) That applicant was asked if she had a sister or sisters, and, if so, the age, or ages, of the living, and, if dead, the age at death, the cause of death, how long sick, and the previous condition of the health of deceased to which, defendant alleged, applicant answered that she had one sister living, and that her health was good; whereas, in truth and in fact she had one sister dead, who had died a short time prior to the making of the application for the beneficial certificate. (3) That applicant was asked if any member of her family or near relative had "ever committed, or at-

tempted to commit, suicide, or had consumption, raising of blood, rheumatism, insanity, cancer, gout, epilepsy, or other hereditary disease," to which applicant answered, "No;" whereas, it was alleged that in truth and in fact the deceased sister had died from the effects of poison administered with suicidal intent, and that applicant's mother had died, as aforesaid, of cancer.

It was alleged by defendant that if it had known that these answers were untrue and had known the facts to be as defendant alleged them to be, it would not have issued the certificate on the life of the deceased, Dollie Loesch; that said application, together with the constitution and by-laws of the defendant, Supreme Tribe of Ben Hur, constituted a part of the contract of insurance, and that the defendant had issued the policy, relying upon the literal truth of the answers to the questions as written.

Plaintiff, in a supplemental petition, without admitting that Dollie Loesch made any false or fraudulent answers in the application and medical examination, pleaded that the portion of the act of the Thirty-Third Legislature known as article 4830, and also article 4957, of the Revised Statutes, are each unconstitutional and void, for the reason that the subject expressed by said articles, and each of them, was not contained in the title and caption of the act of the respective Legislatures that passed the said laws, as provided by article 3, § 35, of the Constitution of Texas. The unconstitutionality of article 4830 was pleaded upon other grounds not necessary here to mention. It was further pleaded that, even though it should be conceded that in certain respects the answers of the deceased to the questions hereinabove set out were not literally true, and were in part a misstatement of the real facts, yet they were not material to the risk assumed, and therefore were not a sufficient basis for avoiding the policy.

A trial was had before a jury, and at the conclusion both parties requested a peremptory instruction, and the request of the defendant was granted, and plaintiff appeals.

[1] As we view the case presented by the pleading and proof, it is not incumbent upon us to determine (1) whether article 4948, Vernon's Sayles' Texas Civil Statutes is applicable to the character of policy here sued upon; (2) whether article 4830, under chapter 7, and under title "Fraternal Benefit Societies," is void for unconstitutionality, in that the exemption provided for in this article was not mentioned in the caption of the original act; (3) nor as to whether article 4957, Id., is void also, as being in contravention of article 3, § 35, of the Constitution of Texas. But we will discuss the questions raised without reference to the constitutionality or non of the last two mentioned articles, or the applicability of article 4948 to policies

issued by fraternal benefit societies. We think it can be safely stated that, even though it should be held that article 4948 has no application to this character of insurance policies, yet that the ordinary rules and principles with reference to construing contracts would apply, unless they have been changed, or modified, or abrogated by statute, and especially by statutory enactment with reference to fraternal benefit societies.

We will now take up and discuss each of the answers alleged to be false, made by deceased in her application; and, to make what we have to say the more intelligible, we will here insert question 23 and the answers thereto, as they appear in the application:

23. Family History. In the matter of family history, state the specific cause of death, especially when there may be a suspicion of consumption. Such general terms as "exposure," "general debility," "childbirth," "change of life," "effects of cold," "fever," etc., without explanation are not satisfactory. If the health of any living member of the family is stated as "fair," or "poor," state the nature of the ill health. If a doubt exists as to cause of death in any case, make a statement whether there was any suspicion of tuberculosis.

	Age if Living.	Condition of Health.	Age at Death.	Cause of Death.	How Long Sick.	Previous Health.
Father	68	Good				
Mother			47	Typhoid fever.	1 mo.	Good.
Brothers No. —	26	Good				
Sisters No. 1	22	Good				

It will be noted that the matters inquired about are under the title of "Family History," and that presumably the inquiry is expected to elicit information received from that source. It must be conceded that in the main the knowledge one has of the ages, state of health, cause of death, etc., of his relatives must be based upon information received from others, hearsay in its nature. Information as to the age of one's parents, or older brothers or sisters, or even of one's own age, is necessarily derived from information received from others. There is no evidence to show that Mrs. Loesch was present at the time of her mother's death, or knew of the nature, or the duration, of her last sickness, except as she was informed by those present. Nor is there any proof that it was not a part of the family history that her mother died of typhoid fever. Dr. Camp testified for the defendant that he waited upon Mrs. Draper, mother of deceased, and made a microscopic examination, and found her case to be one of malignant cancer, and that such was his diagnosis. There is no evidence to which we have been directed going to show that Dr. Camp imparted the information he had received through the

microscopic examination to the insured, or indeed to any member of her family. The application and other evidence show that at the time the application was made, to wit, September 30, 1913, Mrs. Loesch resided in the city of Ft. Worth, and had resided there for 2 years prior to said date, while the evidence further shows that her mother died February 5, 1910, at Joplin, Mo. It is true that Mrs. A. H. Henderson testified that she was a neighbor of Mrs. Draper at the time of her death, and had known her for about six months prior thereto, and nursed her at times during such period, and that the malady or disease from which Mrs. Draper was suffering was cancer of the bowels. There is no evidence to show that Mrs. Henderson confided her information or belief as to the nature of the malady with which Mrs. Draper was suffering to the insured, or that she knew insured. She did testify:

"She (Mrs. Draper) was confined to her bed from the effects of her malady, illness, or disease, from which she died, about five or six weeks next prior to her death."

And Dr. Camp testified:

"She was confined to her bed about one month prior to her death."

There is no contention that Mrs. Loesch died of any cancerous affection, or that she committed suicide. Certainly, we do not think it should be held that the statements made with reference to family history can be held to be warranties. In *Assurance Co. v. Cotton Machine Mfg. Co.*, 92 Tex. 297, 49 S. W. 222, our Supreme Court defines warranty as follows:

"A warranty in an insurance contract is a statement made therein by the assured, which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true."

See *Fidelity & Casualty Co. v. Carter*, 23 Tex. Civ. App. 359, 57 S. W. 315, 317.

[2] Certainly, it was not expected that the applicant, in answer to the questions propounded, could give more than what she believed to be true, based upon the family history. These answers are necessarily largely a matter of expression of an opinion, and under the well-established rule that an insurance policy shall be construed most liberally in favor of the insured, and, as held in *Daniel v. M. W. of A.*, 58 Tex. Civ. App. 570, 118 S. W. 211, where an applicant in good faith believes the statements to be true, their falsity will not necessarily vitiate a certificate warranting the truth of the applicant's answers, and stipulating that he agrees that the literal truth of each shall be a condition precedent to a recovery on any contract issued on the faith of the answers. See, also, *M. W. of A. v. Owens*, 60 Tex. Civ. App. 398, 403, 130 S. W. 858, 861. While the last-cited case holds that where answers and an application were expressly made a part of the benefit certificate, and were expressly made warranties, the question of good faith in mak-

ing the answers, if they were false, is immaterial, since express warranties must be literally complied with, yet, as limiting this rule by the particular facts shown on that case, the Court of Appeals for the Third District held that:

"Unless there is some good reason to the contrary, parties to a contract are presumed to have meant what they would reasonably understand each other to mean under the circumstances of the case by the language used. In this case, Owens had previously waited on his brother, who died of typhoid fever, but it does not appear from this that he knew that the germs of that disease were in his system, and would probably develop in the near future. We take it that his answer that he did not have typhoid fever was true, in the sense that the parties must have understood each other at the time, though a physician may be able to say from the fact that he had typhoid fever three days later that the germs of said disease were then in his system and in process of development."

In *Reppond v. Insurance Co.*, 100 Tex. 519, 101 S. W. 786, 15 Ann. Cas. 618, 11 L. R. A. (N. S.) 1981, the Supreme Court held that the use of the word "warranty" did not necessarily create a warranty in law, unless it appeared that the parties mutually intended that the policy should not be binding if the statements were not literally true.

As shedding light upon the sense in which the parties to this contract used the words "warranties" and "warrant," we may refer with propriety to the constitution of the defendant society, by the application and policy made a part of the contract entered into between deceased and the society. Section 21 provides that the executive committee shall have full power and authority to revoke any beneficial membership, and to cancel any certificate "for any fraud practiced, or misrepresentation made, in its procurement, or for any false answer made by an applicant in his application for beneficial certificate or beneficial membership," etc., and further provides for notice to the insured of the charges of fraud or misrepresentation made, and for a hearing thereon; and said section further provides:

"If the executive committee, after hearing the charges and all the evidence, and being fully advised in the premises, shall find that the allegations and charges are true, and that it is sufficient cause for the cancellation of the beneficial certificate, or the revoking or annulling of the beneficial membership, the executive committee shall thereupon revoke, cancel, or annul such beneficial certificate and beneficial membership," etc.

Section 103, *Id.*, under the title "False Statements," provides, in part:

"Whenever it shall come to the knowledge of the executive committee of the Supreme Tribe that a beneficial certificate has been obtained by false representations or concealment of any material fact (italics ours) . . . they may at once inquire into the fact, and if they find such charges true"

—the section then further providing for a trial upon such charges.

[3] We think it is evident from these extracts from defendant's constitution that the warranties recited in the application were in-

tended to protect the defendant society only against misrepresentation of facts material to the risk assumed. Therefore we conclude that it cannot be held as a matter of law, that, though it may appear, in the light of the microscopic examination made by the physician, that the mother of deceased, at the time of her death, was afflicted with cancerous affection, the policy should be avoided because the applicant did not so state. See *Life Insurance Co. v. Evert* (writ denied May 31, 1916) 178 S. W. 643.

[4, 5] As to the contention urged by defendant in its pleading in the trial court that applicant had falsely stated that she had no sister dead, or had fraudulently concealed the fact that she had a sister dead at the time of her application, it will be noted, by reference to the schedule hereinabove inserted, that only two sets of spaces are provided for the answers with reference to applicant's sisters. On the line next to the bottom, she gives the information concerning her living sister. If the bottom line should be held to contain spaces for information concerning sisters dead, then the fact that she stated that she had one sister dead would have put the defendant society, through its medical examiner, on notice as to the cause of said deceased sister's death. It does not appear from the testimony of the medical examiner that any further question was asked her, nor is there any evidence to show that she knew the cause of her sister's death. Moreover, the evidence utterly fails to establish that her sister committed suicide. The landlady where she boarded, and the physician who attended her, both testified in the case, and both declined to state that she committed suicide. We are of the opinion that the evidence fails to show (1) that the applicant willfully concealed any knowledge in her possession with reference to her deceased sister; (2) or that if the real facts, as disclosed by the evidence, had been imparted to the examiner, they would have been material, and that the failure of the applicant to impart same in any way affected the risk assumed. In answer to question 3, part 2, in the application, which is as follows:

"Has any member of your family, or any near relative, ever committed, or attempted to commit suicide, or had consumption, raising of blood, rheumatism, insanity, cancer, gout, epilepsy, or other hereditary disease"

—the applicant answered, "No." For the answer or answers to this question a space perhaps less than two inches in length and a quarter of an inch in width is provided. It will be noted that the concluding phrase, "or other hereditary disease," specially directs the attention of the applicant to such hereditary diseases as may be included in this long list, and invites an affirmative or negative answer as to that particular kind of diseases. While we do not assume any special knowledge of or learning upon the various diseases to which human flesh is heir, yet it is a matter

of common knowledge that the medical profession at least are divided on the question as to whether a number of the diseases mentioned in this category are hereditary or not. Many reputable physicians and pathologists deny that consumption, rheumatism, gout, cancer, etc., are hereditary. If we should adopt the ejusdem generis rule of construction, it would probably limit the inquiry made to "hereditary diseases," and under this view, the applicant, though apparently unlearned in the science of diseases, would have had to decide, at the risk of invalidating her policy, which of the diseases mentioned were hereditary and which not. At least some of us believe that in the form the question is asked, the answer given is not shown, even by the testimony of Mrs. Henderson and Dr. Camp, to be untrue, and that by the rule of strict construction, which the appellee invokes herein, the answer given should be limited to those diseases upon whose hereditary character there is no room for division. But be this as it may, all of us are of the opinion that the question asked, like those under question 23, heretofore mentioned, call only for the family history upon the matters inquired about. As before stated, we are of the opinion that the evidence entirely fails to establish the suicidal death of the insured's sister, and fails to show that it was not the family history that the insured's mother died of typhoid fever. Both witnesses who testified to Mrs. Draper's having died of cancer stated that her final sickness was of short duration, one stating that it lasted a month, and the other six weeks. Dr. Chas. O. Hook, witness for plaintiff, testified, in part, as follows:

"A woman 47 years old suffering from cancer of the rectum and bowels could contract typhoid fever; a person may have any disease and contract typhoid fever; typhoid fever is almost universally infectious, once the germ is introduced, or it is so considered. A person having cancer of the rectum, if they were to contract or become infected with typhoid fever, would, of course, be more susceptible to greater suffering, or to it being more severe with them. Typhoid fever is an infectious disease, and an ulceration of the intestines is its principal manifestation; it is an inflammation of the small intestine."

[6] The burden of proof was on defendant to establish the alleged falsity of the answer of applicant as to the cause of her mother's death. Defendant's witness Dr. L. M. Camp testified:

"Mrs. Draper had an infection of the bowels or intestines, including the rectum. She had cancer of the rectum, with general breakdown of the system. She had an inflammation or ulceration of the rectum or bowels. I made a microscopical examination, and found her case to be malignant cancer. * * * You can determine positively whether any growth or inflammation is malignant or cancerous in its nature by a microscopical examination."

From the testimony of these two witnesses, both medical experts, it would seem that to the laity the symptoms in a malignant case of

typhoid fever and in a cancerous affection of the bowels would be, in some respects, similar; and, as before stated, since it is not shown that in fact the insured had any other information as to the cause of her mother's death than that recited in her application, and since it is not shown that it was not part of the family history that her mother died of typhoid fever, we are not prepared to hold that the uncontradicted testimony establishes the falsity of such answers, or that the applicant should be charged with notice of the existence of a disease whose discovery was only effected by the physician in charge by the use of the microscope.

From what has been said, it follows that, in our opinion, the trial court erred in giving a peremptory instruction in favor of defendant. Hence appellant's second, third, fourth, and fifth assignments are sustained, and the judgment reversed, and the cause remanded.

DAVIS et al. v. WYNNE. (No. 8537.)

(Court of Civil Appeals of Texas. Ft. Worth. June 24, 1916. On Motion for Rehearing, Dec. 2, 1916.)

1. EVIDENCE \S 448—PAROL EVIDENCE—PRELIMINARY NEGOTIATIONS.

In the absence of ambiguity in a written contract, and of fraud, accident, or mistake, evidence to establish preliminary negotiations for the contract, or to show an intention of the parties thereto at variance with its terms, is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. \S 448.]

2. PATENTS \S 192—RIGHTS OF ASSIGNEES—JOINT ASSIGNEES—MANUFACTURE AND SALE.

Each of several assignees to whom an interest in a patent right is assigned has a right to manufacture and sell the patented article, no matter how small his interest may be.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 269; Dec. Dig. \S 192.]

3. CONTRACTS \S 321(1)—CONTRACT TO ORGANIZE CORPORATION—BREACH—REMEDIES.

The fraudulent breach by defendant of a contract to organize a corporation and convey a patent to it does not authorize the subscribers to the stock to recover on preliminary and tentative agreements for the transfer of an interest in the patent to them which were merged in the subsequent contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1508; Dec. Dig. \S 321(1).]

4. SPECIFIC PERFORMANCE \S 31—CONTRACTS ENFORCEABLE—DEFINITENESS—CONTRACT TO INCORPORATE.

A contract to form a corporation cannot be specifically enforced, where there is no showing of an agreement upon the preliminary steps necessary to its formation, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1122, such as the names and number of persons who would be directors for the first year, the place or places where the business would be transacted, the term for which it should exist, etc.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 86-88; Dec. Dig. \S 31.]

5. **CONTRACTS** ¶75(2) — **CONSIDERATION—**
CONSIDERATION FOR OTHER PROMISE.

Where the parties had made an original contract, whereby, in consideration of the subscription of plaintiffs to stock in a corporation to be organized to acquire the patent rights of defendant, the latter agreed to assign his rights to the corporation when it should be formed, the subscriptions could not be also the consideration for a subsequent promise by defendant to assign to each of the other parties an interest in the patent equivalent to the interest he would have had in the corporation.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 280-285; Dec. Dig. ¶75(2).]

6. **CONTRACTS** ¶65(3) — **CONSIDERATION—**
"NOVATION."

Nor could the rights of the plaintiffs under the former contract be a consideration for the latter, where there was no agreement to surrender those rights, but the plaintiffs were insisting on the performance of both contracts, since a novation cannot arise unless there is a previous valid obligation, an agreement of all the parties to the new contract, the extinguishment of the old contract, and a valid new contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 292, 293; Dec. Dig. ¶65(3).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Suit by W. D. Davis against W. P. Wynne for specific performance, in which R. E. Gatewood and others intervened and asked for the same relief as the original plaintiff. Judgment for the defendant, and plaintiff and interveners appeal. Affirmed, and motion for rehearing overruled.

Baskin, Dodge & Eastus, of Ft. Worth, and B. C. Padelford, of Cleburne, for appellants. Ike A. Wynn, of Ft. Worth, for appellee.

DUNKLIN, J. W. D. Davis instituted this suit against W. P. Wynne for specific performance of two alleged contracts to convey to him an undivided one-tenth interest in and to a certain patent right covering an invention originated and owned by the defendant, which consisted of an attachment for converting motor-propelled vehicles into tractors. As a basis for his prayer for a temporary writ of injunction pending final trial on the merits of the case, it was alleged that the defendant was proposing to assign the patent right to other persons in hostility to plaintiff's rights, and thereby to defeat the beneficial results of any judgment that plaintiff might finally procure in the case. R. E. Gatewood, J. H. Harris, and Ben Van Tuyl all intervened in the suit, each of whom alleged like contracts on the part of the defendant to convey to him an undivided interest in the patent right. The intervenor Gatewood filed a separate plea of intervention, containing allegations relative to the contracts made by the defendant, substantially to the same legal effect as the ones alleged by the plaintiff. He also adopted the pleading of the plaintiff in his own behalf, and the plaintiff in turn furthermore adopted his pleadings also. Intervenors Har-

ris and Van Tuyl adopted the pleadings of both the plaintiff and Gatewood. The application for the temporary writ of injunction was heard by the trial judge, and was refused without hearing any evidence in support of the allegations, but solely upon the ground of the insufficiency of the pleadings of plaintiff and interveners to show a cause of action for specific performance, and from that order the plaintiff and intervenor Gatewood have appealed.

The first contract alleged by the plaintiff and sought to be specifically enforced was substantially as follows: An agreement by and between the plaintiff and the defendant for the formation of a private corporation to be known as the Automatic Tractor Company, with a capital stock of \$10,000, divided into 1,000 shares of the par value of \$10 each, for the purpose of exploiting the patent and the manufacture and sale of the attachments; 550 shares of said capital stock to go to and be taken by the defendant in consideration of the transfer to the corporation of the patent right, and 450 shares of the capital stock to be paid for in money by subscribers therefor, 1000 shares of the capital stock to be subscribed by the plaintiff, and the remainder of said capital stock to be subscribed and paid for by other persons. The defendant agreed to procure other subscribers for the remainder of the capital stock and to procure a legal charter for the company. According to allegations in plaintiff's petition, after said agreement was entered into and in pursuance thereof, he signed a subscription contract for \$1,000 worth of the capital stock of said proposed corporation and paid to Wynne thereon \$150 in cash and agreed to pay to him \$150 when the company was fully organized and the remaining \$700 within 30 days thereafter. According to further allegations in the petition, the defendant thereafter failed and refused to procure a charter for said company in accordance with his agreement, in consequence of which the patent right could not be transferred to the proposed corporation, and that thereupon another agreement was entered into by and between the plaintiff and the defendant, by the terms of which the defendant agreed to transfer to the plaintiff an undivided one-tenth interest in the patent right itself.

The intervenors Gatewood, Harris, and Van Tuyl each pleaded two contracts between him and the defendant substantially in the same terms as the two contracts pleaded by the plaintiff, except that Gatewood agreed to and did subscribe for \$500 worth of capital stock, or 1/20 of the whole, and the intervenor Harris agreed to and did subscribe for 1/40 of the capital stock or \$250 worth, and Van Tuyl subscribed for \$200 worth of capital stock or 1/50 of the whole; each of said intervenors paying in

cash to the defendant 15 per cent. of the amount so subscribed, and agreed to pay 15 per cent. more when the charter should be obtained, and the remaining 70 per cent. of his subscription within 30 days after the issuance of the charter, and according to the second contract with each of those interveners the defendant agreed to transfer to him a corresponding interest in the patent right itself. The defendant addressed a general demurrer and several special exceptions to the petitions of plaintiff and interveners.

The pleadings of plaintiff and interveners abound with allegations of conversations and negotiations between them, respectively, and the defendant occurring prior to and culminating in the execution of the subscription contracts for capital stock in the proposed corporation, and the agreement by defendant to secure the balance of stock subscriptions and procure a charter for the corporation. The purport of those allegations was that it was intended and understood by and between such subscribers of stock that the contracts so made would have the legal effect of vesting in each subscriber for stock an undivided interest in the patent right itself, and the prayer for the specific enforcement of those contracts was predicated upon that theory.

[1] In the absence of some ambiguity in the first alleged contracts, and in the absence of fraud, accident, or mistake causing the execution of the subscriptions for stock, it is too well settled to require the citation of authorities that proof would not be admissible to establish such preliminary negotiations, or to show an intention of the parties thereto at variance with the terms of the contracts resulting therefrom; and special exceptions were addressed to those allegations substantially upon that ground.

[2] As noted already, according to the allegations of the complainants, defendant agreed to transfer the patent right to the proposed corporation as soon as the same should be chartered. If this had been done, clearly the entire and exclusive right to manufacture and sell the attachments for vehicles covered by the letters patent would have been vested in the corporation. But if, instead of organizing the corporation, an interest in the patent right had been transferred to each of said subscribers, then each of them by virtue of that interest, however small, would have been vested with the right to manufacture and sell such attachments to the same extent as if he had owned the entire patent right. *Blackledge v. Weir & Craig Mfg. Co.*, 108 Fed. 71, 47 O. C. A. 212; *Lalance & G. Mfg. Co. v. National Enam. & Stamping Co.* (C. C.) 108 Fed. 77; and authorities there cited.

[3] The pleadings contained allegations of fraudulent breach by defendant of the contracts to organize the corporation, for the purpose of disposing of the patent right to

others upon terms more favorable to defendant; but such allegations were wholly insufficient to set aside such contracts and substitute therefor prior alleged preliminary and tentative agreements to transfer to such subscribers interests in the patent right itself, which according to the pleadings were merged into the contracts to form the corporation to take over the entire interest in the patent right, coupled with the written subscriptions by complainants for capital stock in such proposed corporation. Nor did the complainants seek so to do, but, on the contrary, sought a specific enforcement of the contract last mentioned.

[4] Their pleadings fail to contain allegations of an agreement of the parties upon several preliminary steps necessary to the formation of the proposed corporation, such as the names and number of persons who would be directors of the corporation for the first year of its existence, the place or places where its business would be transacted, the term for which the corporation should exist, etc., and the absence of such allegations would of itself preclude a specific enforcement of the alleged contract, as insisted, in effect, by one of defendant's special exceptions to the pleadings. Article 1122, *Vernon's Sayles' Texas Civil Statutes*; *Rudiger v. Coleman*, 199 N. Y. 342, 92 N. E. 665; *Loewenberg v. De Voigne*, 145 Mo. App. 710, 123 S. W. 99. Furthermore, by articles 1126 and 1127, *Vernon's Sayles' Texas Civil Statutes*, it is provided that no charter of a private corporation shall be filed until "the stockholders of any such company shall furnish satisfactory evidence to the Secretary of State that the full amount of the authorized capital stock has in good faith been subscribed, and fifty per cent. thereof paid in cash, or its equivalent in other property or labor done, the product of which shall be to the company of the actual value at which it was taken, or property actually received."

As noted already, complainants alleged that the parties agreed to the capitalization of the proposed corporation at \$10,000, of which amount defendant was to receive \$5,500 worth of the capital stock in consideration of a transfer by him to the company of the letters patent; but there is no allegation in any of their pleadings of the value of such patent right. On the contrary, it is specifically alleged that the value of the patent right is unknown to them. The absence of such a showing, coupled with the fact that 85 per cent. of the subscriptions by complainants was not due until after the issuance of the charter, is a further barrier to relief by specific enforcement of the contract to form the corporation.

The case of *Jones v. Jones*, 49 Tex. 633, was a suit for specific performance of a contract to convey land, and in disposing of it our Supreme Court used the following language:

"Neither the petition nor amended petitions of the appellees (the plaintiffs in the court be-

low) present in clear and distinct terms the contract sought to be enforced, as is required in an action of this kind; neither the aggregate amount to be paid for the land, nor time at which the different installments were payable, is stated; and the averments of performance, or of the facts relied upon to excuse literal performance of the contract on the part of the alleged purchaser, are certainly but vaguely and indefinitely stated—if, indeed, the averments of the petition and amended petition in these particulars are not repugnant and contradictory. It is a fundamental rule, in actions of this character, that the consideration for the agreement, the time and manner of its performance, and in fact all of its essential terms and stipulations, must be clearly and definitely alleged as well as proven, to warrant the court in granting the relief here sought."

To the same effect are *Ward v. Stuart*, 82 Tex. 333; *Guadalupe Co. v. Johnston*, 1 Tex. Civ. App. 713, 20 S. W. 833, and authorities there cited.

[5] In the present suit, as above shown, each of the complainants rely on and seek specific performance of two separate and distinct contracts; the first to form a corporation which would take over the entire patent right and issue to them capital stock in the respective amounts subscribed; the second contract being the agreement of defendant to forego the formation of the corporation and to convey to each complainant an interest in the patent right itself.

One of the special exceptions addressed to the latter alleged contract was that it was without any consideration to support it, and therefore was not enforceable. We are of the opinion that this exception is meritorious. It is expressly alleged in the pleadings that the consideration for the second contract was the same as the consideration for the first contract, viz., the subscription for capital stock in the proposed corporation, a payment in cash of 15 per cent. of the amount so subscribed, an agreement to pay 15 per cent. of the balance when the charter was obtained, and an agreement to pay the balance of 70 per cent. within 30 days thereafter. The consideration so alleged could not support both contracts at one and the same time with both in full force and effect. The second contract was not within the contemplation of the parties when the first contract was made, and hence was no part of the first contract, but was subsequent to and entirely different in legal effect from it, and in square conflict with it, and therefore it cannot be said that the consideration for the first also supported the second.

[6] Nor do the pleadings show any agreement that the first contract should be canceled and that the cancellation of the same should be a consideration for the second; in other words, the pleadings fail to allege a novation of contracts, but, on the contrary, preclude even an inference to that effect, for both contracts are alleged as a part of the cause of action asserted by each complainant and specific enforcement of both is expressly prayed for.

190 S.W.—83

In 29 Cyc. 1130, the following is said:

"In every novation there are four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one. A novation is a new contractual relation. It is based upon a new contract by all the parties interested; and in some states it is specifically provided by statute that a novation shall be made by contract and be subject to the rules concerning contracts in general.

"In order that a contract of novation may be effected there must be a previous obligation to be released. This previous obligation, which is to be released, to be within the rule, must be a valid one."

Again, on page 1133, same volume:

"A novation, like other valid contracts, must be supported by a consideration, which in this case is a discharge of the original debt. If the agreement does not, or was not intended to, operate as a release of the original debt, it is not a novation. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor."

See, also, *Pierce Fordyce Oil Ass'n v. Woods*, 180 S. W. 1181.

Again, in the absence of any showing that the value of the patent was as much as \$5,500, in connection with the fact that 85 per cent. of the complainants' subscriptions for stock was not payable until after the procurement of the charter, there is no showing in the pleadings that the proposed charter for a corporation with an authorized capital stock of \$10,000 could have been procured, and, in the absence of such a showing, it does not appear from the pleadings that the first contract to form such a corporation was a valid and enforceable agreement so as to furnish a sufficient basis for a novation.

For the reasons stated, we conclude, as did the trial judge, that the pleadings of complainants were insufficient to support a judgment for specific performance, and therefore it is unnecessary to determine the merits of other special exceptions addressed to those pleadings. And, if the pleadings were insufficient to support the recoveries sought, it follows as a matter of course that there was no error in refusing the application for the temporary writ of injunction prayed for. *Beckham v. Munger Oil & Cotton Co.*, 185 S. W. 991.

The order denying the temporary writ is affirmed.

On Motion for Rehearing.

In our original opinion we said that there was no allegation in any of the pleadings of the plaintiffs of the value of the patent right, which it was alleged defendants agreed to transfer to the proposed corporation in payment of 550 shares of the capital stock of the corporation contemplated. In their motion for rehearing appellants call our attention to an allegation, to the effect that the patent was worth at least \$5,500, which defendants agreed to transfer to the proposed

corporation in payment of capital stock of the face value in the same amount.

In the voluminous pleadings, we overlooked that allegation and now here correct the mistake made by us. It is true, however, as stated in our original opinion, that the pleadings of the complainants also contained specific allegations that the value of the patent right was unknown to them. Our original conclusion on the whole case that there was no error in refusing the application for a temporary writ of injunction was based upon other reasons shown in our original opinion, which were sufficient of themselves to support the conclusion reached, as will appear from the opinion.

With this modification of our original opinion, the appellants' motion for rehearing is overruled.

PRODUCERS' OIL CO. v. SNYDER. (No. 8445.)

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 21, 1916. On Motion for Rehearing,
Nov. 25, 1916.)

1. CONTRACTS —163—CONSTRUCTION.

Where a contract is ambiguous because of apparent inconsistencies between the written or typewritten and printed parts, the written or typewritten words control; the written words being the immediate selection of the parties themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 745; Dec. Dig. —163.]

2. MINES AND MINERALS —78(1)—GAS AND OIL LEASE—CONSTRUCTION—WORKING.

An oil and gas lease of 19 quarter sections held separate leases of each quarter section, requiring the sinking of a well on each quarter section to avoid forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 205; Dec. Dig. —78(1).]

On Motion for Rehearing.

3. APPEAL AND ERROR —934(2) — PRESUMPTION.

Notwithstanding Rev. St. 1911, arts. 1990, 1991, requiring judgment to be rendered on conclusions of fact found by the judge where they are separately stated, etc., where there is no statement of facts in the record and there are findings of fact, such findings will support the judgment, although not stating affirmatively every fact necessary to support the judgment, since such facts will be presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. —934(2).]

Appeal from District Court, Shackelford County; Thomas L. Blanton, Judge.

Action by C. B. Snyder against the Producers Oil Company and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

T. J. Lawhon, of Houston, John C. Kay, of Wichita Falls, and Walter L. Morris, of Albany, for appellant. Carrigan, Montgomery & Britain, of Wichita Falls, for appellee.

BUCK, J. On July 11, 1913, C. B. Snyder entered into an oil and mineral lease contract with M. W. Bahan, whereby Snyder granted to Bahan certain oil, gas, and other mineral rights in 19 quarter sections of land located in Shackelford county. Subsequently, Bahan transferred his lease rights to the Producers' Oil Company, appellant herein. Subsequent to July 11, 1915, and more than two years from the date of the lease contract mentioned, said Snyder filed suit against Bahan, the Producers' Oil Company, and the Texas Company, in one count in form of trespass to try title, alleging that on said July 11, 1913, plaintiff executed to said Bahan the lease on the said 19 quarter sections, and setting out said lease in the petition in full. Plaintiff further alleged that according to the terms of said lease the rights therein granted to the lessee were subject to forfeiture unless "operations for the drilling of a well for oil or gas shall be begun within three months from the time of final execution and delivery of this contract." But that it was further provided that:

"Forfeiture may, however, be saved by the grantee, and the vitality hereof be continued and maintained, notwithstanding operations be not begun within the proper time limit, provided only that for the privilege of delay in such beginning from time to time the grantee may pay as hereinafter provided fifteen hundred twenty and no/100 (\$1,520.00) dollars per quarter for a period not exceeding two years from date hereof."

It was further alleged that no operations for drilling had been made by the grantees, or any of them, on any one of the 19 quarter sections covered by the lease, and that more than two years having elapsed, plaintiff was entitled to a judgment quieting his title and removing cloud therefrom.

Defendant, Producers' Oil Company, answered that on July 8, 1915, within two years from the date of the lease contract, operations for drilling had been begun by it, and that, therefore, plaintiff was not entitled to the forfeiture claimed, and that defendant had fully complied with the terms of the contract in this respect. On the trial plaintiff conceded that as to the quarter section upon which drilling operations had been begun, to wit, the southeast quarter of section 26, Lunatic Asylum land, defendant was entitled to judgment, but insisted that the contract of lease made by plaintiff and Bahan, and the terms of which had been assumed by the transferee, the Producers' Oil Company, provided for a separate lease as to each of the 19 quarter sections, and that the obligation of the grantee to begin operations within two years in order to avoid forfeiture contemplated the sinking within two years of a well upon each quarter section as a condition of nonforfeiture.

The pleadings are voluminous, especially the plaintiff's first amended original petition, covering some 17 or 18 pages, yet the issue

between plaintiff and defendant was as to whether said written contract or lease contemplated the separate lease of each of the 19 quarter sections and the fulfillment by the grantee of the obligations specified as a condition of nonforfeiture, or whether the said 19 quarter sections were to be considered as one tract of land and the beginning of operations within the two years upon one quarter section should be regarded as a compliance with the terms of the contract in this respect.

The cause was tried before the court without a jury, and the trial court concluded that the plaintiff's contention was correct, and gave judgment for him, quieting his title as to 18 quarter sections, and gave judgment for defendant as to the other quarter section. Defendant, Producers' Oil Company, has appealed.

The record contains no statement of facts, but the court has filed his findings of fact and conclusions of law, and the original lease contract has been sent up with the record for the inspection of this court. This contract is in printed form, and certain inserts have been made in writing and by typewriter. Only those portions of the contract which we deem necessary to consider in order to determine the intention of the parties need be set out in this opinion, and where the words used are written by hand or by the typewriter they will be italicized. After the habendum clause the contract provides:

"1. The considerations of this contract are as follows:

"(a) The sum of *fifteen hundred twenty and no/100* dollars, payment whereof by the grantor is hereby acknowledged.

"4. The royalty for natural gas shall be \$100.00 per annum for each well from which gas is used off the premises, the grantor to have the privilege at his own risk and cost to make connections and use gas free of charge for dwelling located on each quarter section, provided gas is produced on said quarter section.

"6. Under penalty of forfeiture of the rights and estates hereby granted, operations for the drilling of a well for oil or gas shall be begun within *three months* from the time of final execution and delivery of this contract, and, if so forfeited, the rights and liabilities of both parties shall thereupon be ended. Forfeiture may, however, be saved by the grantee, and the vitality hereof be continued and maintained, notwithstanding operations be not begun within the proper time limit, provided only that for the privilege of delay in such beginning from time to time the grantee may pay, as hereinafter provided, *fifteen hundred twenty and no/100 (\$1,520.00)* dollars per quarter, for a period of not exceeding *two* years from delivery hereof. Operations upon a well begun shall be prosecuted with diligence, unavoidable accidents and contingencies only excepted; and when a well is begun, it shall be sunk to a depth of *1,500* feet, unless oil or gas be sooner developed in paying quantities—but a well which may be lost or spoiled may be continued at another location, and to be considered the same as the original. When operations are begun the same shall be continuous until the property is developed, unless otherwise agreed by the parties hereto. After a well is begun, no further payments in respect to delay shall be due, on the quarter section (160 acres) upon which such well is begun and the drilling of such well shall in all

events secure said quarter section from forfeiture.

"6a. It is expressly agreed that the drilling of well or wells will stop rental only upon the quarter section and quarter sections upon which such well or wells are located, such rental being based at \$2.00 per acre per year, and deductions of rental for quarter sections upon which wells may be located shall be taken from amount of rental as recited in stipulation No. 6.

"6b. In consideration of moneys paid and other valuable considerations, it is expressly agreed that the grantee may at his option surrender any quarter section or quarter sections herein described, and that there will be no further payments due, and liabilities of both parties shall thereupon be ended, and the grantee agrees to execute a formal release of all such surrenders."

Plaintiff in his trial petition, and in the second count thereof, pleaded as follows:

"Plaintiff further represents that if he is mistaken in the construction hereinbefore given said lease contract, and if the court should hold that said lease contract, when properly construed, does not upon its face clearly provide for the separate development of each of said 19 quarter sections of land above referred to, by beginning operations thereon for drilling a well within the time specified in said contract, and if said court should fail to hold that the failure under the circumstances alleged hereinbefore by the plaintiff (evidently meaning defendant) to begin operations on said land, except on the southeast quarter of section 28, did not have the effect to terminate said lease as to all said quarter sections except that one upon which operations were begun, then this plaintiff further alleges that the said lease contract above referred to is at least of doubtful meaning and of doubtful construction."

Plaintiff further pleaded that grantee, Bahan, who it is alleged was never the beneficial owner of the contract, but was acting for the appellant company and others, and plaintiff orally agreed upon the proposed terms of said lease, and that under said oral agreement the lease contract to be entered into was to be a separate lease upon each quarter section of land, and that each quarter section should be developed separately, or at least be subject to forfeiture for non-development, and that the lease offered by him (Bahan) did not contain the typewritten portions of paragraph "6," nor did it contain paragraphs "6a" nor "6b," nor the written interlineation in paragraph 4, and that these additions and alterations were made at the instance of plaintiff and in order to carry out the mutual understanding of the parties that the lease should provide for the development of each quarter section. Other pleadings were included in plaintiff's petition which would justify the introduction of parol testimony to explain any ambiguity which might exist in the lease contract.

[1] It is a well-recognized rule of construction that where a part of a contract is written, or typewritten, and part is printed, and the written and printed parts are apparently inconsistent, or there is reasonable doubt as to the sense and the meaning of the whole, the words in writing will control the construction of the contract. The obvious reason for this rule is that the written words

are the immediate language and terms selected by the parties themselves for the explanation of their meaning, while the printed form is intended for general use without reference to particular objects and aims. 6 R. C. L. § 237, p. 848.

The trial court found, among other things:

(1) That the lease mentioned was finally executed and delivered on July 11, 1913; (2) that on September 20, 1913, M. W. Bahan transferred and assigned in writing said lease to the Producers' Oil Company, and that said transfer was duly recorded in Shackelford county; (3) that subsequent to the execution of the lease in controversy the Producers' Oil Company had bored within the radius of a mile and a quarter of the land in controversy and on two sides thereof, 15 wells for oil and gas, and that the average cost of said wells was \$14,000 each; (4) that seven of said wells produced oil and gas, and that eight of them produced no oil or gas; (5) said Producers' Oil Company began operations for drilling a well on the southeast quarter of section 26, July 8, 1915, and continued the same with reasonable diligence until it had reached, at the time of the trial, a depth of 1,945 feet, at a cost of \$12,000, and that so far no oil or gas had been found; (6) that no operations for the drilling of any well had ever been begun upon any other quarter section than the southeast quarter of section 26; (7) that the Producers' Oil Company had paid to plaintiff the sum of \$12,160 rental for the two years in quarterly payments of \$1,520, the last payment being made three months before the expiration of the two years, each payment being made in advance; (8) that the 3,040 acres of land embodied in this tract prior to the execution of the lease had been patented by the state of Texas in separate patents, each covering a quarter section of 160 acres, specifically described by field notes.

[2] We find that the contract as written is ambiguous, and that the court was authorized under the plaintiff's pleadings to admit parol testimony in order to explain the seeming ambiguity. While the printed portions of paragraph 6, as well as other printed portions of the contract, would indicate that the lease was intended to cover the 3,040 acres as a whole, and that upon the payment of the rental provided for in said paragraph and the beginning of operations within the two years, the right of forfeiture on the part of plaintiff would be destroyed, yet the type-written portions of paragraph 6, as well as paragraphs 6a and 6b, and the written portion of paragraph 4, would indicate that the intent of the parties was that the lease should cover the 19 quarter sections separately, and that in order to avoid forfeiture on any one quarter section not only would the rental provided for have to be paid, but operations for the sinking of a well would have to be begun within the two years prescribed. There being no statement of facts in the

record, we feel it our duty to impute to the court findings of fact necessary to sustain the judgment, and that evidence was introduced sufficient to sustain such findings.

Therefore the judgment of the trial court will be in all things affirmed, and it is so ordered.

On Motion for Rehearing.

[3] Appellant refers to the following language in our original opinion, to wit:

"There being no statement of facts in the record, we feel it our duty to impute to the court findings of fact necessary to sustain the judgment, and that evidence was introduced sufficient to sustain such findings."

Appellant cites us to the cases of *Chance v. Branch*, 58 Tex. 490, *Cousins v. Grey*, 60 Tex. 346, *Continental Insurance Co. v. Milliken*, 64 Tex. 46, *Kimball v. Houston Oil Co.*, 100 Tex. 336, 99 S. W. 852, and articles 1990 and 1991, Revised Statutes, as authority for the proposition that, where the court has filed his findings of fact and conclusions of law, and in the absence of a statement of facts, "the appellant having excepted to and the appellee having acquiesced in said findings of fact, same must be looked to solely as the basis of said judgment."

Appellant presented only two assignments of error, one attacking the court's conclusions of law, and the other leveled at the court's action in rendering judgment for appellee. No finding of fact was assailed. Plaintiff's pleadings justified the admission of parol evidence to explain the seeming ambiguity in the instrument sued on, and alleged facts which, if proven, would have amply sustained plaintiff's theory that the contract as agreed upon by the parties, and as evidenced by the written instrument, contemplated the beginning of a well upon each quarter section in order to prevent forfeiture of the lease thereon. We do not think, in our holding, to the effect that we should impute to the court findings in harmony with plaintiff's pleadings, and in assuming that evidence was introduced in conformity with such allegations, we were in conflict with the cases relied on by appellant, and cited above. As said in *Kimball v. Houston Oil Co.*, supra:

"It may sometimes happen that findings omit any mention of a fact, proof of which would be essential to the correctness of the judgment, and that, in the absence of anything said about it, such fact should be presumed; and we are not to be understood as holding that such findings are to be treated as special verdicts were formerly treated and required to state affirmatively every fact necessary to support the judgment. *Thomas v. Quarles*, 64 Tex. 493."

See, also, *Paden, Adm'r, v. Briscoe*, 81 Tex. 563, 17 S. W. 42.

It certainly is not to be required of the trial court that he shall set forth in his findings of fact every bit of probative evidence sustaining his conclusions, in order for such conclusions to be upheld. Necessarily, many evidentiary facts must be omitted. In preparing his findings of fact and conclusions of

law, the trial court need not state the evidence upon which he bases his findings or conclusions. *Gordon v. McCall*, 20 Tex. Civ. App. 283, 48 S. W. 1111. In the case of *Oldham v. Medearis*, 90 Tex. 506, 39 S. W. 919, it is held that a finding that "Oldham, being ignorant and illiterate, was not negligent in not discovering the said shortage (in the land) sooner," would not justify the Court of Appeals in treating the finding of the trial court, that Oldham was not negligent, as based entirely upon the fact that Oldham was "ignorant and illiterate." In the instant case, as evidence of the fact that the court held the contract or lease to be ambiguous, and that there was evidence supporting the theory of a separate lease as to each quarter section, it will be noted that in the findings themselves, the stenographer was directed to underscore in black ink with a pen those portions of the original lease shown to be written with pen, and to underscore in red ink with a pen those portions shown to be typewritten. The court further found that the 3,040 acres embraced in the tract had been, prior to the execution of the lease, patented in separate quarter sections. Thus is evidenced the purpose of the court to show that he reached his stated conclusions of law favorable to appellee by reason of evidence showing that the parties dealt with the land as being composed of separate tracts, and that they understood that the lease contract was severable as to the various quarter sections. As held by the Supreme Court in the *Oldham Case*, supra, we are not justified in concluding that the facts stated constituted the only evidence upon this issue, but we are justified in assuming that there was other evidence to the same effect deemed by the court, in conjunction with the facts stated, sufficient to establish plaintiff's contention.

The motion for rehearing is overruled.

COBB v. RILEY. (No. 8452.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 28, 1916.)

1. WITNESSES \S 255(5)—REFRESHING MEMORY—STATEMENT FROM BOOKS OF ACCOUNT.

One who loaded cars with goods sold and shipped, and made out slips of the amount in each car, and turned them in to the bookkeeper, can refresh his memory from a statement thereof drawn from the books, and testify to its correctness; that is, that it is a correct copy of the memoranda originally made by him.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 878; Dec. Dig. \S 255(5).]

2. SALES \S 181(13) — ACTION FOR PRICE — REJECTION OF GOODS—EVIDENCE.

Evidence, in an action for price of gravel sold and shipped, held sufficient to sustain a finding of none of it having been rejected as unfit.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 491; Dec. Dig. \S 181(13).]

3. SALES \S 181(11) — ACTION FOR PRICE — RECEIPT OF GOODS—EVIDENCE.

Evidence, in an action for the price of gravel sold and shipped, held sufficient to sustain a finding of defendant having received it; except as to a car billed, without authority shown, to a town, instead of to defendant.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 486, 487, 490; Dec. Dig. \S 181(11).]

Appeal from Denton County Court; Fred M. Bottorff, Judge.

Action by J. H. Riley against O. E. Cobb. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur.

R. H. Hopkins, of Denton, for appellant. Owsley & Owsley, of Denton, for appellee.

BUCK, J. J. H. Riley, a resident of Dallas county, sued O. E. Cobb, a resident of Denton county, in the county court of Denton county, and for cause of action pleaded that plaintiff was operating a gravel pit near Carrollton, Dallas county, and that defendant was a contractor engaged in the business of constructing streets, etc.; that during the year 1913, defendant purchased from the plaintiff some 37 cars of gravel, agreeing to pay therefor 90 cents per yard, less the freight charges from Carrollton to Pilot Point; that defendant agreed to advance the freight charges on the receipt of the gravel at Pilot Point, but the amount of said charges was agreed to be deducted from the total amount due at the agreed price per yard. Attached to plaintiff's petition were Exhibit A, showing the number of cars shipped, the dates of shipment, and the number of yards contained in each car, and the value of the gravel in each car at the agreed price, totaling \$1,164.60; Exhibit B, giving the list of the freight charges paid by defendant on each car, said amount being \$623.37. Plaintiff acknowledged the receipt of \$143, and sued for the balance alleged to be due, to wit, \$398.23. Defendant in his answer alleged that he had paid, in addition to the \$143, evidenced by a check, the sum of \$7 in money. He further pleaded that under the contract between him and Riley, Riley was to furnish him, f. o. b. cars at Pilot Point, with gravel of the stipulated and agreed grade at 90 cents per yard; that under the terms of said contract it was agreed that if any of the said gravel failed to meet the approval of the engineer, Rush, employed by the town of Pilot Point, said gravel was to become the property of the plaintiff; that thereafter the plaintiff shipped to the defendant some 15 cars of said gravel, which were condemned by engineer Rush and held to be unfit to be used upon the work defendant was doing in the town of Pilot Point; that each of said cars contained approximately 28 yards of gravel. That after the condemnation of said 15 cars of gravel, plaintiff came to Pilot Point and ascertained the number of yards of gravel so condemned. Defendant further pleaded that he had paid,

as freight charges on said 15 cars, alleged to have been condemned, the sum of from \$16 to \$20 per car, and that it had cost him about \$3 per car to unload said cars of gravel so condemned, and that plaintiff became liable to defendant for said freight charges and cost of unloading. He further pleaded that each of the cars received was short from six to eight yards in the amount alleged by plaintiff to be contained and charged for by plaintiff, and that by reason thereof plaintiff was indebted to him in the further sum of \$199.80. He further pleaded that plaintiff was indebted to defendant in the sum of \$560 for gravel used and shipped by plaintiff out of a gravel pit owned by defendant. Defendant sued plaintiff in reconvention for the sum of \$860. Plaintiff, by supplemental petition, denied the allegations contained in defendant's answer: First, as to the amount paid plaintiff by defendant; second, as to the condemnation and unfitness of the 15 carloads of gravel; third, as to the claim of defendant for gravel alleged to have been used out of defendant's gravel pit. Upon a jury trial, the cause was submitted upon a general charge, both as to plaintiff's claim and defendant's counterclaim, and the jury returned the following verdict:

"We, the jury, find for the plaintiff, J. H. Riley, \$398.23, as asked for."

Whereupon the court entered judgment for plaintiff in said amount, and further decreed that the defendant should take nothing by reason of his counterclaim. Defendant appeals.

[1] The plaintiff's witness Larkin testified that he loaded the gravel in the 37 cars shipped to Pilot Point, and made out slips showing the amount in each car and each night he would turn in to the bookkeeper these slips to be copied in a book kept by the bookkeeper; that part of the time Miss Mertie Riley was bookkeeper, and later a Mr. Painter took her place; that the witness had looked over the statement handed him by counsel for plaintiff, and that, while he did not make that statement himself, he knew from what the statement was made, and that it was made from the two books kept by the bookkeepers aforesaid; that he had refreshed his memory by looking over the statement, and to the best of his memory it was a correct statement of the amount of gravel that he had loaded. The defendant objected to the last answer of the witness—

"the objection being that the statement offered—the evidence shows that it is a copy from the book, the books having been kept by Mertie Riley and the witness Painter, who has testified—the witness Mertie Riley has not testified, and the statement that it is made from books kept by her is not admissible in evidence unless she is here to testify that the books the statement was taken from are correctly kept."

We do not think the answer of the witness to the question propounded by plaintiff's counsel, to wit:

"Since you have done that (that is, refreshed his memory by looking at the statement), can you tell whether it was a correct statement of the number of cars and the amount of gravel in each car; have you looked or can you tell whether you can do that?"

—is subject to the objection urged: First, that it was an effort to prove by the witness a fact from a copy made from books kept by another person without first proving that the books were properly kept; and, second, that the evidence was inadmissible because hearsay. The witness answered the question to the effect that the statement handed to him was a correct statement of the number of cars and the amount of gravel that he loaded for the plaintiff to ship to the defendant at Pilot Point. The witness having made the memorandum from which the purported statement shown the witness was made, after having been copied into the books kept by the bookkeepers and thence transferred to the statement tendered the witness for the purpose of refreshing his memory, would be competent to testify whether the statement so shown the witness was in fact a correct copy of the memoranda originally made by the witness. We understand this to be the effect of the testimony objected to. The statement itself was not offered in evidence at this time, but only the declaration that it was a correct statement, which was, in effect, a shorthand rendition of testimony that the statement shown the witness contained the same items, as to dates, weights, etc., as the lists furnished by him to the bookkeepers, and that the lists prepared by him were correct. In the case of *Eppler v. Brown*, 30 S. W. 710, cited by appellant, by this court in an opinion by Justice Head, it was held that a manuscript copy of a list of weights of certain cotton taken from a letter book impression of a letter into which such weights had been copied from the weigher's book was not admissible in evidence to show the classification of the cotton, no sufficient excuse being shown for failure to produce the weigher's book, from which they were first copied. But the opinion further states that:

"There was no claim that the witness was able to testify from memory after inspecting these papers."

Thus, in effect, this authority holds that the manuscript copy could properly be submitted to the witness for the purpose of refreshing his memory, and if, after having it so refreshed, he was able to testify that the items therein contained were correct, he would be permitted to do so. In the case of *Garrett v. Garrett*, 47 S. W. 76, also cited by appellant, it was attempted to prove by a witness that, after the death of deceased, the witness, the plaintiff, and the defendant examined the books of deceased, and from the best they could tell, deceased owed the plaintiff about \$208. The court properly held that the books themselves were the best evidence of the facts sought to be established,

and that the statements of the witness as to the contents of the books were purely hearsay. But if it had been shown, as in this case, that the witness had furnished the data or information as to the items and charges contained in the books, and the witness had been shown a statement purporting to contain such items or charges, we doubt not that the court would have held that the witness could have refreshed his memory therefrom and testified to the correctness of such items or charges. *Gresham v. Harcourt*, 33 Tex. Civ. App. 196, 75 S. W. 808; *T. & P. Ry. Co. v. Daugherty & Voliva*, 33 Tex. Civ. App. 267, 76 S. W. 605; *Smith v. James*, 42 S. W. 792; *Wigmore on Evidence*, §§ 748, 750.

[2] We overrule appellant's first assignment, presenting this alleged error, and also his second assignment directed to the verdict of the jury as being contrary to the evidence and against the weight of the evidence as to the gravel alleged to have been rejected by reason of being unfit for use. While defendant, as well as some of his witnesses, testified to the rejection of some 12 or 15 cars of gravel, yet the plaintiff and his witness Larkin, and perhaps others, testified to facts and circumstances which put the question of whether or not any of the gravel was rejected as unfit for use squarely in issue, and the jury has passed upon this question of fact adversely to the defendant. Larkin testified, in brief, upon this question that the defendant Cobb came to the pit and selected the kind of gravel he wanted, and that witness loaded the gravel that was shipped to him, and that it was extra good and was better than the gravel defendant picked out. The plaintiff Riley testified to the same general effect, and, further, that, though he went to Pilot Point while the work was under construction, and saw the defendant, he never heard of any of the gravel being condemned, and that he was not notified to such effect, and never heard of Cobb's making any objection about the character of the gravel shipped; that he went to the railroad agent after the work was completed to check over the lists of cars and get the amount of freight, and that at that time there was no gravel in the yard; that he never heard any complaint as to the quality of the gravel until about the time the suit was filed. Defendant himself testified that in fact he did use at least a part of the gravel he claimed to have been condemned by the engineer for the purpose of making fills around some curbing at the depot, etc.

[3] Appellant's third and fourth assignments are directed to the insufficiency of the evidence to sustain the verdict and judgment as to the last three cars of gravel delivered, appellant claiming that the undisputed testimony shows that these three cars were not received by the defendant, nor used by him, but received, if at all, by the town of Pilot Point, and receipted for by its agent,

one L. Shaw. It is true that the witness R. L. Boran testified:

"That last car was signed for by L. Shaw, a man who hauled for the city of Pilot Point. Car 16207, on which the freight was \$21.72, was billed out on the 28th of November, and was received at Pilot Point on the 1st of December. The three last cars were hauled by Shaw. He receipted for and hauled the three last cars, and the last car to arrive was billed to the city of Pilot Point. He didn't say whether any of the gravel shipped by Riley was unloaded down there by the side of the track, but from the time the gravel first commenced to come in there until it was finished, there were several cars unloaded by the side of the track. * * * It was unloaded at the request of Mr. Cobb in order to save demurrage; the cars were coming in so fast on him that they couldn't possibly get the gravel off the cars before the time limit was up on them. The gravel that was unloaded there to prevent demurrage was hauled away. There was none of that gravel left there by the side of the track; it was all hauled away. * * * The last car that was received on December 13th was not billed to O. E. Cobb at all; it was billed to the city of Pilot Point. Yes; that car is included in the exhibit that is attached to the plaintiff's petition. I presume the city paid the freight on the car of gravel that was shipped to the city of Pilot Point. It is signed for by a man that hauled for them sometimes. Yes; that is the same man that receipted for some gravel that was shipped to Cobb."

Defendant Cobb testified:

"The freight bill that you have just handed me is for a car of gravel shipped to the city of Pilot Point. That car was shipped on the 11th of December, and arrived at Pilot Point on the 13th of December. I did not get that car of gravel; I was away from there then. That car of gravel is charged to me on the list made up by the defendant in this case. * * * The freight on that car was \$19.50. That car was signed for by Mr. Shaw. As to whether I did not order and get this car billed to O. E. Cobb on which the freight was \$21.72, will say that was a Cotton Belt shipment, but the city of Pilot Point took that one, too; the city of Pilot Point put two inches of gravel on the streets after I left there. Yes; it shows on this freight bill that the car was consigned to me. It shows that the car was receipted for by Shaw, but then Shaw had nothing to do with my business. I did not pay the freight on that car. I did not get that car. That car was shipped the 28th of November. It was along about the 1st of December when we got through with our job there. The freight bill shows that the car was received there and receipted for the 1st of December. I was not at Pilot Point at that time. I think it was about the 1st of December when I left there. As to how it is that it was shipped to me there, will say I was getting this gravel, and after I left there, they had so much water there on the streets that ran from the hotel down there to the depot, they had only put in six inches of gravel there, and the city put two inches more of gravel on there after I had left and finished the job."

The plaintiff Riley testified:

"There was one car of gravel shipped by me to the city of Pilot Point, and I rendered the city a statement for that car of gravel. * * * We got a letter with reference to that car, but I do not have the letter with me. Cobb, nor the city of Pilot Point, or nobody else ever paid me for that carload of gravel. Yes; we shipped the car up there."

Cobb further testified that on or about the 3d or 4th of December, he went back and

settled with the town of Pilot Point for the work done, and as to the last three cars of gravel shipped, he testified, in part, as follows:

"No; I don't know where that gravel went. I know that it was not by my own arrangement that those three carloads of gravel went in there on that job. I couldn't tell you by what authority the city of Pilot Point took those two cars of gravel that were shipped to me. It is a fact that I left my checks signed by me—to pay the freight. I left them with Smith and Degan. Yes; I suppose those checks went to pay the freight. As to whether I raised any fuss about them using my checks to pay the freight on gravel that belonged to the city of Pilot Point, will say I don't suppose I knew anything about the city's books or stuff; Degan kept those books, and I supposed he was looking after it—it was a small job and I never looked after it. I don't say that I didn't know anything about the job; I was there and knew a little about it. * * * It was about the last of November or the first of December that we loaded the equipment."

The witness Boran further testified as to blank checks being left by Cobb to pay the freight. Cobb further testified as follows:

"I said a while ago that I didn't think it made any difference about the number of cars that were condemned. The reason I said that, I just figured that it didn't make any difference. I figured that that would be the last time I would have a job that I could use gravel around here, and I knew that it would be the last chance I would ever have of getting that money. * * * As to whether it is not a fact that I was trying to get out of there the best I could and not pay him for the gravel, will say I was trying to get as much as I could on the debt."

While the evidence is not in a very satisfactory condition for us to determine the question with any degree of accuracy, we have concluded that in support of the verdict and judgment we are justified in concluding that the evidence is sufficient to sustain the verdict and judgment as to the last two cars shipped to the defendant, and the freight on which was probably paid by him with the blank checks left for that purpose. There is no evidence to which we have been directed going to show that defendant had notified the plaintiff not to ship any more gravel before the shipment of these two cars mentioned, and even though said cars were in fact used by the town of Pilot Point, or by some person other than the defendant, yet, since they were billed to defendant, and apparently the freight thereon was paid by him, we are of the opinion that the appellant cannot complain of the verdict and judgment as to the two cars mentioned, and therefore overrule appellant's fourth assignment.

But as to the third assignment, complaining of the verdict with reference to the last car, which the uncontradicted evidence shows was billed to the town of Pilot Point and the freight probably paid for by it, and said billing is not shown to have been authorized by the defendant, we are of the opinion that, so far as the last car mentioned is concerned, the verdict is without sufficient evidence to

sustain it, and appellant's third assignment is hereby sustained.

As to the fifth assignment, complaining of the verdict and judgment on defendant's counterclaim for freight paid by him on the 12 to 16 cars of gravel shipped by plaintiff and claimed by defendant to have been condemned by Engineer Rush, we hold that, for the reason given in discussing the second specification of error, said assignment must be overruled.

For the error in permitting plaintiff to recover for the car of gravel billed to Pilot Point, the judgment must be reversed, unless within 15 days from this date the appellee shall file a remittitur in the sum of \$14.70, being \$34.20, the amount of gravel, less \$19.50, amount of freight paid by the city. If said remittitur shall be filed within the time designated, the judgment will be reformed and affirmed; and if not, the judgment will be reversed and the cause remanded. Costs of appeal taxed against the appellee.

MUNDAY TRADING CO. v. J. M. RADFORD GROCERY CO. (No. 8465.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 18, 1916.)

1. PAYMENT \S 75 — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that a payment by defendant corporation was to be applied upon a debt due plaintiff from another firm, which was closely connected with defendant, and which was defendant's creditor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 239; Dec. Dig. \S 75.]

2. CORPORATIONS \S 432(12) — REPRESENTATION BY OFFICERS—PAYMENT—AUTHORITY.

Evidence held to sustain a finding that defendant corporation's manager acted within the scope of his employment in giving plaintiff a firm check to apply on an indebtedness due plaintiff from a third firm, which was a creditor of defendant's, and in which defendant's manager was financially interested.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1717, 1737, 1743, 1762; Dec. Dig. \S 432(12).]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by the J. M. Radford Grocery Company against the Munday Trading Company. Judgment for plaintiff, and defendant appeals. Affirmed.

For opinion upon a former appeal, see 178 S. W. 49.

D. J. Brookreson, of Benjamin, for appellant. R. W. Haynie, of Abilene, for appellee.

DUNKLIN, J. The J. M. Radford Grocery Company instituted this suit against the Munday Trading Company on an account in the sum of \$958.61, for goods, wares, and merchandise sold to the defendant company, who was sued both as a private corporation and as a partnership firm composed of J. H. McClain and R. W. Warren, and from a

judgment in favor of the plaintiff against the defendant, both as a corporation and as a partnership firm, the corporation and the members of the partnership firm have appealed.

The only controverted issue upon the trial was whether or not a payment of \$250 by the Munday Trading Company to the plaintiff should have been credited to its account. The Munday Trading Company was doing business in the town of Munday, and the McClain Company, another private corporation, was doing business in Knox City, about 14 miles distant. The McClain Company had also purchased goods from the Radford Grocery Company, and the payment of the \$250 made by the Munday Trading Company was applied as a credit upon the account of the McClain Company. J. H. McClain was president of the McClain Company, and was also one of the members of the partnership known as the Munday Trading Company, which was afterwards incorporated, and after that incorporation was the duly accredited manager of the latter company, with authority to draw checks upon its account. The payment of the \$250 in controversy was made by a check drawn upon the Bank of Munday in the name of the Munday Trading Company by J. H. McClain, Manager.

Appellant contends (1) that the payment so made was intended and understood by J. H. McClain and a representative of the Radford Grocery Company, to whom the check was delivered, to be applied as a credit upon the account of the Munday Trading Company; and (2) that it was not within the scope of the authority of J. H. McClain, as manager of the Munday Trading Company, to apply such payment to the credit of the McClain Company. By appropriate assignments of error, it is insisted that the evidence introduced upon the trial of the suit was insufficient to support a finding in plaintiff's favor upon those two issues, and those are the only assignments presented here.

On a former appeal of this case the judgment in favor of the plaintiff was reversed, and the cause remanded for a new trial. The opinion of this court upon that appeal appears in 178 S. W. 49. The evidence then showed that the Munday Trading Company was a partnership composed of J. H. McClain and R. W. Warren, and we held that the evidence was not sufficient to sustain the finding that it was within the scope of the authority of J. H. McClain, as the managing member of the partnership firm, to apply the funds of the firm to the payment of the McClain Company's debt, and thereby to bind R. W. Warren and the partnership by such payment. But on the last trial of the case the evidence shows without controversy that, at the time of the payment, the former partnership firm had been incorporated as the Munday Trading Company. Upon the last trial the representative of the plaintiff firm to whom the check was given by J. H.

McClain testified directly and positively that the same was given as a credit upon the McClain Company's account. It was further shown by undisputed evidence that at the time the check was given the Munday Trading Company owed the McClain Company more than \$6,500. The bookkeeper of the Munday Trading Company further testified as follows:

"The business matters of the Munday Trading Company and the McClain Company were closely interwoven. Goods were shipped from the Munday Trading Company one week over to the McClain Company, and in return the goods were shipped from the McClain Company to the Munday Trading Company. The bulk of the merchandise with which the Munday Trading Company started business came out of the McClain Company's stock; that is, the bulk of the dry goods."

There was also introduced in evidence a ledger account kept by the McClain Company with the Munday Trading Company. This account shows several items of goods returned on February 2, 1914, to the McClain Company, one of such items being in the sum of \$3,576.63. There was also shown payments made by the Munday Trading Company to other creditors of the McClain Company, and J. H. McClain testified as follows:

"It is a fact that prior to the time I gave this \$250 check to Radford, I had paid checks out of the Munday Trading Company's fund and in behalf of the McClain Company. It is a fact that I had issued a check in the sum of \$500 to the American National Bank of Ft. Worth."

It was also shown that J. H. McClain had general authority to issue checks upon the Munday Trading Company's account in the payment of its debts. It appears, further, that the item of \$250 was entered upon the books of the McClain Company as a credit to the account of the Munday Trading Company with the former company. That credit, however, was of date February 2, 1914, while the check was dated January 21, 1914, and the bookkeeper of the McClain Company, who entered the credit, testified that he did so solely upon notice from the Radford Grocery Company that the check had been applied as a credit on the account of the McClain Company to the Radford Grocery Company.

[1, 2] We are of opinion that the evidence referred to was sufficient to show that in giving the check it was understood and intended by J. H. McClain that the same should be applied as a credit upon the McClain Company's account to the Radford Grocery Company, and that the McClain Company should credit the same upon its account with the Munday Trading Company, as was afterwards done, and that it was clearly within the scope of its authority as manager of the Munday Trading Company to so apply the payment, since in so doing he was but paying the debt of the Munday Trading Company.

For the reasons indicated, the judgment of the trial court is affirmed.

DAWEDOFF v. HOOPER et al. (No. 640.)(Court of Civil Appeals of Texas. El Paso.
Dec. 18, 1916.)**1. DEPOSITIONS — 98 — CASE IN WHICH TAKEN.**

Rev. St. 1911, art. 3677, provides that depositions may be used on trial of any suit in which they are taken. Article 7778, as to trial of right of property, relates to sequestration claims by third persons, and to return of the writ to the proper county court. Art. 7779 makes it the duty of the clerk of the court to which such return of the writ is made to docket the same in the name of the plaintiff in the writ as the plaintiff, and the claimant of property as defendant. Plaintiff caused writ of sequestration to issue in original suit for possession of an automobile worth \$400, and claimants, by giving bond and oath, instituted derivative suit as defendants in the county court, the court of the original suit. Deposition was taken by one of the claimants; the notice to take it stating that it was "to be read in evidence upon behalf of the claimant," naming the two. The stipulation as to the use to be made of the deposition when taken was between the attorneys of record of claimants, the plaintiff and defendant in the original suit. The subject-matter of the evidence went to substantiate the issues of claimants. *Held* that, while the record showed the style and number of the case in which the deposition was taken to be the original suit, the deposition was really taken in the claimant's suit, and therefore was admissible therein.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 280-287; Dec. Dig. —98.]

2. INSURANCE — 607 — THEFT POLICY — PAYMENT — SUBROGATION — ASSIGNMENT OF RIGHTS OF INSURED.

Where, upon payment of theft policy, the owner's interest in a stolen automobile is assigned, and a bill of sale of the car made, to the insurance company, the latter may appear as claimant upon sequestration of the automobile.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1512, 1513; Dec. Dig. —607.]

3. SEQUESTRATION — 18 — TRIAL OF RIGHT OF PROPERTY — PARTIES.

One in lawful possession of personal property when stolen may appear as claimant upon sequestration thereof.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 38-41; Dec. Dig. —18.]

4. APPEAL AND ERROR — 877(4) — RIGHT TO ALLEGE ERROR — PARTIES.

Where two parties join in claiming personal property upon its sequestration and both recover judgment, the fact that one of them cannot maintain such claim is not error of which plaintiff may complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3567; Dec. Dig. —877(4).]

5. SEQUESTRATION — 18 — TRIAL OF RIGHT OF PROPERTY — QUESTION FOR JURY.

On trial in sequestration proceedings to determine claim to a stolen automobile, the rule that the jury should pass on the testimony where the only evidence of title and right of possession is that of interested parties, did not apply where disinterested witnesses not parties to the suit identified the car by its number, etc., since such evidence was strongly corroborative of claimant's testimony.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 38-41; Dec. Dig. —18.]

6. SEQUESTRATION — 18 — TRIAL OF RIGHT OF PROPERTY — BURDEN OF PROOF.

Where, upon writ of sequestration, a claimant tenders issue as to right of property by giving bond and oath, the burden of proving title and right of possession is on claimant if when the levy was made the property was in the possession of defendant in the writ.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 38-41; Dec. Dig. —18.]

7. SEQUESTRATION — 18 — TRIAL OF RIGHT OF PROPERTY — BURDEN OF PROOF.

Where, upon writ of sequestration, a claimant tenders issue to try right of property by giving bond and oath, the burden is on the plaintiff in the writ of proving that possession was in defendant where the return of the officer on the writ does not disclose in whose possession the property was found when the levy was made.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 38-41; Dec. Dig. —18.]

8. SEQUESTRATION — 18 — TRIAL OF RIGHT OF PROPERTY — BURDEN OF PROOF.

Where it is uncertain in whose possession the property was when seized, the trial court should direct which party shall assume the burden of proof of ownership and right of possession.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 38-41; Dec. Dig. —18.]

9. APPEAL AND ERROR — 925(2) — RECORD — PRESUMPTION.

Where, upon writ of sequestration, a claimant tenders issue to try right of property by giving bond and oath, and where, it being uncertain in whose possession the property was when seized, the record does not show that the court directed which party should assume the burden of proving title and right of possession, it will be presumed that the burden was on the plaintiff in the writ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3730-3733; Dec. Dig. —925(2).]

Appeal from El Paso County Court; Adrian Pool, Judge.

Action by Jack Dawedoff against W. H. Hooper and another. From judgment for defendants, plaintiff appeals. Affirmed.

Jones, Jones & Hardie, of El Paso, for appellant. U. S. Goen, of El Paso, for appellees.

WALTHALL, J. This is a suit for the trial of the right of property of an automobile.

Appellant tendered issues in which he alleged that on the 21st day of January, 1914, he purchased the car from Phil Gallick and wife, they then being the owners thereof and having the car in their possession in El Paso, Tex.; that on said date, after said purchase, Gallick and wife regained possession of the car; that thereafter, on January, 23, 1914, he filed suit against Gallick and wife for possession, docket number being 4201, and on said day caused a writ of sequestration to issue in said cause, and on the same day executed by the sheriff by levying upon said car and taking it into the possession of the sheriff; that said car at the time of the levy was in the possession of

Gallick and wife and their agents and not in the possession of Hooper, Firemen's Fund Insurance Company, or their agents; that the car was valued by the sheriff at \$400; the presentation to the sheriff by claimants of the oath and bond and the delivery of the car to claimants; that in the original suit No. 4201, on the 19th day of March, 1914, he obtained a judgment, adjudging him to be the owner of the said car as against Gallick and wife, and that as against them he have his writ of restitution and be placed in possession of said car; that he is the owner of the car and entitled to its possession.

Appellees, claimants, tendered issues: That on the 11th day of January, 1914, Hooper, as agent for the Standard Door & Sash Company, was the owner of said automobile, together with equipment. That on said date, said car was stolen from the possession of Hooper in Los Angeles by parties unknown to claimants. That thereafter the car was located in El Paso, Tex., in the possession of Phil Gallick, who afterwards transferred same to Dawedoff. That at the time of the theft of the car, it was insured against theft with claimant, Firemen's Fund Insurance Company, giving policy number, amount, date, time of expiration; that the policy was in force at the time of theft. That on being advised of the theft of the car, and when the car was located, claimant company took an assignment of all the interest of the owners to the insurance policy and to said car and became subrogated to all the rights, title, and interest in the car which the original owners at any time had. That claimants at once filed oath and claimants' bond and took the car thereunder.

The case was tried to a jury. After the evidence was heard, the trial court instructed a verdict for claimants.

[1] Appellant's first ground of error is to the admission in evidence over the objection of appellant to the deposition of Gilmore taken in the case of Dawedoff v. Gallick et ux., No. 4201 while the case on trial in which the deposition was admitted was styled Jack Dawedoff v. W. H. Hooper and Firemen's Fund Insurance Co., No. 4296. His proposition is that a deposition is not admissible in evidence in any suit except the suit in which it is taken. The Gilmore deposition was taken by the defendants by direct interrogatories and bears the original suit number of Dawedoff v. Gallick et ux., the suit number being 4201. The notice to take the deposition is as follows:

"In the county court of El Paso county, Texas, March term, 1914, Jack Dawedoff, Plaintiff, v. Phil Gallick et ux., Defendants. No. 4201. To Jack Dawedoff, or His Attorneys of Record, Messrs. Jones, Jones & Hardie, Phil Gallick and wife, Rita Gallick or to John T. Hill Their Attorneys of Record: You will please take notice that after five days' service hereof, I shall apply to the clerk of the county court of El Paso county, Texas, for a commission to take the

deposition of George D. Gilmore and W. H. Hooper, residing in the city of Los Angeles, California, to the following direct interrogatories, the answers to which, and to such cross-interrogatories as you may see fit to file, to be read in evidence upon behalf of the claimant, Fireman's Fund Insurance Company and W. H. Hooper, in the above-styled and numbered cause. [Signed] U. S. Goen, Attorney for Firemen's Fund Insurance Company."

The following agreement accompanied the interrogatories:

"It is hereby agreed by and between U. S. Goen, attorney for the claimant, Firemen's Fund Insurance Company, Jones, Jones & Hardie, attorneys of record for the plaintiff, Jack Dawedoff and John T. Hill, attorney of record for defendant, Phil Gallick et ux. that filing, service of copy, time and issuance of commission is hereby waived and that the answers to the direct and cross-interrogatories herein may be taken by any officer qualified by law to take and certify to depositions; that the same may be taken upon the originals and returned to the clerk of the court in which said cause is pending and any and all formalities regarding the return and certifying of same are hereby waived, reserving, however, any objection to the competency or admissibility of the testimony."

The agreement was signed by the several attorneys named in the body of the agreement as attorneys for their respective clients, as stated. The answers to the interrogatories, after stating the style and number of the case as above, the place of taking the deposition, the name of the officer, and his office as notary public, the appearance of the witness, continued:

"Produced on behalf of the claimant, Firemen's Fund Insurance Company, in the above-entitled action now pending in said court."

The envelope inclosing the deposition of the witness gave the style and number of the case as above. The witness Gilmore, in the deposition, gave the history of the automobile, identifying same by its engine, motor, and factory numbers, as stated in the claimant's issues above, the issuance and the payment of the policy of insurance, the transfer of the policy, the execution and delivery of the bill of sale, inclosing a copy, all as in the claimant's issues stated.

Article 3677, Revised Statutes, 1911, provides that depositions may be read in evidence upon the trial of any suit in which they are taken. Article 7778, Revised Statutes, has reference to jurisdiction and return of the writ under which the levy was made according to the assessed value of the property. Article 7779, Revised Statutes, makes it the duty of the clerk of the court to which the return of the writ is made, to docket the same in the name of the plaintiff in the writ as the plaintiff, and the claimant of the property as defendant. All of the transactions had in the case, the issuance of the writ of sequestration in the original suit, the return of the writ, the filing of the claimant's oath and bond were all in the same court.

The question here presented is: Was the deposition of Gilmore taken in the suit in which it was read in evidence? We are refer-

red to *People's National Bank v. Mulkey et al.*, 94 Tex. 395, 60 S. W. 753. The Supreme Court in that case held that the statute prescribing that depositions may be read in evidence upon the trial of any suit in which they are taken determines the extent to which they may be used; that the words of the statute are so plain that there is no room for construction, and clearly limit the use of depositions to the suit in which they are taken. Appellant's proposition, no doubt, states the law, but has it application in the case at bar?

There is some confusion, disclosed by the record, as to the suit in which the deposition was really taken and in which it was intended it should be used. The deposition of the witness was taken by the claimant. The notice to take the deposition states that it is "to be read in evidence upon behalf of the claimant," naming the two. The stipulation quoted as to the use to be made of the deposition when taken is between the attorneys of record of the claimant, the plaintiff and the defendants in the original suit. The subject-matter of the evidence of the witness Gilmore goes to substantiate the issues of the claimants, rather than Gallick and wife. In fact, the evidence in the deposition would at most be remote, if admissible at all, as between Dawedoff and Gallick and wife, so we conclude that, while the record shows the style and number of the case in which the deposition was taken to be the original suit of *Dawedoff v. Gallick and Wife*, the deposition was really taken in the claimant's suit. The assignment is overruled.

The second ground of error is to the admission of the deposition of witness Hooper. The same facts apply to the taking of the deposition of this witness as discussed in the former assignment. The assignment is overruled.

[2] The third ground of error insists that the evidence is insufficient to justify a peremptory instruction for the claimants. The evidence clearly identifies the automobile as the one stolen from the place where it was temporarily left by Hooper in Los Angeles a short time before it was discovered in El Paso. Dawedoff showed no title or right of possession to the car other than that obtained through Gallick and wife, and they seem to have had neither. Hooper was in lawful possession of the car before and at the time it was stolen and had a right to maintain that possession as against a trespasser, at the time of the trial. His right of possession did not arise after, but before, the car was stolen. *Walmsley v. Hubbard*, 24 Tex. 612. The Firemen's Fund Insurance Company had insured the car against theft; the policy issued by them was in force at the time of the theft; that company, when the theft was reported, paid the policy and took an assignment of all the interest of the owners of the car to the policy of insurance and a

bill of sale to the car. We think the right of the company to maintain a suit as claimant in the action would not be in the position of one whose title and right of possession arose subsequent to the levy of the writ of sequestration, or as a mortgagee of a chattel out of possession. *Craig v. Martin-Bennett Co.*, 102 S. W. 1172; *Jones et al. v. Lawrence*, 151 S. W. 584. In *Osborn v. Koenigheim*, 57 Tex. 91, it is said that:

"The statute regulating the trial of the right of property is intended to give one who claims to be the owner of property, or to one who is entitled to the possession of property, a simple remedy by which he may protect both his title and possession."

[3, 4] But if we are not sustained by the authorities in our view as to the right of the Firemen's Fund Insurance Company to maintain a claimant's suit, we think it quite clear that claimant Hooper can do so, and if he could, the fact that both claimants recovered judgment would not be such error that appellant could complain and have the judgment set aside. The assignment is overruled.

[5-7] Appellant complains, in his fourth ground of error, of the peremptory instruction, because the only evidence of appellees' title and right of possession was that of interested parties, all parties to the suit, and for that reason it is claimed the jury should pass upon the truth of the testimony. The authorities on the proposition are in conflict, but our Texas courts seem to sustain the contention, as an abstract proposition. *Burleson v. Tinnin*, 100 S. W. 350, and cases there cited. We think, however, the rule invoked has no application to the instant case. The evidence of Good, identifying the car by its number, and that of Gilmore, both disinterested witnesses, and not parties to the suit, we think strongly corroborate the testimony of Hooper on the issues tendered, even if Hooper was such an interested party as to bring him within the rule. Again, the contest involved the ownership of the car at the time of the seizure under the writ. We think it quite doubtful as to whether the burden of proof on the trial of the issues was on the claimants. The party on whom the burden rests depends upon the question as to who was in possession at the time of the levy of the writ of sequestration. Plaintiff tendered the issue that the car was in the possession of Gallick and wife at the time of the levy. If Gallick and wife were in possession, the burden of proof would be on the claimant. The return on the writ does not disclose who was in possession. Where the return of the officer on the writ does not disclose in whose possession the property was found when the levy was made, the burden is on the plaintiff of proving that the possession was in the defendant in the writ. *Boaz & Co. v. Schneider*, 69 Tex. 128, 6 S. W. 402.

[8, 9] Plaintiff offered no proof as to who was in possession at the time of the levy. *N. S. Good*, the officer who executed the writ,

said, "The car was located by the sheriff in an alley near the Elk's Home," but made no statement as to who, if any one, was in possession. The rule is that where it is uncertain in whose possession the property was when seized, the court should direct which party shall assume the burden of proof. *Miller v. Sturm*, 36 Tex. 291. The record does not show that the court directed which party should assume the burden. We take it that the burden of proving ownership and right of possession as against the claimants was on the plaintiff, under the *Boaz-Schneider* case, *supra*. The assignment is overruled.

What we have said in discussing the fourth assignment, we think sufficient to dispose of the fifth, sixth, seventh, and eighth. We think the evidence of the claimants sufficient to clearly show that Hooper, one of the claimants, was in possession of the property for the owner at the time it was stolen in Los Angeles, and that, before the plaintiff bought the car from Gallick and wife, and before the writ of sequestration was issued and a levy made thereunder, and, as against plaintiff, would have the right to join in the suit with the owner for the possession of the car; that the Firemen's Fund Insurance Company having insured the car against theft before the levy of the writ, and that after the car was stolen, having paid the insurance, and bought the car, and having taken an assignment from the owners of all their rights in the car, had such rights as that it could assert its ownership and right of possession in a trial of the right of property. Under the evidence, the court was not in error in directing the verdict, as there was no controverting evidence as to claimants' ownership and right of possession.

The case is affirmed.

MERCHANTS' & BANKERS' FIRE UNDERWRITERS v. PARKER. (No. 8451.)

(Court of Civil Appeals of Texas, Ft. Worth, Nov. 4, 1916. Rehearing Denied Dec. 9, 1916.)

1. INSURANCE — 645(3) — ESTOPPEL — PLEADING.

In an action on a fire insurance policy, plaintiff cannot rely on the estoppel of defendant to deny the agency of the one who took plaintiff's application and premium, unless the estoppel is specially pleaded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1634-1641; Dec. Dig. 645(3).]

2. INSURANCE — 130(2) — CONTRACT — APPROVAL OF APPLICATION.

Where an application for fire insurance provided that no liability should attach until the application was actually approved by the home office, there can be no recovery where the jury found that the application had not been approved, since until the approval there was no contract, but only a proposal for a contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 196, 197; Dec. Dig. 130(2).]

Error from District Court, Wichita County; E. W. Nicholson, Judge.

Action by I. D. Parker against the Merchants' & Bankers' Fire Underwriters. Judgment for the plaintiff on special issues found by the jury, and defendant brings error. Reversed, and cause remanded.

Thompson, Knight, Baker & Harris and Will C. Thompson, all of Dallas, for appellant. Weeks & Weeks, of Wichita Falls, for appellee.

BUCK, J. The following statement of the nature and result of the suit made by the defendant in error we find to be substantially correct:

"This suit was instituted on November 10, 1914, in the district court of Wichita county, Texas, by I. D. Parker against the Merchants' & Bankers' Fire Underwriters, alleged to be a 'mutual reciprocal fire insurance company, unincorporated, of Bexar County, Texas, of which J. A. Baker & Co. are general attorneys and managers.'

"Plaintiff alleges in substance: That about April 6, 1914, he applied to defendant for a policy of fire insurance in the sum of \$700, covering his residence and household goods in Electra, Wichita county, Texas, for a term of six years at an annual premium of \$11.20. That the application was in writing and was delivered to defendant's duly authorized agent, A. J. Adams, together with the first premium, both of which were accepted by defendant and a policy of fire insurance issued to defendant. Plaintiff further alleged: That the original policy had either been lost or was in the possession of defendant. That on May 25, 1914, while the policy was in full force and effect, all the said house and contents were completely destroyed by fire. That such property was then worth \$1,250. Then plaintiff further pleaded that he had complied with all the terms and conditions of the policy, made due proof of loss and demanded payment of the insurance, etc., and prayed for judgment for \$700.

"By its first amended original answer, defendant denied all the material allegations of plaintiff's petition; denied the agency of A. J. Adams; and further pleaded in defense the following terms of its application: 'And no liability of the association shall attach until this application has been actually approved at the home office of the association.' Defendant denied the receipt of any such insurance application at its home office, and further specially pleaded the failure of plaintiff to make proof of loss. That plaintiff's application was destroyed in his presence and his money refunded by A. J. Adams.

"By a supplemental petition, plaintiff further alleged the agency of Adams, the receipt of the application and premium by defendant, and the acceptance and approval of same, willingness at all times to accept the policy as applied for, that liability attached as soon as defendant approved the application, and pleaded estoppel to defendant's issue in reference to proof of loss.

"The case was tried before a jury on March 25, 1915, and submitted to them on special issues, which together with the answers of the jury are as follows:

"Issue 1: Did or did not the plaintiff sign an application to A. J. Adams, for insurance on his house and household goods in defendant company? Answer yes or no. Answer: 'Yes.'

"Issue 2: If you answer the above issue in the affirmative, then for what amount was plain-

tiff's house and household goods to be insured? Answer: '\$700.'

"Issue 3: Was or was not A. J. Adams the agent of defendant company, at the time he solicited insurance from plaintiff, and gave him the receipt and received from plaintiff the check offered in evidence? Answer yes or no. Answer: 'Yes.'

"Issue 4: Did or did not the defendant company ratify the acts of A. J. Adams, in the soliciting of said insurance from plaintiff and in giving said receipt and in receiving said check for first premium, by accepting the application and money for first premium? That is, if he did solicit said insurance and give said receipt and accept said check, if it did accept same. Answer, yes or no. Answer: 'Yes.'

"Issue 5: Did or did not the defendant company receive the application and money for first premium on said insurance? Answer yes or no. Answer: 'Yes.'

"Issue 6: Did or did not the defendant company act on said application and accept and approve same? Answer yes or no. Answer: 'No.'

"Issue 7: Did or did not the defendant company receive and keep the cash premium paid by plaintiff for said insurance? That is, if any cash premium was paid. Answer yes or no. Answer: 'Yes.'

"Issue 8: Did or did not plaintiff, within 91 days after said loss by fire, make proof of the loss of his said house and household goods in compliance with the requirements of the application and policy? Answer yes or no. Answer: 'Yes.'

"Issue 9: Did or did not A. J. Adams destroy said application? Answer yes or no. Answer: 'No.'

"Issue 10: Did or did not A. J. Adams return to plaintiff the money plaintiff paid him for the first premium on said insurance? Answer yes or no. Answer: 'No.'"

On these findings both parties made motion for judgment, the court granting plaintiff's motion, and entering judgment for him in the sum of \$644, with interest from March 25, 1915, at 6 per cent. per annum. From this judgment the defendant has prosecuted this writ of error.

The first assignment of error is as follows:

"This honorable court erred in overruling defendant's motion for judgment, because the undisputed evidence showed that A. J. Adams was not the defendant's agent. That the defendant did not approve an application of plaintiff for insurance or contract with plaintiff for insurance."

The second assignment is:

"This honorable court erred in rendering judgment for plaintiff, because the undisputed evidence and the findings of the jury showed that there was no contract of insurance in existence between plaintiff and defendant prior to the fire complained of."

These two assignments will be discussed together.

As will be remembered, the sixth special issue was as follows:

"Did or did not the defendant company act on said application and accept and approve same? Answer yes or no." To which the jury answered: "No."

The defendant, both by pleading and testimony, denied the agency of A. J. Adams, the purported agent who took the application for insurance of the plaintiff. J. A. Baker, who describes himself as "attorney and manager for the Merchants' & Bankers' Fire Underwriters," but who testified that

he owned the business, denied that at any time Adams had been employed or authorized to solicit insurance. He testified that Adams had, through him, applied to the commissioner of banking and insurance for a commission to act as an insurance agent for the defendant, but that such application had not been granted by said commissioner, and that Adams was not in fact at any time an agent of defendant company. He further testified that the last time he had heard of Adams, the latter was in Florida. He denied that the company ever received an application for insurance from plaintiff, either through A. J. Adams, or any other person, or had ever received any check or other payment for the first premium on the policy, or that said association or he knew anything about any application having been made, or about any money having been paid thereon, until after the fire occurred. While there is no direct contradiction of this testimony with reference to the employment of Adams by the defendant, yet there is certain testimony constituting a sufficient basis perhaps, especially under a plea of estoppel to deny agency, for the finding of the jury that said Adams was the agent of defendant. The plaintiff testified that Adams approached him several times in the town of Electra, soliciting his insurance, and that finally he gave to said Adams a check, dated April 15, 1914, for \$11.20, and signed an application, dated April 6, 1914, for insurance on his residence and household goods in the sum of \$700, for a term of six years, the cash payment being the first of six annual premiums. The check was introduced in evidence as having been paid through the local bank, and indorsed on the back "J. A. Baker & Co., per A." He explained the difference between the date of the check and the date of the application was due to the fact that the agent agreed to accept a check dated a few days ahead, as at the time the application was made he was a little short of funds.

W. H. Dallishaw testified that he gave an application for insurance to Adams in March, 1914, and paid Adams by check, and said check was cashed through the bank, and that Adams gave him a receipt similar to that given to plaintiff; that witness signed an application giving a description of the property, said application providing for a premium to be paid in annual installments; that witness, in response to his application, received the policy with the name "Merchants' & Bankers' Fire Underwriters Company" on it.

S. C. Chapman, assistant cashier of the First National Bank of Electra, testified to knowing A. J. Adams since February, 1914, and that he came into the bank with Thomas Tripp "who is represented as the state agent of the Merchants' & Bankers' Fire Underwriters, San Antonio." He further testified to Adams' having an account in the bank, and giving checks on said account, and he identified the signature of Adams on the

check given by the witness Dallishaw. He further testified that Adams had written a policy in the defendant company in April, 1914, for T. D. Walker, a hotel man at Electra, and that Adams had with him while in Electra supplies with the name of defendant company thereon.

John Mann testified to having a policy in the defendant company, the application for which had been given to Adams, and that witness had received a receipt from Adams for the first premium. That he did not receive any policy, and he wrote the defendant company, and that later Mr. Tripp came to see him, and that witness received a policy subsequent to the visit of Mr. Tripp, and that the policy came from San Antonio.

T. C. Tripp testified that he had paid to the company the amount of the first year's premium claimed by the witness Mann to have been paid to Adams, that Mann was a friend of long standing, and that he did not want him to lose anything by reason of the transaction with Adams. He further stated that it was his remembrance that the name "R. F. Stevenson & Co." was signed to the Mann receipt; that he knew R. F. Stevenson, but not "R. F. Stevenson & Co."; that Stevenson was one of defendant's agents living at Proctor, and that he did not recall that said Stevenson had any authority to appoint any agent to help him; that Stevenson was still an agent for the company. The witness further testified that he was with Adams at Electra in February, 1914, and that he (witness) was trying to get Adams a commission from the commissioner of banking and insurance—

"to be our duly authorized agent, but he did not get it. It would seem that he solicited. I knew last December that Adams had solicited, when he was talking to John Mann here in Wichita Falls. I knew that he had no right to solicit without authority." The commissioner of banking and insurance is at Austin. When I was in Electra with Adams I was trying to get him an appointment. I did not get him the appointment. It is customary for a man not to solicit insurance until he gets a permit from the commissioner of insurance. I did not solicit before I got my commission. Adams was assisting me in the securing of business at Electra. I went into the bank with him a number of times. If he collected money and remitted it to the Merchants' & Bankers' Fire Underwriters, I do not know it. I do not remember the T. D. Walker policy. I have no recollection of the Crawford & Menerick policy (taken out by the witness Dallishaw). I do not know anything about Adams' soliciting that business. I do not know anything about any policy being issued. I do not know anything about the policies, but if they were to my account they had my name on the back. I was with Adams some four to six days. I do not remember one he solicited when he was with me. It was some kind of a hotel and burned, and we had to pay for it. I sold that policy myself. I do not remember of him ever soliciting at all. He was with me and I solicited and he listened to me."

He further testified that Stevenson took applications for the appointment of agents, but did not have the power to appoint such agents. That in December, 1914, he saw Adams in Wichita Falls, and knew at the

time that he had taken money from John Mann without any authority, and that he (witness) had not personally taken any steps to have said Adams prosecuted. That he had heard from Adams in January, 1915. He further testified:

"I represent the defendant in my limited way in North Texas. Mr. Baker is over me. He is the one who is referred to in the policy form, 'J. A. Baker & Co., Attorneys and Managers.' * * * I have looked up the John Mann policy to the Star Furniture Company, and find that the premium of \$23.65 was charged to me. My duties with reference to this defendant are to solicit applications, and I never do anything else, unless I have specific instructions from the company. By soliciting I mean that I take an application and go to a man and talk about insurance, tell him what I have done, the company I am with, what price on his risk, what the board rate is, and I fill out the application and have him to sign it, give him a receipt, and send the application to the head office, and, if it is approved, a policy is issued on it, and, if not, it is sent back. Mr. J. A. Baker of San Antonio approves applications. When I give a receipt I sign it as nearly like the commissioner of insurance specifies as I can; my name always appears on every receipt I give. I never sign 'J. A. Baker' per myself; I haven't that authority. Adams and myself were in Electra in the early part of February, 1914, for four, five, or six days. To have had Adams appointed agent I had to have him file an application to the commissioner of insurance and banking at Austin, Tex., stating the men that he had worked for for the last five years; letters of recommendation—everything to show his reputation for five years past, that is the law; you have a form to comply with and I had him fill that out and forward it to Mr. Baker; his duty was to forward that to the commissioner of insurance and banking; the permit would be sent to Baker in order that a man might become our agent; after considerable negotiations the commissioner refused to issue that permit; it was turned down. If Mr. Baker declines a permit, it is done; if it is sent to the commissioner and he declines it, it is done; I cannot pass on things at all; nor can anybody else except those two."

[1] But whether the testimony above set out is sufficient to sustain plaintiff's plea of the agency of Adams, in the absence of a plea of estoppel, which the plaintiff's pleadings do not contain, and which equitable doctrine must be specially pleaded, except in action of trespass to try title (Townes' Texas Pleading [2d Ed.] 543; Scarbrough v. Alcorn, 74 Tex. 358, 12 S. W. 72), we are not called on to decide, for, as we view it, the question presented in appellant's second assignment is decisive.

[2] If the finding of the jury in answer to issue No. 6 be given its natural and proper effect, the other findings become immaterial, and judgment should not have been rendered for the plaintiff. If the defendant company did not accept and approve the application, the contract of insurance was not consummated, and, ordinarily it should be held in such an instance, the insurance company would not be liable for loss accruing, for the application made by plaintiff below provided:

"And the association shall not be bound by any act done, or statement or agreement made, or promise, or knowledge of any solicitor, deputy or other person, which is not contained in this

application, and no liability of the association shall attach until this application has been actually approved at the home office of the association, and the undersigned applicant for the proposed insurance hereby agrees to accept the policy issued by the association upon the application."

See *Life Ins. Co. v. Hockett*, 35 Ind. App. 59, 73 N. E. 842; *Sterling v. W. O. W.*, 28 Utah, 505, 80 Pac. 375, on rehearing, *Id.*, 28 Utah, 526, 80 Pac. 1110; *Walker v. Ins. Co.*, 51 Iowa, 679, 2 N. W. 583; *Cooksey v. Ins. Co.*, 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26; *Chamberlain v. Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851; *Ins. Co. v. Rudolph*, 45 Tex. 454; *Coker v. Atlas Acc. Ins. Co.*, 81 S. W. 703; *Etna Life Ins. Co. v. Hocker*, 39 Tex. Civ. App. 330, 89 S. W. 262.

Cooley in his work entitled "Briefs on the Law of Insurance," vol. 1, p. 412 (c), says:

"The making of an application is, however, merely a step in the creation of a contract. As was said in *Lee v. Life Ins. Co.*, 15 Fed. Cas. 158, the rights of the applicant are not concluded by the making out of the application. When the application is made out and forwarded to the company, it is not yet a contract of insurance. It has then only attained the position of a proposition on one side, which must be accepted on the other. That is to say, until it is accepted by some one having authority to accept the terms proposed, the application is not a contract, but merely a proposal."

In some cases it has been held that where an application has been made and forwarded to the insurance company and retained by it an unreasonable length of time, without action, and the applicant has relied on his protection to his loss, the insurance company is liable. See 1 Cooley on Insurance, *supra*, 426 (b); *Adams v. Eldam*, 42 Minn. 53, 43 N. W. 690; *Waters v. Security, etc., Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978 (writ of error denied); *Cont. Ins. Co. v. Haynes*, 10 Ky. Law Rep. 276; *Halle v. N. Y. Life Ins. Co.* (Ky.) 58 S. W. 822, cited in *Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211.

But without discussing each of these cases, and others of similar import, separately, it is perhaps sufficient to say that in each case the conclusion reached was based upon a state of facts peculiar to it, and showing an instance of equitable grounds of recovery upon the part of plaintiff by reason of the negligent delays of the defendant. Moreover, the holding in this class of cases is in conflict with the trend of authority throughout this country. Quoting the language used in *Life Ins. Co. v. Rudolph*, *supra*:

"It devolved on the plaintiffs to prove, according to their averment, that the contract of insurance had been completed by the acceptance on the part of the company of the application. By the terms of the receipt no insurance was attempted to be created until the application was accepted. Mr. Parsons, in treating the subject, says: 'It would seem that a policy may take effect if the bargain be completely made, although, before any delivery of it, the one insured has died, and delivery was withheld in

consequence. It need not be added that the evidence must be very clear and the circumstances very strong to give effect to such a policy.'"

In the case of *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986, the Supreme Court of Kansas announces, we think, the true doctrine, where it, in effect, says when a contract of insurance has been agreed upon, the execution of a policy is not essential to its taking effect, unless part of the contract be that it shall not take effect until the execution and delivery of that instrument; and, except in such cases, the insured may bring suit upon the agreement before the issuance of the policy, if a loss has occurred in the meantime, and may also join in the suit a cause of action in equity for the specific performance of the contract to issue a policy. Of course, no such condition exists in the instant case but, on the contrary, the application provided that the contract of insurance should not take effect until the application had been approved by the home office.

We conclude that the trial court erred in rendering judgment for plaintiff, in the face of the jury's finding to special issue No. 6, for which error the judgment must be reversed.

Judgment reversed, and cause remanded.

BLOCH v. BLOCH. (No. 646.)

(Court of Civil Appeals of Texas. El Paso.
Dec. 7, 1916. Rehearing Denied
Jan. 5, 1917.)

1. DIVORCE — § 93(3) — PLEADING — PETITION — SUFFICIENCY.

In a wife's suit for divorce on the ground of cruel treatment, in the absence of an allegation of physical violence or imputation of want of chastity the petition must allege such treatment as will produce a degree of mental distress which threatens to impair her health.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 300, 304-307; Dec. Dig. § 93(3).]

2. DIVORCE — § 93(3) — PLEADING — PETITION — SUFFICIENCY — SPECIAL EXCEPTION.

In a wife's suit for divorce on the ground of cruel treatment, a petition, which failed to specifically state the time, place, and material circumstances of acts of cruel treatment alleged, is insufficient upon special exception, as stating merely the conclusion of the pleader.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 300, 304-307; Dec. Dig. § 93(3).]

3. DIVORCE — § 91 — PLEADING — JURISDICTIONAL FACTS.

In a divorce case, a petition should follow the language of the statute respecting jurisdictional facts of residence in the state and county.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 287-289; Dec. Dig. § 91.]

4. DIVORCE — § 150(2) — TRIAL — FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In a divorce case, where the evidence was conflicting upon material issues, the failure of the court to file findings of fact and conclusions of law upon seasonable request therefor was error.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 505-508; Dec. Dig. § 150(2).]

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Suit for divorce by Annie Klein Bloch against Herman Bloch. Decree for plaintiff, and defendant appeals. Reversed and remanded.

Jno. T. Hill and C. W. Croom, both of El Paso, for appellant. P. E. Gardner and W. S. Berkshire, both of El Paso, for appellee.

HIGGINS, J. Appellee brought this suit against appellant for divorce, settlement of property rights, and partition, and for custody of a minor child. As grounds for divorce, it was alleged that about three years before the parties separated—

“the defendant began a course of unkind and inhuman, harsh and tyrannical, treatment towards plaintiff, which continued until plaintiff was forced and compelled to abandon defendant, as aforesaid; that the defendant often cursed and abused plaintiff and applied to her the vilest and most approbrious epithets without any cause or provocations whatever on the part of this plaintiff; that he was guilty of inhuman treatment and gross excesses at all times; that he would frequently stay out all night and gamble away his money; that he kept company with women of ill repute; that he contracted a contagious and loathsome disease known as syphilis; that he was at all times quarrelsome and abusive; that on the — day of September, 1915, in their home at El Paso, Tex., he boasted of his conduct with other women; that he called plaintiff vile names and threatened to kill her, and offered to strike her with a chair; that he frequently threatened her life, and plaintiff lived in constant fear of her life, and heaped upon her such abuses as to endanger her health and make her life unbearable; that he refused to contribute to the support of plaintiff, and although he made considerable money, he would squander it in gambling and other vices; that he would often curse and abuse plaintiff's mother and her brother; that his course of conduct towards her generally was of such a nature as to make her life unbearable and to render their further living together as husband and wife insupportable.”

To the portion of the petition quoted, defendant filed the following special exceptions:

“Defendant excepts to the third paragraph for the reason that the same embodies the conclusions of the pleader, indefinite and uncertain, for the reason that it fails to state the time and place of the various charges made therein against defendant; defendant excepts to that portion of said paragraph 3 that alleges, on the — day of September, 1915, that defendant boasted of his conduct with other women; that he called plaintiff vile names, and threatened to kill her, and offered to strike her with a chair, threatened her life, and abused plaintiff in such way as to endanger her health, for the reason it is nowhere alleged that plaintiff feared that defendant would enforce his threats, and failed to allege that she feared defendant, and fails to allege that his threats and conduct did in truth and in fact endanger her life or her health. Defendant excepts to that portion which alleges that defendant failed to support plaintiff for the reason that she was not in need of means of support, also defendant excepts to that portion of said paragraph which alleges that plaintiff squandered and gambled away his money, and that he cursed and abused plaintiff's mother and brother, because it is not shown that the plaintiff was in need of the money spent by defendant, and that it is not shown that defendant cursed and abused plaintiff's mother and brother without provocation.”

The overruling of these exceptions is assigned as error. The law is settled in this

190 S.W.—34

state that, in order to entitle the wife to a divorce upon the ground of cruel treatment, in the absence of physical violence or accusations imputing to her a want of chastity, she must show such treatment as will produce a degree of mental distress which threatens to impair her health. *Bush v. Bush*, 103 S. W. 217; *Eastman v. Eastman*, 75 Tex. 478, 12 S. W. 1107; *McKay v. McKay*, 24 Tex. Civ. App. 629, 60 S. W. 318; *Ryan v. Ryan*, 114 S. W. 464.

[1] The petition alleges no physical violence towards appellee, nor any imputation of a want of chastity, and the exception should have been sustained which complains of the failure to show any threatened impairment of plaintiff's health by reason of defendant's threats and conduct. It is true there is an allegation that defendant “heaped upon her such abuses as to endanger her health,” but it is not stated what the “abuses” were, and there is nothing to show that such “abuses” referred to the threats and conduct against which the special exception was particularly directed.

[2] Another established rule in divorce cases is that the acts complained of must be specifically stated as to the time, place, and material circumstances. General charges of excesses, cruel treatment, and outrages are conclusions of the pleader, and are insufficient upon special exception. The acts relied upon as constituting the same should be stated so that the court may determine whether they constitute such excesses, cruel treatment or outrages, as the statute contemplated. The defendant's special exception, complaining of the insufficiency of the petition in this respect, was improperly overruled. *Wright v. Wright*, 3 Tex. 168; *Byrne v. Byrne*, 3 Tex. 336; *Nogees v. Nogees*, 7 Tex. 538, 58 Am. Dec. 78; *Jones v. Jones*, 41 S. W. 413.

It is quite manifest that many of the plaintiff's allegations are subject to the objection that they embody merely the conclusion of the pleader; that they are indefinite and uncertain in the particulars pointed out by the exception.

Various assignments question the sufficiency of the evidence. In view of a retrial, we refrain from commenting upon the probative force of the evidence.

[3] It is also asserted that the petition fails to sufficiently allege that at the time of exhibiting her petition, the plaintiff had been an actual bona fide inhabitant of the state for a period of 12 months, and had resided in El Paso county for six months next preceding the filing of the suit. The petition is possibly sufficient in that respect, but we suggest that it would be well to follow the language of the statute respecting these jurisdictional facts. By so doing, this question, upon retrial, will be freed of any doubt.

In view of this reversal, it is unnecessary to pass upon the assignment complaining of

the court's action in awarding the custody of the child to Mrs. Bloch.

[4] Error is also assigned to the failure of the court to file findings of fact and conclusions of law. A seasonable request therefor was made and bill of exception taken to the court's failure to file same. It is true there is a statement of facts in the record, but the evidence is conflicting upon material issues. In such case, it is error to fail to comply with a request for such findings. It is a right granted by the statute, and we are unable to say that the failure to comply with the request is not harmful in such cases. Our views upon this subject are well stated in *Kyle v. Blanchette*, 158 S. W. 796, and *Herman v. Bailey*, 174 S. W. 865. See, also, *Wandry v. Williams*, 103 Tex. 91, 124 S. W. 85; *Wood v. Smith*, 141 S. W. 795.

Reversed and remanded.

WELLS FARGO & CO. v. LONG. (No. 5742.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 13, 1916.)

1. EVIDENCE \hookrightarrow 543(4)—EXPERTS.

In action for value of a lost picture, a witness, whose estimate as to its being worth \$250 was based on the fact that an ordinary water color painting of that size would be worth \$150, and that the lost picture would be worth \$100 more because painted on porcelain and inlaid with mother of pearl, was not qualified sufficiently to make such opinion admissible; it being evident from her testimony that the estimate of \$100 difference was merely a guess.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2358; Dec. Dig. \hookrightarrow 543(4).]

2. EVIDENCE \hookrightarrow 543(4)—EXPERTS.

Such witness did, however, sufficiently qualify to testify that the painting exclusive of special features was worth \$150, it appearing that she had handled water color paintings for two years in the art department of a store, and that she sold water color paintings of that size in ordinary water colors for from \$150 to \$175 and \$200, whether on porcelain or anything.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2358; Dec. Dig. \hookrightarrow 543(4).]

3. APPEAL AND ERROR \hookrightarrow 1054(1)—HARMLESS ERROR.

Where trial is before the court, the admission of hearsay testimony does not require reversal, provided there be legitimate evidence sufficient to support the judgment, and the result would have been the same had the hearsay testimony been excluded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4185; Dec. Dig. \hookrightarrow 1054(1).]

4. APPEAL AND ERROR \hookrightarrow 1011(1)—CONFLICTING EVIDENCE—QUESTION OF FACT.

Although the testimony of defendant appears more convincing than that upon which plaintiff recovered below, judgment will be affirmed if supported by competent and sufficient evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. \hookrightarrow 1011(1).]

Appeal from County Court for Civil Cases, Bexar County; John H. Clark, Judge.

Action by W. J. Long against Wells Fargo

& Co. From judgment for plaintiff, defendant appeals. Affirmed.

Ball & Seelgson and C. W. Trueheart, all of San Antonio, for appellant. Henry, McCloskey & Robertson, of San Antonio, for appellee.

MOURSUND, J. [1, 2] Appellee sued appellant for \$500, the alleged value of a picture which appellant contracted to transport from San Antonio, Tex., to Santa Anna, Tex., and which was destroyed while in appellant's possession. Upon a trial, without a jury, judgment was rendered in favor of appellee for \$140. This judgment was based upon the testimony of Mrs. Marian A. Sellers, and appellant contends that she failed to qualify sufficiently as an expert to justify the court in admitting and considering her testimony. She expressed the opinion that the picture was worth \$250, and there is no doubt that she failed to qualify sufficiently to make that opinion admissible; for it appeared that her estimate was based upon what an ordinary water color painting of that size would be worth, and her estimate of \$100 for the difference between an ordinary water color picture and plaintiff's picture, which she described as a water color painting on porcelain, inlaid with mother of pearl. It is evident from her testimony that this estimate of \$100 difference was merely a guess. However, as the court only allowed \$140, it may be inferred that he discarded this \$100 and allowed the value of an ordinary water color painting of the same size. There is no doubt that the witness qualified to give an opinion on the value of water color paintings, which she had handled for two years in the art department of Hummert's store. She testified this was a water color painting, and that she sold water color paintings of that size in ordinary water colors for from \$150 to \$175 and \$200, whether on porcelain or anything. Afterwards she said:

"A water color painting \$125 or \$150, according to size of it, and it leaves a margin between that \$150 and \$250 for the porcelain and mother of pearl, and the idea is very hard to produce."

This amounts to the expression of an opinion that the picture, stripped of the features which she testified made it more expensive, was worth \$150. It is true she testified that the value of ordinary water color paintings "is not so much a criterion of the value of this picture"; but it is apparent from all of her testimony that she did not mean by this to say that there was any difference in so far as the painting itself was concerned, but that the plaintiff's picture, being on porcelain and inlaid with mother of pearl, would be more valuable than if it was an ordinary water color picture. We conclude that we cannot hold

that she did not sufficiently qualify to testify to the fact that the painting, exclusive of special features, was worth \$150. The court evidently took this view of the matter.

[3] It is also contended that the court erred in permitting Mrs. Sellers to testify that such pictures had only been made abroad, and were no longer being made anywhere, and had ceased to be made to any extent. The witness admitted that this testimony was hearsay, but it appears that there is testimony from other witnesses to the same general effect. In addition, the trial being before the court, the fact that hearsay testimony was admitted does not require a reversal, provided there be legitimate evidence sufficient to support the judgment, and the result would have been the same had such hearsay testimony been excluded. *Erwin v. Archenholt Co.*, 34 Tex. Civ. App. 55, 77 S. W. 823; *Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989.

[4] It is also contended that the judgment should be reversed for insufficiency of evidence. We have stated the testimony on which the court must have rendered his judgment. After such testimony was given, defendant produced the damaged picture in court, and had four witnesses to testify with reference thereto. All of them testified it was a cheap picture, and not a work of art; and none of their estimates of its value exceeded \$20. Two of them were sure it was an oil painting, while one said he could not get at it to tell whether it was an oil painting or water color painting, and the fourth said he could not tell whether it was an oil painting, that it had the appearance of one, but could be either an oil painting or water color painting. They denied it was on porcelain, but their theories differed in regard to how it was made. Some of these witnesses testified to experience which should have well qualified them to make an estimate upon the value of the picture, and their testimony appeals to us as being more convincing than that upon which the court based his judgment. However, we cannot say that the judgment is not supported by competent and sufficient evidence, and we conclude that we should affirm the same.

Judgment affirmed.

PETTY v. WILKINS. (No. 1579.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 1, 1916. On Motion of Appellee for a Rehearing, Nov. 23, 1916. Dissenting Opinion, Nov. 25, 1916.)

1. BOUNDARIES — §36(5) — EVIDENCE — SURVEYS — REPORT TO COMMISSIONERS' COURT.

It was error to admit against plaintiff's objection as evidence of a boundary line a report to the commissioners' court of a survey, where neither plaintiff nor any one under whom he claimed had anything whatever to do with the

report, since his rights could not be affected thereby.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 171-176; Dec. Dig. §36(5).]

2. BOUNDARIES — §40(1) — EVIDENCE — QUESTION FOR JURY.

Evidence held to make location of boundary line a question for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-203; Dec. Dig. §40(1).]

3. FRAUDS, STATUTE OF — §103(2) — CONTRACTS FOR SALE OF LAND — OPTION — "ACCEPTED IN WRITING."

An instrument, leasing land for one year and also giving exclusive option to lessee during the year, although signed by both parties, was not an option accepted in writing, and hence was not enforceable in equity, although within the year the lessee undertook to act on the option, since what the lessee accepted by signing the instrument was not lessor's offer to sell him the land, but lessor's agreement that he should have the exclusive privilege during the year to purchase it if he should so desire.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 195; Dec. Dig. §103(2).]

On Motion of Appellee for Rehearing.

4. SPECIFIC PERFORMANCE — §97(1) — PERFORMANCE BY PLAINTIFF — OPTION — TENDER OF PAYMENT.

Where the title of the giver of an option on land was defective as to part, the option holder was not entitled to specific performance of the option as to the part to which title was good, where he merely expressed a willingness to buy that part and pay therefor a sum estimated to be its pro rata value, and did not either pay or tender its proportionate value, at the price of the entire tract.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 286-290, 294, 295; Dec. Dig. §97(1).]

5. DEEDS — §38(1) — DESCRIPTION — UNCERTAINTY.

A deed, although describing land uncertainly, was not void for uncertainty, where it also recited that the place was "known as the place built on by Thos. Davis and lastly occupied by G. N. Breckenridge," since from such description the land might be identified by extrinsic evidence.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 65; Dec. Dig. §38(1).]

Hodges, J., dissenting in part.

Appeal from District Court, Franklin County; H. F. O'Neal, Special Judge.

Action by S. A. Petty against J. M. Wilkins, in which defendant brought cross-action. From judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

For a valuable consideration to be paid to him, appellant, by an instrument dated January 3, 1911, leased certain land situated in the town of Mt. Vernon to appellee for a period of one year from that date, for use by appellee as a site for an electric light plant, and by the same instrument agreed to sell the land to appellee for \$400 if the latter should desire to purchase it during the term of the lease. Before the expiration of the lease appellee, having satisfied himself that other parties than appellant owned part of the land, purchased such part of them,

and then demanded of appellant a conveyance of the part he owned, offering to pay him therefor a sum representing its value at the rate of \$400 for the entire tract. Instead of complying with this demand, appellant commenced and prosecuted this suit against appellee to try the title to the tract he had leased to appellee. Appellee by a cross-action sought, as to the part of the tract owned by appellant, to enforce a specific performance of his contract to convey. The trial resulted in a judgment, in conformity to the verdict of a jury, in appellee's favor on the issue of title as to part of the tract, and in his favor for a specific performance by appellant as to parts thereof found to belong to appellant. Much of the testimony of witnesses offered for the purpose of identifying the land in controversy was with reference to maps and plats admitted as evidence, but omitted from the record sent to this court. As a consequence of this omission this court has been subjected to much greater labor than it otherwise would have been in the effort to understand the testimony referred to, and besides, and what is more serious, feel that they have not understood all of it and may have misunderstood part of it. Where, as is the case here, the rights of parties to an appeal depend upon the location on the ground of corners and lines of surveys relied upon to identify tracts and parts of tracts of land they respectively claim, it is of the utmost importance to an understanding by an appellate court of the testimony of witnesses offered to prove the location of such corners and lines on the ground that maps and plats referred to by them and admitted as evidence should be included in the record on appeal, and the parties to the appeal should see to it that they are included.

R. T. Wilkinson and H. L. Wilkinson, both of Mt. Vernon, for appellant. S. D. Goswick, of Mineral Wells, L. E. Keeney, of Texarkana, and R. E. Davenport, of Chickasha, Okl., for appellee.

WILLSON, C. J. (after stating the facts as above). [1, 2] It appears from a deed in the record that L. Collins conveyed to W. H. C. Davenport blocks 10 and 11, in the S.E. corner of the Mt. Vernon town tract, and a strip of land 20 yards wide south of and adjoining said block 10 and extending east and west the length of its south boundary line. The rights of the parties, it seems, depended upon the location on the ground of the south boundary line of the strip of land referred to, and the location of its said boundary line depended upon the location on the ground of the south boundary line of said block 10, which was also the south boundary line of the town tract. Over appellant's objection the court permitted appellee to introduce as evidence a report made by Cowan and King to the commissioners' court of a survey of the town

tract and of lots and blocks into which it had been subdivided, made by them at the instance of said court. This report and a plat which was attached to and formed a part of it, but which is not in the record, it seems showed the south boundary line of block 10 and the town tract to be 74 feet farther south than the distance called for in the field notes of the town tract, if respected by the surveyors, would have placed same. Appellant insists it was error to admit the report to the commissioners' court as evidence, and further insists that it was error for the trial court to instruct the jury, as he did, that the south boundary line of the Davenport land was located 20 yards south of said block 10, "as shown by the map or plat of said town by the survey made by Cowan and King." We think both contentions should be sustained. Neither appellant nor any one under whom he claimed had anything whatever to do with the survey and report thereof made at the instance of the commissioners' court, and his rights could not be affected by it. Therefore the report was inadmissible as evidence against him. It appeared from testimony that, in the survey made at the instance of the commissioners' court, Cowan and King located the south boundary line of the town tract and block 10 74 feet farther south than the distance called for in the field notes of the town tract, in order to give lots and blocks shown by an old plat they used in making the survey to be subdivisions of the town tract the dimensions north and south given them on the plat. When and whose instance the old plat was made was not shown. In this condition of the testimony the trial court should have submitted to the jury for determination a question as to the location of the south boundary line of the Davenport land, instead of instructing them as a matter of law that it was 20 yards south of block 10 as located by the Cowan and King survey.

[3] The court instructed the jury to find in appellee's favor as to a part of the land on his cross-action for a specific performance of appellant's contract to convey same. The objection urged to the instruction is that it was unauthorized by the testimony because it did not appear that appellee had in writing accepted the option given him in the contract. Under the holding in *Patton v. Rucker*, 29 Tex. 408, which, though ignored by the Court of Civil Appeals in *Anderson v. Tinsley*, 28 S. W. 121, it seems has never been overruled, the objection is believed to be a meritorious one. In the *Rucker Case*, followed by the Court of Civil Appeals in *Foster v. Land Co.*, 2 Tex. Civ. App. 505, 22 S. W. 260, *Daugherty v. Leewright*, 174 S. W. 841, and other cases, the Supreme Court said:

"In order to their enforcement by the courts, the sale of land must be evidenced by writing. When the writing relied on contains within itself all the particulars of a concluded

contract, it is sufficient if it be signed by the party against whom it is sought to be enforced; but if, instead of being evidence of a concluded agreement, whatever may be its form, it is really a mere proposal, such a writing is turned into an agreement, and can be enforced in equity by the other party only by his acceptance of it in writing."

And see *Anslay Realty Co. v. Pope*, 105 Tex. 440, 151 S. W. 525; 1 *Warvelle on Vendors*, § 125 et seq.

Other assignments, not in effect disposed of by what has been said, and also appellee's cross-assignments, are overruled.

The judgment is reversed, and the cause is remanded for a new trial.

On Motion of Appellee for a Rehearing.

It is insisted we were wrong in holding the instruction to find in appellee's favor as to part of the land, on his cross-action for a specific performance, was unauthorized because "it did not appear that he had in writing accepted the option given him in the contract." In support of his contention appellee asserts that:

"The testimony is undisputed that there was a written contract for the sale of this land, signed by both parties, and within the time fixed by the contract the appellee accepted the option in the contract and offered to perform."

The facts as shown by the record are: That appellee signed the instrument, evidencing the lease of the land to him by appellant for a term of one year; that by this instrument appellant agreed that appellee might—

"have an option on said lot for one year, and agrees that the party of the second part [appellee] may have the exclusive privilege of buying said lot at any time within one year from this date [January 3, 1911] by paying him [appellant] the sum of \$400; and should the said party of the second part pay or tender him the said sum of \$400 within said one year, he [appellant] hereby agrees to make said party a warranty deed conveying to him said lot by a good and perfect title."

That by said instrument appellee on his part agreed:

"That he will accept the terms of this contract and will furnish the party of the first part [appellant] electric lights in his residence for the term of said lease and accept the use of the lot as before mentioned as payment in full for said lights."

That appellee afterwards ascertained that appellant owned only a part of the land covered by the lease; and within one year from its date he advised appellant he was willing to buy that part and pay him for same the sum of \$90, which he (appellee) estimated was its value on the basis of the entire tract being worth \$400.

We were, and are, of opinion the instrument did not show a concluded contract between the parties, because it did not appear therefrom that appellee had accepted appellant's offer to sell him the land, but was left free during the time specified to accept it or not as he might choose. As it was not pretended that appellee ever afterwards within that time in writing accepted appellant's

offer, we thought, and think, the rule announced in *Patton v. Rucker*, 29 Tex. 406, applied to the case. The writing evidenced no more than a "mere proposal" on the part of appellant to sell the land to appellee, and it was not, as the rule required it must have been, to entitle appellee to the relief he sought, "turned into an agreement by his (appellee's) acceptance of it in writing." What appellee "accepted" by signing the instrument was not appellant's offer to sell him the land, but appellant's agreement that he should have "the exclusive privilege" during the life of the lease to purchase it if he should wish to do so.

As supporting his contention appellee cites *Morris v. Gaines*, 82 Tex. 257, 17 S. W. 538, *Dyer v. Winston*, 38 Tex. Civ. App. 412, 77 S. W. 227, *Hazzard v. Morrison*, 180 S. W. 244, *Black v. Hans*, 146 S. W. 309, and cases decided in other jurisdictions. It is not doubted that the weight of authority outside this state supports the proposition that, appellant's offer being in writing, appellee could maintain a suit for a specific performance, notwithstanding his acceptance thereof was oral. But, as we understand it, such is not the rule in this state, and the Texas cases cited do not hold it is. All of them on their facts are plainly distinguishable from this case, on grounds indicated in *Foster v. New York & Texas Land Co.*, 2 Tex. Civ. App. 506, 22 S. W. 262, cited in the opinion on this appeal.

[4] But if the rule in this state were otherwise, and as appellee contends it is, the instruction of the trial court to find in appellee's favor on his cross-action for a specific performance would have been unauthorized, because it did not appear that appellee, within the time specified, either paid or tendered to appellant the proportionate value, at the price of the entire tract, of the part thereof owned by appellant. As stated above, all appellee did was to express to appellant a willingness to buy that part and pay him therefor a sum he estimated to be its pro rata value.

[5] It is also insisted that we erred when we overruled appellant's cross-assignment, in which he complained of the action of the trial court in admitting as evidence, over his objection thereto that it was void for lack of a sufficient description of the land it purported to convey, the deed from L. Collins to R. J. Stephenson, dated March 24, 1869. The deed was not copied into the record sent to this court, but is referred to therein as follows:

"Deed from L. Collins to R. J. Stephenson, dated March 24, 1869. Recorded in vol. 3, p. 390, Deed Records of Franklin County. Filed for record April 5, 1869. A certain tract or parcel of land better known and described as follows, to wit: Beginning on the east boundary line of a hundred and sixty acre survey made by virtue of the headright certificate of Joseph Stone a stake, thence west 168 $\frac{1}{2}$ vrs. a stake, thence south 139 $\frac{1}{2}$ varas a stake, thence east 168 $\frac{1}{2}$ vrs. a stake, thence north

139²/₁₁ to the place of beginning. Also known as the place built on by Thos. Davis and lastly occupied by G. N. Breckenridge, containing four (4) acres being a part of said Stone survey. Together with all and singular the appurtenances thereto belonging."

The specific grounds upon which it is claimed the description was insufficient are that the land in controversy was a part of the Joseph Sloan survey, whereas it was described in the deed as a part of the Joseph Stone survey; that it did not appear from the deed in what county and state the land it purported to convey was situated; and that "the beginning in the description was not sufficiently located in order to describe any land." We were, and are, of opinion the deed was not on its face void for uncertainty in the description of the land it purported to convey, because it appeared therefrom that the land therein described might be identified as the land in controversy by proof showing that it was "known as the place built on by Thos. Davis and lastly occupied by G. N. Breckenridge." The rule is that a deed is not void for uncertainty unless on its face the description cannot by extrinsic evidence, be made to apply to any definite land. *Waterhouse v. Gallup*, 178 S. W. 773; *Roberts v. Hart*, 165 S. W. 473.

The motion is overruled.

HODGES, J. (dissenting in part). I concur in the disposition made of this case, but do not agree to all of the grounds upon which it is based. After quoting a portion of a written contract relied on by the appellee, the Chief Justice in his opinion on a motion for a rehearing uses this language:

"We are of the opinion that the instrument did not show a concluded contract between the parties, because it did not appear therefrom that the appellee had accepted appellant's offer to sell him the land, but was left free during the time specified to accept it or not as he might choose."

I am unable to agree to that construction of the contract referred to, or concur in the holding that the contract was not one which could not have been enforced because no written acceptance had been made during the period mentioned. Our statute, which prescribes the requirements of a valid contract for the sale of land, requires that such instruments be in writing, and be signed by the party to be bound. A contract by which an owner of land grants to another the option or privilege to purchase within a stated period, if supported by a consideration, is valid and enforceable, although the party to whom the option is given is not bound to purchase. *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586, 68 S. W. 979. There is no question of a want of consideration in this case. Appellant was the owner of the land and for a sufficient consideration bound himself to this effect:

"Should said party of the second part [appellee] pay or tender to him [appellant] the said sum of four hundred dollars within said one year, he [appellant] hereby agrees to make said party a warranty deed conveying to him said lot by a good and perfect title."

This agreement was signed by both parties. The portion of our statute of frauds which relates to contracts for the sale of land was enacted for the purpose of providing written evidence of the obligations which the parties assumed. The statute is complied with when in addition to a description of the subject-matter of the contract the writing contains the promises and agreements to be performed in the future. It is unnecessary to reduce to writing a stipulation which binds no one. In the contract before us the vendor for a presumed consideration which had already passed sold to the vendee an option or privilege of purchasing for cash the land described and at a specified price. The sale contemplated being for cash, and there being no agreement to purchase, the vendee promised nothing. Hence there was nothing to be reduced to writing.

I do not regard the cases referred to in the majority opinion as being in conflict with what I have said. The practical importance of this dissent is not such as to justify any extended discussion. I think the following cases are in harmony with what I have said: *Killough v. Lee*, 2 Tex. Civ. App. 260, 21 S. W. 970; *Anderson v. Tinsley*, 28 S. W. 121.

LONDON v. WM. E. HUSTON DRUG CO. et al. (No. 8462.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 18, 1916.)

1. BILLS AND NOTES ⇨365(1)—GOOD-FAITH PURCHASERS.

A purchaser of notes before maturity for valuable consideration without notice of any defense or defect can recover thereon, though the maker has a good defense as against the original payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958; Dec. Dig. ⇨365(1).]

2. BILLS AND NOTES ⇨334 — GOOD-FAITH PURCHASERS.

Notice of defects in notes acquired after purchase by purchasers in good faith without notice does not affect the holder standing as a bona fide purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 812, 813; Dec. Dig. ⇨334.]

3. BILLS AND NOTES ⇨342 — GOOD-FAITH PURCHASERS—EVIDENCE.

The mere fact that the edge of notes showed perforations, indicating that they might have been attached to other paper, is not sufficient to show notice of defects or defenses against them.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830-841; Dec. Dig. ⇨342.]

4. **BILLS AND NOTES** ~~537~~(1)—EVIDENCE—QUESTIONS FOR JURY.

Evidence held to require peremptory instruction for plaintiff in action by holder of notes upon such notes against the maker and indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871-1875, 1891-1893; Dec. Dig. ~~537~~(1).]

Appeal from Cooke County Court; R. V. Bell, Judge.

Action by A. C. Landon against the Wm. E. Huston Drug Company and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Garnett & Garnett and James Ralph Bell, all of Gainesville, for appellant. Culp, Murphy & Culp, of Gainesville, for appellees.

BUCK, J. [1] After a careful examination of the record in this case, including the statement of facts, we have reached the conclusion that plaintiff's tendered peremptory instruction should have been given by the trial court. If plaintiff was the purchaser of the notes given by defendants to the Vernon Advertising & Manufacturing Company, before maturity and for valuable consideration, and without notice of any defense or defect, he was entitled to recover thereon, even though the maker of the notes, the Wm. E. Huston Drug Company, had a good defense as against the Vernon Advertising & Manufacturing Company. Landon v. Foster Drug Co., 186 S. W. 434; article 539, Vernon's Sayles' Texas Civil Statutes; Daniel v. Spaeth, 168 S. W. 509; Kaufman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 264; Texas Banking & Insurance Co. v. Turnley, 61 Tex. 365. We do not understand that appellees question the correctness of this proposition of law, but it is urged that the evidence does not show that appellant was a bona fide purchaser of the notes, and hence he is in no position to claim protection as such bona fide holder. We are directed to no evidence, and after a careful consideration of the statement of facts have found none, even tending to establish the contention of lack of good faith in the purchaser of the notes, except the testimony of appellant on cross-examination that:

"These notes had a perforated margin, showing that they had been detached from something, such as is ordinarily used by manufacturing concerns who float serial notes."

While the appellant further testified that he had had some trouble in collecting some of the notes (other than those in controversy) purchased by him from A. J. Boatright of the Vernon Advertising & Manufacturing Company, yet he further testified that at the time of the purchase of these notes he did not know of any trouble that had been experienced by the company (meaning the Vernon Advertising Company), and that at the time of said purchase he did not know of any defense or defenses that the defendants, or any one

else, had against the notes, and had no notice of any infirmity of any of said notes, or any fraud or misrepresentation practiced by the company aforesaid in procuring said notes. It is evident, taking the testimony as a whole, that the trouble he experienced in collecting some of the notes purchased from the advertising and manufacturing company occurred subsequent to the purchase of the notes in question.

[2] Of course, any notice received subsequent to his purchase of the notes would not affect his standing as a bona fide purchaser or holder. He testified that, when approached by Boatright with regard to purchasing notes held by the advertising company, he agreed to purchase some \$4,000 worth a month of such notes, reserving the right to decline any such that, after investigation, he deemed not satisfactory; that before purchasing the notes in question he procured from R. G. Dun a favorable report as to the standing and credit of the defendants; that at the time of said purchase no contract was attached to the notes, nor did the plaintiff know of any such contract in existence.

[3] We are of the opinion that the mere fact that the notes in controversy had a perforated margin, standing alone, is insufficient to show notice, and that, this being the only evidence adduced by the defendants upon the question of notice, the court should have given the peremptory instruction asked by plaintiff. In Landon v. Halcomb, 184 S. W. 1098, the perforated margin of the notes was mentioned as one of a number of circumstances which tended to show notice to the plaintiff. The case last cited, by this court, is relied upon by appellees in support of the contention that sufficient notice had been shown of an alteration having been made in the notes by their separation from some other instrument. The strongest case we find in support of appellees' contention is Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382, where defendant agreed to become the agent for a patented article and agreed to execute his note for \$225, the price of 15 sets of springs, provided that there should be inserted in said note the condition that he, the defendant, should have credit on the note at maturity for such of the springs as might then remain unsold. This condition was agreed to by the agent of the payee, but said agent declined to put the condition on the face of the note, on the ground that there was not sufficient space therefor. He did write the condition, however, on the "stub" of the note (the note and stub attached being in a book of blank notes), and defendant signed the note upon the promise of said agent that the stub "should stay there if it was four yards long." Later the note was detached from the stub and transferred for value, whether before or after maturity does not appear, to the plaintiff in the suit. Upon an action

by the latter on the note, the maker pleaded a material alteration by virtue of said detachment, which had altered the instrument as actually made, and as agreed upon between the parties thereto, by removing therefrom the condition that he should have credit on the note for the springs unsold. The Supreme Court of Tennessee sustained defendant's plea, on the ground that by agreement of the parties before the signing of the note this condition was a substantive part of the note, and restricted its negotiability the same as if the condition had been indorsed upon the face of the note; that the severance of the condition without the consent or knowledge of the maker was a material alteration of the original contract to his prejudice, and therefore the act was forgery; that the fact that the stub could be easily separated from the note could make no difference, as no rule of law required the maker to anticipate that the payee would commit a felony by the alteration.

There is no contention made by the appellees in the instant case that it was the understanding and agreement of the original parties to the notes in question that they should not be negotiated, nor is there any evidence in the record, so far as we can discover, that the notes were ever attached to any other instrument, or that their negotiable nature was in any way conditioned by a contemporaneous agreement between the parties. Therefore, even though it should be held that the Tennessee court announces the true doctrine with reference to the state of facts there disclosed, the principle has no application to this case.

As the evidence of the understanding that the notes should be freely negotiable, defendant testified that he had paid the first of the series of six notes, and had sent a check in payment of the second note, but later stopped payment on the check and returned said second note to the plaintiff. He further testified that, as far as possible, he had carried out the advertising scheme provided for under the contract between him and the advertising company, and had sold a number of the articles furnished him by the said company, in part consideration, at least, of the notes, and did not even plead a tender to this plaintiff of the articles remaining or the value of the articles sold. The controlling reason he gives for not paying the notes is that he was advised by his attorney that the plan of advertisement offered by the advertising company was a lottery or a gambling scheme. However, even after being so advised, the evidence shows that the defendant proceeded to carry out the plan provided for in his contract with the advertising company.

[4] We are of the opinion that the trial court should have given the peremptory instruction requested, and that therefore the judgment must be reversed. The record show-

ing that the evidence was fully developed in the trial, this court feels impelled to enter the judgment which the trial court should have entered upon the verdict of the jury under peremptory instructions to find for plaintiff, and therefore judgment is here rendered in favor of appellant for the amount of said five notes, with legal interest from maturity thereof, and all costs of suit.

Reversed and rendered.

CITY NAT. BANK OF EASTLAND v. KINNEBREW et al. (No. 8399.)

(Court of Civil Appeals of Texas. Ft. Worth. June 10, 1916. On Motion for Rehearing, Nov. 25, 1916.)

1. EXECUTION \Leftarrow 172(2)—INJUNCTION—OFFER TO PAY DEBT.

In a suit under Vernon's Sayles' Ann. Civ. St. 1914, art. 4043, to restrain the sale of a wife's separate property under execution against the husband, the husband is only a formal party, and it is not necessary that plaintiffs offer to pay the debt for which the execution was levied.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 524; Dec. Dig. \Leftarrow 172(2).]

On Motion for Rehearing.

2. HUSBAND AND WIFE \Leftarrow 266—WIFE'S SEPARATE ESTATE—EVIDENCE—GIFT BY HUSBAND.

In a suit to restrain the sale of a wife's property under execution against the husband, where defendant claimed that the property was the proceeds of a partnership and therefore community property, evidence held sufficient to show that the husband had made a gift to the wife of his community interest in the money with which the land was bought, which was valid as against a subsequent creditor under Vernon's Sayles' Ann. Civ. St. 1914, art. 3967, providing that a gift is not void as to subsequent creditors though it may be as to prior creditors.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925-928; Dec. Dig. \Leftarrow 266.]

Appeal from District Court, Eastland County; Thomas L. Blanton, Judge.

Suit by Mrs. Lizzie Kinnebrew and another against the City National Bank of Eastland to enjoin the sale of property under a levy of execution. From a judgment granting perpetual injunction, defendant appeals. Affirmed, and motion for rehearing denied.

Earl Conner, of Eastland, for appellant. J. R. Stubblefield, of Eastland, for appellees.

DUNKLIN, J. An execution issued on a personal judgment for \$136.50 rendered against J. J. Kinnebrew in favor of the City National Bank of Eastland was levied upon a tract of land which was claimed by Mrs. Lizzie Kinnebrew, wife of J. J. Kinnebrew, as her separate property. This suit was instituted by her, joined by her husband, as plaintiff, against the City National Bank of Eastland, the owner of the judgment, and G. H. House, the constable who levied the writ of execution, to enjoin the sale of the property

under said levy. A temporary writ of injunction was issued as prayed for, and later, upon the trial of the case on its merits, the injunction was perpetuated, and from that judgment the defendant bank has prosecuted this appeal.

Mr. and Mrs. Kinnebrew had been married approximately 29 years at the time of the levy of the writ. Prior to her marriage she owned a tract of land which was sold after her marriage for the sum of \$2,000 and the proceeds invested in a gin. J. T. Crim was a joint purchaser with Mrs. Kinnebrew of the gin, and at the time of its purchase they entered into a partnership agreement for the operation of the gin, under the firm name of J. T. Crim & Co., by the terms of which Mrs. Kinnebrew and Crim were to share equally the profits arising from the operation. J. J. Kinnebrew assented to that agreement under a further agreement between all of the parties that he should receive a salary of \$250 per year for his services in assisting in the operation of the gin, and also such profits as he would be able to realize from the operation of a corn mill which was run as an incident to the gin. It was further agreed by and between Mr. and Mrs. Kinnebrew that all of the profits so realized by Mrs. Kinnebrew should be her separate property, and in compliance with that agreement such profits were deposited to her credit in bank. The land upon which the levy was made in the present suit was paid for out of the profits so realized by Mrs. Kinnebrew during several years' operation of the gin, and the last payment made thereon was on October 17, 1909, while the judgment upon which the writ of execution in the present suit was issued was rendered November 30, 1914. The deed recites a cash consideration of \$3,160, paid by Mrs. Kinnebrew out of her sole and separate estate, and the assumption of the payment out of her separate estate of an outstanding indebtedness of \$1,000, against the land secured by lien in favor of the Land Mortgage Company of Texas, and the conveyance was to her for her separate use.

No contention is made in the present suit that the debt of J. J. Kinnebrew, which ripened into the judgment upon which the execution was issued, was incurred prior to the last payment made by Mrs. Kinnebrew for the land in controversy. The statement is made in appellee's brief that said judgment was for an indebtedness which accrued during the two years next preceding the filing of the suit on July 13, 1915; but we have been unable to verify the correctness of that statement from the reference given in the brief to the statement of facts.

Appellant has cited many cases, such as *Green v. Ferguson*, 62 Tex. 525, *Miller v. Marx*, 65 Tex. 132, and *Kellett v. Trice*, 95 Tex. 170, 66 S. W. 51, announcing the general rule that the wife is incapable of entering into a legally binding partnership for

the conduct of a mercantile business, and thereby acquire in her separate right the profits arising therefrom; and the further rule that the husband and wife cannot by their agreements alter the character given to property by the law as applied to the facts under which it is acquired. Notwithstanding those rules, it is quite evident from the record in the present suit that the acts of J. J. Kinnebrew in depositing the profits arising from the operation of the gin to the credit of his wife in bank, the payment of those profits to the vendor of the land in controversy as a consideration for such deed, and the taking of the deed in his wife's name, stipulating that the title so acquired was for the sole and separate use of his wife, amounted in law, at all events, to a legally binding gift of any community interest he might have had in the funds so paid for the land, and in the land itself. And, in the absence of any showing in the statement of facts that the debt for which the bank's judgment was rendered accrued prior to such gift, the bank can have no right to question the validity of such a gift, even though it should be said, as contended by the appellant, that at the time of such conveyance Kinnebrew owed other debts which he was unable to pay, and that the finding of the jury that he was then solvent is not supported by the evidence. 3 *Vernon's Sayles' Texas Civil Statutes*, art. 3967.

From the foregoing conclusions it follows that appellant's second, third, fourth, fifth, sixth, seventh, and eighth assignments are overruled; all of said assignments being predicated upon the assumption that Mrs. Kinnebrew's part of the proceeds arising from the operation of the gin and the land purchased therewith necessarily were community property of herself and her husband, and that the prior agreement between her and her husband that the same should become her separate property would have no legal effect to make them so.

[1] By another assignment it is insisted that neither Mrs. Kinnebrew nor her husband could maintain the present suit for the equitable relief by injunction without first offering to pay the judgment upon which the execution was levied. Authorities such as *Shannon v. Hay*, 153 S. W. 360, and *Seymour v. Hill*, 67 Tex. 357, 3 S. W. 313, cited in support of that contention, have no application to the present suit. The judgment upon which execution was issued was against J. J. Kinnebrew and was not against Mrs. Lizzie Kinnebrew. J. J. Kinnebrew was the plaintiff in the suit, but he was joined pro forma with his wife, who was really the party in interest, and it is quite clear that she had the right to an injunction to restrain the sale of her separate property to satisfy her husband's debt without offering to pay such debt. *Vernon's Sayles' Texas Civil Statutes*, art. 4643; *City of Brownwood v. Brown Tel-*

ograph & Telephone Co., 152 S. W. 713, and authorities there cited.

For the reasons indicated, the judgment is affirmed.

On Motion for Rehearing.

[2] In our opinion upon original hearing we did not intend to hold that the acts of J. J. Kinnebrew in depositing the proceeds arising from the operation of the gin in bank to his wife's credit, and the taking of the deed in his wife's name containing the recital that it was for the separate use of his wife, constituted a gift as a question of law; but we meant only that such acts, in connection with other facts and circumstances in evidence, were sufficient to support a finding of such a gift.

With this correction, the motion for rehearing is overruled.

PENCE v. GALVESTON, H. & S. A. RY. CO. (No. 637.)

(Court of Civil Appeals of Texas. El Paso. Dec. 7, 1916. Rehearing Denied Jan. 5, 1917.)

1. RAILROADS §113(5)—MAINTENANCE—LIABILITY FOR INJURIES.

Under Rev. St. 1911, art. 6495, providing that a railroad shall not construct a roadbed without the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof, defendant railroad would be responsible to plaintiff in damages for destruction of his property by filling of the basement in his house with water if caused by defendant's failure to construct the proper culverts, or sluices, through its embankment, necessary to pass off surface water falling on higher grounds as it would have flowed but for obstruction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 357; Dec. Dig. §113(5).]

2. RAILROADS §114(4)—MAINTENANCE—ACTIONS—EVIDENCE—SUFFICIENCY.

In action against a railroad for damages caused by the flooding of plaintiff's basement by surface water, collected and diverted from its natural course by defendant's elevated roadbed, evidence held sufficient to take the question of defendant's failure to provide proper culverts or sluices, as required by Rev. St. 1911, art. 6495, to jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 371; Dec. Dig. §114(4).]

3. RAILROADS §113(5)—CONSTRUCTION—LIABILITY FOR INJURIES.

As defendant railroad's liability to the plaintiff for damages suffered by flooding of his basement by surface water must be by reason of the failure of the defendant to construct proper culverts and sluices in accordance with Rev. St. 1911, art. 6495, it owed no duty to notify plaintiff that an opening had been washed out through its roadbed, or that the opening had been cribbed up, or that it intended to put a culvert under its roadbed at any point at any time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 357; Dec. Dig. §113(5).]

4. RAILROADS §114(1)—MAINTENANCE—ACTION—PLEADING.

In an action against a railroad for damages caused by flooding of plaintiff's basement by surface water, allegations that the damage was sustained by reason of defendant's failure to construct necessary culverts under its elevated road-

bed, thereby collecting and retaining water in such large quantities that it flowed through a culvert to plaintiff's house, filling his basement with water and caused damage, and that by construction of its elevated roadbed defendant interfered with the natural flow of rainfall causing the water to collect in large quantities instead of flowing off in its natural course, and that the waters were thus caught and caused to flow through a culvert under the roadbed in such quantity as to flood plaintiff's basement, causing damage, although indefinitely stated and confused by failure to separate the two counts and pleading of immaterial facts, were sufficient, in the absence of special exceptions, to state a failure of the duty enjoined by Rev. St. 1911, art. 6495.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 368; Dec. Dig. §114(1).]

Error from District Court, El Paso County; P. R. Price, Judge.

Suit by George Pence against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. A. Buckler, of El Paso, for plaintiff in error. Beall, Kemp & Nagle, of El Paso, and Baker, Botts, Parker & Garwood, of Houston, for defendant in error.

WALTHALL, J. This suit was brought by George Pence against the Galveston, Harrisburg & San Antonio Railway Company, to recover damages alleged to have been sustained by him by reason of the company's failure to construct necessary culverts under its elevated roadbed and track, thereby collecting and retaining the waters that naturally flowed down to said roadbed, from the north side of its track in such large quantity that, when it reached a culvert placed under its said roadbed by the company, it flowed through said culvert and down to plaintiff's house, situated on the south side of said roadbed, filling his basement with water to the depth of several feet, thereby destroying certain merchandise stowed in said basement. Plaintiff alleged that by the construction of its elevated roadbed and tracks, it so interfered with the natural flow of the rainfall upon the higher ground on the north side as to cause the water to collect in large bodies on the north side of said roadbed, instead of flowing off in its natural course and spread itself over a large area of ground to the south and southeast of said track; that the waters were thus caught and retained by said elevated roadbed, and caused to flow into and through a culvert placed under its roadbed in such quantity that it flowed into his basement, causing the damage complained of. Defendant answered by general demurrer and general denial. The court heard the evidence and gave a peremptory instruction to the jury to find for the defendant. The only question presented on this appeal is the sufficiency of the evidence to take the case to the jury. The evidence amply shows that plaintiff sustained the damage alleged, and that it was caused by the water filling

his basement to the extent of several feet. On the issue as to the defendant's liability for the damage sustained, the evidence, in part, is as follows: The plaintiff testified in part:

"During the time I lived there, prior to that, there had never been any floods affecting my house. There was no difference in the location and elevation of the streets prior to that time and the time I lived there. * * * The next morning I went out to try to find out where the water came from, to find out what was the cause of it, and I followed the water up—there was still a lake of water there. I went across the street and found out where it came from. I found a cribbed-up condition of the Southern Pacific track, ties on either side the Galveston, Harrisburg & San Antonio track and I found the water had come through there. I don't know of any other place along the track up there where it could have come through. Yes; I found the culvert under the main line cribbed up. The cribbed-up culvert was a uniform size, cribbed up with ties, an opening of something less than the present opening, and it was probably 4 feet wide and 4 feet high or more. There is a permanent bridge there now, 10 or 12 feet long and about 4 feet high. I am familiar with the construction through that part of the town. * * * There is a network of tracks just at the west end of the El Paso & Southwestern tracks. They have a board fence across the end of their property there, and between that board fence and the brickyard there on Dallas street there is a network of various tracks; the main line of the Galveston, Harrisburg & San Antonio's track is laid on an elevated roadbed, beginning, say, 200 yards west of the culvert, or more; it is elevated more or less 4 feet higher than the land below it. I have known that part of defendant's road about 26 years. Yes, prior to this flood I had observed accumulated bodies of water on the north side of the track at various times, in fact, every time it comes a rain I noticed it there; it filled up the low places and stood there, and there was constantly water there during the rainy season, in more than in one place, in various places around the area where the tracks are. * * * The water came in quantity, and raised very rapidly around my house."

Photographs were introduced and plaintiff testified, explaining points shown in them. Testifying further, he said:

"Picture No. 5 shows the north side of the track, showing the conditions of the grades and the places that the water accumulates here between the various tracks, and shows the west end of the Southwestern shops, and the water runs towards that end of that fence; being the south end of that north and south fence, and from there all up in here is where the water accumulates, and shows the grade higher, and shows the low ground where the water is held. This culvert was within 20 or 30 feet of this El Paso & Southwestern fence."

The United States Weather Bureau report for the month was introduced, showing the greatest rainfall in 24 consecutive hours to be 2.06 inches.

Plaintiff, testifying further, said:

"I had lived down there five years prior to 1914. * * * During the time I lived there there had never been any floods over that land. * * * The main track was the same height ever since I have known it. * * * The natural drain in all this country is from the foothills toward the river. * * * There is no depression on the inside of my fence; it is about the same all along there. * * * I went out to that opening and it was cribbed up; a lot of water had passed through there, and the railroad section men had cribbed it up. I went out

to see some time in the forenoon of the next day. * * * I traced the source of the water to find out how it got in there. It came through that place. It ran to the cribbing, I found, on the north side of the track from town—I suppose from the streets in town. I saw where it came from the north side of the Galveston Harrisburg tracks. It came down Dallas street, the regular source; it is the regular drain there. I went up to Dallas street."

F. B. Stuart testified:

"Since I have been there (the Atlas Brick Company plant) I have noticed water standing north of the Galveston, Harrisburg & San Antonio track, immediately east of Dallas street, by our plant there. It extended up to the corner of the fence of the Southwestern yards. I have seen water standing there many times. I have seen it probably 3 feet deep there; I don't know exactly. It ran over the track there. The water comes down Dallas street there and runs around our plant, and runs over the Galveston, Harrisburg & San Antonio track and also the Southwestern track that connects the Southern Pacific with the Southwestern. I have seen it do that when the train is sufficient, when they have a flood in the northern part of the town. The water ran over the Galveston, Harrisburg & San Antonio track right in that immediate neighborhood."

Speaking in reference to a blueprint offered in evidence, the witness Stuart, after locating certain culverts in the track of the Southwestern, said:

"The Southwestern has a drainage under its tracks so the water would come down the Galveston, Harrisburg & San Antonio tracks. I have seen water come down here and run around over this track here, right here and here. I have seen this washed out so the trains could not pass over it. The trend of the water would be down this way; it could not come from this way I am quite sure."

Lee H. Orndorff, speaking of the Pence place, said:

"It was flooded last year by water from the north. It has been flooded three times since the culvert was put in over there. * * * That property has not been flooded for ten years prior to 1914, before this culvert was cut under the main track of the Galveston, Harrisburg & San Antonio. * * * That is a low part of town down there. If the railroad was not there, I think the water would run across the whole country. * * * If the railroad were not there, the water would go over the whole country. * * * The natural tendency is from the foothills to the river."

Article 6495, Revised Statutes 1911, provides:

"In no case shall any railroad * * * construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof."

[1] If the evidence quoted was sufficient to show, prima facie, the construction or maintenance by defendant of an embankment along its right of way constituting its roadbed, which obstructed the natural flow of the surface waters falling on the higher ground on the north side of its tracks and roadbed, and thereby caused to be diverted from its natural course, as the lay of the land on the north side requires and collected in such quantity from want of necessary culverts or sluices, as to break through its roadbed, or to flow through a culvert or

sluice constructed under its roadbed and to run down on the south side of its tracks in such volume as to fill plaintiff's basement and cause the injury complained of, the defendant would be liable in damages to plaintiff therefor. It has long been the law that if a railway company fails to construct the proper culverts, or sluices, necessary to pass off the surface water falling on higher grounds, in the direction the water would have flowed but for said embankment or obstruction, it is responsible for the damage incurred by such failure. *G., C. & S. F. R. R. Co. v. Helsley*, 62 Tex. 593; *G., C. & S. F. R. R. Co. v. Holliday*, 65 Tex. 512; *Railway v. Donahoo*, 59 Tex. 128; *Railway v. Tait*, 63 Tex. 223; *G., H. & S. A. Ry. Co. v. Riggs*, 107 S. W. 589; *Fentiman v. A., T. & S. F. Ry. Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939; *Texas & Pacific Ry. Co. v. O'Mahoney*, 50 S. W. 1049.

[2] We believe that the evidence quoted, and other evidence in the record somewhat similar but in different language, sufficient to require that the case be submitted to the jury on the facts suggested.

In view of another trial, we think it well to pass upon some features of appellant's cause of action as pleaded and insisted upon in this appeal.

[3] We are of the opinion that the defendant did not owe to plaintiff the duty of notifying plaintiff that an opening had been washed out through its roadbed, or that the opening had been cribbed up, or that defendant intended to put a culvert under its roadbed at any point at any time. If defendant was liable to plaintiff for any of the damages suffered, it must have been by reason of the failure to perform the duty enjoined upon it by the statute and authorities above quoted.

[4] Plaintiff's cause of action, whether under the statute, or independent of the statute, is rather indefinitely stated, and confused by not separating the two counts and by pleading immaterial facts, but we are inclined to think it sufficient, in the absence of special exceptions to state a failure to discharge the duty enjoined by the article of the statute quoted.

For reasons stated, the cause is reversed and remanded.

CARRANZA v. HICKS et al. (No. 5764.)

(Court of Civil Appeals of Texas. San Antonio.
Dec. 20, 1916.)

1. CONTRACTS — 141(2) — ILLEGALITY — EVIDENCE — DECLARATIONS.

In an action by the head of a faction in a foreign state to recover money intended for the purchase of arms which had been intrusted to an agent, who proved to be a spy of another faction, and who turned the money over to a United States secret service officer, it was not error to exclude declarations of the agent to the secret service officer that he received the mon-

ey from the commander of one of plaintiff's armies, and from other adherents of plaintiff, since such declarations did not establish plaintiff's right to the money.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1785; Dec. Dig. —141(2).]

2. INTERPLEADER — 82 — JUDGMENT — NEITHER PARTY ENTITLED.

Where, in an action to recover money, the defendant disclaims any interest in the money and an intervenor claims it, but neither plaintiff nor intervenor establishes title, the money should be left in the hands of the defendant.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 72, 73; Dec. Dig. —32.]

3. CONTRACTS — 138(3) — ILLEGAL TRANSACTION — RELIEF OF PARTIES.

The head of a faction in a foreign state cannot recover money, intrusted to an agent to buy arms in the United States contrary to the president's proclamation, from a secret service officer to whom the agent delivered it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 688, 689; Dec. Dig. —138(3).]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by V. Carranza against Robert L. Barnes, to recover a sum of money, in which Marshall Hicks intervened as a claimant. From a judgment awarding the fund to the intervenor, plaintiff appeals. Affirmed.

R. L. Edwards and Haltom & Haltom, all of San Antonio, for appellant. Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellee.

FLY, C. J. The appellant, describing himself as a citizen of Coahuila, in the republic of Mexico, and as recognized "First Chief of the Constitutionalist Party of the Republic of Mexico," instituted this suit against Robert L. Barnes, a resident of Bexar county, Tex., to recover 1,450 pesos, Mexican money of the value of \$725 in the money of the United States, claiming to be the owner of the same by virtue of his position in Mexico. R. L. Barnes answered that the money in question is on deposit in a Houston bank, subject to his control and disposition; that it came into his possession in performance of his duties as a special agent of the Bureau of Investigation of the Department of Justice of the United States; that the money was delivered to him by one M. M. Mirando to be used as evidence in the possible prosecution of parties for violation of the neutrality laws of this country, and that he was willing to deliver the money into the registry of the court. He also alleged that Marshall Hicks was asserting a claim to the money, and prayed that he be made a party to the suit. Hicks intervened in the suit, claiming that he bought the pesos from Mirando and paid a valuable consideration therefor. The cause was tried, without a jury, and judgment rendered in favor of Marshall Hicks for the 1,450 pesos, and that appellant pay all costs of suit.

The evidence shows that M. M. Mirando placed the money in the possession of Barnes

to be used as evidence in any criminal prosecution thereafter instituted against persons furnishing the money to Mirando, for violating a proclamation of the President of the United States, prohibiting the exportation of arms and ammunition into Mexico from this country. No indictment was returned against the parties, and the money remained in the possession of Barnes, who disclaimed any interest in the same. It was also shown that V. Carranza was at that time at the head of a faction in Mexico, and was called "First Chief." Marshall Hicks testified that on September 30, 1913, Mirando sold and assigned to him the 1,450 pesos, for a consideration of over \$200 in United States money. He also stated that he was at that time in the employ of the Huerta government in Mexico, as an attorney at law, and that he knew that Mirando was in the secret service of the Huerta government, and that Mirando told him that by pretending to be against the Huerta government, he had induced enemies of that government to let him have the 1,450 pesos under pretense that he would use the same to purchase arms and ammunition to be sent into Mexico and used against the Huerta government. Mirando also told Hicks that he had placed the pesos in the possession of Barnes, to be used in prosecuting the parties from whom he had obtained it.

[1] The first assignment of error assails the action of the court in refusing to allow Barnes to testify what Mirando told him as to how he came into possession of the money. The excluded statement of Mirando is practically the same as the statement made to Hicks, except that there is a general statement that he had received the money from the officers and agents of the Carranza faction, followed by the statement that 1,000 pesos had been received from Gen. Blanco, a general in the Constitutionalist army of Mexico, and that the remaining 450 pesos had been delivered to Mirando by friends and agents of the Carranza army at Mercedes, Tex. That evidence, if it had been admitted, would not have connected the "First Chief" with the ownership or right to possession of money given by Gen. Blanco and friends and agents of the Carranza army in Texas. It did not tend to show that the money belonged to Carranza, or that he could assert, as did the French king, "I am the State," and had the ownership of all the money of his followers in Mexico and his friends in Texas. The statement of Mirando had no probative force in establishing the claim of appellant to the money. Its only tendency was to show that Mirando by fraud and deceit obtained money from the adherents of a certain Mexican faction to buy arms to be used against another faction. His statement did not show that he obtained money belonging to appellant, or over which he had any control what-

ever. The presumption is that Gen. Lucio Blanco gave his own 1,000 pesos to Mirando, and that the friends of Carranza at Mercedes gave their own 450 pesos to Mirando. No right, title, or interest in the money was shown to be held at any time by appellant.

The bill of exceptions reserved to the exclusion of the statements of Mirando does not disclose that Mirando ever told Barnes that the money belonged to the government of Mexico, as is stated in the brief. It would have taken a more reckless man, perhaps, than Mirando to have been willing to say that there was any government in Mexico in 1913, and to locate it on the map. Of course Mirando has departed this life, as would be the natural result in the long run to any man following his occupation in Mexico.

[2] There is but the one assignment of error presented by appellant, and R. L. Barnes has not appealed from the judgment, and there is therefore no assignment of error questioning the right of Marshall Hicks to the money. In fact, appellant advised the court, who seemed to doubt the right of either appellant or intervener to recover the money, that he should render judgment for one of them. This court does not commit itself to the proposition that the two parties could dispose of property to which neither may have shown a title. In that event, the money should have been left in the hands of the bailee to whom it had been committed. The right of intervener to the money not being questioned in this court, we are not called upon to express an opinion on the same.

[3] Even though appellant had shown, as he did not, that he had the right to the money, the courts of Texas would not enforce his right thereto because the possession of the money by Mirando grew out of an illegal agreement to violate the laws of this country and override the proclamation of its President. Courts will not enforce contracts made in violation of law, or relieve the parties thereto, but will leave them in the position in which they have placed themselves.

The judgment is affirmed.

BLOCH v. RIO GRANDE VALLEY BANK & TRUST CO. (No. 641.)

(Court of Civil Appeals of Texas. El Paso. Dec. 7, 1916. Rehearing Denied Jan. 5, 1917.)

1. BILLS AND NOTES \S 74—ACCEPTANCE OF BILL OF EXCHANGE.

Where drafts were presented to, and accepted by, the defendant, there was a primary contract between him and the owner of the drafts, and he became absolutely liable, regardless of the question whether or not the payee in the drafts was alive or dead when they were drawn.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 125, 126, 128, 180-185, 137-141; Dec. Dig. \S 74.]

2. BILLS AND NOTES \S 467(2)—PLEADING—COMPLAINT—SUFFICIENCY.

In an action against the drawee of drafts, an allegation that the drafts were indorsed and delivered by the owner is a sufficient allegation of a legal indorsement without allegation of the name of the indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1481-1487, 1490, 1491; Dec. Dig. \S 467(2).]

3. BILLS AND NOTES \S 485—PLEADING.

Under the direct provisions of Rev. St. 1911, art. 588, in an action against the drawee of a bill of exchange, in the absence of a sworn plea raising any issue as to the genuineness of the indorsements, it was not necessary to offer any proof to support the allegations that the drafts had been indorsed and delivered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1542-1554; Dec. Dig. \S 485; Pleading, Cent. Dig. \S 866, 875.]

4. BILLS AND NOTES \S 467(2)—PLEADING—FOREIGN LAWS.

The holder of drafts belonging to the estate of a foreign administrator and indorsed by the latter can maintain a suit on the drafts in the courts of Texas without alleging the administration laws of the foreign country or state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1481-1487, 1490, 1491; Dec. Dig. \S 467(2).]

5. BILLS AND NOTES \S 489(2)—ACCEPTANCE OF BILL OF EXCHANGE—PLEADING—PROOF.

In an action against the drawee of a draft, where the pleading does not state whether the acceptance was oral or in writing, it is permissible to prove either a verbal or a written acceptance.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1588, 1589; Dec. Dig. \S 489(2); Pleading, Cent. Dig. \S 1327.]

Error from El Paso County Court; Adrian Pool, Judge.

Suit by the Rio Grande Valley Bank & Trust Company against Herman Bloch. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. T. Hill, of El Paso, for plaintiff in error. Goldstein & Miller, of El Paso, for defendant in error.

HIGGINS, J. Defendant in error brought this suit against Bloch to recover upon three drafts each in sum of \$100 and one in sum of \$200, drawn by Juvenio Estrada upon Bloch. The \$100 drafts were dated March 2, March 4, and March 5, 1915, respectively, and the \$200 draft was dated March 10, 1915. Appellee, in its petition, alleged the facts stated, and these further averments were made, viz.: That the three \$100 drafts were drawn payable to the order of J. Goodman at sight and the \$200 draft was drawn payable to the order of Testamentaria de Jose Goodman at sight; that said drafts were presented to and accepted by Bloch on March 10, 1915; that by the execution of the drafts and the acceptance thereof by Bloch he promised, agreed, and bound himself to pay to the order of J. Goodman, at sight, the three sums of \$100, evidenced by the first three drafts, and to pay to the order

of the Testamentaria de Jose Goodman, at sight, the sum of \$200 evidenced by the last draft; that, while the first three drafts were payable to the order of Jose Goodman, they were, in fact, the property of and belonged to the estate of Jose Goodman and were delivered to Testamentaria de Jose Goodman, that is to say, under the laws of Mexico, to the administrator of the estate of Jose Goodman; that the said Testamentaria de Jose Goodman, i. e., the administrator of the estate of Jose Goodman, indorsed and delivered the drafts to plaintiff; and that plaintiff was the owner and holder thereof. Verdict was returned and judgment rendered in plaintiff's favor.

It is asserted that the petition is subject to a general demurrer because it shows upon its face that J. Goodman was dead when the drafts were drawn and they were therefore null and void. In support of this contention, our attention is called to authorities holding that a promissory note in favor of a payee who is dead is void. Those authorities are not in point where an acceptor of a draft is sought to be held liable upon his acceptance. The drawee of a draft is not a party to or in any way liable thereon until he has accepted it. *Gamer v. Thomson*, 35 Tex. Civ. App. 283, 79 S. W. 1083. Upon his acceptance, a privity of contract is created between him and the holder, and such contract is not collateral, but primary. *Raborg v. Peyton*, 2 Wheat. (U. S.) 385, 4 L. Ed. 268. His engagement to pay is general, and he is considered the principal debtor. By acceptance, the bill becomes very similar to a promissory note; the acceptor being the promisor. Mr. Bigelow says:

"By absolute acceptance, the drawee contracts much as the maker of a promissory note contracts; he binds himself to the holder absolutely to pay, according to the tenor of the bill. * * * Besides undertaking to pay, the acceptor 'admits' as a legal incident to his contract, the existence of the drawer, the genuineness of the drawer's signature, and his capacity and authority to draw the bill, and also the existence of the payee and his capacity at the time to indorse." Bigelow on Bills, Notes & Checks (2d Ed.) pp. 51, 52.

See, also, *Kildare Lumber Co. v. Bank*, 91 Tex. 95, 41 S. W. 64; *White v. Dienger*, 25 S. W. 666; 1 Daniels on Neg. Insts. (6th Ed.) \S 532; 4 Am. & Eng. Ency. Law (2d Ed.) 450; 7 Cyc. 770.

[1.] In this case, it is alleged that defendant in error is the owner of the drafts by indorsement of the administrator of the estate of Jose Goodman; that the drafts were presented to and accepted by Bloch. This showed a new and primary contract between him and the owner of the drafts, and he became absolutely liable upon this contract regardless of the question of whether Goodman was alive or dead when the drafts were drawn.

[2, 3] It was not necessary to allege the

name of the indorser of the drafts. It was alleged that they were indorsed and delivered by the administrator of Goodman's estate, and this was a sufficient allegation of a legal indorsement. There was no sworn plea raising any issue as to the genuineness of the indorsement, and, in the absence thereof, it was not necessary to offer any proof to support the allegations that the drafts had been indorsed and delivered. Article 588, R. S.

[4] There was no necessity to allege what the administration laws of Mexico were. A foreign administrator can indorse drafts belonging to the estate represented by him, and the holder of such drafts can maintain suit on the same in the courts of this state. *Solinsky v. Bank*, 82 Tex. 244, 17 S. W. 1050; *Abercromble v. Stillman*, 77 Tex. 589, 14 S. W. 196; *Keller v. Alexander*, 24 Tex. Civ. App. 186, 58 S. W. 637.

[5] It is contended that an acceptance in writing was alleged, and the court therefore erred in submitting the issue of a verbal acceptance. The pleading does not state whether the acceptance was oral or in writing. With such a pleading, it was permissible to prove a verbal or a written acceptance.

Affirmed.

FREEMAN v. KLAERNER. (No. 5757.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 20, 1916.)

1. MORTGAGES \Leftrightarrow 497(1)—FORECLOSURE—RES JUDICATA.

A judgment, in a suit in which the junior mortgagees and the mortgagors are joined, foreclosing a first mortgage and directing distribution of the proceeds of foreclosure sale among the parties, is res judicata of the issues determined, and bars suit by a mortgagor and a junior mortgagee to readjust the proceeds of the land sold.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1469, 1471, 1473; Dec. Dig. \Leftrightarrow 497(1).]

2. DESCENT AND DISTRIBUTION \Leftrightarrow 91(1)—SUIT BY HEIR—CONDITION PRECEDENT.

For an heir to sue a debtor of his ancestor's estate, he must allege and prove there was no administration and none necessary.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 359-361, 368, 375; Dec. Dig. \Leftrightarrow 91(1).]

Appeal from District Court, Gillespie County; N. T. Stubbs, Judge.

Action by M. T. Freeman against H. Y. Freeman, in which John Klaerner intervened. From judgment for intervener, defendant appeals. Reversed and rendered.

A. W. Moursund, of Fredericksburg, for appellant. W. O. Linden, of San Antonio, for appellee.

SWEARINGEN, J. M. T. Freeman sued H. Y. Freeman for one-sixth of \$7,000, or \$1,166.66, less a credit of \$625.55. The cause of action declared on was that 320 acres of land had been the separate property of Minerva Freeman, the mother of M. T. and H.

Y. Freeman. During her life she executed a deed of trust on the land to secure the payment of \$2,500, with interest and attorneys' fees, provided for in a note given to A. Grote. After the death of Minerva Freeman, H. Y. Freeman by inheritance and purchase became the owner of a five-sixths interest, and M. T. Freeman a one-sixth interest, in the 320 acres of land, subject to the debt of \$2,500, made by the mother. After the mother's death, H. Y. Freeman mortgaged his five-sixths interest to secure a debt to Robinson, and M. T. Freeman executed a mortgage on his one-sixth interest in the land to secure a debt due by him to John Klaerner. Both junior mortgages were subject to superior mortgage of August Grote. Suit No. 914 was filed by August Grote to foreclose his mortgage lien on the 320 acres of land. The parties to suit No. 914 were August Grote, holder of the superior mortgage, John Klaerner and Robinson, holders of the two junior mortgages, and also M. T. and H. Y. Freeman. The mortgages were foreclosed in suit No. 914 and order of sale issued, the land sold by the sheriff for \$7,000, and the proceeds applied in strict obedience to the judgment foreclosing the respective liens, viz., \$89.75 was applied to payment of costs of the suit No. 914 and sale; \$3,156.90 to payment of the principal, interest, and attorneys' fee on said note for \$2,500; and of the remainder one-sixth, or \$625.55, was paid to John Klaerner on his debt secured by the mortgage on M. T. Freeman's one-sixth interest on the said land. In the present suit, M. T. Freeman attempts to show that all of the \$2,500 note was the indebtedness of H. Y. Freeman, and that M. T. Freeman should have received one-sixth of the \$7,000 for which the land was sold. In other words, that he should have received \$1,166.66 instead of \$625.55. John Klaerner intervened in the instant suit and adopted all the pleading of the plaintiff, M. T. Freeman, as his own, and in addition thereto averred that M. T. Freeman had guaranteed that the land when sold would bring enough money to pay in full his debt against M. T. Freeman. The case was tried without a jury, and judgment was rendered holding that M. T. Freeman had assigned all his interest to John Klaerner and that John Klaerner should recover of H. Y. Freeman \$266.25. All costs of suit were adjudged against H. Y. Freeman.

[1] It is apparent, from the foregoing statement of the cause of action presented by all the pleadings, that this suit is an attempt to readjust the proceeds of the land sold by virtue of the judgment in suit No. 914. That judgment was final, and definitely ordered the distribution actually made, and it determined the issues sought to be readjusted by this present case, and all the parties to this present suit are estopped thereby, because they were parties to that suit.

[2] It may be that H. Y. Freeman owed the estate of his mother \$2,500, and that M. T. Freeman, his mother's heir, was entitled to one-sixth of the \$2,500 debt; but no such cause of action is alleged in this case, and could not be, because M. T. Freeman could have no right to sue H. Y. Freeman for the debt due the mother's estate unless he alleged and proved that there was no administration of her estate or no necessity for one. *Laas v. Seidel*, 95 Tex. 442, 67 S. W. 1015. Furthermore, M. T. Freeman gave John Klaerner only a mortgage on the one-sixth interest in the 320 acres of land and did not give him his one-sixth interest in the estate of his mother. M. T. Freeman expressly alleged that he had never conveyed his interest in the estate to any one. This allegation was expressly adopted by John Klaerner, intervenor. The proof showed only a mortgage to John Klaerner for one-sixth of the equity in the 320 acres of land.

The judgment recites that M. T. Freeman had assigned his interest in the estate to John Klaerner. The judgment is therefore unsupported by the pleadings and is contrary to the undisputed evidence in this case.

The judgment of the trial court is reversed and here rendered for appellant, H. Y. Freeman.

SIMMS et al. v. MIEARS. (No. 5715.)

(Court of Civil Appeals of Texas. Austin.
Nov. 29, 1916. Rehearing Denied
Dec. 23, 1916.)

PROCESS \S 24—REQUISITES—STATUTE.

Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1852, requiring a citation to state the date of the filing of the plaintiff's petition, etc., a citation in a suit for partition of land which failed to give the true date of filing of plaintiff's petition, but gives another and different date, is fatally defective, and the court acquired no jurisdiction over the defendants by reason thereof.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. \S 9, 19; Dec. Dig. \S 24.]

Error from District Court, Caldwell County; Frank S. Roberts, Judge.

Suit for partition by A. J. Miears against E. V. Simms and others. From a judgment for plaintiff by default, defendants bring error. Reversed and remanded.

J. B. Hatchitt, of Lockhart, for plaintiffs in error. Nye H. Clark, of Lockhart, for defendant in error.

RICE, J. Defendant in error Miears brought this suit for partition of three certain tracts of land in Caldwell county against E. V. Simms, D. C. Simms, Matthew Simms, Vinie Simms, Nathaniel Simms, Lee Simms, and Ida and Henrietta Petty, the last two of whom are minors, making the usual allegations necessary in such suits. At a former term of the court defendant in error acquired by purchase at a foreclosure sale the interest of E. V. Simms in said land.

None of the plaintiffs in error (defendants

below) having answered, judgment went against them by default; and the court having found that the land was incapable of partition, the same was sold under order of the court and bought in by defendants in error, and this writ of error is sued out for the purpose of setting aside said judgment, on the ground that plaintiffs in error were not legally served with citation herein, as required by law.

It appears from the record that the plaintiff's original petition was filed in said court on the 6th of October, 1915; whereas the citations served upon Henrietta Petty, Lee Simms, and Matthew Simms, as shown by the sheriff's return, states that the petition was filed on the 5th of October, 1915. Article 1852, vol. 2, *Vernon's Sayles' Civ. Stats.*, prescribes what a citation shall contain; and, among other things, requires that it shall state the date of the filing of the plaintiff's petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall contain the requisites prescribed in article 2180. It has frequently been held that the requirements of this article are mandatory, and a failure to comply with its provisions will vitiate the citation. See *Durham v. Betterton*, 79 Tex. 223, 14 S. W. 1060; *Pruitt v. State*, 92 Tex. 434, 49 S. W. 366; *Dunn v. Hughes*, 36 S. W. 1084; *Leavitt v. Brazelton*, 28 Tex. Civ. App. 4, 66 S. W. 466; *Duke v. Spiller*, 51 Tex. Civ. App. 237, 111 S. W. 787; *Crenshaw v. Hempel*, 60 Tex. Civ. App. 385, 130 S. W. 731.

The citation in this case, we think, is fatally defective, in that it fails to give the true date of the filing of plaintiff's petition, but gives another and a different date. Defendant in error contends, however, that this defect was technical, and could not affect the rights of the parties; and he therefore insists that plaintiffs in error's assignments presenting it should be overruled. It does not appear to be immaterial, however, and in the instant case might become a matter of serious importance to the plaintiffs in error. Suppose, for instance, that they wished to interpose the statute of limitation, and their right became perfect thereunder on the 6th of October, but believing that the suit was filed, as stated in the citation, on the 5th, before their right had accrued, they made default. It will thus be seen that they would have lost a material right by reliance on the date stated in the citation.

On account of the failure of the citation to state the true date of the filing of the plaintiff's petition, we hold that the same is void, and that the court acquired no jurisdiction over plaintiffs in error by reason thereof, for which reason the judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

JOHNSON et al. v. BREEDING et al.

(Supreme Court of Tennessee. Dec. 23, 1916.)

ASSIGNMENTS \Leftrightarrow 8—CONVEYANCE OF "EXPECTANCY"—RIGHT OF HEIRS ON FAILURE OF GRANTOR TO INHERIT.

As the "expectancy" of an heir apparent is the bare, inchoate hope of succession, and has no attribute of property, where deceased by warranty deed conveyed his expectancy as heir of his mother, but predeceased her, his children, although taking by right of representation through him, took by inheritance immediately from the grandmother, and were not bound by the covenant of warranty in the deed executed by the deceased to relinquish to his grantee the property involved as after-acquired property.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. \Leftrightarrow 8.]

For other definitions, see Words and Phrases, First and Second Series, Expectancy.]

Certiorari to Court of Civil Appeals.

Suit to quiet title by S. J. Johnson and another, by next friend, against W. J. Breeding and others. A judgment of the chancellor for complainants was affirmed by the Court of Civil Appeals, and defendants bring certiorari. Writ of certiorari denied.

Bryant & Clouse, of Cookeville, for plaintiffs. H. Camp, of Sparta, and O. K. Holladay, of Cookeville, for defendants.

WILLIAMS, J. The bill of complaint was filed by the minor children of J. L. Johnson, by a next friend, to have canceled as a cloud on their title a deed executed by their father in which he conveyed to Breeding his expectancy as an heir apparent in the realty of his mother, complainants' grandmother, Fannie Johnson.

It appears that this deed was executed in good faith, based on a fair valuable consideration, and was one of general warranty. J. L. Johnson predeceased his mother, and it is the contention of complainants that thereby his expectancy failed of realization; and, instead, the estate that he would have inherited had he survived his mother passed immediately to them as heirs at law of their grandmother, with result that Breeding as grantee took nothing. The chancellor and the Court of Civil Appeals upheld this contention, and we are asked to review the decree of the last-named court.

"Expectancy" is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property, and the interest to which it relates is at the time nonexistent and may never exist. In *re Robbins' Estate*, 199 Pa. 500, 49 Atl. 233; *Taylor v. Swafford*, 122 Tenn. 303, 308, 123 S. W. 350, 25 L. R. A. (N. S.) 442; 9 R. C. L. 135.

However, it is now generally held that an heir apparent's conveyance of his expectancy by deed may, in certain circumstances, be enforced in equity; not, however, on the

theory that the grant is one of a present interest or right, but on the theory that the deed is an executory agreement to convey, enforceable as such, or the claim of the grantee worked out by way of estoppel, when the estate comes to the grantor.

Although the grantor has not at the time of the conveyance any right, yet the property on its subsequent acquisition inures to the use of the grantee; or, in the language of Lord Coke, the grantor shall be rebutted and barred when he shall claim against his own warranty.

In this case there was not a subsequent acquisition by the grantor, J. L. Johnson. By reason of his death prior to his mother's he never came to be an heir real; what had been an expectancy was predicated of heirship apparent and it perished without fruition.

The law cast the descent on his children on the death of J. L. Johnson, as the heirs of Fannie Johnson immediately, and not mediately through or under him. The relationship of these children to Fannie Johnson came through their father, but the title or descent cast did not.

If persons take an estate by inheritance from such a remote ancestor by right of representation of a nearer ancestor, they cannot be regarded as taking by inheritance from the latter within the meaning of the statute of descent, since it never became his.

In *Sedgwick v. Minot*, 6 Allen (Mass.) 171, the claim was that the children must be deemed to have taken under their mother, who predeceased the grandmother, the estate of the latter. The court said:

"In determining who were the heirs of their grandmother, the statute made them entitled to take the share which their mother would have taken, if she had lived, as representing her in the line of descent; but the inheritance was directly from the grandmother. The representation of their mother is only to fix the share which they shall inherit."

Such heirs of the remote ancestor are not affected by the warranty in the deed executed by their father to Breeding, which conveyance concerned his, and not their, expectancy. *Habig v. Dodge*, 127 Ind. 31, 38, 25 N. E. 182; *Bohon v. Bohon*, 78 Ky. 408; *Rawle, Covenants*, § 254.

Counsel of petitioner Breeding quote and rely upon this excerpt from *Taylor v. Swafford*, *supra*:

"Where it is found that the contract of an expectant has been fairly made and upon a valuable consideration, it will be enforced, as against the grantor and his privies, whenever the property covered by it comes into possession."

This means that the heirs of the grantor as privies are bound by his conveyance after the property has come into the grantor's possession; his warranty binding them. The complainants, as heirs of their father, the grantor, are not bound by his covenant of warranty to relinquish to his grantee the

property here involved as after-acquired property. They do not, as already seen, take it under or as heirs of the grantor, but from a distinct source; and any such estoppel fails to reach to such an interest.

Writ of certiorari denied.

PENNINGTON et al. v. STATE.

(Supreme Court of Tennessee. Nov. 25, 1916.)

1. HOMICIDE \S 216—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.

Where deceased said he could not live until the doctor came, and was praying, and an attendant who was present and observed his condition and heard what he said, testified that he knew he was going to die, he was sufficiently shown to have known himself to be in extremis to render his dying declarations admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 457; Dec. Dig. \S 216.]

2. HOMICIDE \S 209—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.

The mere fact that an attendant present just before deceased's death said on preliminary hearing that she had not read the paper purporting to be deceased's dying declaration over to him, did not render the declaration inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 441; Dec. Dig. \S 209.]

3. CRIMINAL LAW \S 1168(2)—HARMLESS ERROR—WITNESS UNDER RULE—CONDUCT OF ATTORNEY—STATEMENT OF TESTIMONY OF OTHER WITNESS.

Where a witness under rule, when examined before the court, stated that a purported dying declaration had been read over to deceased, though an attorney then explained to the witness that such had been the testimony of a former witness, and the jury was then brought in and the witness repeated his testimony, the error, if any, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8124, 8124½, 8129-8136; Dec. Dig. \S 1168(2).]

4. HOMICIDE \S 216—EVIDENCE—DYING DECLARATIONS—PRELIMINARY PROOF.

A witness who remains with the deceased a considerable time before his death, hears him talk, witnesses his demeanor and has full opportunity for reaching a correct conclusion, may testify to the opinion or conclusion formed from such circumstances that the deceased was aware of impending dissolution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 457; Dec. Dig. \S 216.]

5. HOMICIDE \S 209—EVIDENCE—DYING DECLARATIONS—PROOF.

A dying declaration of which witnesses testified that it was in the words of deceased as nearly as they could be written, that the statement was read to deceased, and he was asked if it was true, and replied that it was, and at such time that deceased was suffering very greatly, and that it was not clear whether he was physically able to have subscribed his name, the statement was admissible, though unsigned.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 441; Dec. Dig. \S 209.]

Error to Criminal and Law Court, Campbell County; Xen Hicks, Judge.

John and Lacy Pennington, under indictment for murder, were found guilty of voluntary manslaughter, and they bring error. Affirmed.

John Jennings, Jr., of Jellico, L. H. Carlock, of La Follette, A. J. Agee, of Jacksboro, and M. H. Hollingsworth, of La Follette, for plaintiffs in error. Frank M. Thompson, Atty. Gen., for the State.

GREEN, J. The plaintiffs in error were indicted for the murder of O. B. Byrd, and found guilty of voluntary manslaughter. They have appealed in error to this court.

We have discussed the facts orally and are of opinion that the conviction is well supported by the evidence.

The principal errors of law assigned relate to the admission in evidence of a certain paper writing purporting to have been the dying declaration of Byrd. This writing is as follows:

"April 13, 1915.

"This is my statement given by my own words. I met Lacy Pennington and John Pennington. Lacy says 'now you once had the advantage of me, but now I want to talk to you; don't you move while I do,' and I said, 'you have me boys where I can't help myself and don't shoot, don't kill me.' John Pennington stepped back and shot me. I turned my back to him and started to run, then he shot me again, then pushed me in the creek."

It will be observed that this statement was not signed by the deceased. It was introduced by Miss Eldora Sharp, who testified that she reduced the statement to writing; that it contained the words of the deceased, as near as she could get them; that deceased was lying on the bed and suffering very much at the time the writing was done. She was not able to say whether he had physical strength to have signed the paper or not.

Miss Sharp testified that deceased told her before she wrote out the statement that he didn't think he could live until the doctor came; that he was suffering; that he dictated very slowly to her and at intervals during the dictation was praying. She appears to have been present at the house where deceased was taken after he was shot and had abundant opportunity to observe him, notice his condition and hear his statements, and she testified that Byrd thought he was going to die when he made this statement. The statement was made in the afternoon, or evening, and Byrd died on the next morning.

Miss Sharp was asked if she read the statement over to Byrd after it was written out. She said that she could not recollect whether she did or not. She stated, however, that before leaving Byrd she asked him if the statement was true, and he replied that it was.

The statement not having been signed by Byrd, and Miss Sharp not being certain whether she read it over to him the court refused to admit it. The jury was then excused from the courtroom, and in their absence Miss Sharp was further examined. Likewise a witness named M. B. Moore was

examined by the court, and Moore testified that he was present when Miss Sharp prepared the statement, and that she did read it over to the deceased.

The jury was then recalled and Miss Sharp testified further before them, and Moore testified that the statement had been read over to the deceased, and said statement was then permitted to go to the jury, as the dying declaration of Byrd.

It seems that when Moore was examined before the court as to whether or not the statement had been read to deceased, there had been no conversation between Moore and the state's attorneys, before Moore was put on the stand. After the jury returned, however, he talked with attorneys for the state and they told him what Miss Sharp's testimony had been and about her failure to recollect whether or not the writing had been read to deceased.

The testimony of a court reporter, who took down the evidence at the committing trial, was introduced, from which it appeared that, according to the notes of the reporter, Miss Sharp had testified on the preliminary hearing that she had not read over this dying declaration to Byrd.

[1] It is first objected that the proof does not show deceased realized that he was in extremis when the declaration was made.

Manifestly this objection is not well founded. The proof shows that deceased said that he could not live until the doctor came; that he was praying; and Miss Sharp, who was present, observed his condition and heard what he said, testified that he knew he was going to die.

[2] It is next contended that the dying declaration was inadmissible by reason of the testimony of the court reporter; that Miss Sharp said, on the preliminary hearing, that she had not read the paper over to the deceased. Such testimony did not render the dying declaration inadmissible by any means; it went more to the credibility of Miss Sharp than to the competency of the declaration.

[3] It is urged that the court erred in permitting the witness M. B. Moore to testify that this paper writing was read to deceased, after Moore had been talked to by the Attorney General and told the substance of Miss Sharp's testimony—Moore being under the rule.

The trial court will not be put in error ordinarily for permitting a witness under the rule to testify, although such a witness has heard the evidence, or part of it, when there are circumstances justifying such action on the part of the court below. We have numerous cases in which it has been held that a trial court has discretion in such matters and the rule may be relaxed. *Pile v. State*, 107 Tenn. 532, 64 S. W. 477; *Smith v. State*, 4 Lea, 428; *Ray v. State*, 108 Tenn. 282, 67 S. W. 553; *Nelson v. State*, 2 Swan. 287.

Moreover, in this case it appears that the

witness Moore made the same statement in the matter when examined in the presence of the court, before he had advised with counsel and heard about the testimony of Miss Sharp, that he made to the jury after he conferred with counsel and learned what Miss Sharp had said. It is obvious, therefore, that plaintiffs in error were not prejudiced in any way by the communication between the state's counsel and this witness, as to what had transpired in the courtroom. If there was any error, it was not prejudicial.

[4] It is further insisted that the court erred in permitting Miss Sharp to testify that deceased realized he was going to die. This assignment of error is not well taken. There is abundant authority to the effect that a witness who remains with the deceased a considerable time before his death, hears him talk, witnesses his demeanor, and has full opportunity for reaching a correct conclusion, may testify to the opinion, or conclusion formed from such circumstances, that the deceased was aware of impending dissolution.

The Supreme Court of California says that such an expression of such a witness is not a mere opinion of the witness in the objectionable sense. "It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired; and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others." *People v. Sanford*, 43 Cal. 29.

To like effect, see *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177; *Garza v. State*, 3 Tex. App. 286; *Davis v. State*, 120 Ga. 843, 48 S. E. 305; *State v. Ju Nun*, 53 Or. 1, 8, 97 Pac. 96, 98 Pac. 513; *Lewis v. State*, 48 Tex. Cr. R. 614, 89 S. W. 1073.

We may add that there is other proof in the record heretofore pointed out tending to show that deceased realized that he was going to die, and the admission of this so-called opinion of Miss Sharp as to deceased's state of mind was not harmful to plaintiffs in error.

[5] The last assignment of error, with reference to the dying declaration, is that the paper, not being signed by the deceased, was not primary evidence and should not have been admitted, but that the same could have only been looked to to refresh the memory of the witness in giving oral testimony as to the dying declaration.

In *Beets v. State*, Meigs, 106, an unsigned paper purporting to contain a dying declaration was excluded. In that case, however, the witness did not undertake to testify that deceased stated the facts contained in the paper. Witness only said that he took down the

statement, and the paper he produced was a copy from the original.

In the case before us Miss Sharp says that the paper introduced was in the words of deceased as near as she could get them. Moore testifies that the statement was read to deceased. Miss Sharp again testifies that she asked deceased if the statement was true, telling him she wanted to know in case he died, and deceased replied that it was true. Deceased was shown to have been suffering very much, and it is not clear that he was physically able to have subscribed his name to this paper.

Under the circumstances stated, we think that deceased should be held to have adopted this statement as much as if it had been signed by him.

In *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046, a written declaration of one Pemberton was admitted signed "J. D. Pemberton, by J. T. Saunders." Saunders identified the paper and read it to the jury. He wrote it, at the dictation of Pemberton, as the dying declaration of the latter, and then affixed the signature in question. The court said there was nothing in the record to rebut the presumption that the signature was made by Saunders for Pemberton, on account of the latter's enfeebled condition.

It has been held that a declaration made in extremis, committed to writing by another, and not signed by the deceased, is not inadmissible because of lack of such signature, where the deceased is physically unable to sign it. *State v. Carrington*, 15 Utah, 480, 50 Pac. 526.

We think this case announces a correct result. On the facts disclosed by this record, we think we may indulge the presumption, as the court did in *Moore v. State*, supra, that deceased failed to sign the statement, here introduced, because of his physical condition, and we are of opinion that a dying declaration, dictated by the deceased, reduced to writing, read over to him, and by him approved, should not be excluded where the deceased failed to sign it on account of his physical weakness.

We do not consider it necessary to discuss other assignments of error. All of them are overruled, and the judgment below will be affirmed.

FERGUSON v. PRINCE.

FERGUSON et al. v. SAME.

(Supreme Court of Tennessee. Nov. 18, 1916.)

1. ESTOPPEL § 38—DEED—WARRANTY—AFTER-ACQUIRED PROPERTY.

Where the grantor in a general warranty deed was without title, upon his subsequent acquisition of title it immediately inured to the benefit of the grantee by virtue of the warranty.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 99-107; Dec. Dig. § 38.]

2. CHAMPERTY AND MAINTENANCE § 7(1)—CONVEYANCE OF PRETENDED INTEREST IN LANDS—STATUTE—"CHAMPERTOUS."

Under Shannon's Code, § 3174, providing that the provisions of section 3171, 3172, and 3175, making the conveyance of pretended interests in land champertous, shall not prevent an absolute and bona fide sale or mortgage of lands not possessed and held adversely at the time of such sale or mortgage, a conveyance by one without title or possession is not champertous, unless the land was held adversely.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-56; Dec. Dig. § 7(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Champerty*.]

3. CHAMPERTY AND MAINTENANCE § 7(1) — GRANT OF LAND HELD ADVERSELY—ESTOPPEL.

Although land conveyed by warranty deed by one out of possession and without title was held adversely, the champerty statutes would not apply as between the parties; as the grantor would be estopped to deny the validity of the deed.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-56; Dec. Dig. § 7(1).]

4. ADVERSE POSSESSION § 24—SUFFICIENCY OF POSSESSION.

A possession consisting of intermittent acts of having dirt thrown upon a lot from time to time to fill up holes and occasionally storing lumber and wagons thereon is not sufficient to support a claim of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 114, 115; Dec. Dig. § 24.]

5. BOUNDARIES § 11—DESCRIPTION—ADJOINING LANDS.

Where a deed to land which was bounded by two streets meeting at an acute angle described the land as beginning at a point 50 feet east of an adjoining lot running 50 feet along the first side and running back in parallel lines to the second street, the description indicated that the lines were intended to run parallel with the adjoining lot which was at right angles to the second street.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 92-94; Dec. Dig. § 11.]

6. DEEDS § 177—CONSTRUCTION.

Where a grantor made two conveyances correctly describing the lots conveyed, but staked off the lot in the second conveyance so as to include a portion of the first, the description must be confined to the language of the deeds, and, nothing else appearing, the successors in title and the grantee of the first lot may recover that portion of their lot staked off as belonging to the second.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 549, 549½; Dec. Dig. § 177.]

7. ADVERSE POSSESSION § 43(3)—TACKING POSSESSION—NECESSITY OF PRIVACY.

Successive adverse possessions under the statute of limitations cannot be tacked unless they are connected by contract or other form of legal privacy, and each subsequent possession not so connected takes a new start unaided by the prior possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 215-217; Dec. Dig. § 43(3).]

8. ADVERSE POSSESSION § 43(3)—PRESUMPTION OF GRANT—SUCCESSIVE POSSESSION.

Under the doctrine of presumption of grant by continuous adverse possession of land for 20 years while successive possession must be connected without any hiatus, there need be no

privity of contract or other legal privity between the successive occupants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 215-217; Dec. Dig. 43(3).]

9. LIMITATION OF ACTIONS 72(3)—DISABILITY—INFANCY.

As it must appear that the parties against whom a presumption of grant to land is sought to be enforced were in a position to resist possession during the whole 20 years, where the possession of an adverse holder was less than 20 years when the owner died leaving minor children, one of the children still a minor is entitled to recover his interest in the property; the presumption not having completely run as to him because of his disability.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. 72(3).]

10. LIMITATION OF ACTIONS 72(3)—DISABILITY—INFANCY.

As the 8 years' saving for infants prescribed by the statute of limitations has no bearing upon the presumption of title to land from lapse of time, where one was an infant at the time of inheriting land to which another claims title by adverse possession, only the time during which the disability existed will be counted out in determining the length of the adverse possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. 72(3).]

11. TENANCY IN COMMON 55(3)—RIGHT TO SUE IN EJECTMENT—DECREE.

Tenants in common may sue together in ejectment, and one may recover and be entitled to a decree, although the other be barred and fail to recover.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 143-150; Dec. Dig. 55(3).]

12. EJECTMENT 9(2)—TITLE TO OTHER ACTION.

A widow, not being the heir of the husband, cannot recover in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 17; Dec. Dig. 9(2).]

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Actions in ejectment by Della Ferguson, and by Della Ferguson and others against D. R. Prince. From a decree dismissing the bill in each case, the complainants appeal. Decree ordered for defendant in the first case. Decree ordered for complainant Richard Lawson Ferguson for the interest claimed by him, and for the defendant as to the remainder, in the second case.

O. W. Cansler and Frank Sanders, both of Knoxville, for appellants. T. L. Carty, of Knoxville, for appellee.

NEIL, C. J. These were two separate cases tried in the chancery court of Knox county, being ejectments for distinct lots of land in the city of Knoxville, but, the evidence being much the same in both, they were consolidated for purposes of hearing, and disposed of by the chancellor in one decree and appealed to this court under one transcript. The chancellor dismissed the bill in each case, and the complainants have appealed.

The bill in the first case sought to recover a part of lot No. 112 in McAnally's addition to Knoxville; the part sued for being accurately described in the record.

[1] The determinative facts with respect to this piece of property are that on the 13th day of July, 1905, the complainant, then without title, conveyed the property in question by a deed containing a general warranty of title to the defendant, D. R. Prince, but subsequently, on the 30th day of November, 1906, she acquired the title by deed from the owners, Robert L. Lilley and wife, Lottie. Upon the acquisition of this title it immediately inured to the benefit of and passed into the defendant, Prince, by virtue of the warranty. This rule of law was derived by our jurisprudence from the English law, and has long been a settled principle in this state. Its application, together with different formulations of it, will be found in the following cases in our state: Stuart v. Nelson, 4 Hayw. (5 Tenn.) 200; Henderson v. Overton, 2 Yerg. (10 Tenn.) 394, 396, 24 Am. Dec. 492; Robertson v. Gaines, 2 Humph. (21 Tenn.) 367, 383; Gookin v. Graham, 5 Humph. (24 Tenn.) 480, 483, 484; Birdwell v. Cain, 1 Cold. (41 Tenn.) 301, 302; Susong v. Williams, 1 Helsk. (48 Tenn.) 625, 630; Coal Creek Mining & Manufacturing Co. v. Ross, 12 Lea (80 Tenn.) 1 and 4; Woods v. Bonner, 89 Tenn. 411, 421, 422, 18 S. W. 67; Bird v. Cross, 15 Cates (123 Tenn.) 419, 422, 131 S. W. 974.

It is insisted that, since the complainant was out of possession at the time she made the conveyance to the defendant, it is therefore void, under our champerty laws. Shannon's Code, §§ 3171, 3172, 3175. But section 3174 provides that:

"These provisions shall not prevent an absolute and bona fide sale or mortgage of lands or tenements not possessed and held adversely at the time of such sale or mortgage," etc.

[2, 3] The evidence fails to show that there was any adverse possession at the time. So the champerty provisions do not apply. Still, if there had been such adverse possession, they would not apply between the complainant and the defendant, because the deed would be good between them; she being estopped to deny its validity. Wilson & Wheeler v. Nance & Collins, 11 Humph. (30 Tenn.) 191, 192; Ruffin v. Johnson, 5 Helsk. (52 Tenn.) 608, 611.

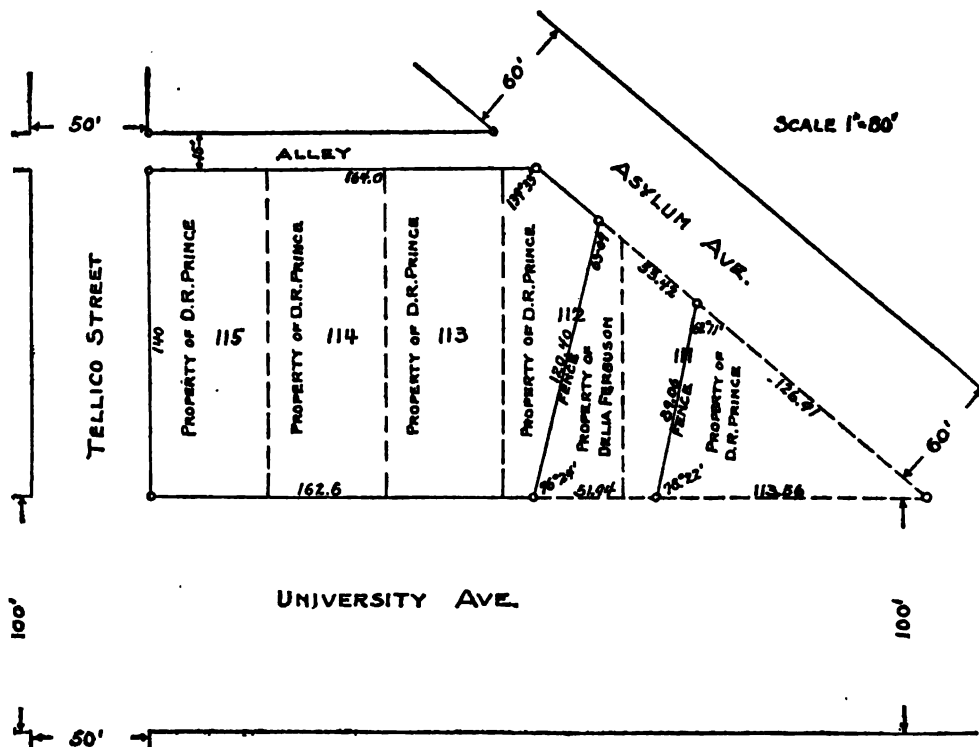
[4] The defendant also insists that he had been in adverse possession of this lot for more than 7 years next before the bill was filed, claiming under his deed from the complainant. But the evidence fails to sustain this defense; his supposed possession consisting simply of having dirt thrown upon the lot from time to time to fill up holes, and also of occasionally storing lumber and wagons thereon. Such intermittent acts are not sufficient. Gernt v. Floyd, 131 Tenn. 119, 174 S. W. 267. However, on the first point

stated, the decree of the chancellor must be affirmed.

The second bill was filed by the heirs at law of Charles F. Ferguson, and by his widow, the complainant Della, against the same defendant, on the 12th of March, 1914. The heirs suing are Frances Rebecca, born March 12, 1890, and therefore 24 years old to a day, when suit was brought, and Richard Lawson Ferguson, born May 28, 1894, who was therefore just a little over 19 years old. These dates are important in view of the defense of the statute of limitations of 7 years' adverse possession, and also the defense of 20 years' adverse possession, from which a deed or grant may be presumed. It is also proper to be stated here that Charles F. Ferguson, the father of these children and the husband of the complainant Della, died April 28, 1901. The widow joins in the bill as next friend of the minor complainant, and also as asserting her right to dower.

In order to properly understand the facts it will be necessary to refer to a map which we find in the record and attach to this opinion showing McAnally's addition and the lot in controversy in connection with other lots adjoining.

linked lines rather than solid lines. The eastern boundary of lot No. 111 does not appear upon the map. The space marked on lot No. 112, "Property of D. R. Prince," is the part of lot No. 112 which was sold by Della Ferguson to the defendant, Prince, and is the property involved in the previous case just disposed of. It is perceived that immediately east of that is a part of lot No. 112 marked, "Property of Della Ferguson," and immediately east of that is a part of lot No. 111. It is perceived that the line marked "89.06" has along its length the word "fence," and also the line west of Della Ferguson's marked "120.40" also has attached to it the word "fence." Both lots Nos. 111 and 112 were formerly owned by Patrick Cain. On June 28, 1878, he sold a strip 50 feet wide off of the west side of lot No. 111 to Fannie Branner, and the latter, on May 22, 1891, sold this 50 feet to Charles F. Ferguson. On October 28, 1878, Patrick Cain sold to Harriet C. Branch the next 50 feet of lot No. 111 lying immediately east of and adjoining that previously sold to Fannie Branner. Harriet Branch sold this to E. C. Camp. E. C. Camp on December 31, 1881, sold this lot to Rachel Connor and Harriet Branch. The lat-



On turning to this map it is perceived that lots Nos. 115, 114, and 113 are rectangles, that three sides of No. 112 are bounded by right lines, but that the northern line is broken by the margin of Asylum avenue running at an acute angle. The east and west lines of lot No. 112 are, it is perceived,

ter sold a half interest back to E. C. Camp on January 10, 1889. E. C. Camp on June 1, 1901, sold this half interest to defendant, D. R. Prince. On December 8, 1903, Rachel Connor conveyed to D. R. Prince the other half of this lot.

Rachel Connor built a house and inclosed

what she thought was her lot in the latter part of 1881, but instead of running her lines perpendicular to Asylum avenue, and also to University avenue, these lines were inclined so as to cause the front of the lot to face with the angle of Asylum avenue, resulting in the laying of a part of her lot over on the Ferguson lot. When Ferguson came to build, supposing the fence marked with the figures "89.06" represented the eastern line of his 50 feet, he laid down his lot at the same angle, which resulted in putting about half of it over on lot No. 112, which belonged to a party named Lilley, the lot at that time vacant. In course of time Lilley discovered the invasion, and compelled Ferguson, or rather his widow, to buy the whole of lot No. 112, a part of which she subsequently sold to the defendant, as we have stated, and as shown in the previous case.

So the Fergusons bring the present suit to recover so much of the first 50 feet of lot No. 111 belonging to them as is now held by the defendant, Prince, under the fence made by Rachel Connor; that is to say, to rectify the lines. The defendant pleaded the statute of limitations of 7 years, claiming adverse possession for that length of time, and also 20 years' adverse possession, as a basis for the presumption of a grant. He likewise defends on the ground that the true method of laying off the lots, in the diagonal manner was adopted by Rachel Connor, and subsequently followed by Ferguson. This defense is based, apparently, on two grounds: First, that it is the natural way; secondly, that Patrick Cain himself staked off on the ground the 50 feet to Harriet Branch. It was not the natural way, as will be perceived from the language of the deed to Harriet Branch. The description in that deed is:

"A part of lot No. 111 of McAnally's addition to Knoxville, Tenn., beginning at a point fifty feet east of lot No. 112 and running fifty feet towards Knoxville along the pike and running back in parallel lines to University avenue."

The subsequent deeds on down to Prince used substantially the same language either directly or by reference to prior deeds. The language of the deed to Ferguson for the first 50 feet of lot No. 111 is:

"Fifty feet front of lot No. 111 in McAnally's addition to Knoxville, Tenn., being the western portion of said lot and adjoining lot No. 112 and running back to University avenue, the said front of said lot being on the Montgomery pike [now Asylum avenue], and being the same lot that was conveyed to the said first party [Fannie Branner] by deed from Patrick Cain," etc.

The description in the deed from Patrick Cain to Fannie Branner was:

"A part of lot No. 111 of McAnally's addition to Knoxville, the west corner of said lot adjoining Martha Lilley [meaning lot No. 112], fronting 50 feet on Montgomery pike [now Asylum avenue] and running back to University avenue."

[5] We think it is clear from these descriptions that the lines were intended to run

parallel with the east boundary line of No. 112 and at right angles with University avenue.

[6] As to the contention that the 50-foot lot conveyed by Patrick Cain to Harriet Branch was staked off on the ground by him, this cannot avail in so far as such act of his caused that lot to impinge upon the lot previously conveyed to Fannie Branner; the conveyance to Fannie Branner having been made on June 27, 1878, and that to Harriet Branch having been made on October 26, 1878. After having already conveyed to Fannie Branner the first 50 feet lying on the western side of lot No. 111, he could not lawfully lay down upon that lot subsequently any part of the 50 feet intended to be conveyed to Harriet Branch; so the descriptions must be confined to the language of the deeds and the rectangular strips of land.

The scale on the map is 40 feet to one inch.¹ Applying this scale to the map, the following results are obtained:

From the intersection of University avenue and Asylum avenue a straight line westward to Tellico street extends the length of 828.1 feet. Lots Nos. 115, 114, 113, and 112 are each 50 feet wide, or a total distance of 200 feet from Tellico street eastward to the east line of lot No. 112. That leaves the distance from the east line of lot No. 112 to the intersection of Asylum avenue and University avenue exactly 128.1; so that the Fergusons would be entitled to the first 50 feet of lot No. 111 measuring from the southeast corner of lot No. 112 eastward. The next 50 feet directly east of that would be the property which was conveyed by Patrick Cain to Harriet Branch, and subsequently, through a series of conveyances, passed to the defendant, Prince.

Nothing else appearing, the complainants are entitled to recover the first 50 feet of lot No. 111, or so much of it as they are not already in possession of.

We shall now consider the defense of the statute of limitations interposed by the defendant.

[7] Rachel Connor and Harriet Branch, her granddaughter, received a conveyance of the lot in question on December 31, 1881. The evidence is that during that year the fence was put around the lot; that is, not the lot actually described in the deed, which we have held intended right lines, but the fence ran in the diagonal manner we have previously stated, throwing a part of the lot over on the first 50 feet of lot No. 111, which had been conveyed to Frances Branner, under whom the complainants claim. The ground fenced up in this erroneous manner was held in possession by Rachel Connor until her conveyance to defendant Prince on December 8, 1903—that is to say, for 22 years. But in the conveyance which Rachel Connor

¹ The scale here used is 80 feet to the inch.—Reporter.

made to defendant, Prince, she did not describe her actual possession, but the 50 feet described in the deed which she and Harriet Branch had received from Camp, that is, by lines parallel with the east line of lot No. 112. The same is true of the conveyance by E. O. Camp to defendant Prince on June 1, 1901, of the other half interest in the same lot. So it is that Prince's claim to the lot as actually fenced rests simply upon the fact that he succeeded Rachel Connor in the possession, without any privity of contract between them as to the ground covered by the fence, except in so far as her deed covered part of the land fenced; that part lying upon Ferguson's lot to the west not being covered by the deed. This being true, the defendant could take no advantage of the previous possession by Rachel Connor, or by the latter and Harriet Branch, since their possessions were not united to his by any form of legal privity, that is, by a contract, or descent, or the like. Therefore, under the rule as laid down in *Erck v. Church*, 3 Pick. (87 Tenn.) 575, 11 South. 794, 4 L. R. A. 641, defendant's possession was entirely new when he entered on vacation of the premises by Rachel Connor. The doctrine of *Erck v. Church*, drawn really from *Marr v. Gilliam*, 1 Cold. (41 Tenn.) 491, is in effect, that successive possessions under the second section of the act of 1819 (chapter 28) cannot aid each other unless they be connected by contract or other form of legal privity, and that each subsequent possession not so connected takes a new start or beginning, unaided by the prior possession. It results that the defendant obtained no right under the statute of limitations, and is not protected thereby.

[8, 9] We shall next consider whether he is protected by the presumption of a grant. The doctrine on which this presumption rests is that, where one has remained in uninterrupted and continuous possession of land for 20 years, a grant or deed will be presumed. The reasons underlying the rule are variously stated. Sometimes it is said that such long possession furnishes an inference of fact that such muniment of title actually existed, which in course of time had been lost or in some manner unintentionally destroyed. Other cases in effect hold that the presumption is a fiat presumption of law intended for the repose of society. But, whichever be the true theory, the presumption undoubtedly exists. It has some special qualities which we shall now state. The possession may be continuously in one person, or there may be several successive possessions. In the case of successive possessions they must be connected without any hiatus, but there need be no privity of contract or other legal privity between the successive occupants, in this matter radically differing from successive possessions used in making out a defense under the statute of limitations. This point

is fully brought out with the distinction just indicated in the case of *Marr v. Gilliam*, 1 Cold. (41 Tenn.) 488, 501, 502, 511, 512. The absence of any necessity for privity between the successive holders of the property is also brought out very fully in *Scales v. Cockrill*, 3 Head (40 Tenn.) 433, and *Mimms & Wife v. Ewing*, 15 Lea (83 Tenn.) 667. An earlier case (*Chilton v. Wilson's Heirs*, *infra*) held that it was necessary to have privity, but, of course, the later cases control. It must also appear that the parties against whom the presumption is sought to be enforced were, during the whole 20 years, in a position to resist the possession, that is, were not under disability. *Marr v. Gilliam*, *supra*; *Ferrell v. Ferrell*, 1 Baxt. (60 Tenn.) 329; *Saunders v. Simpson*, 97 Tenn. 382, 37 S. W. 195; *Drewery v. Nelms*, 132 Tenn. 254, 262, 263, 177 S. W. 946.

Other aspects of the doctrine not necessary to be specially noticed in this opinion may be found in the remaining cases which appear in our Reports, viz.: *Gwathney v. Stump*, 2 Overt. (2 Tenn.) 308, 312-314; *Hanes v. Peck's Lessee*, Mart. & Y. (8 Tenn.) 228; *Gilchrist v. McGee*, 9 Yerg. (17 Tenn.) 455, 457; *McCorry v. King's Heirs*, 3 Humph. (22 Tenn.) 267, 276, 277, 35 Am. Dec. 165; *Chilton v. Wilson's Heirs*, 9 Humph. (28 Tenn.) 399, 405; *Lessee of Brock v. Burchett*, 2 Swan (32 Tenn.) 27, 31; *Collins v. Hipshire*, 2 Swan (32 Tenn.) 109, 111; *Cannon v. Phillips*, 2 Sneed (34 Tenn.) 211; *White v. Lavender*, 5 Sneed (37 Tenn.) 648; *Williams v. Donell*, 2 Head (39 Tenn.) 695; *Snoddy v. Kreutch*, 3 Head (40 Tenn.) 301; *Hunter v. Bills*, 3 Shan. Cas. 97, 101; *Railroad v. Hays*, 11 Lea (79 Tenn.) 382, 386, 47 Am. Rep. 291; *Dunn v. Eaton*, 92 Tenn. 743, 753, 754, 23 S. W. 163.

[16] Recurring now to some of the dates previously stated, Rachel Connor was continuously in possession of the lot which she had fenced up from December 31, 1881, until December 8, 1903, when she conveyed to defendant Prince, which was just 23 days less than 22 years. During a part of that time, that is, up to May 22, 1891, the lot now claimed by complainant was owned by Fannie Branch, a single woman. This would cover 9 years, 4 months, and 21 days, that is, from December 8, 1881, to May 22, 1891, on which latter date Charles F. Ferguson became the owner of the lot now sued for. He lived until April 28, 1901, a period of 9 years, 11 months, and 6 days, making 19 years, 3 months, and 27 days from the date when Rachel Connor fenced up the lot. But he left two minor children, one of whom, Richard Lawson Ferguson, is still a minor; therefore as to him the 20 years' presumption has not completely run. And he, as heir of his father, is entitled to recover of the defendant an undivided half interest (there being two children) of the property sued for. The other heir, Frances Rebecca Ferguson, having been

born March 12, 1890, was 11 years, 1 month, and 16 days old when her father died, and remained a minor 9 years, 10 months, and 14 days. But the adverse possession began December 31, 1881, and the bill was not filed until the 12th day of March, 1914, a period of 32 years, 12 months, and 11 days. Deducting from this time the minority of Frances Rebecca, there is left 22 years, 2 months, and 27 days during which the time was running wherein persons sui juris might have sued. So Frances Rebecca can recover nothing; the full presumptive period being made out. It is insisted in her behalf that she has the 3 years' saving for infants prescribed by our statutes of limitation, but this is a mistaken view. That provision has no bearing upon the presumption of title from lapse of time. All that is allowed under the cases we have cited is the counting out of the time during which any disability existed.

[11] There is no difficulty in granting a decree to complainant Richard Lawson Ferguson and denying Frances Rebecca Ferguson's right of recovery, since in this state tenants in common may sue together in ejectment and one may be barred and fail of recovery, and the other may not be barred and may recover, and a decree will be entered accordingly. *Barrow's Lessee v. Navee*, 2 Yerg. (10 Tenn.) 227; *Wade v. Johnson*, 5 Humph. (24 Tenn.) 119, 42 Am. Dec. 422; *Belote v. White*, 2 Head (39 Tenn.) 703, 712; *Williams v. Mining & Manufacturing Co.*, 115 Tenn. 578, 93 S. W. 572, 6 L. R. A. (N. S.) 710, 112 Am. St. Rep. 878, 5 Ann. Cas. 822. And see *Jones v. Phillips*, 10 Helsk. (57 Tenn.) 562, 563, and *Turner v. Lumbrick*, Meigs (19 Tenn.) 7, 11.

[12] The widow is, of course, not an heir of the husband, and cannot recover in ejectment. It does not appear that her dower had ever been assigned; so her only proper status is that of next friend of the minor complainant, Richard Lawson Ferguson.

The result is a decree will be entered in the second case dismissing the bill as to complainant Della in so far as she sues in her personal capacity, and as to the complainant Frances Rebecca. A decree will be entered in favor of the complainant Richard Lawson Ferguson for an undivided half interest in the first 50 feet of lot No. 111, lying immediately east of the eastern boundary line of lot No. 112, treating the east line of that lot as being parallel with the east boundary of lot No. 112, and distant 50 feet from that boundary line, and running in a perpendicular line from University avenue northward to Asylum avenue.

As to the costs, inasmuch as the two cases were tried together, and the evidence taken for one used in both, the assessment will have to be made as if both cases were in one bill. The complainants having completely failed in the first case, and having failed as

to half of the second case, a fair division of the costs would be to charge the complainants Della and Frances Rebecca with two-thirds of the costs and the defendant Prince, with one-third of all the costs.

On Rehearing.

After a further consideration of the calls in the deed made by Patrick Cain to Fannie Branner and those in the deed made by the latter to Ferguson, we are of opinion that in ascertaining the part of lot No. 111 to be recovered by the minor complainant the measurement should begin at the northeast corner of lot No. 112, and extend thence 50 feet southeastwardly along the margin of Asylum avenue; thence due south to University avenue; thence west to the southeast corner of lot No. 112; thence north to the beginning. This makes a slight difference in quantity in favor of defendant, due to the inclination of the line bounding Asylum avenue.

STARLIPER v. GRAY et al.

(Supreme Court of Tennessee. Nov. 28, 1916.)

SPECIFIC PERFORMANCE — TIME OF PERFORMANCE — ABANDONMENT OF RIGHT.

Where contracts for the purchase of corporation stock of several persons were not completely executed within the time limit because of failure of the purchasers to perform their part, a seller was entitled to specific performance, having performed his part of the agreement, notwithstanding other sellers under the same contract, becoming alarmed at the purchasers' delay, sold at less than the contract price.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 12-16; Dec. Dig. ¶7.]

Appeal from Chancery Court, Washington County; C. J. St. John, Special Chancellor.

Suit by C. F. Starliper against S. H. Gray and another. From decree for defendants, complainant appeals. Reversed and remanded, with directions.

J. Stanley Barlow, of Johnson City, for appellant. Thad A. Cox and Ben H. Taylor, both of Johnson City, for appellees.

NEIL, C. J. This bill was filed for the purpose of obtaining a specific performance of a contract entered into between complainant and others with defendant Gray and one W. S. Smith, to buy certain stock in the Johnson City Lumber & Manufacturing Company.

The controversy arose out of the following facts:

Some time prior to the occurrences which are the subject of the present controversy the lumber company had received a deed from the Holston Company for a lot on which its buildings were erected. This deed was made with the aid of the Chamber of Commerce of Johnson City. In order to forward the transaction, and advance the interests of

Johnson City, the Chamber of Commerce paid to the Holston Company \$1,250, and in that way the lot was secured. The deed which was made by the Holston Company to the lumber company, however, contained certain conditions, one of which was that the business should be conducted upon the lot for ten years, and that a certain number of employes should be operated, and other points not necessary to specially mention.

The building was constructed and the business conducted harmoniously, and apparently with reasonable profit, and indeed with growing success, until about the time the present controversy arose, when, owing to the increasing scope of the enterprise, the need of additional capital was felt, and, in order to obtain this capital, the books were opened for additional subscriptions, and the defendant Gray, along with others, took stock. Mr. Gray, so it seems, was a man of some means and very tenacious, and very careful in the furtherance of his own business interests. He also had become bound for the company in the sum of about \$5,000. Mr. S. E. Miller, another stockholder, was bound for about \$15,000, but had a mortgage on the property for \$10,000. A contract was given to Mr. Gray for the buying of logs, which many of the stockholders deemed to be unfair to the company, and this caused dissension. An effort was made, or was in contemplation, so to speak, to set aside Mr. Gray's very favorable contract, and he regarded this as very hurtful to his interests. So it gradually developed that a conflict of interests grew up between Gray and the other stockholders, except Smith; the latter siding with Mr. Gray. The struggle was to obtain the majority of the stock. Starlipper belonged to the faction which was opposed to Gray, and he purchased the stock of one Whitsant for \$800. This gave his faction the control. However, Gray and Smith contended that the purchase was illegal, and so the conflict continued. In this unsettled condition of the business every one recognized that the corporation was likely to suffer. Starlipper's faction insists that Gray and Smith were threatening to put the business in the hands of a receiver. Gray and Smith deny this, but say that they simply said, in substance, that the way things were going along, considering the dissension among the stockholders, the business would soon land in the hands of a receiver, or must soon land there, in the natural course of events.

In order to cure this condition, Gray and Smith offered to buy the stock of all the others at 85 cents on the dollar. The contract was in writing, and was in the following words:

"This agreement made and entered into by and between S. H. Gray and W. S. Smith, parties of the first part, and T. B. Wallace, E. C. Wallin, Edgar Wallin, S. E. Miller, and Frank Starlipper, parties of the second part, witnesseth: That the parties of the first part do hereby agree to purchase the stock of the parties of

the second part in the Johnson City Lumber & Manufacturing Company, said stock being as follows:

"T. B. Wallace and E. C. Wallin, sixty shares, \$6,000.00; Edgar Wallin, seventeen shares, \$1,700.00; S. E. Miller, twenty shares, \$2,000.00; Frank Starlipper, twenty-two and one-half shares, \$2,250.00—and pay for the same eighty-five cents on the dollar, one-half of which will be paid in cash, and the balance in six and twelve months from date hereof, the deferred payments to be evidenced by our joint and several notes, and to be secured by said stock so purchased, which will be attached to said notes as collateral security.

"It is agreed, however, that the ten shares of stock of S. E. Miller will be paid for outright at par by the cancellation of two notes given by S. E. Miller to the Johnson City Lumber & Manufacturing Company in payment for said ten shares of stock, and the remaining ten shares will be paid for as above stated at the rate of eighty-five cents on the dollar; all other notes of said company on which S. E. Miller is indorser will be taken up and paid, or renewed without his endorsement.

"It is stipulated that the parties of the first part will cause to be canceled the note of Frank Starlipper for the sum of eight hundred dollars given in payment for eight shares of stock in the Johnson City Lumber & Manufacturing Company on surrender by him of the certificate of stock given therefor properly endorsed.

"This agreement this day executed by the parties of the first part and by S. E. Miller, one of the parties of the second part, and is to become effective and binding on all the parties if signed by all the parties, and on condition of the release of the incumbrances in deed from Holston Corporation to the Johnson City Lumber & Manufacturing Company being procured by properly executed deed within ten days from this date.

"It is understood and agreed that the parties of the second part, upon the execution of this agreement within ten days as above stated, will tender their resignation as directors and officers of the Johnson City Lumber & Manufacturing Company, and the same to become effective at once.

"In testimony whereof we have hereunto affixed our signatures on this 8th day of March, 1916.

[Signed] S. H. Gray,

W. S. Smith,

"Parties of the First Part.

T. B. Wallace,

S. E. Miller,

E. C. Wallin,

Edgar Wallin,

C. F. Starlipper,

"Parties of the Second Part."

A companion contract to this was as follows:

"This agreement by and between S. H. Gray and W. S. Smith, parties of the first part, and S. E. Miller, party of the second part, witnesseth:

"That the party of the second part, S. E. Miller, agrees to cause to be released to the Johnson City Lumber & Manufacturing Company, a corporation, the conditions and incumbrances made and contained in the deed from the Holston Corporation to the Johnson City Lumber & Manufacturing Company, so as to vest in the company an unencumbered title, so far as said conditions are concerned, and in consideration thereof parties of the first part agree to pay to said S. E. Miller, so soon as said conditions can be released, the sum of \$500.00. and S. E. Miller agrees on his part to have said conditions released and fully discharged without any further or other costs to the Johnson City Lumber & Manufacturing Company.

"The company, through the parties of the

first part, agrees to furnish party of the second part all statements and data of business done to date for the use of the Holston Corporation and Chamber of Commerce, and to assist in every way when called upon to have said conditions released at the least possible sum, but said sum of \$500.00 will be paid to S. E. Miller, whatever he may have to pay said Holston Corporation or Chamber of Commerce.

"It is understood, however, that the agreement to pay said sum of \$500.00 is conditioned upon the execution of another contract of even date herewith between the parties of the first part and S. E. Miller and associates for the purchase of their stock in the Johnson City Lumber & Manufacturing Company.

"In testimony whereof witness the signatures of the parties to this instrument on this March 8, 1916. [Signed] S. H. Gray,

"W. S. Smith,

"Parties of the First Part.

"S. E. Miller,

"Party of the Second Part."

An addition or modification of this contract was entered on March 10, 1916, as follows:

"The parties of the first part agree to a modification of the above agreement to the extent of agreeing to pay to S. E. Miller said sum of \$500.00 (five hundred), and on condition that the Chamber of Commerce shall agree to take a bond in the penalty of \$1,250.00 to guarantee the operation of the plant for the period of five years on the terms and conditions set out in deed of April 27, 1915, the parties of the first part agree that such a bond will be given, and the party of the second part will not be required to procure the release of the conditions and restrictions in said deed except on terms of said bond being given, and the agreement of the Chamber of Commerce to take said bond and release the Holston Corporation shall be taken and treated as a compliance with the agreement of party of the second part hereto. But said Chamber of Commerce shall on the execution of said bond release all claims for reimbursement.

"This March 10, 1916.

"[Signed] S. H. Gray.

"W. S. Smith."

Gray and Smith did not execute the bond which they were required to execute under the contract of March 10th, although the Chamber of Commerce agreed to accept Mr. Gray's own bond. He testifies that he did not give it simply because he did not wish to.

In the meantime, before the expiration of the ten days mentioned in the contract of March 8th, a deed had been sent forward to the chief office of the Holston Company in New York, but it was not returned until after the ten days had expired. It seems that it had to pass the scrutiny of its local attorney in Johnson City, and also the authorities of the company in New York. But, as stated, the bond had not been given by Gray and Smith, and so there was no obligation on the part of the Chamber of Commerce to further the matter. The Chamber of Commerce was the real party in interest, because it had paid the \$1,250 originally, and the Holston Company would not agree to make the deed of release except with the consent of the said Chamber of Commerce of Johnson City. So the ten days expired without the execution of the deed. After the expiration of that time Gray and Smith re-

fused to have anything further to do with the matter. There is a controversy as to whether they refused to go forward with the deal before the expiration of the ten days. S. E. Miller, one of the leading men in the corporation, and Mr. Wallin, testify that Gray evaded them so that they could not get sight of him, dodged into stores, and in other ways escaped them, and that they were informed by Mr. Smith that Gray was going to "back out" because he could not get the money cheaply enough, and that he himself could not go forward unless Gray went with him. Smith in his evidence, practically admits this fact. Gray denies that he evaded these stockholders. However, we think the weight of the proof shows that the last three or four days of the ten days Gray and Smith were wavering and were giving it out that they could not go forward with the purchase; but about 4 o'clock on the last day they suddenly became bold and said that they would carry out their contract and purchase the stock, but that they must have this deed of release from the Holston Company first, and when Miller and Wallin offered them some papers showing that it was only a matter of a few days when the deed could be produced, they said that they were ready "right now" to carry out the contract if the deed should be delivered to them, but that they would not, after the expiration of the ten days, take the stock. This was, as stated, at 4 o'clock on the last day, when they knew that it was impossible to procure the deed within the ten days.

After the expiration of the ten days, about the 27th of March, the Holston Company executed the deed.

The stockholders who had agreed to sell the stock at 85 cents—that is, Starliper, S. E. Miller, Wallin, and others—were confronted with the following situation: Gray and Smith had refused to buy the stock. To compel them to take it a litigation would have to be inaugurated. This meant a continuation of the previous dissension in a more aggravated form, with constant deterioration of business, and necessarily with great loss to all, or nearly all, the stockholders. The situation was acutely felt by Mr. Miller, because he was the leading financial spirit in the enterprise, and was bound for more of the debts of the corporation than anybody else; that is, as already stated, for \$15,000.

In this situation all of the stockholders on that side of the controversy, except Starliper, felt they must make some concessions. So Miller remained in the company, and all of the others agreed, except Starliper, to take 75 cents for their stock, and this new contract was carried out. Starliper refused, and filed his bill to compel a specific execution of the contract to take his stock at 85 cents on the dollar. The defendants resisted this demand, on the ground that when the ten days expired their obligation ceased. They claim-

ed that the ten days' time was of the essence of the contract. They further say that in order to obtain the release deed of the Holston Company they had to pay the Chamber of Commerce of Johnson City \$500 in cash.

In respect of this latter feature the record shows that the Chamber of Commerce was perfectly willing to receive the bond provided for in the modified contract of March 10, 1916, but that Gray and Smith finally refused to give that bond, and preferred to pay \$500, and did so.

It is the insistence of Gray and Smith that they were not to pay anything except the \$500 fee to S. E. Miller; that in consideration of paying this to Miller he was to get the consent of the Chamber of Commerce to the release, which was to be made by the Holston Company. In singular contrast to this contention is the modified contract of March 10th, under which they agreed, without any kind of protest at the time, to execute a bond for \$1,250 in order to procure the release. Really it is very clear from the contract which was made between them and Miller on the 8th of March, 1916, that it was plainly understood they would have to pay the Holston Corporation something, or the Chamber of Commerce, in addition; that is, what might be paid to Miller would not satisfy, or might not satisfy, the Holston Corporation, or the Chamber of Commerce. This is clear from one paragraph in the contract just referred to, viz.:

"The company, through the parties of the first part, agrees to furnish party of the second part all statements and data of business down to date for the use of the Holston Corporation and Chamber of Commerce, and to assist in every way when called upon to have said conditions released at *the least possible sum*, but the sum of \$500.00 will be paid to S. E. Miller *whatever he may have to pay said Holston Corporation or Chamber of Commerce.*"

This could mean nothing else than that it was understood that something would have to be paid to the Holston Corporation or the Chamber of Commerce in order to get the release. In the light of the language italicized we can see how perfectly reasonable it was that Gray and Smith on the 10th of March agreed to execute the bond for \$1,250. If it ever had been understood that Miller's \$500 fee was to eventuate in the securing of the release without the payment of any consideration to the Chamber of Commerce, or to the Holston Corporation, Gray and Smith would never have agreed to make the bond. But if we are wrong about this, at all events they agreed to give the bond; and it thus devolved on them as a condition precedent to the release to execute the bond or to make satisfaction to the Chamber of Commerce in respect thereof.

As it turned out, they not only paid the fee of Miller, but in lieu of the bond paid \$500 to the Chamber of Commerce.

So the result of the matter was that Gray and Smith obtained all they desired to ob-

tain within a month or such a matter, but at less cost than they anticipated. They got the release they wished. They got rid of all of the other stockholders except Miller by paying them 10 cents less on the dollar than they had agreed to pay except Starliper, and against the latter's will they retained him, as Mr. Gray said, because they needed his work, he being a sawyer, just a workman in their service. They willingly retained Miller, a valuable man, as they had now the majority of the stock, and he could not thwart them.

Starliper, however, was not willing to have his rights thus disposed of. He insists upon having the contract performed. The question is: Is he entitled to this relief?

We think that he is so entitled.

Regardless of the question of construction as to whether the ten days' time limit was of the essence of the contract, it is perfectly clear that when Gray and Smith agreed to the modification of March 10th, under which they were to execute the bond, the duty rested on them after that to make the first move; that is, to execute the bond, or to pay such a sum of money as they and the Chamber of Commerce could agree on in lieu of the bond. During their inaction the time limit was automatically extended. It never became incumbent upon the Chamber of Commerce to authorize the delivery of the deed of release by the Holston Company until it, the Chamber of Commerce, should be satisfied by the bond, or by some commutation of it. This was finally arranged some time in March, when the \$500 was paid by Gray and Smith, and the deed was received. When this deed was received, it became their duty to pay to Mr. Starliper the amount due for his stock.

His rights are not at all compromised by the fact that other stockholders took fright and settled with Gray and Smith at 75 cents on the dollar, and that Miller stayed in. Starliper had the right to stand fast as he has done, and to claim his dues.

It is insisted that, because at a meeting of the stockholders about the 1st of April, 1916, Starliper seconded certain motions, he is thereby estopped. There is nothing in this. He never agreed to settle with Gray and Smith, or to give up his rights, and they were in no wise injured, nor was he benefited by the seconding of the motions. Indeed, it was merely a formal matter and done by him at the request of the acting secretary at that time, Mr. Miller, as a matter of form in order to show some variety of action in the motions and seconds; there being only a very few stockholders present at the meeting.

It is insisted that Starliper accepted the status because, when Mr. Miller agreed to remain, and other persons, except Starliper, took 75 cents for their stock, Miller offered Starliper's stock to Gray and Smith at 75 cents on the dollar, which they refused. Both Miller and Starliper say that this was done

without Starliper's authority, and there is no proof to the contrary.

A good deal is said in the briefs about the Whitsant \$800 of stock. It was a part of the agreement, as appears from one of the writings above set out, that Gray and Smith were to relieve Starliper of this stock. This they subsequently did. Whether they did so pursuant to the contract, or otherwise, is not material. That was a mere incident of the contract. The real subject of the contract, as far as Gray and Smith and Starliper were concerned, was that they were to buy Starliper's stock at 85 cents on the dollar, outside of the \$800 of his Whitsant stock, which had been acquired by him in the manner previously stated, and about his ownership of which there had been some controversy.

Complainant, Starliper, is entitled to a decree against Gray and Smith compelling them to take his stock at 85 cents on the dollar. The decree of the chancellor will therefore be reversed, and the cause remanded to the chancery court at Johnson City, with directions to the chancellor to enter a decree in Starliper's favor against Gray and Smith for one-half the par value of the stock at the rate of 85 cents on the dollar, with interest from

March 27, 1916. Under the terms of the contract the remaining half of the one half was to be paid at six months from its date, which, under the postponed period indicated, would be September 27, 1916, which has already passed. The chancellor will enter a decree against Gray and Smith for this sum. The remaining half of the sum left, after deducting the cash payment called for, will fall due 12 months from March 27, 1916, which will be March 27, 1917. The chancellor will retain the cause in court until that date, and if the money shall not be then paid, he will enter a judgment against Gray and Smith for the amount. None of these judgments, however, will be entered until Starliper files in court the stock, which will be held in the cause by the chancellor until all the payments are made by Gray and Smith, and then the stock will be delivered over to the said Gray and Smith. On the filing of the stock in court Starliper will be entitled to an execution on the two amounts adjudged in his favor, and on the 27th of March, 1917, the remaining sum due him for his stock.

A decree for all the costs of the cause will be entered against Gray and Smith, both for this court and the court below.

EAST v. SOUTHERN COTTON OIL CO.
(No. 57.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. APPEAL AND ERROR ¶713(3)—BILL OF EXCEPTIONS—WHAT TO CONTAIN.

Where the motion for new trial appeared only in the bill of exceptions, while the bill is not the proper place for such motion, it will yet be considered, in order to avoid unnecessary delay by certiorari to bring up the motion in the proper way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. ¶713(3).]

2. APPEAL AND ERROR ¶547(1)—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS—UNNECESSARY ORDERS.

Where no motion was filed to strike paragraphs of the answer, but they were demurred to and demurrer sustained with exceptions saved, but the court in sustaining the demurrer struck the paragraphs, such order was surplusage, so that it need not be presented by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429, 2430; Dec. Dig. ¶547(1).]

3. PRINCIPAL AND AGENT ¶90(1)—COMMISSIONS—LIEN.

A contract of employment by which the servant was to receive a commission for purchasing cotton seed, which contract allowed a certain sum per ton to cover house rent and loading and made him responsible for loss of weight arising from errors in weighing, theft, drying, handling, or any other cause, and required him to keep the seed under lock and key, while it may not technically constitute him a factor or broker, entitles him to an interest in or lien upon the seed purchased to the extent of the commission due for purchasing it and the charges for storing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 240-242; Dec. Dig. ¶90(1).]

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Replevin by the Southern Cotton Oil Company against T. W. East, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Appellee brought suit in replevin against appellant in the Clark circuit court for about 14 tons of cotton seed in possession of appellant, same being stored in a little house just in the rear of the livery barn of appellant in Arkadelphia. The complaint stated that appellee was the owner of the seed and entitled to the immediate possession thereof, and that the defendant unlawfully detained same, and asked for \$50 damages for the detention of said seed. Appellant filed an answer and cross-complaint. The first paragraph of the answer denied that appellee was the owner and entitled to the possession of said seed, and denied that he had damaged it in any sum by the retention of said seed. The second paragraph of the answer set out the contract between appellant and appellee, under which the seed were purchased. The contract was made an exhibit to the answer and is as follows:

"Contract between plaintiff and defendant, made on Aug. 11, 1915.

"First. The oil company (plaintiff) hereby employs the second party (defendant) and the second party accepts such employment to purchase sound cotton seed for the oil company at Arkadelphia during the season beginning Sept. 15, 1915, ending March 15, 1916; but this contract may be rescinded and terminated at any time by either party by notice to the other party.

"Second. The second party shall receive as compensation a salary of fifty dollars per month, for six months, starting September the 15th, 1915. On all purchases over two hundred tons, the oil company agrees to allow a commission of one dollar and fifty cents per ton. The oil company agrees to allow forty cents per ton to cover house rent and loading on each ton bought for their account.

"Third. The oil company to give defendant quotations and instructions as to buying said seed and defendant to give diligent effort to purchasing, and defendant will make daily written reports of said purchases showing quantity, cost of each load on forms furnished by the company; and if defendant can buy seed at prices lower than quotations the oil company is to have the benefit.

"Fourth. Defendant not to report seed unless they are actually delivered and deposited in the storage place, and not to purchase any seed for future delivery unless authorized.

"Fifth. The oil company can arrange for cashing seed tickets in the town where purchased, but if the cashing of said tickets cannot be satisfactorily arranged, then the oil company will advance such sums of money as it deems proper to defendant, with the understanding that such sums advanced are trust funds to be used and accounted for under the direction of the company and to be used only in the purchase of seed.

"Sixth. The company provides a house for storing of seed purchased by defendant and scales for weighing, which are suitable for the purpose, and defendant is responsible for any loss in weight arising from errors in weighing, theft, drying, handling or any other cause. All seed shipped to the company shall be weighed at such point the company may designate; and defendant is responsible for any difference in weight between what it shown by his reports and the weights at such designated point in excess of the weights shown at said designated point.

"Seventh. Defendant is to keep all seed under lock and key and see that the scales are in good order.

"Eighth. Defendant is to ship seed as directed by the company and to ship all reported purchases and received in storage.

"Ninth. Defendant, during the existence of this contract, will not sell or purchase cotton seed for any other person.

"Tenth. The contract not binding until ratified by Memphis, manager of the Southern Cotton Oil Company."

He, in substance, alleged that under this contract he purchased 308 tons of cotton seed, and that he was entitled to \$1.50 per ton on 110 tons as commission for purchasing same and 40 cents per ton on 808 tons for storage and loading, making a total sum of \$288 for which he was entitled to a lien on the seed then in his possession. Paragraph 3 of said answer and cross-complaint was, in substance, the same as paragraph 2, but in the nature of a cross-complaint, asking for \$150 damages for his wrongful discharge by appellee in addition to the amounts claimed for commissions and storage, making a total claim of \$438, for which he asked judgment.

A demurrer was filed to the second and third paragraphs of the answer and cross-complaint, which demurrer was sustained by the court, and exceptions saved to said ruling by the defendant. In addition to sustaining the demurrer to the two paragraphs of the answer and cross-complaint the court struck out the paragraphs. The court declined to permit appellant to make a defense under the second and third paragraphs of his answer and cross-bill, and, sitting as a jury, found for appellee, and rendered judgment against appellant for 10 tons of cotton seed and the costs of the suit. Appellant filed his motion for a new trial, which was overruled, exceptions were saved, and this cause is brought here on appeal. The motion for a new trial appears in the bill of exceptions, and does not appear otherwise as a part of the record in this cause.

McMillan & McMillan, of Arkadelphia, for appellant. John H. & Dwight H. Crawford, of Arkadelphia, for appellee.

HUMPHREYS, J. (after stating the facts as above). [1] Appellee contends that the motion for a new trial has no place in the bill of exceptions, and therefore that no motion for a new trial appears in the record, and that for this reason the cause should be affirmed. Our court held in the case of Farquharson v. Johnson, 35 Ark. 536, that it was necessary for the motion for a new trial to appear in the bill of exceptions, and the court could not take notice of it unless it was there. In later cases, the court held that the proper place for a motion for a new trial was in the record, and not in the bill of exceptions. Because the court ruled in 35 Arkansas that it could not take notice of a motion for a new trial unless it appeared in the bill of exceptions, it is now contended that, since the court holds that the bill of exceptions is not the proper place for a motion for a new trial, the same reasoning should apply, and no notice should be taken of the motion for a new trial unless it appeared in the transcript separate and apart from the bill of exceptions. Should we adopt the reasoning of learned counsel, the court would suspend the consideration of this cause and direct a writ of certiorari to bring up the motion for a new trial. This would bring about an unnecessary delay of the case. While the bill of exceptions is not the proper place for the record entries and the pleadings, and while the motion for a new trial is a pleading, yet it is here, and we will treat it as transferred to its proper place rather than delay the cause and issue the writ. No contention is made that the motion for new trial is incorrect in any respect.

[2] It is also contended that when a paragraph is once stricken from a pleading, the only way to get it back into the record is by saving an exception and getting it back

through the route of a bill of exceptions. The case of Blackmore v. President, 4 Ark. 454, is cited in support of this contention. We do not overrule this case, but hold that when an unnecessary act is done by a trial court, it is unnecessary to except to it. No motion was filed to strike these paragraphs. They were demurred to, the demurrer was sustained, and appellant saved his exceptions. The order sustaining the demurrer was sufficient. The order striking the paragraphs was clearly surplusage.

[3] Having disposed of these technical contentions, we now proceed to a consideration of the real issue in the case. It is conceded by appellee that if appellant was a factor or broker, he would have a right to retain the possession of the cotton seed until his commissions, advances, and expenses were paid. Many authorities are cited in both briefs with reference to the law applicable to brokers and factors. It is unnecessary to discuss these authorities in this opinion. The rights of appellant depend upon the construction of the contract. The contract provides for a commission for purchasing this seed. It also allows 40 cents per ton to cover house rent and loading each ton bought for their account, and makes appellant responsible for any loss in weight arising from errors in weighing, theft, drying, handling, or for any other cause. It requires appellant to keep the seed under lock and key.

In the case of Hill v. Robinson, 16 Ark. 93, our court said that cotton could not be recovered in replevin until the party picking and hauling it had been paid for the picking and hauling. It is true in that case that Hill, the picker, was to pay himself out of the cotton for picking, and divide the balance. In the contract before us, it is not specifically agreed that appellant should have a portion of the cotton seed for his work, but it was agreed that he should have a commission for purchasing the seed and 40 cents a ton for loading and storage, and he was required to stand any loss in weights or loss from other causes. Under this provision of the contract if he had this seed in his own house for storage, he was clearly a warehouseman. These provisions in the contract certainly give him some right in the seed. It is conceded by appellee that it could not maintain replevin if appellant was a factor or broker under the terms of this contract. The terms of the contract may not make him technically a factor or broker, but we are convinced that the contract created an interest in or lien on the cotton seed purchased to the extent of the commission due for purchasing the seed and the charges for storing same. Both amounts should be paid by appellee before it could bring a suit in replevin for the seed. Making him responsible for any shortage in weight or loss by theft, drying, handling, or any other cause, together

with his right to a commission for purchasing same and the pay for storing same, coupled with possession, takes him out of the category of naked purchasing agents.

This being our view, we think the court erred in sustaining the demurrer to paragraphs 2 and 3 of the answer and cross-complaint. For this error the cause is reversed and remanded, with instructions to overrule the demurrer, and for further proceedings.

HARRIS v. RING. (No. 56.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

APPEAL AND ERROR ⇐1002 — REVIEW — WEIGHT OF EVIDENCE.

Where the evidence is conflicting, the verdict will not be disturbed where there is substantial evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Suit by George W. Ring against C. C. Harris. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Sellers & Sellers, of Morrillton, for appellant. Edward Gordon, of Morrillton, for appellee.

HUMPHREYS, J. Appellee brought suit before a justice of the peace against appellant on a duebill for \$100, and interest, dated April 4, 1914. Appellee lost his suit there and appealed the case to the circuit court. The case was heard in the circuit court, and appellee obtained judgment against appellant for the amount of the duebill, interest and cost. The duebill was given in part payment for a check for which appellee had sold his cattle. The check was for \$250, and, in addition to executing this duebill, appellant had paid appellee \$150 in money. The execution of the duebill is admitted by appellant, but he pleads payment as his defense thereto. The question of payment was submitted to the jury in the circuit court, and the jury found against appellant.

Appellant contends that the verdict of the jury is clearly against the weight of the evidence and to such an extent that the case should be reversed. We do not understand that it is the province of this court to ascertain whether the weight of the evidence is against the verdict of a jury. The rule laid down in *Hodges v. Bayley*, 102 Ark. 200, 143 S. W. 92, is as follows:

"If there is any evidence adduced which is legally sufficient to sustain the verdict, it becomes conclusive in the consideration of the case upon appeal to this court."

We would not be justified in going into the record further than to ascertain whether there is substantial evidence to support the

verdict of the jury. In looking to this record, we find Geo. W. Ring in the possession of a duebill executed by C. C. Harris for a valuable consideration. Ring asserts most positively that the duebill was never paid. Harris swears positively that it was paid in cash. He attempts to corroborate his evidence by a cash slip and a loose leaf from the books of a firm with which he was connected under the style of Austin & Harris. According to the weight of the evidence, he swore in the justice of the peace court that he paid this order on April 20th. In the circuit court he swore that the payment was made on April 10th, and entered on April 20th. He declined to produce the ledger, but contented himself with introducing the loose leaf. There was some evidence tending to show that the original entry on the loose leaf, or a portion thereof, had been erased and a different entry made. When the question of the payment of the order first arose between appellant and appellee, appellant claimed that he could show by his books where the order had been paid, and, according to the evidence of appellee and his son, appellant was unable after hours of search to make the showing by his ledger.

To say the least of it, this case was submitted to the jury on conflicting evidence, and the jury found against appellant, and the verdict must stand, for the reason that there is substantial evidence to support the verdict.

Judgment is affirmed.

OADDO RIVER LUMBER CO. v. GROVER. (No. 54.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. MASTER AND SERVANT ⇐185(22)—NEGLIGENCE.

The act of a fellow servant, chipping out Babbitt metal, in asking another servant to hold a light around, and unexpectedly striking the chisel with a hammer so as to chip a piece of metal into the eye of the other servant, was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 411; Dec. Dig. ⇐185(22).]

2. MASTER AND SERVANT ⇐294(5)—ACTION—INSTRUCTION.

In an action against an employer for negligence of fellow servant in chipping metal injuring plaintiff's eye, an instruction holding the master to the exercise of ordinary care to protect plaintiff from danger held proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1164; Dec. Dig. ⇐294(5).]

3. CONSTITUTIONAL LAW ⇐245—SUBJECTION OF FOREIGN CORPORATIONS TO LAWS GOVERNING DOMESTIC CORPORATIONS.

The application of the fellow-servant act (Acts 1907, p. 162) to a foreign corporation, the same as to domestic corporations, does not violate the Fourteenth Amendment of the federal

Constitution by denying such foreign corporation the equal protection of the laws.

[Ed. Note.—For other cases, see Constitution—al Law, Cent. Dig. § 702; Dec. Dig. ¶245.]

4. TRIAL ¶129 — ARGUMENT — RETALIATORY REMARKS.

Where, in a personal injury suit, defendant's counsel argued that, notwithstanding falsity of plaintiff's testimony, plaintiff's counsel, because of his experience and skill in such cases, would make it appear plausible, the answering comment of plaintiff's counsel that he would not represent corporations in such cases lest he might do some cripple an injustice and that he would lose his arms or have his tongue cleave to the roof of his mouth before he would represent a corporation trying to defeat as just and meritorious a claim as the jury were then considering, while perfervid, was invited, and was not, therefore, prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 810; Dec. Dig. ¶129.]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Action by M. L. Grover against the Caddo River Lumber Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. C. Pinnix, of Murfreesboro, and McRae & Tompkins, of Prescott, for appellant. Pace, Seawell & Davis, of Little Rock, for appellee.

SMITH, J. Appellee recovered judgment for a large sum of money to compensate a personal injury sustained by him while employed by appellant. No serious complaint, however, is made against the size of the judgment, but it is insisted that no judgment should have been permitted for the reasons which are herein discussed.

Only appellee and a man named Ashcraft were present at the time of the injury, and they differ in some material respects in their versions of this occurrence. These differences, however, have been resolved in appellee's favor by the verdict of the jury, and we may state the facts as he related them to the jury. He and Ashcraft were seeking to remedy some trouble with the crank shaft of appellant's light engine. About a week before the accident appellee had taken this crank shaft to Glenwood, and had brought it back and had it fitted to its place in the engine. It became loose again, and a new crank shaft was ordered, and when it came it was found not to fit its bearings. It was necessary to take out the Babbitt metal in the bearings, and re-Babbitt them, and appellee was directed to assist Ashcraft in doing this work, and he described the manner of his injury as follows:

"We started to work on it at 7 o'clock, got the engine torn down, got the crank torn down, and we started on the Babbitt metal to chipping it out. We worked on it until about 12 or 1 o'clock, pretty close around there, when I received the accident. Just before 12 o'clock I went to the machine shop to look up a Babbitt ladle and also a small bellows which I knew was out there, and was going to use it in blowing out this fine dust out of the anchor hole in one of the bearings. I had already got one of

these bearings cleaned out, the left-hand bearing, and when I came back in John says to me: 'We are getting along slow; it would be a good plan for you to go ahead and work on this bearing here and let me finish chipping this out over here.' So I picked up the lantern setting on top of the engine. I was holding my lantern above my head and had a small end punch which I was using in cleaning out the anchor hole that was required to hold the Babbitt metal in the bearings. These holes are about half an inch apart, drilled into the casting to give this metal a hold so it will set there and let the shaft turn free in the metal. Now, I was standing there holding this light and cleaning out this fine dust out of these holes. * * * I was cleaning out these anchor holes with a small end punch and holding the lantern in my left hand above my head. I had my back to John Ashcraft and was working on the right-hand bearing behind me. I had been working there, I judge, 15 minutes, when Ashcraft spoke to me. He says, 'Grover, hold the light around,' he says, 'A little closer so I can look at what I am doing.' I turned around with the light, thinking he wanted to get his bearings and see what he was doing. I never dreamed he was going to chip at that time. I turned square around, and just as I turned around and threw the light over where he was working he struck the chisel with the hammer and a piece of Babbitt metal flew in my eyes."

He further testified that at the time the blow was struck the chisel was in a slanting position which made it more probable that the metal would fly in his direction, and that the chisel would not have been in this position had time been given to adjust it.

Special interrogatories were submitted to the jury, to which the following answers were made:

"No. 1. Was Ashcraft negligent, and, if so, in what did his negligence consist? Answer: Yes, when Ashcraft called Grover's attention and struck the chisel with the hammer unexpected.

"No. 2. Was Grover negligent, and, if so, in what did his negligence consist? Answer: No, he was not."

[1] It is first insisted that Ashcraft was not negligent, but the jury, in answer to the interrogatories, has specially found that he was negligent in striking the chisel an unexpected blow, and we cannot say the evidence is not sufficient to support this finding.

It is next insisted that the risk was an ordinary one and was assumed by appellee. But such is not the case. The servant is relieved of the assumption of this risk under Act 69, Acts 1907, p. 162, entitled:

"An act to give right of action against an employer for injuries or death resulting to his agents, employes or servants, either from the employer's negligence or from the negligence of some of his other employes, servants or agents, and to repeal all acts and parts of acts in conflict herewith."

[2] Objection is made to the first instruction given at appellee's request upon the ground that it imposed a degree of care beyond the requirements of the law, in that it told the jury that it was appellant's duty "to exercise ordinary care to protect plaintiff from danger," and that the instruction was inapplicable under the issues joined.

This instruction was a lengthy one and announced familiar principles of the law of master and servant, and told the jury that if the act of "said John Ashcraft caused plaintiff to look in his direction and without notice or warning to plaintiff, after causing plaintiff to look in his direction, cut said Babbitt metal with his chisel, causing a piece of said metal to chip off and fly into the eye of the plaintiff, destroying the sight of the same, and that the said John Ashcraft in thus striking said metal and causing a piece of the same to fly into the eye of the plaintiff at the time failed to exercise ordinary care to protect plaintiff from danger, and that his act in thus cutting the metal was negligence and the proximate cause of the injury, and that the plaintiff at the time was exercising ordinary care for his own safety, and had not assumed the risk," that the jury should find for the plaintiff in such sum as would fully compensate him for the injuries received. We think this a correct declaration of the law as applicable to the facts of this case.

[3] The complaint alleges that appellant is a foreign corporation, and this fact is not denied, and it is said, therefore, that the fellow-servant act cited above violates the Fourteenth Amendment to the Constitution of the United States, in that it denies appellant the equal protection of the law. This question has been thoroughly considered by this court and decided adversely to appellant's contention. *Ozan Lbr. Co. v. Biddle*, 87 Ark. 587, 113 S. W. 796; *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568; *Soard v. Western Coal Co.*, 92 Ark. 504, 123 S. W. 759; *St. L. S. W. Ry. Co. v. Burd*, 93 Ark. 92, 124 S. W. 239; *Ark. State Co. v. State*, 94 Ark. 84, 125 S. W. 1001; *St. L., I. M. & S. Ry. Co. v. Brogan*, 105 Ark. 545, 151 S. W. 699; *St. L., I. M. & S. Ry. Co. v. Ledford*, 90 Ark. 543, 119 S. W. 1123; *Kleeh v. Hopkins*, 108 Ark. 578, 158 S. W. 981; *Chapman & Dewey Land Co. v. Woodruff*, 116 Ark. 189, 173 S. W. 188.

And the fact that appellant is a foreign, instead of domestic, corporation can make no difference. The statute applies to them alike. *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *Western Union Co. v. State*, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82.

[4] It is finally insisted that error was committed by the court in refusing to reprimand counsel for appellee for statements contained in his closing argument. This argument consisted in a statement by Mr. Frank Pace that he would not represent corporations in cases of this character for fear that he might do some cripple an injustice, and that he would suffer the loss of his arms, or would have his tongue cleave to the roof of his mouth before he would represent a corporation in an attempt to defeat the assertion of a claim as just and meritorious as the one the jury was then considering. We

think this argument was too impassioned, and therefore an improper one, but we cannot say that it was prejudicial in this case. Counsel for appellant had severely criticized appellee's testimony and had argued that it was false, yet he stated that the experience and skill of Mr. Pace was such through connection with many cases of this kind that he could, and would, make it appear plausible, notwithstanding it was false. This attack invited the response, and while the response was perverid it was but the expression of counsel's own view. Personalities should be avoided as they tend to throw no light upon the issues of the case, but one who throws down the gauntlet may not complain against him who picks it up where the challenged party does no more than repel the challenge or defend himself from some charge which might militate against the cause he represents.

Finding no prejudicial error, the judgment is affirmed.

BOTHE v. GLEASON et al. (No. 18.)

(Supreme Court of Arkansas. Dec. 4, 1916.)

1. VENDOR AND PURCHASER — VENDOR'S LIEN — FORECLOSURE — REDEMPTION.

There is no statutory right of redemption under a sale to foreclose a vendor's lien.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 820, 821; Dec. Dig. § 289.]

2. VENDOR AND PURCHASER — VENDOR'S LIEN — FORECLOSURE — PARTIES — REDEMPTION.

The wife of the purchaser is not a necessary party to a suit to foreclose a vendor's lien, since she can have no dower or homestead right therein, and therefore cannot intervene in such suit and redeem the property from the sale.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 778-782; Dec. Dig. § 279.]

3. DOWER — PRIORITY — VENDOR'S LIEN.

In view of Kirby's Dig. § 2891, providing that a widow is not entitled to dower in lands purchased by her husband during coverture as against those claiming under a purchase money mortgage, the right of dower cannot exist against the holder of a vendor's lien.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 67, 68, 71; Dec. Dig. § 26.]

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Suit by C. F. Prang against John G. Gleason and others to foreclose a vendor's lien. From a decree of the court permitting Edith O. Gleason, the wife of one of the defendants, to intervene and redeem the land from the commissioner's sale to H. Bothe, the purchaser appeals. Reversed and remanded, with directions to dismiss the intervention and to confirm the sale.

Appellant pro se. O. M. Young and Geo. C. Lewis, both of Stuttgart, for appellees.

MCCULLOCH, C. J. Appellant was the purchaser of the lands in controversy at a

judicial sale, and appeals from the decree of the court permitting the wife of one of the defendants in the suit in which the original decree was rendered to redeem. The original suit was instituted by C. F. Prang against certain parties, including John C. Gleason, the husband of appellee Edith O. Gleason, to foreclose a vendor's lien on the lands in controversy. The chancery court granted the relief and entered a decree ascertaining the amount of the indebtedness due as purchase price of the land, and ordered the land sold by a commissioner. The sale was duly made by the commissioner, and appellant, H. Bothe, became the purchaser, and the sale was reported to the court, and when it came up for confirmation, appellee Edith O. Gleason intervened for the purpose of redeeming from the sale and the court permitted her to redeem.

There is a question presented in the case as to the amount required in redemption, if redemption be allowed at all, but we need not go into that if we reach the conclusion that appellee had no right to redeem.

[1, 2] There is no statutory right of redemption under a sale to foreclose a vendor's lien. *Priddy & Chambers v. Smith*, 106 Ark. 79, 152 S. W. 1028. The decision turns on the question whether or not the wife of a purchaser of land is a necessary party to a suit to foreclose the vendor's lien for purchase money; for, if the wife is not a necessary party to the suit, she has no right to redeem after the husband's right of redemption is foreclosed by the sale.

In 39 Cyc. p. 1859, the rule is broadly stated that:

"The wife of the purchaser is neither a necessary nor a proper party to a suit to foreclose a purchase-money lien upon land purchased by her husband unless the title to the land is in her, since no homestead right can exist as against the purchase money."

[3] The same may be said with respect to the dower right; for no such right can exist as against the debt for the purchase money. *Kirby's Digest*, § 2691; *Birnie v. Main*, 29 Ark. 591. The rule stated in the encyclopedia is sustained by numerous authorities. *Amphlett v. Hibbard*, 29 Mich. 296; *Fowler v. Bracy*, 124 Mich. 250, 82 N. W. 892, 83 N. W. 874; *Sarver v. Clarkson*, 156 Ind. 316, 59 N. E. 933; *Porter v. Teate*, 17 Fla. 813; *Mutual Building Ass'n v. Wyeth*, 105 Ala. 639, 17 South. 45; *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185; *Waldon v. Davis* (Tex. Civ. App.) 185 S. W. 1000.

In *Fowler v. Bracy*, supra, the Michigan court, in disposing of the question, said:

"The sole question, therefore, is whether, in a suit in equity to foreclose the lien of a land contract, the wife of the contract purchaser is a necessary party, when, as in this case, a portion of the land which is the subject of the contract is a homestead. This question must be answered in the negative. Stating the rights of the contract purchaser most broadly, they cannot be greater than a purchaser under a deed of conveyance who gives back the purchase

money mortgage. Indeed, this is the relation which equity accords to the parties; that is to say, equity treats the purchaser as the holder of the title, subject to the lien of the vendor for the purchase price."

The authorities do not appear to be entirely in accord, at least so far as concerns the necessity for joining the wife as a party in a suit to foreclose a mortgage. In the last edition of *Wiltale on Mortgage Foreclosure*, § 155, the rule is stated to be that the wife is a necessary party to a suit to foreclose a mortgage, and that her rights will not be affected unless she is made a party. Cases are cited which support the text. Notwithstanding the fact that in equity the parties to a vendor's lien and to a mortgage are treated as the same, a distinction may be found in a foreclosure proceeding so far as relates to the necessity for making the wife a party. The distinction is this: The wife in the mortgage foreclosure may have a defense separate and apart from her husband, for instance, that she did not sign the mortgage, or that she was coerced into signing it; whereas the wife has no separate defense against the vendor's lien, for, if the husband is bound, she is bound too. In other words, the wife has no dower right as against a vendor's lien under any circumstances, and any defense to a suit is necessarily a common one between the husband and wife. This distinction, however, does not seem to be observed in the line of cases cited holding that the wife is not a necessary party. At any rate, the decisions of this court place it in accord with those cases which hold that the wife is not a necessary party.

In *McWhirter v. Roberts*, 40 Ark. 283, and *Fourche River Lumber Co. v. Walker*, 96 Ark. 540, 132 S. W. 451, the court decided that the widow of a deceased mortgagor is not barred of dower by decree of foreclosure, though she was a party to the suit, unless her right to dower was directly put in issue. In the *McWhirter Case*, Chief Justice English, speaking for the court, said:

"The purpose of the foreclosure suit was to bar the equity of redemption of the administrator and heirs of the mortgagor. The widow had no equity of redemption in the lands. She had a dower right in them which was paramount to the title of the mortgagees and the mortgagor, or persons claiming under him. There was no allegation of the bill calling in question or tendering an issue as to her right of dower, if it could have been litigated in a foreclosure suit. She admitted, it seems, the allegations of the bill to be true, and consented to a decree of foreclosure, which it is not probable she would have done had it been alleged that she had no right to dower in the lands, or had it been understood by her that the effect of the decree would be to bar her right of dower."

In line with those cases, we said in *Brignardello v. Cooper*, 116 Ark. 103, 172 S. W. 1030, that:

"The wife is not a necessary party to a suit to foreclose a mortgage executed by her husband, save for the purpose of barring her inchoate right of dower."

Now, if we had held that the wife was a necessary party to the foreclosure suit, the conclusion therefrom would have been that, if she was in fact made a party, she would be necessarily barred by the decree; for she could not have been made a party for any other purpose. And, since we held that she was not bound by the decree unless her right to dower was expressly made an issue, it necessarily follows from those decisions that she is not a necessary party. If the wife's inchoate right of dower exists, then it cannot be barred except by an express adjudication, but if it does not in fact exist as against the vendor's lien, the failure to make her a party does not give her the right to redeem, as her inchoate dower right subject to the vendor's lien falls with the foreclosure against her husband.

We decided in *Brignardello v. Cooper*, supra, that in a mortgage foreclosure suit against a husband the wife, though not a party, was bound by the adjudication that the property did not constitute the homestead, and it necessarily follows that, where there is a foreclosure of the vendor's lien against the husband, the wife is bound by it so far as her right to claim dower, and that she has no right of redemption after the husband's right is cut off by the foreclosure.

The chancery court erred in allowing the appellee to redeem, and the decree is reversed, and the cause remanded, with directions to dismiss the intervention of Edith O. Gleason and to confirm the commissioner's sale to appellant.

HICKS v. HELM. (No. 1.)

(Supreme Court of Arkansas. Nov. 27, 1916.)

EVIDENCE \S 443(2)—PAROL EVIDENCE VARYING CONTRACT.

Parol evidence of representations made by the selling agents of a corporation that the corporation would create and maintain a surplus fund out of money received in excess of the face value of the capital stock is not admissible to vary a written subscription for the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2049; Dec. Dig. \S 443(2).]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by T. E. Helm, as receiver of the Arkansas Life Insurance Company, against John T. Hicks, in which defendant filed a cross-complaint. From a judgment sustaining demurrer to the cross-complaint, defendant appeals. Affirmed.

Moore, Smith, Moore & Trieber, of Little Rock, and John T. Hicks, of St. Louis, Mo., for appellant. T. N. Robertson, of Little Rock, for appellee.

WOOD, J. This action was begun by the appellee as receiver of the Arkansas Life Insurance Company, an Arkansas corporation, against the appellant, John T. Hicks,

on a promissory note executed by him to the insurance company in the sum of \$2,000, due six months after date, with 6 per cent. interest, and also to recover on a duebill for \$60, payable May 1, 1912. The complaint alleged that the note and duebill were past due and unpaid; that the appellant deposited certain corporate stock as collateral with the insurance company, and judgment was asked for the principal and interest of both instruments and for foreclosure of the company's lien on the collateral. The appellant filed his answer and cross-complaint, and in his answer he admitted the execution of the instruments and the deposit by him of collateral stock with the insurance company, but denied that he was indebted to the company and to the plaintiff appellee, its receiver, and prayed that the stocks be surrendered, and that he be discharged, with costs. The appellee demurred to the cross-complaint, which demurrer the court sustained, and, the appellant refusing to plead further, the court entered a decree in favor of the appellee in the sum of \$2,447.95, the amount of the appellee's debt and interest, from which decree this appeal has been duly prosecuted.

The appellant's cross-complaint alleges, in substance, and he contends, that he was induced to purchase shares of the capital stock of the insurance company, and to execute the note and duebill in suit therefor, upon the representations of its agents and the agreement upon the part of the corporation that the amount of money that might be received by the corporation in excess of the face value of its capital stock then being sold should be placed by the corporation in a surplus fund, to the end that its capital stock might not be impaired, and that the company might thereby be enabled to prosecute its business with profit; that without such representations and agreement the capital stock purchased by appellant would have been worthless and the company would not have been permitted to transact business in the state; that appellant purchased the stock relying upon the representations and agreement of the corporation to create the surplus fund above mentioned, and executed his note and duebill with the bona fide intention of paying same, but that the insurance company wholly failed to carry out its agreement to create and maintain the surplus fund, thereby rendering the stock purchased by the appellant absolutely worthless; that instead of using the surplus to pay the legitimate indebtedness of the company, it squandered the same in exorbitant salaries to its officers and agents and in ultra vires enterprises; that by reason of the failure of the company to perform its agreement to create and use the surplus fund to prevent the impairment of its capital stock as represented to the appellant, the stock purchased by him was worthless, and the note and duebill upon which the

suit is based were wholly without consideration and void. The contention of appellant is contrary to former decisions of this court, and therefore cannot be sustained. In the case of Mississippi, Ouachita & Red River Ry. Co. v. Cross, 20 Ark. 452, this court said:

"If, when a subscriber for stock is sued for calls made upon it, he may defeat the action by showing that the directors of the company have violated the charter by departing from the route or points fixed by it for the location of the road, there is no good reason why he may not defeat the suit by making it appear that they are appropriating the funds of the company to unauthorized purposes, * * * or that the directors and officers of the company are consuming the funds for their own purposes, and utterly neglecting to progress with the enterprise, or wholly incompetent to prosecute it to a successful termination, or any other abuse of the charter. If the door were once opened for such defenses, in every suit brought by a corporation the conduct of its directors would be canvassed, and collateral issues would become interminable. As above remarked, the charter is the law of the subscriber's contract. If directors undertake to make an unwarrantable departure from the provisions of the charter in the location or construction of the road, or in the appropriation of the funds of the company, the stockholder has his remedy by injunction. Not to enjoin the collection of calls due upon his stock, * * * but to restrain the corporation from the particular violation or abuse of its charter complained of."

In *Collins v. Southern Brick Co.*, 92 Ark. 504, 507, 123 S. W. 652, 653 (135 Am. St. Rep. 197, 19 Ann. Cas. 882), we said:

"The contention of the defendant that he is not bound by his stock subscription notes, which was based on the alleged unperformed condition that he was to be made manager of the business when organized, cannot be sustained, for the well-recognized reason that a condition resting in parol cannot be grafted on a written stock subscription. The written agreement signed by the subscribers constituted the contract between them, the mutuality of the agreement being the consideration; and it cannot be varied nor contradicted by parol testimony, nor can an oral agreement or condition be grafted upon it. * * * 'Parol evidence is not admissible to vary the terms of a subscription to the capital stock of a corporation, or to show a discharge therefrom in any manner other than that required by the terms of subscription, charter and by-laws. All separate agreements and conditions made at the time of subscribing, which are inconsistent with the written contract, are void, whether they be verbal or are contained in a separate written contract.'"

See, also, *Warner v. Bonds*, 111 Ark. 239, 245, 246, 163 S. W. 788. The allegations of appellant's cross-complaint show that 50 shares of the capital stock of the insurance company were issued to appellant, for which he executed the note in suit by which he agreed in writing to pay appellee the sum of \$2,000 for value received. The appellant does not aver that the articles of association or by-laws, or that the charter of the insurance company, required that the company should create and maintain a surplus fund to meet its current liabilities and prevent the impairment of its capital stock, and that these were conditions precedent to the payment of

this note, or the performance of the contract on his part. The allegations of the appellant's cross-complaint show that he got the capital stock, the thing that he purchased, and that this contract of purchase on his part was evidenced by the note in suit. The allegations of appellant's cross-complaint show that the representations and agreement of the company to create and maintain a surplus fund were but oral representations and agreements upon the part of the agents of the company that it would do certain things in the future. Nowhere is it alleged that the articles of association, or by-laws, or the certificate showing the purposes for which the corporation was formed, or the charter, which according to the above cases constitutes the law of appellant's contract, sets forth that the corporation was to create and maintain the alleged surplus fund. Appellant does not allege, and it is not specified in his note as a condition precedent, that same was to be paid only upon condition that the company should create and maintain a surplus fund out of the excess over the face value paid into the treasury of the corporation by the subscribers and purchasers of its capital stock. Conceding that the allegations of appellant's cross-complaint are true, they only show that the selling agents of the company made appellant certain oral representations which the company had not performed, but, as pointed out in the above cases, such testimony could not be admitted to vary the written contract upon which the appellee predicates his suit. If the insurance company could be bound by these alleged representations of its selling agents, appellant as a stockholder could not set up the failure upon the part of the company to comply with these representations in defense to a suit against him for the purchase money of his stock. That is not his remedy, as shown by the opinion in *Mississippi, Ouachita & Red River Ry. Co. v. Cross*, supra.

The decree is therefore correct, and it is affirmed.

PEAY v. KINSWORTHY et al. (No. 52.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. INJUNCTION \S 114(2)—RESTRAINING CONNECTION WITH SEWER.

Commissioners of a sewer improvement district, whose sewer has not been turned over to the city, may enjoin one constructing a system of sewers for private profit from making connection with the improvement district sewer until reasonable compensation is made for such connection, in view of Kirby's Dig. § 5728, providing for proportionate compensation to be paid by an individual tapping a city sewer, although there is no statute controlling the case of a connection with a sewer before it has been taken charge of by the city.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 203-210; Dec. Dig. \S 114(2).]

2. APPEAL AND ERROR \S 877(4)—REVIEW.

Appellant cannot complain of the fact that appellees were not granted the relief they prayed for, although it should have been granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3567; Dec. Dig. \S 877(4).]

Appeal from Pulaaki Chancery Court; Jno. E. Martineau, Chancellor.

Suit by E. B. Kinsworthy and others against Nick Peay. From decree for complainants, defendant appeals. Affirmed.

Comer & Clayton, of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellees.

SMITH, J. This suit was brought by appellees, as commissioners of sewer improvement district No. 78 of the city of Little Rock, to enjoin appellant from making connection with the sewers of that district until he shall have made compensation for the value of that use. It was alleged in the complaint that appellant, as a private individual and for the purpose of profit, constructed a system of sewers in a territory adjacent to appellees' district, in consideration of the abutting property owners paying him certain sums of money as compensation for connecting with his sewer, and that appellant, without permission from appellees and without their knowledge, connected his sewer with appellees' sewer, and proposed to use the same without compensation; that appellees' sewer has not been completed, accepted, or turned over to the city of Little Rock, and there was a prayer for an order restraining appellant from making this connection until after he had made reasonable compensation for the value of its use. Appellant filed a general demurrer, and an answer denying the allegations of the complaint, and alleging the facts to be that the city council, by an ordinance, No. 2015, granted to him authority to construct a system of sewers at his own expense within a defined territory and, as compensation for said service and money so expended, the city was to permit him to recover \$50 per lot for each lot connected with said sewer until such time as the amount collected should equal the investment, plus 10 per cent. interest thereon, at which time said sewer should become the property of and be thereafter controlled by the city. The validity of this contract is not questioned by appellees, and we, therefore, express no opinion upon that question. It was further alleged that appellees' sewer district was organized subsequent to the passage of said Ordinance No. 2015 and embraced a portion of the territory described in said ordinance, and that appellees' district was completed and had thereafter become the property of the city and the commissioners were without authority over said sewer, and that appellant had connected his sewer with the city's sewer more than 12 inches from the termination or

manhole of the appellees' sewer pipe. Appellant's franchise, required him to connect with the city sewer at Fourth and Byrd streets, and the proof shows that to have laid a pipe this distance would have involved a cost of over \$1,300, but by making the connection here sought to be enjoined appellant secured an outlet without cost except that of making the connection. The chancellor made no special finding of fact, but the testimony, while somewhat conflicting, warrants our finding that the commissioners had not made final settlement with the contractors, and had not accepted the sewer from them, nor had they turned the sewer over to the city, but were still in charge of it, and that portions of the work remained to be done. Applications for sewerage connections had been made by the property owners in appellees' district, but the record does not show that such permission had been granted. The city superintendent of public works had issued to appellant a permit to connect with sewer district No. 78, and had designated the point of connection, but, as stated, this was done while the commissioners were still in control. The commissioners insisted that appellant be required to pay the amount which the connections saved him; but the court found the value of this connection to be \$400, and enjoined appellant from making or using the connection until this sum was paid, and this appeal is brought to reverse that decree.

[1] Appellant says the only question in this case is whether or not appellees were authorized, under the powers granted by the statute, to maintain this proceeding; and, as appellees join issue on this question, we shall consider that question only.

In the case of *Martin v. Hilb*, 53 Ark. 300. 14 S. W. 94, the court held that the property owner, under the then existing statute, had the right to connect with the sewer which had been turned over to the city without bearing any part of the burden of its construction; but the opinion called attention to the act approved February 19, 1889 (Acts 1889, p. 17), which is now section 5726 of Kirby's Digest, and which was evidently enacted subsequent to the time of the trial of that cause in the court below. This section is as follows:

"Sec. 5726. The city council shall regulate by ordinance the terms, time and manner, and the compensation which shall be paid by the private parties not building sewers under the orders of the board of health, upon compliance with which said parties may tap the sewers of said city; but no person shall be allowed to tap any such sewer without paying in proportion to the value of his property to be benefited thereby, as compared with the value of the property taxed in the district and the actual cost of said sewers."

It will be observed that this section deals only with sewers which have been turned over to the city; but it is contemplated that the sewer will be turned over to the city im-

mediately upon its completion, and the act manifests the legislative will that he shall bear proportionately the cost of the sewer who shares in its benefits; and we perceive no reason why this principle should not be applied to the facts of this case. Here a sewer system has been constructed for private profit by one who proposes to use as an outlet for his system the sewers of another district. It is not said that the amount charged for this connection is excessive; it is only insisted that the commissioners have no right to enforce the payment of any sum.

[2] There appears to be no statute controlling the case of a connection with a sewer before it has been taken charge of by the city; but there is no reason why the commissioners of the sewer district should not, until that time, take the necessary action to protect the interests of their district. It is not contended that this connection will in any manner impair the utility and serviceability of district No. 78; nor is it contended that appellant would not be entitled to make this connection after the district was turned over to the city. But he could do so then only upon complying with the conditions of the statute set out above. Here appellees did not sue to recover a money judgment, but to restrain appellant from connecting with their district, while it was still under their control, and the decree rendered is not primarily a money judgment. Appellees were not granted the relief they prayed, but appellant cannot complain of that fact, even though this relief should have been granted.

The court below held that appellant should not make this connection without paying a sum which is apparently a very reasonable one; and, as we think the commissioners acted within the authority conferred upon them in the institution of this suit to protect the interests of their district, the decree of the court below is affirmed.

**JONES et al. v. ROAD IMPROVEMENT
DIST. NO. 1. OF SEVIER COUNTY.**
(No. 46.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

**1. HIGHWAYS §90 — ROAD IMPROVEMENT
DISTRICT—REQUEST FOR SURVEY—STATUTE.**

Under Acts 1915, p. 1400, relating to the establishment of road improvement districts, providing that upon application of the county judge or ten or more landowners within the proposed district to the state highway commission, the commissioners shall direct the state highway engineer to prepare preliminary surveys of the proposed road, and file them in the county court before petitions are circulated, such request is directory merely and not jurisdictional.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

**2. HIGHWAYS §90 — ROAD IMPROVEMENT
DISTRICT—PETITION—TIME.**

Acts 1915, p. 1400, providing for the establishment of road improvement districts, gives the

right to add names to the petitions sufficient to make a majority up to the time of the final presentation of the petitions in the county court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

3. HIGHWAYS §90—ESTABLISHMENT—PETITION—FILING.

Under Acts 1915, p. 1400, providing for the establishment of road improvement districts, by section 1, subd. "a," providing that the original petition may be circulated among the landowners, or that such number of exact copies thereof as may be deemed necessary may be circulated, and that when all the petitions are filed at or before the hearing, the petitions shall be consolidated and treated as one, construed with subdivision "b," the petition or petitions must be filed before the county court has authority to cause notice to be published, but the petitions may be added to or additional petitions filed up to the hearing, and all the petitions so filed are to be considered in determining whether there is a majority of owners signing the petitions.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. §90.]

**4. HIGHWAYS §71 — ROAD IMPROVEMENT
DISTRICT—COUNTY ROAD.**

Under Acts 1915, p. 1400, providing for the establishment of road improvement districts, and by section 36, providing that the commissioners and the county court in changing the route of any road may enter upon and lay out the road over any lands in any improvement district, and that nothing shall be construed to divest the county court of its exclusive jurisdiction as to county roads, the commissioners have no power to change the route of a county road, unless the county court orders the change.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 236, 237; Dec. Dig. §71.]

**5. APPEAL AND ERROR §1010(1)—FINDINGS
—CONCLUSIVENESS.**

The finding of the trial court is binding upon the Supreme Court when supported by legally sufficient evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. §1010(1).]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Proceeding for the formation of Road Improvement District No. 1 of Sevier County, in which J. W. Jones and others filed a remonstrance. From a judgment of the circuit court affirming the judgment of the county court for petitioner and ordering the formation of the district, the remonstrators appeal. Affirmed.

B. E. Isbell, of De Queen, for appellants. Steel, Lake & Head, of Texarkana, for appellee.

McCULLOCH, C. J. The county court of Sevier county, on the petition of what was found to be a majority of the owners of real estate in the locality affected, made an order forming a road improvement district pursuant to the terms of Act No. 338 of the General Assembly of 1915, entitled "An act providing for the creation and establishment of road improvement districts for the purpose of building, constructing and maintaining the highways of the state of Arkansas." Appel-

lants, who are the owners of real property in the district, appeared in apt time and filed a remonstrance against the organization of the district, and they appealed to the circuit court from said order. On the trial in the circuit court there was a finding in favor of the petitioners, and the court rendered a judgment, affirming the judgment of the county court, and an appeal has been duly prosecuted to this court.

[1] The first point made against the validity of the proceedings is that there is no legal evidence in the record as to a request, either by the county judge or by ten property owners, to the state highway commission for the survey of the line of the road as required by the terms of the statute. The statute provides that upon the application of the county judge or ten or more landowners within a proposed district to the state highway commission, it shall be the duty of the commissioners to direct the state highway engineer, or his assistant, "to prepare preliminary surveys, plans, specifications and estimates of the roads which it is proposed to construct and improve," and file the same in the county court for the purpose of determining the feasibility of the project and the costs thereof, and that said surveys, plans, specifications, etc., shall be filed in the county court before the petitions are circulated among the property owners.

It is contended that the request of the state highway commission is a jurisdictional step in the proceedings, and that the evidence thereof must affirmatively appear in the record. We held in *Lamberson v. Collins*, 123 Ark. 205, 185 S. W. 268, that the requirement for the making of the surveys, plans, maps, estimates, etc., by the state highway engineer, and filing same in the county court before the circulation of the petition, was jurisdictional, and that the failure to comply with that provision was fatal to the validity of the organization. It is quite another question, however, whether the request by the county judge or the number of landowners mentioned, to the state highway commission is jurisdictional. The important thing that was evidently in the mind of the lawmakers was to provide some means whereby the property owners could know in advance what steps they were called on to express an opinion about in signing or refusing to sign the petitions circulated. It is not so much a matter as to why the surveys, plans, and estimates were prepared, but the fact that they were prepared and filed with the county court is the jurisdictional requirement set forth in the statute. The request may be made either by the county judge or by ten property owners, and this is directed to the state highway commission, and not to the county court, so it is evident that the Legislature did not intend to make the jurisdiction of the court depend upon the request to the state highway commission, and evidence of that re-

quest is not essential to the validity of the proceedings. The provision about the method of obtaining the surveys and plans is only directory.

[2] It is next contended that the proceeding is void because some of the petitions were filed after the publication of the notice. It appears from the record that the four petitions, containing more than 300 names of the owners of real property in the district, were filed on May 9, 1916, and on that day the county court made an order, fixing the 1st day of June, 1916, as the date for hearing the petitions, and the notice was then published as provided by statute, but that on May 31st other petitions were filed, containing names necessary to make up a majority. There is a controversy as to whether or not the names on the first four petitions constituted a majority in "value, acreage or number of landowners," but we deem that immaterial, for we are of the opinion that the statute gives the right to add names sufficient to make a majority up to the time of the final presentation of the petitions in the county court.

[3] Subdivision A of section 1 of the statute referred to reads as follows:

"The original petition may be circulated among the landowners, or such number of exact copies of same as may be deemed necessary may be circulated, and when all of said petitions are filed at or before the time of the hearing above mentioned the said petitions shall be consolidated and treated as one petition, if same are filed before or at the date of said hearing."

The language of the concluding paragraph of subdivision "b" of the section is not altogether clear, and might appear to be in conflict with the language just quoted above, but we are of the opinion that the two expressions can be harmonized by construing them together to mean that the petition or petitions must be filed before the county court has authority to cause notice to be published, but that the petitions may be added to or additional petitions filed up to the hearing, and that all the petitions so filed are considered by the court in determining whether or not there is a majority of owners signing the petitions.

[4] The evidence adduced by appellants establishes the fact that a small portion of the line of the road to be improved is not a public highway, though the evidence is conclusive that the greater portion of it is in fact a public highway. The entire route of the road stretches clear across the county, but the evidence shows about a mile, or perhaps less, has not been created a public road. It is contended that to grant the petition will conflict with the rulings of this court in certain cases where it was held that it is beyond the power of the Legislature to invade the jurisdiction of the county court by providing for the creation of public roads through the agency of improvement districts instead of by an order of the county court. *Parkview*

Land Co. v. Road Improvement Dist. No. 1, 92 Ark. 93, 122 S. W. 241.

Section 36 of the act provides that the commissioners and the county court in changing the route of any road may enter upon and lay out said road over any lands in any road improvement district, and that:

"Nothing in this act shall be construed to divest the county court of its exclusive jurisdiction to determine any matter relating to county roads over which the said county court has such exclusive jurisdiction."

Now, it is clear that the Legislature intended by this section to preserve the constitutional jurisdiction of the county court and to continue that court's authority over the creation of public roads, and to give it special authority to change the route of any public road to conform to the route of the proposed improvement district. This is not an encroachment upon the jurisdiction of the county court, but preserves its complete authority over the establishment of public highways, for the commissioners have no power to change the route unless the county court orders the change.

[5] Considerable testimony was adduced on each side of the controversy concerning the feasibility of the plan, and we think the testimony was sufficient to sustain the finding of the court that the establishment of the district was for the best interests of the owners of property, and that a majority of them favored it and signed the petitions. The finding of the trial court is binding upon us when supported by legally sufficient evidence. We are of the opinion, therefore, that all of the jurisdictional requirements have been complied with, and that there was no error in the proceedings which calls for a reversal of the judgment.

Affirmed.

HARPER v. WISNER et al. (No. 50.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

EXECUTORS AND ADMINISTRATORS §337 — SALE OF REAL ESTATE—PUBLICATION.

A judgment ordering sale of land of an intestate, contrary to Kirby's Dig. § 196, providing that no order for the sale of land for the payment of debts shall be made except after notice by publication, etc., as directed therein, will be set aside upon direct review.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1397-1409; Dec. Dig. §337.]

Appeal from Circuit Court, Randolph County; J. B. Baker, Judge.

In the matter of the estate of Nannie W. Harper, deceased. From judgment of probate court ordering lands sold on application of Joe A. Harper, administrator, James M. Wisner and others appealed to the circuit court. From judgment of circuit court denying the application of the administrator to sell and setting aside the judgment of the

probate court, the administrator appeals. Affirmed.

S. A. D. Eaton, of Pocahontas, for appellant. J. W. Meeks, T. W. Campbell, and W. L. Pope, all of Pocahontas, for appellees.

HART, J. Joe A. Harper, as administrator with the will annexed of the estate of Nannie W. Harper, deceased, prosecutes this appeal to reverse a judgment of the circuit court setting aside a judgment of the probate court ordering the sale of decedent's lands to pay debts. The material facts are as follows:

On March 2, 1915, Joe A. Harper was appointed administrator with the will annexed of the estate of Nannie W. Harper, deceased. On April 15, 1915, he filed his application for an order to sell a certain 40 acres of land belonging to the estate of Nannie W. Harper, deceased, for the purpose of paying off a mortgage which she in her lifetime had executed on said lands, and which indebtedness was unpaid at the time of her death. In his petition the land was definitely described in the application for the sale of it. The application bears the following indorsement:

"Filed in open court this 15th of April, 1915. The within petition examined, and the first day of July term is set for further hearing on this petition. April 17, 1915. C. E. Pringle, Probate Judge."

Prior to this time the administrator had given no notice whatever of his intended application for the sale of the land. After this time a notice was published in a newspaper published in the county on April 30, 1915, May 7, 1915, May 14, 1915, May 21, 1915, and May 28, 1915, stating that a petition had already been filed in the probate court praying an order for the sale for a certain described tract of land. This notice described a different tract of land from that described in the application. At the July, 1915, term of the probate court an order was made by said court granting the petition and ordering the sale of the land described in it. At that time no claims whatever had been probated against the estate. The land was sold pursuant to the order of the probate court, and a report of sale was made and approved by the court at its October term, 1915. The administrator was directed in the order to collect the amount of sale and settle for the same at the January, 1916, term of the probate court. An appeal from the judgment of the probate court ordering the land sold was prayed by the heirs and legatees of decedent and granted by the probate court within the time allowed by law.

The circuit court held that the probate court cannot lawfully make an order authorizing administrators to sell the lands of an estate unless prior to his making application therefor he has given the notice required by

section 195 of Kirby's Digest, and unless the debts for which the order of sale is made have been duly probated against the estate as above stated. The circuit court rendered a judgment denying the application of the administrator to sell the lands and setting aside the judgment of the probate court. The administrator has appealed from the judgment of the circuit court.

It may be noted at the outset that this is a direct, and not a collateral, attack on the judgment of the probate court ordering the lands to be sold. Section 195 of Kirby's Digest reads as follows:

"No order for the sale of lands and tenements for the payment of debts shall be made by the court, unless it shall appear to the satisfaction of the court that notice of the intended application for the sale of such lands and tenements has been given, at least four weeks before making such application, in some newspaper printed in the county where the lands lie, if there be any printed in such county, and, if none, by advertisements set up in at least six of the most public places in such county."

The probate court is authorized by statute to make orders for the sale of lands of the estates of deceased persons, but the order of the sale can only be made in the manner and for the purposes prescribed by the statute. *Planters' Mutual Insurance Association v. Harris*, 96 Ark. 222, 131 S. W. 949.

In the case of *Rogers v. Wilson*, 18 Ark. 507, the administrator applied for and obtained an order of the probate court empowering him to sell certain lands belonging to his decedent's estate without giving the notice required by statute. In that case relief was denied because no appeal was taken from the judgment of the probate court ordering the land sold, and the action was a collateral attack on the judgment. In that case, however, the court said that it was clearly erroneous to have granted the order for the sale of the real estate without first having given the notice required by the statute, but the court said that the order was not void, because it was made in a proceeding in rem, for the sale of real estate, which, by our statute, is made assets in the hands of the administrator, and over which, by petition, the probate court had jurisdiction.

In the case of *Montgomery and Wife v. Johnson et al*, 31 Ark. 74, which was also a collateral attack on the judgment of the probate court ordering the sale of decedent's lands, the court said:

"As a superior court, with general jurisdiction and plenary power over the matters committed to its peculiar cognizance, its judgment or order, when acting within the sphere of its jurisdiction, however erroneous it may be, is conclusive as to all persons, until reversed upon review by a higher tribunal, or set aside in a direct proceeding for that purpose; for it is well settled that the judicial sentence of a superior court of competent jurisdiction over the subject-matter to which it relates cannot be attacked or impeached in a collateral proceeding upon the ground that the court erroneously exercised its powers"—citing authorities.

Again, in the case of *Livingston, Administrator, v. Cochran et al*, 83 Ark. 294, a bill was filed in the chancery court to set aside an order of the probate court for the sale of land belonging to the estate of a deceased person as being null and void. One of the grounds relied upon was that the administrator had not given public notice of the intended application for the order of sale as required by the statute. The relief prayed for was denied because the court held that the action was a collateral attack upon the judgment of the probate court. The court said, however:

"It was certainly the duty of the executor to give notice as required by the statute, and it was the duty of the probate court to see that the notice had been given before making the order of sale, and the granting of an order of sale without such notice would be an error and ground for reversal of the order on appeal. But when the order comes in question collaterally, as in this case, and not in a direct proceeding to review it, it cannot be treated as null and void because such notice is not shown to have been given, as repeatedly held by this court"—citing authorities.

In the application of these principles to the case at bar we think the judgment of the probate court ordering the sale of the land was erroneous because the notice required by section 195 of Kirby's Digest was not given. As we have already seen, probate courts acting through the agency of administrators and executors have jurisdiction in rem of the property of deceased persons, but that jurisdiction can only be exercised in the manner and for the purpose prescribed by the statute. A notice is required by the statute in order that persons interested may have an opportunity to come in before the application is heard and show that the order of sale should not be granted. In the present case the notice of the intended application required by the statute undertook to describe the land which it stated the petition asked to be sold, and the notice described a wholly different tract of land from that described in the application in the order of sale and subsequent proceedings. As we have already seen, the present case is a direct, and not a collateral, attack on the judgment of the probate court. The judgment of the probate court was erroneous for the reasons already given, and the circuit court properly set it aside. The purchaser at the sale became a party to the proceedings at the time he bid in the lands, and is bound by the subsequent proceedings in the case. It appears from the record that he has not yet paid the purchase money, and it necessarily follows that therefrom having been an appeal and reversal of the judgment of the probate court, the purchaser is not bound by his obligation for the purchase money.

Another reason given by the circuit court for setting aside the judgment was that at the time of its rendition no claims had been

probated against the estate. The record does show, however, that there was an unprobated debt secured by a mortgage on the lands which were ordered sold, and the question of whether the probate court had jurisdiction to order for the protection of the estate a sale of land for the purpose of paying off an unprobated debt secured by a mortgage on land of the estate has never been passed upon by this court. See *Long v. Hoffman*, 103 Ark. 574, 148 S. W. 245. Inasmuch as the circuit court was right in setting aside the sale for want of notice as required by the statute, it becomes unnecessary for us to pass upon the last mentioned question in this case.

The judgment of the circuit court will be affirmed.

MOSAIC TEMPLARS OF AMERICA v. AUSTIN. (No. 53.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. ACCORD AND SATISFACTION \Leftrightarrow 11(1)—COMPROMISE AND SETTLEMENT \Leftrightarrow 8(2)—REQUISITES—CONSIDERATION.

When a claim is disputed and unliquidated, and a less amount than demanded is offered in full payment, whether the creditor agrees to accept the sum offered in satisfaction is a mixed question of law and fact, and if the tender is accompanied by declarations amounting to a condition that if the creditor accepts the amount offered it must be in satisfaction of his demand, and the creditor understands such condition, an acceptance will estop him from denying that it is in full payment, regardless of any protest by him.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75, 79-82; Dec. Dig. \Leftrightarrow 11(1); *Compromise and Settlement*, Cent. Dig. §§ 36-38; Dec. Dig. \Leftrightarrow 8(2).]

2. ACCORD AND SATISFACTION \Leftrightarrow 12(1) — ACCEPTANCE OF LESS AMOUNT.

Where the guardian of a beneficiary of a \$100 beneficial association policy accepted a \$50 check which recited that it was "in full payment of the within account," and which stated the number of the claim, etc., there was no accord and satisfaction of the full amount of the policy, where he thought it was only a partial payment, and the delivering local secretary did not require surrender or cancellation of the policy.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 92; Dec. Dig. \Leftrightarrow 12(1).]

3. APPEAL AND ERROR \Leftrightarrow 184 — OBJECTION BELOW.

The objection that a suit brought in chancery should have been transferred to the law court cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1149, 1150, 1179-1183; Dec. Dig. \Leftrightarrow 184.]

Appeal from Hot Spring Chancery Court; J. P. Henderson, Chancellor.

Suit by James Austin, guardian, against the Mosaic Templars of America. From decree for plaintiff, defendant appeals. Affirmed.

E. H. Vance, Jr., of Malvern, and Scipio A. Jones and Thomas J. Price, both of Little Rock, for appellant. B. S. Bowers, of Malvern, for appellee.

SMITH, J. This suit was brought against appellant by the guardian of the beneficiary of a policy of insurance issued by the appellant company. It was alleged that the policy or certificate was issued for the sum of \$100, but that only \$50 had been paid thereon. A demurrer to this complaint was overruled, whereupon appellant answered and alleged that the policy showed upon its face that it had been surrendered and satisfied by the acceptance of a check for \$50, and there was an allegation that the chancery court in which the suit had been brought had no jurisdiction and a prayer for the dismissal of the complaint on that account. The guardian of the beneficiary, who was the husband of the insured, testified that he indorsed a certain voucher check which contained the following recitals:

"Voucher Check. Notice: If any part of this check is detached it is void and must not be paid. If any parties names hereon are minors the bank must require guardianship papers and require the guardian to sign on behalf of the minors.

"J. E. Bush, National Grand Scribe.
"Mosaic Templars of America, Aug. 17, '15, No. 5474.

"Upon the payee executing in ink the receipt on the back of this voucher check on demand pay to the order of James Austin, guardian for Lucile Austin, fifty dollars, \$50.00.

"[Signed] J. E. Bush.
"National Grand Scribe, M. T. A.
"To the England National Bank, Little Rock, Ark.

"If not correct, return without alteration and state difference. Make all indorsements below.

"Received the amount stated in this voucher check in full payment of the within account.

"[Signed] James Austin,
"Guardian for Lucile Austin, Payee.

"Date, 8-17-15. Description: Claim No. 926. Beneficiary of Jane Austin, deceased; check mailed to M. M. Anthony, W. S. Malvern, Arkansas. Amount."

Indorsed:

"Paid Aug. 20th, 1915.
"England National Bank.
"Little Rock, Arkansas."

He also testified that there was no controversy as to the amount due, and that he supposed the recital in the voucher that the sum received was "in full payment of the within account" referred to the voucher itself and was a mere part payment of the amount due on the policy. That the writing signed by him did not state it was in satisfaction and payment of the policy, and he did not know it was so intended. He further testified that the check was delivered to him by the secretary of the local chamber of which his wife had been a member; that it was the business of the secretary to collect the dues of the members and make remittances thereof, and when the attention of this officer was called

to the amount of the check she stated that this was probably a mere mistake or was intended as a partial payment, and that the balance would no doubt be paid later. The secretary testified that it was her business to deliver policies to those who became members of the chamber of which she was secretary and to collect and remit all dues to the grand lodge, and that all dues on this policy had been paid and remitted, and that no one had ever written to her as secretary that the claim would not be paid in full, and that the letter to her accompanying the check contained no intimation of the company's intention to pay only \$50. She testified that she understood the check to be a mere partial payment of the policy and so advised appellee when she delivered the check. She also testified that some one had given her the policy, but appellee had not done so, and that it was not in his possession at the time of the death of the insured, and that her assistant sent the policy to J. E. Bush, the national grand scribe of the order, at his request, and that appellee made no indorsement of any kind on the policy, nor was he asked to do so. The policy was indorsed: "Paid in full for \$50.00. Policy surrendered and canceled this August 17th, 1915," but this indorsement was signed by J. E. Bush, and not by the beneficiary, nor by any one professing to act for her. A decree was entered for the balance due, and this appeal has been duly prosecuted.

[1] Counsel for appellant cite us to our own and other cases which hold that a check tendered in payment of a disputed claim which recites that it is tendered as payment in full becomes an accord and satisfaction of the debt when the check is retained and collected, and that this is true even though the creditor immediately writes that it will not be so accepted. A recent case involving the principle here sought to be applied is that of Pekin Cooperage Co. v. Gibbs, 114 Ark. 559, 170 S. W. 574, in which case we quoted from

the case of Barham v. Bank of Delight, 94 Ark. 158, 126 S. W. 394, 27 L. R. A. (N. S.) 439, the following statement of the law:

"It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the other demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated, and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that if the creditor accepts the amount offered it must be in satisfaction of his demand, and the creditor understands therefrom that if he takes subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him."

[2] We reaffirm the doctrine of that case; but we think the principle there announced is not controlling here. There was no dispute as to the amount due, and it is not now contended that appellee was entitled to receive only \$50. The language of the voucher is somewhat ambiguous, especially in view of the fact that no surrender or cancellation of the policy was required by the local secretary as a condition for the delivery of the check. Under these circumstances we think the court correctly held that there was no accord and satisfaction of this demand.

[3] This case should have been brought at law, but that was not ground for dismissing the complaint. Appellant did not ask that the cause be transferred to the law court. His prayer was that the complaint be dismissed, and as he was not entitled to the relief asked he is in no condition to complain that the cause was not transferred to the law court because he did not ask that this be done.

Finding no error, the decree is affirmed.

ROYAL v. KANSAS CITY WESTERN RY. CO. (No. 17908.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1916. Motion to Set Aside Order Dismissing Appeal Denied Dec. 20, 1916.)

APPEAL AND ERROR \S 757(1) — "BRIEFS" — **RULE OF COURT—DISMISSAL.**

Under Supreme Court rule 15 (169 S. W. ix), providing that all briefs of the appellant shall contain separate from the argument, a statement of the points relied on, together with a citation of authorities under each point, and that any brief failing to comply with the rule may be dismissed by the court, a brief labeled, "Appellant's Statement, Brief and Argument," covering 103 printed pages, setting out the pleadings, the facts, and evidence, mostly in questions and answers, the assignment of error and an argument interspersed with citation of authorities and covering 42 pages, but containing practically no statement of the case, was not a brief within the rule, so that the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3092; Dec. Dig. \S 757(1).]

For other definitions, see Words and Phrases, First and Second Series, Brief.]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Suit by Charlotte E. Royal, executrix, against the Kansas City Western Railway Company. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

The respondent brought this suit against the appellant in the circuit court of Jackson county to recover the sum of \$10,000 damages for the killing of her husband, through the alleged negligence of the said company. The judgment was for \$10,000, in favor of the respondent, and the appellant appealed the cause to this court.

C. F. Hutchings and McCabe Moore, both of Kansas City, for appellant. Atwood & Hill, of Kansas City, for respondent.

WOODSON, J. Rule 15 of this court (169 S. W. ix), prior to its amendment at the April term, 1916, which governs this case, in substance, provides that all briefs of the appellant shall be printed and shall contain, separate from the argument or discussion of the authorities, a statement in numerical order of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be dismissed by the court. The rule then provides for the assignment of error, etc.

In this case counsel for appellant has filed a pamphlet covering 103 printed pages, labeled, "Appellant's Statement, Brief and Argument." The first 12 pages of this volume consists of a summary of the original petition and the first and second amended petitions filed in the cause, and of the answer thereto, with the reply. Page 13 is headed by the word "Facts," and immediately following, and under the word "Facts," are the words "The Evidence." Then fol-

lows 36 pages of evidence, mostly in questions and answers. Page 52 is headed "Assignment and Specifications of Errors." Following this are 32 assignments of errors, covering 10 pages; and page 61 begins with the heading, "Argument." Then follows the argument interspersed with the citation of many authorities, all covering 42 pages, or the remainder of the pamphlet. This pamphlet contains no numerical statement of the points relied upon for a reversal of the judgment, and in fact no points whatever, nor the citation of authorities, as required by said rule. In other words, there is practically no statement of the case, and absolutely no brief within the letter or spirit of said rule; but it is long on the assignment of errors and the argument of the cause.

No one can read this volume and gather heads or tails of appellant's case. It is a perfect jumble of facts, law, and argument, misleading, rather than assisting and enlightening, the court as to the legal propositions presented for its determination, and how to determine them. The only intelligent way this court could pursue in order to properly state the case, and decide the law, would be to go to the abstract of the record, which consists of 280 pages, and glean the facts therefrom, and to the books, in order to find the law, all of which would take several days to do.

Compliance with this rule is so important to the speedy and proper disposition of the business of this court, said rule 15 was amended at the April term, 1916 (186 S. W. viii), making the requirements more stringent; and to now go back and practically abrogate that rule, would do not only serious violence to the amended rule, but would practically wipe it out, and greatly hamper the administration of justice.

This work of counsel is such a flagrant disregard of the rules of the court, we feel called upon to dismiss the appeal; this must be done in defense of the court, and for the protection of the rights of other litigants.

For the reason stated, the appeal is dismissed. All concur, BLAIR, J., in result.

STATE v. KEET. (No. 19667.)

(Supreme Court of Missouri, Division No. 2. Dec. 6, 1916.)

1. WEAPONS \S 3—**CONSTITUTIONAL PROVISIONS.**

Rev. St. \S 4496, prohibiting the carrying of concealed weapons, is not in conflict with the second article of the amendments to the United States Constitution, since that amendment has no reference to state legislation, but is a limitation upon the powers of the national government only.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. \S 3; Dec. Dig. \S 3.]

2. WEAPONS \S 3—**CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Rev. St. \S 4496, prohibiting the carrying of concealed weapons, is not in conflict with

the Bill of Rights of the state Constitution (article 2, § 17), which provides that the right of a citizen to bear arms in defense of person or property, etc., shall not be called in question, and which contains a further provision that nothing therein is intended to justify the practice of wearing concealed weapons.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.]

3. WEAPONS — CONSTITUTIONAL RIGHTS — CONSTRUCTION — "PRACTICE."

Under Const. art. 2, § 17, preserving the right of citizens to keep and bear arms in defense of home, person, or property, and providing that nothing therein contained is intended to justify the practice of wearing concealed weapons, the word "practice" as there used has reference to an existing practice or custom of wearing such weapons concealed, more or less general among citizens, and not to the practice of any particular individual accused of the crime of wearing such weapons.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.]

For other definitions, see Words and Phrases, First and Second Series, Practice.]

4. WEAPONS — CARRYING CONCEALED WEAPONS — DEFENSES.

The provision exempting persons who carry weapons in self-defense contained in Rev. St. 1879, § 1275, was expressly repealed by Laws 1909, p. 452, and the plea that concealed weapons are carried for self-defense is no justification.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.]

Appeal from Criminal Court, Greene County; Arch A. Johnson, Judge.

Minor Keet was convicted of carrying concealed weapons, and he appeals. Affirmed.

The defendant was convicted of carrying a concealed weapon, a revolver, and his punishment was assessed at a fine of \$175. He has appealed.

On the trial the defendant offered evidence tending to show that he had just before his arrest been assaulted by one Tyndal, who fired several shots at him, and that he, the defendant, was carrying the pistol under well-grounded fears for his personal safety. The court excluded such evidence. The propriety of that ruling is the only question involved in this appeal, which comes to this court because of the fact that it involves the construction of both the federal and state Constitutions.

James B. Delaney, of Springfield, for appellant. John T. Barker, Atty. Gen., and S. P. Howell, Asst. Atty. Gen. (James V. Billings, of Jefferson City, of counsel), for the State.

ROY, C. (after stating the facts as above). [1] I. Our statute against carrying concealed weapons is not in conflict with the second article of the amendments to the Constitution of the United States, as that amendment has no reference to state legislation, but is a limitation upon the powers of the national government only. *State v. Shelby*, 90 Mo. 302, 2 S. W. 466; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615.

[2] II. Neither is that statute in conflict with the Bill of Rights in our state Constitution, which provides:

"That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." Const. art. 2, § 17.

[3] Counsel for appellant contends that the word "practice," as there used, has reference to the man who individually makes a practice of wearing concealed weapons, as distinguished from him who temporarily wears them for self-defense. We think otherwise. The word "practice," as there used, has reference to an existing practice or custom, more or less general among citizens, of wearing such weapons concealed; and the intention is that the Legislature shall have the power to destroy such practice or custom by prohibiting the wearing of concealed weapons by any individual, even the wearing of them temporarily and for self-defense. For it is only by punishing the individuals severally that the practice or custom can be destroyed. That word "practice" will be found in some of the cases hereinafter cited, and in no case is it used in the sense contended for by the appellant. Appellant's brief says:

"The word 'practice' as used therein is significant. It would be doing outrage to every natural impulse and to the universal sentiment of mankind to say that a man may not bear arms in such manner and of such character and at such time and place as he may deem necessary for self-preservation, leaving always to the law of the land and to his peers the question of his good faith and the necessity or reasonableness of his conduct."

A claim so baldly made should be squarely met. We have been able to find but two cases in the union holding a law unconstitutional because it prohibited the carrying of concealed weapons. In *State v. Rosenthal*, 75 Vt. 295, 55 Atl. 610, a city ordinance against carrying concealed weapons was held contrary to the Constitution of that state, which provided:

"That the people have a right to bear arms for the defense of themselves and the state."

There is nothing said in that Constitution about "the practice of wearing concealed weapons." Not a single authority is there cited to support the ruling.

The other case is *Bliss v. Commonwealth*, 2 Litt. (12 Ky.) 90, 13 Am. Dec. 251, decided in 1822. It held a statute against carrying certain weapons concealed to be contrary to the Constitution, which provided:

"That the right of the citizen to bear arms in defense of themselves and the state shall not be questioned."

The statute made no exception where the weapon was carried in self-defense, and self-defense was not a ground of defense in the case; yet the court held that the statute was unconstitutional, saying:

"For, in principle, there is no difference between a law prohibiting the wearing concealed arms and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."

That case has never been cited with approval, but has often been disapproved. We have noticed that Bishop on Stat. Or. § 793, note, cites as in harmony with the Bliss Case, *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Jennings v. State*, 5 Tex. App. 298; *Leatherwood v. State*, 6 Tex. App. 244; and *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52. On examination we find that *Ely v. Thompson* involved the validity of a statute which provided for the infliction of cruel and unusual punishments, but did not involve the carrying of concealed weapons. The two Texas cases cited upheld the power of the Legislature to regulate the wearing of arms, but merely held invalid the provision of the statute for the forfeiture of the weapon. In the Arkansas case there cited the statute was against the carrying of certain weapons, whether concealed or not. The court cited with apparent approval *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, in which the power of the Legislature to prohibit the wearing of concealed weapons is recognized. We note also that *State v. Wilfirth*, 74 Mo. 528, 41 Am. Rep. 330, says that the doctrine of the Bliss Case prevails in Tennessee. No case from that state is there cited. We can find none. *Aymette v. State*, 21 Tenn. (2 Humph.) 154, (and *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8, uphold the right of the Legislature to prohibit the wearing of concealed weapons and disapprove the Bliss Case.

Section 1, subd. 7, of the present Kentucky Bill of Rights preserves to the people "the right to bear arms in defense of themselves and of the state, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." The statute of that state passed in 1854 against carrying concealed weapons made an exception where it was done in self-defense. That exception has been dropped from the present statute of that state. See R. S. Ky. 1900, §§ 3391 to 3396, inclusive.

Hopkins v. Commonwealth, 66 Ky. (3 Bush) 480, decided while the exception above mentioned was in the statute, said:

"A statute so beneficent and so often and so easily evaded should be vigilantly upheld, and stringently enforced by the judiciary for repressing a dishonorable and mischievous practice, which, licensed or unlicensed, leads, almost daily, to causeless homicides and disturbances which would otherwise never be perpetrated; and to that end the accused should always be required to prove that he carried a concealed weapon only for the purpose of defending himself or family or property against an impending attack, reasonably apprehended, and which, if attempted, would justify the use of some such means of defense."

State v. Reid, 1 Ala. 612, 35 Am. Dec. 44, was decided in 1840. The Constitution of that state then provided:

"Every citizen has a right to bear arms in defense of himself and the state."

The statute prohibited the carrying of certain named weapons concealed without any exception in favor of a person acting in self-defense. The evidence showed that the defendant had been attacked by a dangerous and desperate character who threatened his person and came to his office several times to look for him. The court refused an instruction to the effect that defendant had a right to carry the weapon concealed for self-defense, but instructed that the defendant had no such right. The judgment was affirmed. The Bliss Case was expressly disapproved, the court saying:

"The question recurs: Does the act, 'To suppress the evil practice of carrying weapons secretly,' trench upon the constitutional rights of the citizen? We think not. The Constitution, in declaring that, 'Every citizen has the right to bear arms in defense of himself and the state,' has neither expressly nor by implication denied to the Legislature the right to enact laws in regard to the manner in which arms shall be borne. The right guaranteed to the citizen is not to bear arms upon all occasions and in all places, but merely 'in defense of himself and the state.' The terms in which this provision is phrased seem to us necessarily to leave with the Legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals."

This court, in *State v. Wilfirth*, 74 Mo. 528, 41 Am. Rep. 330, made its choice between the Bliss and the Reid Cases, giving the preference to the latter, so far as the questions as there presented were involved. In that case this court said that:

The statute was "directed against the practice of carrying concealed weapons or firearms, and the pernicious consequences flowing from such a practice."

The word "practice" is there considered as having the same meaning that we are giving it, and not the one contended for by appellant.

It was said in *Re Brickey*, 8 Idaho, 597, 70 Pac. 609, 101 Am. St. Rep. 215, 1 Ann. Cas. 55:

"A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void."

And in *State v. Buzzard*, 4 Ark. 18, the court said:

"The act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified. The practice of so bearing them the legislative department of the government has determined to be wrong, or at least inconsistent with sound policy."

In *Nunn v. State*, 1 Ga. 243, it is said:

"We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice

of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defense, or of his constitutional right to keep and bear arms, but that so much of it as contains a prohibition against bearing arms openly is in conflict with the Constitution and void."

Our constitutional provision on the subject originated in 1875. The words "the practice of wearing concealed weapons" are, as we have seen, the language of the courts of our sister states; and there is no reason for thinking that those words are used in the Constitution in a sense other than the one given them in the reported cases. We had no statute on the subject until the act of March 26, 1874. Laws 1874, p. 43.

[4] The provision exempting those who carried a weapon in self-defense from the penalty of the law originated in Revised Statutes 1879, § 1275. That provision was expressly repealed by the act of April 28, 1909 (Laws of 1909, p. 452), and has never been re-enacted.

In *State v. Wilforth*, supra, and in *State v. Shelby*, 90 Mo. 302, 2 S. W. 468, the power of the Legislature to prohibit the carrying of concealed weapons was affirmed but those cases did not, like this, involve the right to prohibit the carrying of such concealed weapons for self-defense, under reasonable apprehension of danger.

Less than a century ago the arms of the pioneer were carried openly, the rifle on his shoulder, his hunting knife on his belt. Since then deadly weapons have been devised small enough to be carried effectively concealed in the ordinary pocket. The practice of carrying such weapons concealed is appreciated and indulged in mainly by the enemies of social order. Our state has been one of the slowest to act in meeting this comparatively new evil, but she has finally spoken in no uncertain language.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

NORTHAM v. UNITED RYS. CO. OF ST. LOUIS. (No. 19459.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1916. Rehearing Denied Dec. 20, 1916.)

APPEAL AND ERROR ⇐1171(1)—REVERSAL—EXCESSIVE DAMAGES.

That the verdict in an action for personal injuries is excessive constitutes reversible error as a matter of law, irrespective of the existence of passion or prejudice on the part of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546, 4552, 4554; Dec. Dig. ⇐1171(1).]

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

Action by William H. Northam against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Reversed and remanded for retrial, unless within ten days plaintiff remit \$7,000 from the verdict for \$17,000, and upon such remittitur judgment affirmed in the sum of \$10,000.

Boyle & Priest and Paul U. Farley, all of St. Louis, for appellant. S. P. Bond, of St. Louis, for respondent.

BROWN, C. This is the second time this case has been before us. The first appeal was from a judgment of the circuit court for the city of St. Louis, entered upon a verdict for plaintiff for \$8,400, which was reversed and the cause remanded for a new trial. Our opinion is reported in 176 S. W. at page 227. A retrial was had resulting in a verdict for \$17,000, from which this appeal is taken.

The only error of which the defendant now complains is that the verdict is excessive. This question has been ably presented by counsel for both parties in oral argument as well as by elaborate printed briefs; and, after carefully examining the evidence, we have arrived at the conclusion that it does not tend fairly to sustain the verdict in the respect mentioned. It is a well-settled doctrine of this court that this constitutes reversible error as a matter of law, irrespective of the existence of passion or prejudice on the part of the jury. *Lessenden v. Railroad*, 238 Mo. 247, 265, 266, 142 S. W. 332; *Campbell v. United Railways*, 243 Mo. 141, 158 et seq., 147 S. W. 788.

The judgment is therefore reversed, and the cause remanded for retrial, unless, within ten days from and after the filing of this opinion, the plaintiff shall remit \$7,000 from the amount of said judgment as of date of its original entry in the circuit court. Upon such remittitur filed in the office of the clerk of this court within said time the judgment shall stand affirmed in the amount of \$10,000.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

WOODWARD HARDWARE CO. v. FISHER et al. (No. 19558.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1916. Motion to Transfer to Court in Banc Overruled Dec. 20, 1916.)

1. STATUTES ⇐113(3)—TITLE—EXPRESSION OF SUBJECT.

Laws 1913, p. 167, is entitled an act to provide for annual registration, supervision, and filing of annual reports of certain corporations, suspension and forfeiture of corporate charters, reinstatement, fixing fees, prescribing fines and penalties for violation, and repealing

all acts in conflict therewith. Section 20 of said act provides that any person, or persons, who shall exercise any of the powers or franchises of any corporation after the certificate of same has been forfeited shall be guilty of a misdemeanor; "and the officers and directors * * * of any corporation which shall so violate the provisions of this act shall be held as partners and become severally and individually liable for the debts of such corporation." Held, the italicized portion of said section 20 is invalid as in conflict with Const. art. 4, § 28, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 144; Dec. Dig. § 113(3).]

2 CORPORATIONS § 613(2)—FORFEITURE.

Laws 1913, p. 167, requiring annual registration, reports, etc., of certain corporations, does not, ipso facto, forfeit and cancel the charter of a corporation by reason of its failure to file its return as required, but under sections 8, 10, and 12 thereof, as condition precedent to the right of the secretary of state to declare forfeiture and cancel the certificate of such corporation, he must have on file in his office the certificate of the Recorder of Deeds of the county in which such corporation is located that notice of the corporation's suspension has been duly posted.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 613(2).]

Woodson, J., dissenting in part.

Appeal from Circuit Court, Mississippi County.

Action by the Woodward Hardware Company against W. W. Fisher and others. From judgment for defendants, plaintiff appeals. Affirmed.

Plaintiff, an Illinois corporation, sued defendants as directors of the Union Warehouse & Implement Company, a Missouri corporation, duly organized on February 2, 1900, and engaged in the general mercantile business in the town of East Prairie, Mo. It is averred in petition that the Missouri corporation continued to do business until December 2, 1913, when its charter was duly forfeited for failure to register as required by the laws of this state; that defendants continued to exercise the powers and privileges of said Missouri corporation, from December 2, 1913, until about the 1st of January, 1915; that they continued business under their said corporate franchise by purchasing and selling goods, wares, and merchandise; that after the forfeiture aforesaid, and while engaged in the business aforesaid, the defendants bought from plaintiff, between April 9, 1914, and October 21, 1914, goods of the value of \$210.62, sued for herein, and that no part of said sum has ever been paid, etc. Defendants, Fisher, Davidson, Morgan, and Sager, filed a joint amended answer to said petition. They admitted the incorporation of plaintiff, but denied each and every other allegation of the petition. They charge in said answer that the acts of the General Assembly of the state of Missouri for 1913, pages 167 to 174, inclusive, and particularly section 20 of said act, under which this suit

was brought, are unconstitutional and void, for the reason that the title of said act does not clearly express the matters contained therein, and particularly those in section 20 thereof, as required by section 28, art. 4, of our Constitution. It is averred, that said section 20 undertakes to impose penalties on individuals and on officers and directors of certain corporations therein described, while the title to said act clearly indicates the imposition of penalties on corporations only. It is further alleged that said act is unconstitutional because it is an *ex post facto* law, is retrospective in its operation, and violates section 15, art. 2, of our Constitution, in that it attempts to make certain persons, therein described, liable for debts and obligations created by certain corporations, whether said debts were created before or after the charters of such corporations were forfeited, and whether or not such debts were created and liabilities incurred before the passage of said act. It is further averred that said act undertakes to impose new and unusual obligations and penalties on corporations already created and existing, prior to the passage and going into effect of said act; that it creates and imposes new and unusual obligations on individuals connected with such corporations. It is further charged in the answer that said act is void because too vague, indefinite, and uncertain in its provisions to be capable of practical construction and enforcement, in that it does not sufficiently specify and designate what officers, directors, and persons of such corporations as may violate its provisions shall be liable for the debts of such corporations, and does not sufficiently describe or specify for what debts of such corporations said officers, directors, and persons shall be liable. It appears from the testimony of Cornelius Roach, secretary of state, that an entry was made in the records of his office on October 11, 1915, stating that "on December 2, 1915," the charter of above Missouri corporation was forfeited. He testified that no certificate was ever sent to the recorder of deeds, in Mississippi county, Mo., stating that the Union Warehouse & Implement Company was suspended; nor did he ever receive from the recorder of deeds of said county any certificate or statement that a certificate, showing the suspension of said Missouri corporation, has been posted in his office for a period of 20 days. No entries were made, of any kind, on the records of his office with reference to said corporation, until after May 22, 1915. It is conceded that plaintiff's account is correct, and that the last item therein was furnished to the Union Warehouse & Implement Company on October 21, 1914. It appears from the evidence that the Union Warehouse & Implement Company, through its directors, notified Sexton, general manager, in October, 1914, not to buy

any more goods, and he bought no more thereafter. The business was closed out in March or April, 1915. On February 29, 1916, after hearing the evidence, the circuit court found the issues in favor of defendants and entered its judgment accordingly. Plaintiff filed motion for a new trial, which was overruled, and the cause duly appealed to this court.

Russell & Joslyn, of Charleston, for appellant. Haw & Brown, of Charleston, for respondents.

RAILEY, C. (after stating the facts as above). [1] I. Section 20 of the act of 1913, page 171, is assailed by respondents, on the ground that the title to said act does not clearly express the matters contained therein, as required by section 28, art. 4, of our Constitution. The title to above act reads as follows:

"An act to provide for annual registration, supervision, and filing of annual reports of certain corporations; suspension and forfeiture of corporate charters for violation of this act; reinstatement after suspension or forfeiture; and fixing fees for registration, prescribing fines and penalties for violation, and repealing all acts in conflict therewith, with an emergency clause."

Section 20 of said act reads as follows:

"Any person, or persons, who shall exercise, or attempt to exercise, any of the powers, privileges, or franchises of any corporation after the certificate, or license, of same has been *forfeited and canceled* as in this act provided shall be deemed guilty of a misdemeanor, and upon conviction punished as hereinafter provided; and the officers and directors, or principal agent in Missouri, if a foreign corporation, of any corporation which shall so violate the provisions of this act shall be held as partners and become severally and individually liable for the debts of such corporation."

The plaintiff is seeking to hold defendants liable for its demand on the theory that the charter of the Union Warehouse & Implement Company was *forfeited and canceled* on December 2, 1913, because it failed to file its report with the secretary of state, as required by said act, and that thereafter these defendants bought from plaintiff the goods in controversy, in the name of said Missouri corporation, and became liable as partners therefor. Although a corporation, chartered under the laws of this state may have complied with the provisions of above act, and *purchased goods while in good standing with the state*, yet section 20 *supra*, would make the *directors* of such corporation personally responsible, as partners, for *said goods, if thereafter the charter was forfeited and canceled and other goods were bought by said corporation, subsequent to the date of such forfeiture and cancellation.* Whether the title to said act be casually or carefully considered, there is not the slightest intimation therein that individuals should be held liable, as partners, for debts which they never personally contracted, and which were purchased solely by the corporation in its corporate name. The members of the General

Assembly, in voting upon said act, might have understood, in reading the title thereto, that the officers of a corporation whose charter had been forfeited and canceled might be punished under the police power of the state for continuing to carry on the business of such corporation after its charter had been legally forfeited and canceled, yet the title to said act would not have imparted any notice to the lawmakers that *personal liability* would be imposed upon the officers of such corporations for debts which *it alone* had contracted in good faith. Section 28 of article 4 of our Constitution provides that:

"No bill * * * shall contain more than one subject, which shall be clearly expressed in its title."

It is manifest that the framers of our Constitution inserted in the organic law the above provision in order that members of the General Assembly, when reading the title to an act, shall be advised, at least in a general way, of the subject sought to be covered in the body of same. State v. Sloan, 258 Mo. loc. cit. 313, 314, 167 S. W. 500; State ex rel. v. Revelle, 257 Mo. loc. cit. 538-540, 165 S. W. 1084; State v. Distilling Co., 237 Mo. 103, 139 S. W. 453; Williams v. Railroad, 233 Mo. 667; State ex rel. v. Gordon, 233 Mo. loc. cit. 387, 388, 135 S. W. 929; State v. Rawlings, 232 Mo. 544, 134 S. W. 530; St. Louis v. Wortman, 213 Mo. 131, 112 S. W. 520; State v. Fulks, 207 Mo. 26, 105 S. W. 733, 15 L. R. A. (N. S.) 430, 13 Ann. Cas. 732; State v. Great Western Coffee & Tea Co., 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; Mengel Box Co. v. Fowlkes et al. (Tenn.) 186 S. W. 91; National Surety Co. v. Murphy-Walker Co. (Tex. Civ. App.) 174 S. W. 997; Burton v. Monticello & Burnside Turnpike Co., 162 Ky. 787, 173 S. W. 144; Cooley on Constitutional Limitations (7th Ed.) p. 205.

Plaintiff's right of recovery is based upon section 20 of above act (1913), which reads as follows:

"Any person, or persons, who shall exercise, or attempt to exercise, any of the powers, privileges, or franchises of any corporation after the certificate, or license, of same has been forfeited and canceled as in this act provided shall be deemed guilty of a misdemeanor, and upon conviction punished as hereinafter provided; and the officers and directors * * * of any corporation which shall so violate the provisions of this act shall be held as partners and become severally and individually liable for the debts of such corporation."

That part of section 20 italicized as above, when considered in the light of foregoing authorities, is in conflict with section 28, art. 4, of our Constitution, and is hereby declared void.

In view of the conclusion just reached, we deem it unnecessary to consider or determine the validity of the remaining portions of above law.

[2] II. The act of 1913, is penal in its nature, and must be strictly construed in determining the liability of defendants in this action. Section 8 of same provides that

where the corporation fails to register before October 1st, its charter shall be *suspended*. Acts 1913, p. 169. It is then made the duty of the secretary of state to certify to the recorder of deeds of the county in which such suspended corporation is located *the fact of such suspension*, and the recorder of deeds shall post the name of such corporation in a conspicuous place in his office for a period of 20 days, and at the expiration thereof, not later than the 1st day of December, certify to the secretary of state that the name of such suspended corporation was so posted in such recorder's office. It further provides that the recorder shall be guilty of a misdemeanor, etc., if he fails to certify the name of such corporation to the secretary of state, as required by said act. Sections 10 and 12 of above act read as follows:

"Sec. 10. If any corporation shall fail to comply with the provisions of this act, on or before the first day of December, the corporate rights and privileges of such corporation shall be forfeited, and the secretary of state shall thereupon cancel the certificate, or license, of such corporation by appropriate entry on the margin of the record thereof, whereupon all the powers, privileges and franchises conferred upon such corporation by such certificate, or license, shall cease and determine, and the secretary of state shall notify such corporation by mail, addressed to it at its post office address as disclosed by the records in his office, that its corporate existence and rights in this state have been forfeited and canceled."

"Sec. 12. Failure to comply with the provisions of this act, and the certificate of the recorder of deeds that the name of the corporation so failing was posted, as required in section eight of this act, shall be sufficient evidence upon which the secretary of state shall declare and enter forfeiture of its corporate rights and privileges as in this act provided."

We are clearly of the opinion that the General Assembly, in the passage of said act never intended that the charter of a corporation, doing business in this state, should be forfeited and canceled *solely* by reason of its failure to file its return as required by law. As a condition precedent to the right of the secretary of state to declare a forfeiture and cancel the certificate of such corporation, he must have on file in his office the certificate of the recorder, as required by section 12, *supra*. Even if section 20 of said act were valid as a whole, no prosecution could be legally sustained thereunder, until the charter rights and privileges of said corporation to do business in this state had been *forfeited and canceled* by the secretary of state as aforesaid. Even then, in order to sustain a conviction thereunder, it would have to appear from the record that the officer of such corporation, proceeded against, had done—or attempted to do—business in its name *after* such charter had been legally *forfeited and canceled*. Turning to the evidence in this case, we find that neither the secretary of state, nor the recorder of Mississippi county ever took any action in respect to the forfeiture and cancellation of the charter of

said Union Warehouse & Implement Company, as required by sections 8 and 10 of said act. The secretary of state testified upon this subject as follows:

"No entries of any kind were made on the records in my office with reference to the Union Warehouse & Implement Company, until some time during 1915, and then the first and only entry was made to the effect that the charter had been forfeited December 2, 1913."

He further gave it as his opinion that this "nunc pro tunc" entry was not made until *October 11, 1915*. The last item in plaintiff's account was bought on October 21, 1914. There is therefore an entire failure of proof, as to the *forfeiture and cancellation* of the charter of said company, and also a failure of proof tending to show that any of the goods in controversy were bought *after* October 11, 1915, when said nunc pro tunc entry was made. On the undisputed facts disclosed by the record, the plaintiff has no case.

The judgment of the trial court is accordingly affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. GRAVES, P. J., and BOND, J., concur. BLAIR, J., concurs in paragraph 2 and result, and expresses no opinion as to paragraph 1. WOODSON, J., dissents as to paragraph 1 and concurs as to paragraph 2 and result.

BOWMAN v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Rehearing Denied
Dec. 20, 1916.)

1. MASTER AND SERVANT — 112(2) — BLOCKING GUARD RAILS — "BEST-KNOWN APPLIANCES."

In an action by railroad employé for injuries from catching his foot between the main and guard rail, because of failure of defendant railroad to properly fill or block the guard rail with the "best-known appliances" for such purposes, as required by Rev. St. 1909, § 3163, where defendant's own proof was that the proper method of blocking guard rails was by a block of wood, it could not be said that coal dust accidentally sifted between the rails was such blocking or filling as required by the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 219; Dec. Dig. ¶ 112(2).]

2. MASTER AND SERVANT — 276(6) — BLOCKING GUARD RAILS — ACTION — EVIDENCE — "GUARD RAIL."

In such action, evidence held sufficient to show that plaintiff was injured at the point on the guard rail where blocking is required; a "guard rail" being a rail placed inside of a main or running or track rail, paralleling such rail except at each end, where it is bent out therefrom in order to prevent the flanges on the car wheels from striking the end of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ¶ 276(6).]

3. MASTER AND SERVANT ⇨112(2) — BLOCKING GUARD RAIL—SCOPE OF STATUTE.

A railroad employé who caught only his toe, and not his whole foot, between the guard rail and the main rail was within the protection of Rev. St. 1909, § 3163, as to blocking guard rails, which states its purpose is to prevent so far as possible the feet of employés from being caught.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 219; Dec. Dig. ⇨112(2).]

4. MASTER AND SERVANT ⇨14 — BLOCKING GUARD RAILS—VALIDITY OF STATUTE.

Rev. St. 1909, § 3163, as to blocking guard rails, is not void for uncertainty, at least as respects a case in which the daily penalty clause does not apply, since such clause may be eliminated without destroying the remainder of the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇨14.]

5. APPEAL AND ERROR ⇨1066 — HARMLESS ERROR—INSTRUCTION.

In action by railroad employé for injury from catching his foot under guard rail maintained without blocking or filling as required by Rev. St. 1909, § 3163, an instruction authorizing a verdict in the absence of blocking was not prejudicial error, where the defense was that the guard rail was blocked and not filled, and the only evidence of filling was that the space had been filled with loose particles of coal or coal dust dropped from passing cars.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇨1066.]

6. TRIAL ⇨296(3)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In such action an instruction stating defendant's duty as being both to fill and block the guard rail was not error, where later instructions were that the jury must find the guard rail was neither blocked nor filled before a verdict could be returned.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ⇨296(3).]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by E. A. Bowman against the Wabash Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. L. Minnis and N. S. Brown, both of St. Louis, and David H. Robertson, of Mexico, Mo., for appellant. M. J. Lilly and O. C. Phillips, both of Moberly, for respondent.

BLAIR, J. This is an appeal from a judgment for \$9,000 rendered by the Randolph circuit court in an action instituted by respondent to recover damages for the loss of a leg. The petition alleged the injury resulted from appellant's failure to block or fill one of its guard rails in its yards at Moberly. Respondent was a switchman, and when injured was engaged, as one of a train crew, in hauling coal over that part of appellant's line between Moberly and Huntsville. This crew had brought a coal train into the Moberly yards, and, in the course of duty, respondent undertook to uncouple some moving cars. He stepped between the cars, his toe slipped under the ball or top of a

guard rail, and before he could remove it a car wheel passed over his foot.

There was evidence pro and con on the question whether the guard rail was filled or blocked in the usual manner. In the sense used in this record a guard rail is a rail placed inside of a main or running or track rail, paralleling such rail except at each end, where it is bent out therefrom in order to prevent the flanges on the car wheels from striking the end of it. The method of blocking or filling guard rails in the Moberly yards generally, and the guard rail in question, was by driving into the open space between the main rail and the flared or curved end of the guard rail a block of wood two or three feet long and large enough to fill the space up to the lower side of the ball of the rails. There is evidence tending to show that the guard rail by which respondent asserts his foot was caught was not blocked, but that coal dust had sifted down from passing cars and filled the unblocked space up to the lower part of the ball of the rail. Other facts in evidence necessary to a decision are stated in the course of the opinion.

[1] I. Appellant contends there was no evidence coal dust accidentally deposited between the main and guard rails was not such blocking or filling as required by the statute. Section 3163, R. S. 1909. This requirement of the statute is that the "best-known appliances" be used for such purposes. On the trial there was no pretense appellant employed, or attempted to employ, in its Moberly yards, or in connection with the particular guard rail in question, any method save blocking as above described. Appellant called the employé who, at the time respondent was injured, was responsible for the safety appliances affected by the statute (section 3163), so far as concerned the Moberly yards, and he testified the method used, with respect to guard rails, was to drive between the main rail and the bent or flared end of the guard rail a block of wood of sufficient size and length to fill the space in such manner that a man's foot could not be caught therein. He also testified that a man's foot could not be caught when a guard rail is properly blocked. Respondent's testimony was to the same effect. The jury must have found respondent's foot was caught under the ball of the guard rail and that the rail was not blocked. In the face of appellant's own proof that proper blocking would have rendered it impossible for respondent's foot to have been caught, it is hardly necessary to say that we cannot hold that coal dust accidentally sifted between the rails, and in spite of which respondent's foot was caught, does not satisfy the requirement (section 3163) that the "best-known appliances" must be used to block or fill the opening between the guard rail and main rail.

[2] II. It is insisted the evidence shows

respondent was not injured at the point on the guard rail where blocking is required. There is evidence respondent's foot was caught under the ball or top of the guard rail, and further evidence, by both appellant's and respondent's witnesses, that it was impossible for his foot to have been caught elsewhere than at the end where blocking is required; the rails being too close together at all other places. Further, respondent testified his foot was caught at a point at which the guard rail was "bent the opposite way a little," and all the evidence is that the bend in the guard rail is the thing which creates the opening which blocking is designed to close. The evidence on this point is sufficient.

[3] III. It is urged the evidence shows respondent's foot was not caught between the main rail and the guard rail, and that this ends the case. Respondent's foot was upon the main rail, and his toe slipped under the ball of the guard rail. The earth outside the main rail was level with its top. The guard rail was slightly higher than the main rail. The evidence tends to show the injury occurred at a point at which blocking was required, and that had the guard rail been blocked respondent's foot could not possibly have been caught as he testified it was. This contention seems to assume that it was necessary to respondent's case that his whole foot be caught between the two rails in order that he might recover in this case. This cannot be true. The lack of blocking caused his toe to become wedged under the ball of the guard rail, and this held his foot until the wheel passed over it. The purpose of the statute (section 3163, R. S. 1909) is "to prevent, as far as possible, the feet of employes from being caught," and respondent brought himself within the statute by showing that his injury resulted from his foot being caught by reason of appellant's failure to block the guard rail mentioned in evidence in this case.

[4] IV. It is contended the statute is void for uncertainty. This question is considered and correctly decided, adversely to appellant, in *George v. Railroad*, 179 Mo. App. loc. cit. 292, 167 S. W. 153 et seq. The question whether the daily penalty could be enforced is not in this case. Eliminating the penalty clause, there is yet a valid provision remaining which is broad enough to cover this case. The elimination of the daily penalty clause, even if that were necessary, would not destroy the remainder of the act.

[5] V. The instructions are criticized. The first predicated certain facts and required certain findings, and then directed the jury to find for respondent if they found that he "was injured as aforesaid by and in direct and immediate consequence of the negligence of defendant in failing to block said guard rail, or in negligently maintaining the said guard rail and track rail without any block-

ing or filling between said rails, so as to prevent as far as possible the foot of plaintiff from being caught therein."

It is insisted the instruction erroneously (1) authorized a verdict in the absence of blocking, "regardless of whether the rail had been filled"; and (2) ignored the evidence tending to show the space was filled with loose particles of coal or coal dust which had dropped from passing cars. The defense was that the guard rail was blocked, not filled. This was the trial theory. Loose particles of coal or coal dust, by chance fallen between the rails, constitute no compliance with the statute. In the circumstances the instruction was not prejudicial.

[6] The second instruction reads as follows:

"The court instructs the jury, as a matter of law, that it was the duty of defendant to fill and block the guard rail mentioned in evidence, for the purpose of preventing, as far as possible, the feet of plaintiff and others of its employes then engaged in and about said railroad yards from being caught therein, and if you find and believe from the evidence that defendant did not on said day have said guard rail filled or blocked, and plaintiff was thereby injured, you should find," etc.

The statute requires guard rails to be filled or blocked. Assuming that the words "fill" and "block" are not used as different expressions of the same idea, the court should not have told the jury the statute required both things to be done. When the court came to the point of directing the jury what omission would authorize a verdict, it cured this, however, by instructing them, in effect, that they must find the guard rail was neither blocked nor filled before a verdict could be returned. This idea was impressed by several of the instructions given at the instance of appellant. There was nothing prejudicial in the instructions.

The judgment is affirmed. All concur.

In re BRYAN'S ESTATE.

TOWER v. ROBERT et al.

(Nos. 18166, 18190.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Motion for Rehearing
Overruled Dec. 20, 1916.)

1. EXECUTORS AND ADMINISTRATORS \S 506(3)
—SETTLEMENT—COMMISSIONS—EVIDENCE.

On the settlement of a deceased executor's account by his executors, evidence, including letters between the deceased executor and the principal beneficiary, held to show their agreement that the executor when making and filing his final settlement should receive as compensation a 5 per cent. commission, amounting to \$19,509.88.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. \S 2177; Dec. Dig. \S 506(3).]

2. EXECUTORS AND ADMINISTRATORS \S 491—
COMMISSION—AGREEMENT AS TO VALUE.

Nothing in Rev. St. 1909, \S 229, relating to the disbursements and compensation allowed an

executor on a settlement, precludes the beneficiary of an estate and the executor from agreeing upon the "value" of certain items of the estate and fixing a rate of 5 per cent. thereon as the compensation which the executor shall receive on his final settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2082; Dec. Dig. ¶491.]

3. ESTOPPEL ¶98(3)—SETTLEMENT—AGREEMENT WITH BENEFICIARY — PERSONS ESTOPPED.

Where the principal beneficiary and the executor had agreed upon the value of certain items of the estate and fixed a rate of 5 per cent. commission thereon to be allowed upon final settlement, the beneficiary was estopped from contesting the executor's right to receive a credit in that amount, and the decedent's administrator de bonis non representing the principal beneficiary of the estate could not complain of the beneficiary's agreement.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 290; Dec. Dig. ¶98(3).]

4. EXECUTORS AND ADMINISTRATORS ¶478—SETTLEMENT—CREDITS—INTEREST.

Where the principal beneficiary of an estate and the executor in 1909 agreed that on a fixed value of the estate the executor should receive a 5 per cent. commission on his final settlement amounting to \$19,509.88, and that certain shares of stock might be treated as the executor's own to borrow money to pay his commission, the interest paid by him under the terms of such agreement was due from the executor personally, and was not chargeable against the estate, as he was not entitled to the stock on which the money was borrowed until the date of final settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2063; Dec. Dig. ¶478.]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Exceptions by George F. Tower, Jr., administrator de bonis non of the estate of Martha T. Bryan, deceased, to the settlement of the estate by D. W. Robert and others, executors of the estate of Edward S. Robert, executor, deceased. Judgment finding in favor of the executors as to an item of commission, and in favor of the administrator de bonis non as to an item of interest, motions for a new trial overruled, and the executors and the administrator de bonis non take cross-appeals. Affirmed.

The above two cases are cross-appeals from the same judgment, and counsel for the respective parties have agreed that but one abstract, brief, and argument on each side should be filed, and that the same might be treated as a compliance with the rules of this court.

Previous to March, 1907, Martha Tower Bryan died testate. In her will she devised three small legacies to her two sisters and a brother, and then devised all the remainder of her estate to her husband, Kenneth Bryan. She appointed Edward S. Robert executor of her estate. He duly qualified as such executor, and began his administration of said estate in February, 1907. He filed his inventory the following month, and disclosed

therein, as the principal items, certain certificates of stock in various corporations, among them shares of stock in the Goodwin Manufacturing Company, Tower Realty Company, Barr Realty Company, Walpole Realty Company, and Pan-American Construction Company, all of which were in the hands of Robert at the time of his decease, and at the time of the trial below were in the possession of his legal representatives, together with stock in the Syndicate Trust Company and the Scruggs, Vandervoort & Barney Dry Goods Company. The stock of the Syndicate Company came from the Tower Realty Company by way of a stock dividend from the latter; and the stock of the Scruggs, Vandervoort & Barney Dry Goods Company came as a stock dividend from the Syndicate Trust Company. The above facts appear in the annual settlement filed by Robert in the probate court of the city of St. Louis on April 10, 1911, and read in evidence at the trial. None of the above stock was ever distributed or turned over to any one under the will of Mrs. Bryan.

Robert filed his first annual settlement on March 27, 1908. That settlement showed the total receipts to be \$71,022.78, and the total disbursements \$14,768.32, leaving a balance of \$56,254.46 in his hands as executor, which balance consisted of \$4.46 cash and certain stocks specified therein. The executor was not allowed, and did not claim, any commissions under that settlement.

Robert's next annual settlement was filed on April 10, 1911. It showed the total assets in his hands to be \$135,998.21, and the total disbursements \$55,511.85, leaving a balance in his hands of \$80,486.36, which balance consisted of \$257.61 cash and certain stocks enumerated therein. In this last settlement Robert was allowed \$550 commissions on account.

Edward S. Robert died in December, 1911, testate. Wm. L. Becktold and Douglas W. Robert were named as executors in his will, and they duly qualified as such executors. Thereafter George F. Tower, Jr., was appointed administrator de bonis non of the estate of Martha Tower Bryan, deceased, and duly qualified as such administrator.

The executors of Edward S. Robert, on September 14, 1912, filed a settlement of said estate in the probate court aforesaid. It showed the total receipts to be \$112,177.86, and the total disbursements, \$8,400. It claimed \$25,640.44 as commissions and interest, and showed that the total amount of property received by the executors and disbursed, as shown by prior settlements, and as shown by the final settlement, was \$454,482.28. Five per cent. of said last-named sum, aggregating \$22,724.11, together with \$2,916.33 paid by Robert as interest on a loan for \$19,509.88, was claimed in said settlement to be due said Robert. Thereupon George F.

Tower, Jr., administrator de bonis non, filed exceptions in the probate court aforesaid to the settlement of the Bryan estate by the executors of Edward S. Robert, deceased, and particularly excepted to credits for commissions covered by the following items:

(A) Nov. 6, 1911, paid said executor as evidenced by voucher No. _____ herein.....	\$ 2,376.25
(B) Nov. 29, 1911, paid said executor on account on commissions.....	\$19,509.88
And paid to said executor in discharge of interest paid by him on a loan made May 11, 1909, under the terms of the above mentioned agreement	2,916.33
Total	22,426.21
(C) Nov. 29, 1911, paid said executor on account of balance of his commissions	287.98
(D) Total amount paid to said executor in commissions and in payment of said sum of \$2,916.33 interest under said agreement of May 7, 1909, and in commissions on property received subsequent to said agreement.....	\$25,640.44

The above exceptions were overruled in toto by the probate court at its December term, 1912, and Tower, as administrator aforesaid, appealed the case to the circuit court.

On June 18, 1913, during the June term, 1913, of the circuit court, the executors of Edward S. Robert and the administrator de bonis non of the Bryan estate appeared in said court by their respective attorneys, and said final settlement and the exceptions thereto were heard anew by said court. Testimony was introduced in the circuit court by the respective parties aforesaid, but we deem it unnecessary to go into the details of same at this time. The main controversy in this court is over the allowance by the circuit court of the \$19,509.88 in favor of Robert's estate and the refusal to allow as a credit \$2,916.33 interest paid by Robert in his lifetime.

It appears from the evidence that Edward S. Robert contemplated a trip abroad and needed money. He was then about ready to make a final settlement of the Bryan estate, but had no substantial sum of money on hand with which to pay his commission. He accordingly, on May 6, 1909, addressed a letter to Kenneth Bryan, Esq., the sole beneficiary of the Bryan estate, after leaving out the three small bequests, which said letter and the reply thereto will be set out in full in the opinion. After Robert received the letter, he took 200 shares of the Syndicate stock to the Mechanics' American National Bank and borrowed from said bank the \$19,509.88 heretofore mentioned by executing his

personal note to said bank for said sum, with the 200 shares of stock aforesaid pledged as security therefor. When Robert returned from Europe in the latter part of 1909, Kenneth Bryan was in such condition mentally that it was believed he was not competent to attend to his affairs, although he was not adjudicated insane until some time in 1912, after Robert's death.

It is conceded that Robert in his lifetime took no credit in any settlement which he filed in the probate court for either the \$19,509.88 or the \$2,916.33 heretofore mentioned. The circuit court on November 17, 1913, found in favor of Robert's estate as to said item of \$19,509.88, and in favor of Tower, as administrator, as to said \$2,916.33. The trial court likewise found that Robert's estate is entitled to a commission of 5 per cent. on the net balance of \$35,156.64 distributed, outside of said \$19,509.88, which said sum, added to the latter, aggregates the sum of \$21,267.71, to which said Robert's estate, as found by the court, is entitled as a credit in the final settlement aforesaid. The executors of Robert, and administrator de bonis non of the Bryan estate, filed motions for a new trial respectively, which were overruled, and the cause appealed to this court by the executors and administrator aforesaid.

Schnurmacher & Rassieur, of St. Louis, for appellant Tower. Marshall & Henderson, of St. Louis, for respondents Robert and others.

RAILEY, C. (after stating the facts as above). In considering the questions before us, it is important to know what the trial court decided in the rendition of its final judgment from which the cross-appeals herein were taken. The court in said decree allowed Robert's estate a credit of \$19,509.88, being 5 per cent. commission on the \$390,197.78 mentioned in Robert's letter to Kenneth Bryan. It allowed 5 per cent. commissions on all other assets actually distributed by E. S. Robert as executor and by his executors, not including the said \$390,197.78, which actual distributions the court found to be as follows:

"Amount actually distributed as shown by the first annual settlement in 1908, \$14,768.32; amount distributed as shown by the second settlement in 1911, \$55,511.85, from which, however, must be deducted smoke preventer stock, \$5,000, which the court finds to be valueless, and investment shares of St. Louis Union stock, \$2,178.75, which the court finds cannot be considered as a disbursement, leaving the actual amount distributed as shown by the settlement in 1911, \$48,333.10; amount actually distributed as shown by the third settlement in 1912, \$6,400—making the total disbursements \$69,501.42. But the court finds that from these disbursements of \$69,501.42 there must be deducted \$34,344.78, being the item 'Cash as per enclosed account, including Pan-American note given you,' which was included in the arrangement of May 6, 1909, and May 7, 1909, between E. S. Robert, executor, and Kenneth Bryan, sole legatee, and on which compensation was allowed to said Robert, leaving a net balance distributed out-

side of said arrangement of May 6 and 7, 1909, of \$35,156.64, on which the court finds the said E. S. Robert, as executor, and his legal representatives are entitled to a commission of 5 per cent., amounting to \$1,757.83, and which sum, added to the \$19,509.88, covered by the arrangement between E. S. Robert and Kenneth Bryan, aggregates the sum of \$21,267.71, to which the said E. S. Robert and his legal representatives are hereby adjudged to be entitled, to be credited in the settlement of said estate of Martha Tower Bryan. The court further finds, orders, adjudges, and decrees that the said E. S. Robert and his legal representatives are not entitled to take credit in their settlements for the sum of \$2,916.33, the amount expended by them on account of interest and discount upon the loan effected by said Robert under his arrangement with said Kenneth Bryan to pay said Robert said sum of \$19,509.88. The court further finds that the legal representatives of said Robert in the settlement of 1912 have taken credit for \$25,640.44 on account of said arrangement between said Robert and said Kenneth Bryan, and for other disbursements not included in said arrangement, but that said settlement in this respect is hereby surcharged so as to allow only \$21,267.73, making a surcharge in this respect of \$4,372.73."

[1] I. It is insisted by Tower, as administrator of the Bryan estate, that the trial court committed error in allowing Robert's estate the above credit of \$19,509.88, because the assets on which said sum was based had never been distributed, nor a final settlement made by Robert in his lifetime, and because the assets were not worth \$390,197.78. On the other hand, it is claimed by Robert's executors that the letters of May 6 and 7, 1909, which passed between Edward S. Robert and Kenneth Bryan, in connection with the action thereafter taken by Robert, constituted an agreement between Robert and Bryan that the former should receive as his commissions 5 per cent. of \$390,197.78, amounting to \$19,509.88.

We do not deem it important in considering the case to inquire into the subject as to whether the five items of property mentioned in Robert's letter to Bryan were of the real value of \$390,197.78. It is not unreasonable to assume that Kenneth Bryan, at the time he received Robert's letter, was fully as familiar with the market value of the five items constituting the \$390,197.78 which had come to him through his wife's will as Robert, the executor of his wife's estate. It is not claimed that Bryan was overreached or deceived as to the valuation aforesaid, and hence it is fair to assume that he was satisfied with the value placed thereon by Robert. The latter wrote to Bryan, as follows:

"St. Louis, May 6, 1909.

"Kenneth Bryan, Esq., City—My Dear Kenneth: The aggregate of the estate is as follows:

Stock in Tower Realty Co. on a 4 1/4 basis	\$267,353.00
Cash, as per inclosed account, including the Pan-American note given you	34,344.78
Goodwin Mfg. Co. stock at par....	21,000.00
Syndicate Surety Co. stock at cost	37,500.00
1/4 of the Goodwin debt of \$120,000	30,000.00

Total \$390,197.78

"Five per cent. of this would be \$19,509.88, which will represent the commissions to which I am entitled. Please look this over carefully, and in a few days I will be up to see you and find out if it is satisfactory.

"What I want to do is to make an arrangement with you by which I can use some of the Syndicate stock to borrow some money and when it picks up sell it and pay myself the above amount. I shall make a little agreement with you covering that right, so if either of us should die the matter would be clear to our successor. You will understand that in the Tower stock on a 4 1/4 basis I have deducted the mortgage of \$450,000, which gives the net value of that stock.

"I shall not use any of the stock until I have seen you, and find out that the above is entirely satisfactory. I shall not need all of the Syndicate stock to raise what I need for the present.

"Yours very truly, E. S. Robert."

There was attached to said letter the following:

Cash, as per inventory	\$ 2,346.71
Goods and chattels, as per appraisal	355.40
Dividends collected	27,480.00
Pan-American note and interest ...	4,162.67

Total \$34,344.78

On May 7, 1909, Kenneth Bryan wrote to E. S. Robert, as follows:

"E. S. Robert, Esq., City—Dear Sir: I have your letter of the 6th inst., and as there is no cash in the estate of my wife to pay your commissions of \$19,509.88, and none in prospect without sacrificing some of the assets, in order that you may close the estate in the probate court, I hereby agree that you may use 200 shares of the Syndicate Trust Company stock, treating it as your own, until a more propitious time to sell the same, and that closing the estate will in nowise preclude your right to said commissions.

"Yours truly, Kenneth Bryan."

It is clear that the stock market was unfavorable at the date of this correspondence. Robert desired to make his final settlement in order that he might receive his commissions, but there was no money on hand with which to pay same. He could have applied to the probate court for an order to sell sufficient stock to pay his commissions, but he and Bryan realized that the stock would be sacrificed if put upon the market and sold. They both desired to avoid this unnecessary sacrifice of Bryan's property. Robert made no concealment as to the amount he expected to charge as his commission on the items and amounts mentioned in his letter to Bryan. The latter knew when he answered Robert's letter that Robert was claiming \$19,509.88 to be due him as his commissions, and that the amount specified was 5 per cent. on the total valuation of the five items of property mentioned in said letter. In Bryan's reply he repeated the amount claimed by Robert as \$19,509.88, and authorized him to use the stock to pay "said commissions." We are of the opinion that, with full knowledge of all the facts, the minds of Bryan and Robert fully met upon the proposition that Robert was to charge \$19,509.88 as his commission on the property mentioned in Robert's letter,

and that Robert was authorized to use 200 shares of the Syndicate stock in borrowing the money to pay said commission.

We are not impressed with the idea advanced that Bryan entered into the above agreement on the theory that Robert was to make his final settlement at once, or at any particular time. The settlements read in evidence disclose that Bryan from time to time had received many thousands of dollars from Robert as dividends on the property in his hands; and we are not advised that he was in need of any more money. He never expressed any dissatisfaction with Robert's management of his property, nor did he evince any disposition to have it taken out of his hands. The facts disclosed by the record indicate to us that Robert was the party who was anxious to make the final settlement in order that his commissions might be paid. He had fully administered upon the estate in his hands, without objection or criticism so far as the record shows, and there was no motive shown upon the part of either Robert or Bryan for hurrying the final settlement after the above commissions had been agreed upon and arrangements made to pay the same.

We therefore rule that the letters which passed between Robert and Bryan, of date, May 6 and 7, 1909, when considered in the light of all the facts in the case, disclosed an agreement between Robert and Bryan that the former, when making and filing his final settlement, should receive as compensation and be allowed as a credit the \$19,509.88 heretofore mentioned.

[2] II. It is contended by Tower as administrator that the estate of Edward S. Robert is not entitled to the above credit of \$19,509.88, because the five items of property on which said commission is based were not turned over to Bryan by Robert in his lifetime, nor was any final settlement ever made by him prior to his death.

We find nothing in section 229, R. S. 1909, or in any of the cases cited, which precludes the beneficiary of an estate and the executor from agreeing upon the value of certain items of the estate and fixing the statutory rate of 5 per cent. thereon as the compensation which the executor shall receive when his final settlement is made. Kenneth Bryan and Edward S. Robert were both competent to contract on the 6th and 7th of May, 1909. They had the right to agree at that time that the five items of property mentioned in Robert's letter were of the value of \$390,197.78, in order that the statutory commission of 5 per cent. thereon might be fixed and the necessary funds borrowed by Robert to pay the same. Robert was not attempting to collect either more or less than the commission allowed by law. On the other hand, Bryan did not expect his wife's estate to pay either more or less than the statutory commission. The probate court in the final settlement would be compelled to ascertain in some way

the value of the items making up said valuation of \$390,197.78, and we know of no good reason for holding that the parties in interest might not agree upon such valuation, and the statutory commission of 5 per cent. thereon, as the amount which the executor should receive when the final settlement was made. *Ladd v. Pigott*, 215 Mo. loc. cit. 370, 114 S. W. 984; *Browning v. Richardson*, 186 Mo. 361, 85 S. W. 518; *In re Irwin's Estate*, 123 Mo. App. 508, 100 S. W. 565; 11 Am. & Eng. Ency. Law (2d Ed.) p. 1303; 18 Cyc. 1157; *Danner's Appeal*, 148 Pa. 159, 23 Atl. 1057; *In re Estate Hamilton*, 29 Nova Scotia, 249; *In re Turler's Estate* (Sur.) 24 N. Y. Supp. loc. cit. 98; *Bowker v. Pierce*, 130 Mass. 262; *Powell v. Foster's Estate*, 71 Vt. loc. cit. 164, 44 Atl. 96; *Hubbell v. Olmstead*, 36 Vt. 619; *In re Estate of Mansfield*, 80 Iowa, 681, 46 N. W. 65.

It does not appear from the record that Bryan ever called upon Robert to turn over any part of his estate which remained in the hands of the executor. It was safe in the hands of the latter, and Bryan was receiving the dividends, etc., from said property as they were realized by the executor. The estate had been fully administered, and Bryan had nothing to lose by allowing the final settlement to be postponed. He had agreed with Robert upon the commissions to be charged upon said five items, and the statute fixed the commission at 5 per cent. on the distributions which had already been made. Upon the return of Robert from Europe, Kenneth Bryan was incapable of managing his own affairs, and Robert's settlement was continued indefinitely at the request of Bryan's mother and his brother-in-law, on account of Bryan's mental condition.

[3] It is not claimed that there was any willful failure upon the part of Robert to make his final settlement before his death, nor has the estate of Mrs. Bryan suffered any loss by reason of his failure to do so. If Robert had been alive when his final settlement was filed, and Bryan had then been capable of managing his affairs, he would have been estopped, upon the record in this case, from contesting the right of Robert to receive a credit for said sum of \$19,509.88; and, as the administrator de bonis non represents Bryan as the principal beneficiary of the Bryan estate, he should not be heard to complain of that which his beneficiary did when clothed in his right mind.

On the record before us we hold, that Robert's executors, in the final settlement filed, are entitled to the credit of \$19,509.88 heretofore mentioned and allowed by the trial court as of the date of said final settlement.

[4] III. It is contended by the administrator that Robert's estate is not entitled to the credit of \$2,916.33 claimed by the executors of Robert in said final settlement, and that the action of the trial court in excluding same should be affirmed. We have found heretofore that Bryan and Robert agreed

that the latter's 5 per cent. commissions on said five items amounting to \$19,509.88 should be credited to Robert when he made his final settlement and turned over the property in his hands. Although the parties as between themselves had agreed upon said credit as part of Robert's 5 per cent. commission when the settlement should be filed, it does not follow that Robert was entitled to have said credit entered, as a part of his commission, on the date when the money was borrowed from the bank. If Robert had made his final settlement when he borrowed the \$19,509.88 from the bank, and had turned over the property in his hands at that time, he would have been entitled, as of that date, to the credit of \$19,509.88, and the loan thereafter would have become, in legal effect, the debt of the Bryan estate, although the money was borrowed in the name of Robert. In other words, under the circumstances last mentioned, the Bryan estate would be primarily liable for both the principal and interest of said loan from the bank. On the other hand, as the final settlement was not filed until September 24, 1912, and the property in Robert's hands had not been turned over prior to said date, Robert's estate was only entitled to have said credit of \$19,509.88 entered as of the date of final settlement. The \$2,916.33 of interest paid by Robert to the bank, was due from him personally, as he was not entitled to the agreed credit supra until final settlement was made.

Suppose the estate of Bryan on May 6 and 7, 1909, had on hands \$19,509.88, and Robert had agreed with Bryan to borrow the same until he got ready to make his final settlement; would it be contended that Robert's estate would be entitled to a credit for the interest which he thus paid? We think not, and yet that is the practical effect of the position assumed by Robert's executors in this action.

We therefore hold that the trial court properly excluded from said final settlement the item of interest paid by Robert, amounting to \$2,916.33, claimed as a credit therein.

IV. Upon a careful consideration of the whole case, we are of the opinion that the final judgment of the trial court is correct, and the same is accordingly affirmed. The costs incurred in the cross-appeals herein, are apportioned equally between the Bryan and Robert estates respectively; and the same are directed to be certified to the probate court aforesaid for allowance and classification.

BROWN, C., concurs as to paragraphs 1, 2, and 4, and in result stated in paragraph 3.

On Cross-Appeal.

RAILEY, C. This is a cross-appeal in the original case numbered 18166, entitled in the same way, from a judgment of the low-

er court in refusing to allow a credit to the estate of Edward S. Robert on final settlement for interest paid by said Edward S. Robert in his lifetime, amounting to \$2,916.33.

The parties in case numbered 18166 supra, stipulated that but one set of the abstract of record and briefs should be filed in said cause, and that the same might be considered as including the case numbered 18190 supra.

In the opinion heretofore delivered in 18-166 we have sustained the action of the lower court in excluding from said final settlement the above item of interest amounting to \$2,916.33, and hence the judgment of the trial court in this proceeding is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All concur.

GRANT v. KANSAS CITY SOUTHERN RY. CO. (No. 18528.)

(Supreme Court of Missouri, Division No. 1, Dec. 1, 1916. Motion to Modify Judgment Overruled Dec. 20, 1916.)

1. APPEAL AND ERROR ⇐1097(6)—EFFECT OF DECISION ON FORMER APPEAL—RES ADJUDICATA.

In an administratrix's action against a railroad for death of its servant, the decision of the Court of Appeals rendered on former appeal was not res adjudicata on appeal to the Supreme Court of the question of the sufficiency of the evidence on a second trial to sustain the verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4365; Dec. Dig. ⇐1097(6).]

2. DEATH ⇐58(1) — INJURIES TO SERVANT RESULTING IN DEATH—ABSENCE OF EYE-WITNESS—PRESUMPTION OF DUE CARE.

In an action for death of a servant, where no one saw the accident, and no eyewitness testified on the subject, the law presumes that at the time of the injury the servant was exercising due care for his own safety.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75, 76, 78; Dec. Dig. ⇐58(1).]

3. MASTER AND SERVANT ⇐276(2)—INJURIES TO SERVANT—MANNER OF OCCURRENCE OF ACCIDENT—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for death of its servant, evidence as to how the accident occurred held insufficient to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ⇐276(2).]

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

Suit by Nina E. Grant, administratrix, etc., against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and judgment rendered for defendant.

The widow of Arthur Grant and the administratrix of his estate brought this suit in the circuit court of Jackson county against the defendant to recover the sum of \$10,000, damages for the alleged negligent killing of her husband. She had judgment below for that sum, and the defendant appealed the cause to this court. This is the second appeal. The first was taken to the Kansas City Court of Appeals, and the opinion is reported in 172 Mo. App. 334, 157 S. W. 1016. At the first trial, the circuit court sustained a demurrer to the plaintiff's evidence, and rendered judgment for the defendant. Upon appeal the judgment of the trial court was reversed, and the cause remanded for a new trial.

The injury occurred in the state of Arkansas, and the original petition counted upon common-law negligence and a statute of that state. Upon the cause being remanded to the circuit court an amended petition was filed eliminating the statutory ground and increasing the claim of damages to the sum of \$10,000.

The main facts of the case are clearly and tersely stated by Judge Ellison in the following language:

"Plaintiff is the administratrix of the estate of Arthur Grant, who was fatally injured by being run over by one of defendant's trains at Mena, Ark., which she charges was caused by the absence of an 'iron handhold' on the end of the tender of the engine. Deceased was in the employ of defendant as head brakeman on a freight train. The train had left a point 60 miles south and had arrived at Mena, where the engine and crew were to be changed, and the train be taken thence on north by another engine and crew. When the train arrived at Mena a freight train, also bound north, was standing in on the siding, which made it necessary that the train involved in this controversy stand on the main track just below the switch; the engine being perhaps 150 feet from the rear of the other train. There each stood for near an hour, waiting for a south-bound passenger train to arrive. When the latter train got in, the freight train standing on the siding began to move out, making room for the train in controversy to move in and clear the main track so the passenger could pass on its way. It did immediately begin to move, following closely on the outgoing train, but intending to stop at the upper end of the siding, where the engine would be detached and a fresh one and new crew substituted. It was deceased's duty as head brakeman to be on the front end of the car next to the engine while approaching or moving through a station. Presumably during the long wait he had left the train, intending to board it as it started into the siding. At any rate, as the train began to move forward, the engineer (plaintiff's witness) saw him about 150 feet up the track walking back towards the engine on the east side of the track. He walked by the engine as it moved on at about 3 miles an hour. He had his lantern, and was last seen by the engineer when opposite the rear end of the tender and about 4 feet east of it. There was a step at the rear end of the tender, and there had been above it an iron 'handhold.' With the aid of these one could climb on top of the tender. So there was a 'ladder' at one or the other end of the car next to the tender. But at this time the handhold was not there, and there was evidence tending to show that it had been missing several days. The train, which

was near a quarter of a mile in length, went on into the siding, stopping with the engine up at the upper end. Deceased was found lying by the side of the track near where last seen, with his arm about crushed off, so that it was amputated, and from the effect of which he died in 24 hours. He being dead, and, there being no eyewitnesses, the engineer being the last one to see him before the catastrophe, the question to be determined, if possible, is what caused his injury and what part in its happening did he himself take? The theory of plaintiff is, and her case depends upon its correctness and the proof of it, that in the dark he did not see the absence of the handhold, and in reaching for it, at the same time attempting to put his foot on the step, he stumbled and fell with his arm under the car. Whatever tendency there was in the testimony of the engineer, was to disprove this; for he last saw him opposite the handhold and 4 feet to the east walking away, and to reach it he would have to turn and run back."

The evidence introduced at the second trial differed but little from that of the first. The defendant introduced no evidence at either trial.

For the purpose of clarifying plaintiff's theory of the case, I will state some parts of the evidence which is largely taken from counsel's statement of the case:

Finally, the train ahead started up, and at the same time some one on the rear end of it gave the engineer of Grant's train a "mooch" signal, meaning to follow it carefully, and come in on the stock track. McDougal says: "Q. Did you get a signal from the other train to start? A. Yes, sir; the man on the rear end of the caboose gave us what we term a mooch signal, or follow him along there carefully. Q. That was the man on the rear end of the train that had been occupying the stock track? A. Yes, sir." Thereupon Grant's train started up, carefully following the train ahead in onto the siding, going no faster than a man would walk.

At the time Grant's train thus started northward he was on the ground on the east side of his train. It was his duty as head brakeman to see that the switches ahead of his train were lined up. The derail switch was always left open, except when a train was about to come in on the siding as his train was then doing. Knowing this, Grant ran ahead and crossed the track in front of his engine from left to right, traveling northeastward to the derail for the evident purpose of seeing that it was lined up. He crossed the track in this manner, went to the derail, stooped down with his lantern, examined the derail, signaled his engine to come on, and stepped eastward to allow it to pass, all of which was done after the engine had started moving in on the stock track. "Q. So as Grant ran on ahead of your engine your engine was moving northward, covering that space, which was no greater than from where you are and the wall, and he cut in ahead of your engine in that space? A. Yes, sir. Q. And all that time you were shortening that distance? A. Yes, sir; after he looked at the rail, he turned around and gave me a signal to come on." At the time he thus signaled he was on the right-hand or east side of the track. As the engine advanced toward it on the east side, the engineer at first thought he was going to get onto the gangway between the engine and the tank. It was his duty to get on and ride northward the few car lengths that remained for the train to travel before being brought to a standstill, and then to cut the tank loose from the train after the train had been brought in upon the siding so that its rear was clear of the main line. "Q. Whose business was it to detach the engine, after you got up there?

A. The head brakeman. Q. Grant? A. Yes, sir. * * * Q. In detaching one of these engines—this engine No. 491—was there some sort of a crank on it by which the pins are lifted? A. What they call a pin lift. Q. Is that lift at the side of the engine? A. Yes, sir. Q. So a man, in order to detach the engine, would stand down here at the corner of the tank, would he (showing witness Exhibit C)? A. Yes, sir. Q. Speaking of detaching the engine, you mean to detach the engine tank from the next car behind it? A. Yes, sir; from the train."

Grant did not get on the gangway, but allowed it to pass him, and continued south alongside the tank, toward its rear end, in a crouching or stooping attitude. The engineer testifies that Grant continued southward to a point opposite the rear corner of the tank where this grab-iron was off. This is the last that the engineer or any one else who testified saw of him until after he was hurt.

Although McDougal says Grant was then slightly east of the line of the tank, he does not testify to the distance positively. He says: "About 4 feet out, as near as I could judge, from the engine." "He was out from it a little distance, still going south." In no place in his testimony does he estimate with greater positiveness this eastern distance. "Q. Did you see him make an effort at all to get onto the tender? A. No; he was walking rather fast in a stooping position." Afterward he changes this and denies that he ever said that Grant was walking rapidly. "Q. Well, at any rate, he started immediately, and had walked at a rapid pace southward, until you did last see him, is that true? A. I don't understand what you are getting at. Q. It does not concern you what I am getting at. A. I didn't say he walked rapidly. I said he walked along at a good gait; that is not rapidly." "Q. Did he walk as much as a car length south of the derail, before you last saw him? A. I couldn't tell you. Q. Did he walk as much as two car lengths south of the derail, when you last saw him? A. I couldn't tell you. Q. It might have been more or less than that? A. Yes, sir. Q. He might have been right at the derail, when you last saw him, might he not? A. He was south of the derail. Q. Was he more than 10 feet south of the derail; would you be able to say? A. I couldn't tell you. Q. Then it might have been as short a distance as ten feet? A. I could not tell you; I would not be positive." McDougal does not say he noticed Grant's movements closely after the gangway passed him.

"Q. Your attention was divided, because you had business ahead? A. Yes, sir. Q. You were not paying very much attention to Grant, were you; your business was ahead, was it not? A. I paid all the attention I could to him. Q. Yes; but you couldn't, by watching this freight train ahead, could you? A. Certainly not, after I had passed him. Q. I want to ask you if this question was not asked of you on the former trial of the case: 'Q. The question is this: Didn't you keep your eyes on the train ahead of you from the time that you started your engine northward, except the glances you gave at Grant as your engine passed him?' to which you answer: 'A. With the exception of momentary glances that I gave him.' Was that question asked and answer given? A. Yes, sir, I turned my head first one way and then another."

Mrs. Grant testified that the day after her husband's funeral she went to the place where he was injured, and there saw the blood stains and the fragments of the lantern still upon the ties. She was asked: "Q. How far south of the derail were these blood stains? A. Where it caught him, where he fell in there, just about as far as from here to that post, 10 feet. Q. South of the derail? A. Yes, sir. I picked up some pieces of his lantern with blood on them. Q. blood was on the ties? A. Yes, sir;

and on the inside; seems as though he had either drug himself; the blood went along that way. Q. There was a trail from that spot eastward, and down from the bank? A. Yes, sir; he had drug himself away from the track. Q. In a southeasterly direction? A. Yes, sir; a puddle right where he had laid when he was holding his arm like that (indicating)."

All this occurred before daylight, while it was so dark that the train ahead was still using its hind lights, and Grant, to examine the switch, used his lantern.

Whatever McDougal saw of Grant after the gangway passed him was only a hasty backward glance along the side of the tank, unaided by the headlight or any other light, except possibly that of Grant's lantern.

J. W. Thrasher testified that he lived on the east side of the railroad, the closest house to the track at that point, being a distance of about 80 yards. He had been up all night with a sick relative, and had just returned home and entered his house and had not taken off his clothes. As he stepped inside the door, the train was passing along in front of his house, and while it was passing he heard Grant's cries. Asked when he heard the shouting with reference to the time the train was passing, he said: "He bellowed during the time the train passed."

* * * Q. Was the train which you saw passing when you first heard the scream a freight train or a passenger train? A. It was a freight train. Q. Which way was it going? A. Going north. Q. On what track? A. Stock track." Thrasher immediately went to the track, and there he found Grant. When Thrasher reached the track, he found Grant near the ends of the ties at the foot of the embankment on the east side, about 10 feet from the east rail. Some other person, whom Thrasher did not know, who was not produced as a witness, and who has not been identified in the testimony further than that he was some brakeman, came up at the same time Thrasher reached Grant. Grant's position when Thrasher reached him was, as Thrasher thinks, about two rail lengths or 60 feet southeast of the derail. Grant had dragged himself from near the derail, where he was injured, southward and eastward to the point where Thrasher found him. When Thrasher reached him, he noticed Grant's lantern, smashed but still burning, somewhere between Grant and the track, he rather thinks it was up on the ends of the ties, but cannot say whether it was inside or outside of the rail, nor locate the lantern or its fragments definitely.

Grant's injured arm was amputated at once by a surgeon, but his injuries were so severe that he lived only about 18 hours, and died at about 11 o'clock the night of the day he was injured, August 15, 1907.

Defendant's car inspector, Monroe, testified that, although he did not inspect the engine or tender, their inspection was not in the line of his duties, he did inspect the cars of Grant's train, and that there was nothing wrong with the handholds on any of them, or anything wrong with any of the equipment of the cars; that all were in perfect order. This is confirmed by the engineer.

There was nothing in the handling of the train to cause the injury, no jar, and from the time the train started in on the siding until it came to a stop with the engine at the north end, a distance of 25 or 30 car lengths, it ran very slowly, about as fast as a man would walk, and the train "just moved slowly and regularly right up there and came to a stop at the proper place." "Q. No jerk, jar, collision, derailment, or any unusual accident? A. No, sir. Q. Just a slow running of the train? A. Yes, sir. Q. When you got up to the stopping point and stopped your engine, had you missed Grant? A. I never missed him until then. Q. You didn't miss him until you brought your engine to a stop? A. No, sir. Q. You didn't know

anything had happened? A. Some one came running up and said one of the boys was hurt. Q. That was after you brought your engine to a standstill? A. Yes, sir. Q. That was the first time you had missed Grant? A. Yes, sir."

The foregoing statement of the substance of plaintiff's evidence, and upon which she relies for a recovery, is as strong or stronger than the record warrants—colored somewhat, to say the least, in her favor.

Cyrus Crane, George J. Mersereau, Samuel W. Sawyer, and Hugh E. Martin, all of Kansas City, for appellant. E. H. Gamble, of Kansas City, for respondent.

WOODSON, J. (after stating the facts as above). I. The chief contention of counsel for the defendant is that the evidence introduced is not sufficient to sustain the verdict of the jury, and for that reason the judgment should be reversed. In response to this contention we are met with the suggestion of counsel for the plaintiff that the decision of the Court of Appeals rendered upon the former appeal is *res adjudicata* of that question, the law of the case, and not subject to review by this court on this appeal. In reply to that suggestion we are cited to the cases of *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, loc. cit. 115, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554, and *Paddock v. Mo. Pac. Ry. Co.*, 155 Mo. 525, loc. cit. 534, 56 S. W. 453.

[1] The ruling announced in those cases is a complete refutation of plaintiff's suggestion. In the former this court said:

"The contention that the decision of the Kansas City Court of Appeals is *res adjudicata* and binding upon this court is untenable. The cases cited by the learned counsel apply only where the second appeal is taken to the same court that formerly decided the case. This court has not decided this case before, and the decision of the Kansas City Court of Appeals is not binding on this court."

The latter is to the same effect.

Having removed this obstruction from our line of progress we will proceed to consider the evidence relied upon to sustain the verdict of the jury.

[2] In the first place, it must be borne in mind that no one saw the accident which resulted in the injury and death of Arthur Grant; no eyewitness testified upon that subject. Under that state of facts, the law presumes that at the time of his injury the deceased was exercising due care for his own safety; and there is nothing to the contrary in the doctrine announced in the case cited by counsel for defendant, of which the case of *Moberly v. Railroad*, 98 Mo. 183, 11 S. W. 569, is a sample. That doctrine only applies where there is evidence tending to prove contributory negligence on the part of the deceased, which is absent in the case at bar.

Counsel for plaintiff frankly states that his case is made if at all, by inferences drawn from the facts stated, and circumstantial evidence introduced. Now what are those facts,

inferences, and circumstances that counsel rely upon to justify this verdict and judgment? In brief they are these: It was the duty of the deceased to uncouple the engine from the train, which, under the rules and customs of the defendant, entitled him to ride on certain parts of the engine and cars, especially the "gangway between the engine and tank"; that the handhold on the rear end of the tender was broken off, and had been off for several days, but the evidence fails to show that deceased knew that fact; that after he had examined the derailing switch, and after his train had started north on the stock track, he was seen by the engineer, walking south on the east side of the track, meeting the engine; that as the engine moved on northward it passed the deceased, and the engineer thought he was going to get on the gangway and ride to the north end of the yards in order to uncouple the engine from the train; that the last time the deceased was seen before his injury was by the engineer, and he was then (quoting the engineer) "right even with the back end of my tank, about four feet out, as I could judge, from the engine, * * * and was still walking south," and he showed no indication of attempting to mount the rear end of the tender, but was still walking south at a good gait, stooping down, and still headed directly south alongside the train.

No one saw deceased again until the train had run about 1,000 feet, when he was discovered at the bottom of an embankment 10 feet from the track, with his arm crushed; and after the injury was sustained blood was found on the ties and rail near where the engineer last saw the deceased.

The theory of counsel for plaintiff is that the deceased attempted to step on the gangway mentioned at the rear of the tender, and grabbed for the handhold. It being off, he stumbled and fell between the tender and the following car, which ran over and crushed his arm. The Court of Appeals took the same theory of the case, and in discussing this question that court on page 342 said:

"The troublesome point is: Did he receive it while attempting to get on the tender with the missing handhold, or the next car with an outside ladder?—defendant being liable in the former instance, and not liable in the latter. We must presume him to have been in the exercise of ordinary care; and a jury could well conclude that if, with his experience, he had attempted the car with the latter in good order, he would not have fallen, and that therefore he in all reasonable probability was trying to get upon the tender."

The trouble with that theory is that there is not a scintilla of evidence tending to show that the deceased ever attempted to get on either the tender or the car following it, much less by means of the missing handhold or the ladder mentioned. It might with equal plausibility be contended that the plaintiff stumbled and fell over the large cinders, some as large as a man's hat or a

two-gallon bucket, which were strewn along the side of the track. In other words, there is no evidence whatever, direct or inferential, which tends to show what was the real cause of the injury. While it is true the deceased might have been injured in the manner stated, yet there is no evidence preserved in this record tending to show that fact.

[3] No fair-minded, disinterested person can read this record and determine therefrom how deceased was hurt. It will not do to conjecture or guess as to what caused it. The law upon that subject is well settled by the following cases: McGrath v. Transit Co., 197 Mo. loc. cit. 104, 94 S. W. 872; Coin v. Talge Lounge Co., 222 Mo. 488, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888; Kane v. Railway, 251 Mo. 13, 157 S. W. 644; Allen v. St. L. & Southwestern Ry. Co., 189 Mo. App. 272, 176 S. W. 297; Hartman v. Railway, 261 Mo. 282, 168 S. W. 1143; Trigg v. Land Co., 187 Mo. 227, 86 S. W. 222.

This view of the case renders it unnecessary to notice the other errors assigned.

For the reason stated, the judgment of the circuit court is reversed, and judgment is here rendered for the defendant. All concur.

McQUITTY v. STECKDAUB. (No. 19002.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1916. Motion to Modify Judgment Overruled Dec. 20, 1916. Motion to Transfer to Court in Banc Overruled Jan. 2, 1917.)

1. JUDGMENT \Leftrightarrow 194—RENDITION—SEPARATE COUNTS.

Under Rev. St. 1909, § 1971, providing that the judgment upon each separate finding shall await the trial of all the issues, and section 2097, providing that only one final judgment shall be given in the action, the court cannot give judgment on a count in the petition for ejectment before determining the issues on another count to establish plaintiff's equitable title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 354-356; Dec. Dig. \Leftrightarrow 194.]

2. EQUITY \Leftrightarrow 427(3)—PRAYER—GENERAL RELIEF.

Where a petition in equity contains a prayer for general relief, the plaintiff is entitled to any relief within the scope of the pleading which is sustained by the evidence, though not entitled to the special relief prayed for.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1009-1014; Dec. Dig. \Leftrightarrow 427(3).]

3. JUDGMENT \Leftrightarrow 252(5)—PRAYER FOR RELIEF.

Where plaintiff had previously recovered judgment on her contract of purchase against the heirs of the vendor, and later brought suit against the grantee of the heirs under a conveyance of that land and other land who had notice of plaintiff's claim, in which action plaintiff prayed for a reformation of the deed to that grantee so as to exclude the land and for general relief, the court should enter a decree vesting the title in her under the prayer for general relief, though it could not grant the reformation of the deed for want of proper parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 441; Dec. Dig. \Leftrightarrow 252(5).]

4. VENDOR AND PURCHASER \Leftrightarrow 240 — REMEDIES OF PURCHASER—SUIT AGAINST SUBSEQUENT GRANTEE — PLEADING — INNOCENT PURCHASER.

A subsequent grantee from one who had contracted to sell to another must plead in a suit by the prior purchaser that he was an innocent purchaser for value before he can rely on that defense.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 601, 602; Dec. Dig. \Leftrightarrow 240.]

5. QUIETING TITLE \Leftrightarrow 30(3)—SUIT AGAINST SUBSEQUENT GRANTEE—PARTIES.

In a suit against a subsequent grantee with notice to have the title vested in plaintiff under her prior contract for purchase, only the subsequent grantee need be made defendant.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 66; Dec. Dig. \Leftrightarrow 30(3).]

6. EJECTMENT \Leftrightarrow 13—RIGHT OF ACTION—EQUITABLE TITLE.

Ejectment, though a possessory action, is a legal action, and can only be maintained on a showing of existing legal title in the plaintiff, or a legally devised title from a common source.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. \Leftrightarrow 13.]

Appeal from Circuit Court, Boone County;

David H. Harris, Judge.

Action by Harriett McQuitty against D. C. Steckdaub, in which the petition contained a count in equity to have plaintiff declared the holder of the legal title to a tract of land under a contract for its purchase and a count in ejectment to recover possession of the land. Separate judgments for plaintiff on the second count in conformity with a verdict for the defendant on the first count for want of necessary parties, and defendant appeals from the judgment on the second count. Reversed and remanded, with directions.

E. W. Hinton, of Chicago, Ill., and N. T. Gentry, of Columbia, for appellant. J. L. Stephens and H. A. Collier, both of Columbia, for respondent.

BOND, J. I. This is an action in two counts for the recovery of real property; the first in the nature of a suit in equity, alleging that the plaintiff was the equitable owner of the 40-acre tract of land in controversy by virtue of a contract with W. R. Wilhite, since deceased, who owned the property at the time of his death on October 7, 1905; that in January, 1906, plaintiff sued the administrators of W. R. Wilhite, and in February, 1906, obtained a decree vesting title in her, which was reversed by the Supreme Court in March, 1909 (McQuitty v. Wilhite, 218 Mo. 586, 117 S. W. 730, 131 Am. St. Rep. 561), because the heirs of said Wilhite were not made parties; that prior to that time, to wit, November, 1906, one of the heirs of said Wilhite, having acquired the interests of the other heirs, conveyed the 40 acres of land in dispute to the defendant, Steckdaub, who took with full notice of plaintiff's claim of title; that in 1909, after the reversal of her

judgment against the administrators, the plaintiff brought suit for specific performance of the contract of their ancestor against the heirs of said Wilhite, deceased, and obtained a decree divesting title out of them and vesting title in her to said land, which decree was affirmed by the Supreme Court in 1912 (247 Mo. 163, 152 S. W. 598).

The first count of the petition upon the foregoing facts prayed that the deed to Steckdaub be so reformed as to exclude therefrom said 40-acre tract of land, adding a prayer for general relief. The second count of the petition was an action of ejectment in the ordinary form for the recovery of possession of said 40 acres of land, the monthly rents and profits, and damages for withholding the same.

On June 25, 1913, a jury trial was had on the issues joined in the second count, and a verdict was rendered that plaintiff was entitled to possession of the real estate and the assessment of damages in the sum of \$100 and the monthly rents and profits at \$14. This verdict was received and the jury discharged, and thereupon, on the 26th day of June, 1913, the court rendered a judgment on said second count in conformity with the verdict of the jury.

Thereafter, on July 4, 1913, the court rendered a distinct and separate judgment on the first count of plaintiff's petition in the following words and figures (omitting caption):

"Now on this day, this cause coming on for final determination by the court upon the cause of action set out in the first count of plaintiff's petition, same having been heretofore submitted to the court upon the pleadings and proof, and by the court taken under advisement until this day, the court, being fully advised in the premises, doth find that on the 7th day of October, 1905, one W. R. Wilhite died, intestate, in Boone county, Mo., and at the date of his death was the record owner of 40 acres of land described in plaintiff's petition; that on the 5th day of January, 1906, the plaintiff, Harriett McQuitty, filed suit in this court against R. L. Wilhite, I. V. Evans, as administrators of the estate of W. R. Wilhite, deceased, claiming title to said land under a certain oral contract and agreement entered into by and between the said Harriett McQuitty and the said W. R. Wilhite during his lifetime; that on the 23d day of February, 1906, a decree was entered by this court vesting title to said land in plaintiff, but which judgment and decree was reversed by the Supreme Court of Missouri, as shown by the mandate, judgment, and opinion of said court filed with the clerk of this court on the — day of —, 1909; that thereupon plaintiff instituted a second suit in this court against all of the legal heirs of the said W. R. Wilhite, deceased, claiming title to said land under said contract entered into by and between her and the said W. R. Wilhite during his lifetime, and a decree of this court at the October, 1909, term thereof was rendered and entered vesting title to said land in plaintiff, and which said judgment and decree of this court was by the Supreme Court of Missouri in all things sustained and affirmed, as shown by the mandate, judgment, and opinion of said Supreme Court filed with the clerk of this court on the — day of January, 1913. The court further finds that prior to November 1, 1906, one R. L. Wilhite

acquired, by deeds offered in evidence, the interest or title of all the other heirs of the said W. R. Wilhite, deceased, to the land described in plaintiff's petition, and on the 1st day of November, 1906, that the said R. L. Wilhite and wife by warranty deed conveyed said land to the defendant, D. C. Steckdaub; that on that date of said conveyance by said R. L. Wilhite and wife to defendant the said judgment and decree of this court entered in the original action affecting title to said land and brought by plaintiff against the said administrators of the estate of W. R. Wilhite, deceased, had not been set aside or reversed by the Supreme Court of Missouri, and the court finds from the evidence that at the time the defendant purchased said land and accepted said deed from R. L. Wilhite and wife on November 1, 1906, he (defendant) had notice and knowledge of plaintiff's claim of title to said land, and that defendant was not and is not an innocent purchaser for value of said land, but that at the time he purchased same and went into possession thereof he had notice of plaintiff's claim of title thereto. The court further finds as a matter of law, and so declares, that plaintiff cannot be awarded in this proceeding the relief sought in the first count of her petition, for the reason that all persons necessary to a determination of the issues therein joined have not been made a party to this action. It is therefore considered, adjudged, and decreed that plaintiff take nothing by the first count of her petition, and that as to said count defendant go hence without day."

Prior to the rendition of this last judgment, to wit, on June 28, 1913, the defendant moved for a new trial of the issues grounded on the second count of the petition. Upon the overruling of that motion the defendant perfected his appeal to this court.

[1] II. The learned trial judge disregarded the plain mandate of the statute in attempting to render a judgment upon the verdict of the jury on the trial of the second count of plaintiff's petition, before having determined, as chancellor, the issues submitted to him under the first count. The statute is clear and explicit that "the judgment upon each separate finding shall await the trial of all the issues" (R. S. 1909, § 1971), and that "only one final judgment shall be given in the action" (R. S. 1909, § 2097), which single final judgment must dispose of all the issues and all the parties in the case. *Cramer v. Barmon*, 193 Mo. loc. cit. 329, 91 S. W. 1038; *Baker v. St. Louis*, 189 Mo. loc. cit. 378, 88 S. W. 74; *Rock Island Imp. Co. v. Marr*, 168 Mo. loc. cit. 257, 67 S. W. 586; *Warren v. Manwarring*, 173 Mo. loc. cit. 37, 73 S. W. 447; *Mann v. Doerr*, 222 Mo. loc. cit. 10, 121 S. W. 86; *Stone v. Perkins*, 217 Mo. 586, 117 S. W. 717; *Smith v. Kiene*, 231 Mo. 215, 132 S. W. 1052; *Clark v. Sub. Ry. Co.*, 234 Mo. loc. cit. 435, 137 S. W. 583; *State ex rel. v. Fraser*, 165 Mo. loc. cit. 256, 65 S. W. 569; *Russell v. Ry. Co.*, 154 Mo. loc. cit. 431, 432, 55 S. W. 454; *Estes v. Fry*, 166 Mo. loc. cit. 70, 65 S. W. 741; *Holborn v. Naughton*, 60 Mo. App. 103; *Beshears v. Vandalla Bank. Ass'n*, 73 Mo. App. loc. cit. 299; *Seay v. Sanders*, 88 Mo. App. 484; *Pipe Co. v. Railroad*, 137 Mo. App. loc. cit. 512, 119 S. W. 1; *Wollman v. Loewen*, 108 Mo. App. loc. cit. 587, 84 S. W. 166.

[2] In the present case no appeal was taken from the judgment rendered by the court upon the findings made by it, sitting as a chancellor, on the issues joined in the first count of the petition. The only appeal taken was the one perfected by the defendant from the prior judgment rendered by the court on the findings of the jury on the issues joined in the second count. The trial court not only disobeyed the statute in attempting to render a final judgment on the first count of the petition distinct and separate from that rendered on the second count of the petition, but erred in the theory of equitable principles upon which its judgment on the first count was based. That count in plaintiff's petition contained the internal substance of a bill in equity to divest the legal title of defendant to the land in dispute and invest it in the plaintiff as the equitable owner thereof. It is true there was a specific prayer in that count for the reformation of the deed conveying the legal title to defendant; but there was also added a prayer for general relief, and the law is settled that in such circumstances the plaintiff is entitled to any relief within the scope of the allegations in his pleading which is sustained by the evidence adduced on the trial. *McLure v. Bank of Commerce*, 252 Mo. 520, 160 S. W. 1005; *Gibson v. Shull*, 251 Mo. loc. cit. 491, 158 S. W. 322; *Phillips v. Jackson*, 240 Mo. loc. cit. 336, 144 S. W. 112.

[3] III. It follows that the plaintiff's right to relief on the first count of her petition was measured by the equities alleged and the accordant proof adduced on the trial. Where not based on documents and the final judgment of this court (247 Mo. 163, 152 S. W. 598), the evidence was clear, cogent, and convincing as to every fact necessary to establish the title of the plaintiff as the equitable owner of the land in dispute, and fully sustained the specific findings set forth in the above-quoted decree of the court on the issues submitted to it under the first count of the petition. The proper judgment which should have been entered under that count was one divesting the legal title out of the defendant and investing it in the plaintiff, the equitable owner of the property. Upon the facts recited in that judgment this conclusion was a mere matter of equitable sequence. In other words, upon the facts found by the learned chancellor, the proper judgment to be rendered thereon was simply a conclusion of law. The plaintiff's ownership of the property in question rested upon a final decree of this court affirming a judgment divesting all title out of the heirs of W. R. Wilhite, deceased, and investing all the title which they acquired as such in plaintiff through the specific performance of the valid contract made by their ancestor to convey the land to the plaintiff. And while it is true the heirs had conveyed the land to the defendant prior to the obtention of such

decree by plaintiff, yet the evidence demonstrated, and the trial court so found, that this title was acquired by the defendant with full knowledge of the equitable rights of the plaintiff. Necessarily, therefore, plaintiff's title as equitable owner was not affected by such conveyance.

[4] The defendant in this case did not plead in either of his answers to the two counts of the petition that he was an innocent purchaser for value without notice, as he should have done to be entitled to rely on such defense (*Young v. Schofield*, 132 Mo. 650, 34 S. W. 497), and hence it was error to have submitted that issue, as appears to have been done on the trial of the count in ejectment. The evidence, however, was so clear and satisfactory in disproof of that status that it was negatived both by the verdict of the jury and the subsequent finding of the chancellor. Taken as a whole, the documentary and oral evidence adduced on the jury trial and subsequently considered by the court sitting as a chancellor sustained every finding of the chancellor entered upon the consideration of the issues joined on the first count of the petition; and doubtless the learned chancellor would have adjudged a divestiture of the title which the heirs parted with to the defendant and an investiture in the plaintiff, except from a failure to apply the settled rule in equity which governs a petition containing a prayer for general relief. The coextensive relief afforded upon such a prayer with the allegations of the pleadings and proof was not limited by the specific prayer for the reformation of the deed which defendant acquired from the heirs of W. R. Wilhite, as seems to have been the theory of the learned trial judge.

[5] Neither was there any necessity for the joinder of other parties than the defendant to a suit to divest the title he had taken with full knowledge of the equitable rights of plaintiff in the land.

[6] The proper final judgment which should have been rendered on the trial of this case was one granting plaintiff full relief under the equitable action set forth in the first count of her petition, and denying any right to her of recovery under the count in ejectment, for the reason that such action, although a possessory one, is strictly a legal action, and, when based upon an assertion of title, can only be maintained upon a showing of existing legal title in the plaintiff, or a legally devised title from a common source.

For the foregoing reasons the separate judgment in favor of plaintiff on the count in ejectment is reversed, and the cause remanded for retrial in conformity with the views herein expressed and for the rendition of one final judgment which shall dispose of all the issues joined. *Scott v. Realty Co.*, 241 Mo. loc. cit. 122, 145 S. W. 48.

It is so ordered. All concur.

SCHNEIDERHEINZE v. BERG et al.
(No. 17609.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Rehearing Denied
Dec. 20, 1916.)

1. JUDGMENT §504(1) — COLLATERAL ATTACK.

Where a court has jurisdiction of the persons of defendants and the subject-matter of the action, none of its proceedings are open to collateral attack for simple irregularities.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 844; Dec. Dig. §504(1).]

2. PROCESS §70—SERVICE—DEFENDANT NOT FOUND.

Laws 1875, p. 105, repealed Gen. St. 1865, c. 164, § 7, authorizing service of summons, when defendant is not found, by leaving copy of writ with some white member of his family, and in the latter act the word "white" is stricken out.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 84; Dec. Dig. §70.]

3. HOMESTEAD §59—EXEMPTION.

Prior to amendment of the homestead statute by Laws 1887, pp. 197, 198, homestead exemption extended only to lands acquired by deed and not by devise under a will, even though the executor conveyed the land to the devisee upon the devisee's paying to the executor a sum of money, upon the payment of which the devise was conditioned, where the executor had no title or power to convey under the will.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 87; Dec. Dig. §59.]

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

Action by Sybilla Schneiderheinze against Otto Berg and another. From judgment for defendants, plaintiff appeals. Reversed and remanded.

Muench, Walther & Muench, of St. Louis, J. H. Schaper, of Washington, Mo., H. F. Hecker, of St. Louis, and Emil Roehrig, of Warrenton, for appellant. T. W. Hukriede, of Warrenton, and Rosenberger & Dowell, of Montgomery, for respondents.

BOND, J. I. Plaintiff, on September 6, 1911, sued defendants under section 2535 of the statutes to recover a one-half interest in 77½ acres of land in Warren county. Judgment was rendered against plaintiff, from which she prosecuted an appeal to this court.

The evidence disclosed that in the year 1862 George Berg died testate; that under paragraph 2 of his will he devised the land in controversy to his son Gottlieb Berg on condition that he should pay into the hands of the executor named in the will, within 12 months, the sum of \$1,000. This money was paid by the devisee, whereupon the executor executed a deed conveying the land to him as devised in the will. This deed was duly recorded in 1863. The grantee took possession of the land as owner, and at his death, in 1909, devised the property to Gustavus Berg on condition of his paying into the estate of Gottlieb Berg the sum of \$5,000. Dur-

ing the lifetime of Gottlieb Berg, to wit, on November 10, 1875, he and one Charles Mittler signed as sureties a promissory note payable to the plaintiff 6 months thereafter, under her maiden name of Sybilla Keuchlin; that on March 25, 1879, plaintiff brought an action against the two sureties for the amount due on said note. The summons issued in this suit bore the return of the officer executing it:

"Served the within writ in the county of Warren, state of Mo. this the 27th day of Mch., 1879, by delivering a true copy of the same together with a copy of the within petition to the within-named Charles Mittler & by leaving a true copy of said writ at the usual place of abode of the said Gottlieb Berg with a member of his family over the age of 15 years, & on said day and in said Co. Fee \$2.00

"S. B. Cook, Sheriff of Warren County."

The defendants having made default, at the next term of the court plaintiff took judgment for the amount due on said note and, thereafter, at the same term of court, without any notice to the defaulting defendants, procured the setting aside of said judgment and the rendition of a second judgment, May 9, 1879. This judgment is in the name of Sibylla Kreuchlin.

No action was taken by the plaintiff to enforce this judgment until July 3, 1888, when an execution was issued thereon, whereunder the land in controversy was sold to plaintiff and one J. C. Fisher, at and for the sum of \$150, whereupon the sheriff of the county executed a deed to Sybilla Schneiderheinze (plaintiff having married in the meantime) and J. C. Fisher, dated December 3, 1888, which was duly recorded, except that the seal of the court was not affixed by the clerk to his certificate of the acknowledgment of the deed. Twenty-three years after plaintiff's obtention of this deed, the whole of which period the land was in the adverse possession of defendants or their ancestor, the present action was begun. Shortly before this suit Fisher, the coganantee in the sheriff's deed, quitclaimed his interest to defendants for \$500, accompanying it with an affidavit that he owned any and all interest which plaintiff acquired under the sheriff's deed.

The evidence showed that Gottlieb Berg used the land in his lifetime as a homestead for himself and family.

[1] II. In support of the judgment below respondent calls attention to certain subsequent variances in the spelling of plaintiff's name in the proceedings after the filing of her petition, and also to the fact that when plaintiff obtained the second judgment after the vacation of the first, no notice was given to either of the defendants, and to the language of the sheriff's return on the original summons against Gottlieb Berg.

There is no merit in any of these contentions, nor in the further claim that the record

of the sheriff's deed was inadmissible (the original having been lost) because of the failure of the recorder of deeds to transcribe on his books the seal of the court to the certificate of the clerk that the deed had been duly acknowledged. This "farrago of irregularities" is unavailable as attacking the validity of the title devolved on plaintiff under her suit to recover the amount of the note, for the reason that if the court in that case was possessed of jurisdiction of the persons of the defendants and the subject-matter of the cause of action, then none of its proceedings are open to the collateral attack attempted to be made in the instant case. *Rivard v. Railroad*, 257 Mo. loc. cit. 168, 165 S. W. 763; *Lovitt v. Russell*, 138 Mo. loc. cit. 482, 40 S. W. 123.

It follows that the only inquiry on this appeal is whether the court acquired jurisdiction of the person of Gottlieb Berg, the ancestor of defendants, through the return of service of process made by the sheriff, which is quoted above.

[2] It is erroneously stated in the brief of respondent that the sufficiency of this return must be judged by the provisions of the General Statutes of Missouri of 1865, § 7, which, with reference to service of process upon several defendants, provides as to those who are summoned subsequently to the first defendant, that the service must be made in case such later defendants are not found, by leaving a copy of the writ at the usual place of abode of the defendant with some (white) person of his family over the age of 15 years. Gen. Stat. Mo. 1865, § 7, c. 164. That statute was repealed by the substitution of another mode of service upon such defendants in the Acts of 1875, p. 105, where it will be seen the word "white" is stricken out. This act of 1875 took effect from and after passage, and was in full force and vigor when the sheriff made his return on March 27, 1879, in strict conformity with the statute then regulating the service of process in such cases. This substitutionary statute was evidently overlooked by the learned counsel for respondent. We therefore conclude that the court was in possession of jurisdiction of the person of Gottlieb Berg, through the above-quoted return of the sheriff at the time plaintiff commenced her suit and recovered her judgment.

III. It is further contended by respondent in support of the present judgment that the bar of the statute of limitations attached. This is a misconception of the law. The statute expressly provides, in the case of a married woman suing to recover her lands, that the bar does not become absolute until after the lapse of 24 years. R. S. 1909, § 1881; *Graham v. Ketchum*, 192 Mo. 15, 90 S. W. 350. In this case the evidence is undisputed that the plaintiff was a married woman at the time she obtained the sheriff's deed to

the land in controversy and remained so to the date of the trial, and that the suit was begun within 24 years after the sheriff's deed to her.

[3] IV. The next contention of the learned counsel for defendants is that the sale is void because the land in question was used by the ancestor of the defendants as a homestead. There is no merit in this contention. The land was acquired not by deed, but by devise under a will, and the rule in this state prior to 1887 was that the homestead was exempt from any indebtedness sought to be enforced against it which arose after the filing for record of the deed creating the estate; but was not protected against such indebtedness if the homestead was acquired by a will or by descent cast. Session Acts 1887, pp. 197, 198; *Clark v. Thias*, 173 Mo. loc. cit. 648, 73 S. W. 616; *Spratt v. Early*, 169 Mo. 368, 69 S. W. 13; *Loring v. Groomer*, 142 Mo. 1, 43 S. W. 647.

In this case the title of defendants' ancestor accrued through a devise in the will of his father, he took nothing under the deed of the executor who had neither title nor power to convey under the will. *Barnard v. Keathley*, 230 Mo. loc. cit. 227, 130 S. W. 306; *Thorp v. Miller*, 187 Mo. loc. cit. 239, 38 S. W. 929; *Sturgeon v. Schaumberg*, 40 Mo. loc. cit. 483, 92 Am. Dec. 311.

It follows, in this case, that the judgment was erroneous. It is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion. All concur.

REYNOLDS v. WHITEMORE (No. 18179.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Motion for Rehearing
Overruled Dec. 20, 1916.)

1. INSURANCE — 32 — INSURANCE COMPANIES — ORGANIZATION.

Under Rev. St. 1909, § 6900, providing for preliminary incorporation of insurance companies solely to secure subscriptions to capital stock, such embryo corporation has no power to pay commission for the sale of or subscription to its stock out of the amounts paid by the subscribers.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 37; Dec. Dig. — 32.]

2. INSURANCE — 32 — PRELIMINARY ORGANIZATION OF COMPANIES — BURDEN OF PROOF.

One receiving from an insurance company, tentatively organized, as provided by Rev. St. 1909, § 6900, for receiving subscriptions to capital stock, money of such corporation in payment of the debt to him of a promoter thereof has the burden of showing that such promoter was either the beneficial owner of the money, or that he had authority from the company to appropriate it to his own personal use, especially where the debt is of questionable origin.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 37; Dec. Dig. — 32.]

3. INSURANCE \Leftrightarrow 32—ORGANIZATION OF COMPANY—PROMOTION EXPENSES.

The advancement of money for promotion expenses of a corporation tentatively organized to secure subscriptions, under Rev. St. 1909, § 6900, does not create an indebtedness against the preliminary corporation or the subscribers, even though the money is used in connection with securing subscriptions to the stock.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 37; Dec. Dig. \Leftrightarrow 32.]

• Appeal from St. Louis Circuit Court; Leo S. Rassleur, Judge.

Suit by Matt G. Reynolds, receiver, against F. Churchill Whittemore. From judgment for plaintiff, defendant appeals. Affirmed.

This is a suit by the receiver of the Continental Assurance Company to recover certain payments alleged to have been made from the funds of the company. The petition is in the ordinary form for money had and received, and is in three counts. The first is to recover money paid on a check for \$138.25, dated December 27, 1909, in favor of the defendant and signed Harry B. Gardner, secretary; the second for \$93.17, paid on a similar check dated October 18, 1909; and the third for \$10,000, the amount of a cashier's check of the Third National Bank of St. Louis, dated November 17, 1909, in favor of the Continental Assurance Company, which was purchased and paid for by a check for that amount dated November 17, 1909, payable to cash, and signed the same as the others. The three checks signed by Gardner, secretary, were drawn against the funds of the assurance company on deposit in the Third National Bank. The two small ones described in the first and second counts were delivered to defendant, cleared through the usual channels, and paid; the defendant receiving the funds for which they called. The cashier's check was indorsed to defendant by the payee, Gardner signing its name as secretary, and was duly presented and collected from the bank issuing it.

These payments to the defendant were made under the following circumstances: A number of gentlemen, including Mr. Harry M. Coudrey, Harry B. Gardner, and W. W. Steele, associated themselves together, as provided in article 2, c. 61, of the Revised Statutes of Missouri, 1909, to organize a life insurance company. The gentlemen named had all been in the life insurance business, and as corporators took the steps required by section 6898, and on April 24, 1909, received the certificate of incorporation authorized by section 6900. The capital stock of the company was fixed at 50,000 shares of the par value of \$10 per share, in addition to which it was proposed that it should be issued at a price which would provide a substantial surplus.

At the first meeting of the corporators, held March 31, 1909, Coudrey was elected president and Gardner secretary, and a resolu-

tion was introduced appointing the latter fiscal agent of the company, and authorizing him to "sell" the entire issue of stock at certain prices named, and to receive as compensation therefor a commission of 24 per cent. based on the selling price. For this compensation he was to pay all the expenses of every kind and nature incurred in the "sale" of the stock. Mr. Gardner employed Mr. Coudrey and Mr. Steele to assist him in making these sales. Both these gentlemen owed insurance companies for whom they had been working for premiums collected by them and not yet turned over, and those companies employed the defendant to collect these sums as trustee for the companies interested. None of them had any claim against the Continental Assurance Company other than the amount to be paid them by Gardner from the proceeds of the arrangement embodied in the resolution referred to. Mr. Gardner testified for the defendant that the company owed him on no other account, and that he only got money under that contract, and understood that he was working for nothing if that contract was not any good. He agreed to accept Coudrey's order in favor of defendant for \$17,500, and did so, and the \$10,000 paid upon this cashier's check was in part payment of that order. The checks described in the first and second counts of the petition were payments of a small indebtedness of Steele assumed by Gardner.

Mr. Gardner had, prior to the issue of the preliminary certificate, advanced nearly \$17,000 "for promotion expenses," which does not appear to have been credited to him on the books of the company. At the date of the payments to defendant he had a credit of \$31,000 on the books on account of the sales of stock.

Other facts appearing in the record will be noticed, if necessary, in this opinion.

Nagel & Kirby, of St. Louis, for appellant. John S. Leahy and Chase Morsey, both of St. Louis, for respondent.

BROWN, C. (after stating the facts as above). [1] 1. The principal points involved in this controversy have been settled to our complete satisfaction in *Ellerbe v. National Bank*, 109 Mo. 445, 19 S. W. 241, and *Taylor v. Insurance Company*, 286 Mo. 283, 181 S. W. 8, in both of which the powers which the embryo life insurance company possess during the tentative stage, attained under the provisions of section 6900 of the Revised Statutes of 1909, do not include the power to pay commission for the sale of its stock out of the amounts paid by subscribers as capital to be used in the transaction of its insurance business when all the stock shall have been subscribed. The only business they are authorized to transact is to accumulate that fund subject to the correlative duty to preserve it intact for the purpose to which it is appropriated

by the terms of the statute. The expectation of personal gain which the corporators may have in mind in the promotion of the enterprise must find something upon which to feed other than the trust fund so created. It is the plainly expressed policy of the law that this be kept intact for the security of prospective policy holders. Mr. Gardner expressed it with much force when he testified: "I was working for nothing if that contract wasn't any good."

2. The money sued for was taken from the funds of the assurance company to pay the personal debt of Mr. Gardner. The defendant does not claim that it owed him a dollar. The cashier's check bore upon its face the evidence that it was the property of the company to which it was payable. He could only turn it into money by the indorsement of the company. The two small checks were drawn upon the company's deposit, and he took this money as the money of the company to pay the debt of Steele. The company itself had no more right to appropriate its funds to pay these debts than the defendant had to receive it for that purpose with full knowledge of its ownership.

In receiving the small checks in payment of his demand upon Steele the defendant acted openly, and used the ordinary method by which money is drawn from a checking account. The next statement of the bank would, if made in the ordinary way, constitute notice to the assurance company that these checks had been drawn and paid, and the checks themselves, in the ordinary course of business, would be returned to the drawer. The \$10,000 transaction was different. The amount was so large that its payment to a stranger would necessarily attract attention, and for some reason, which it is not necessary for us to attempt to characterize, a different method was adopted. The check upon which the money was drawn from the company's account was made to "cash" as if the currency had been drawn by the company itself over the counter, and the proceeds taken in a cashier's check payable to it; and this cash item was thereupon indorsed in its name by Gardner, as its secretary, to the defendant, and cleared through the Merchants-Laclede National Bank, in which the defendant kept an account.

[2] We have stated these circumstances, which are unquestioned in the case, to direct attention to the fact that the defendant received the whole amount of money involved in this suit, knowing at the time that it was the money of the assurance company, and taken from its bank account by Gardner to pay his own debt. If the defendant can be permitted to justify this by showing that Gardner was a creditor of the company, from which he was collecting with one hand while paying his own debt with the other, the burden is upon him to do so; for it will not be presumed that unknown facts exist which

justify one who, without any claim of his own, takes or assists in taking the property of another. Having taken this money, the burden is upon the defendant to show by evidence that Gardner was either the beneficial owner of the fund, or that he had authority from the owner to appropriate it to his own personal use. *Bank v. Edwards*, 243 Mo. 663, 147 S. W. 978, and cases cited. This principle applies with peculiar force to this case, in which the defendant did not invest a dollar in the transaction, but took the money of the assurance company to pay a debt of questionable origin, requiring, as he testifies, prompt measures for its collection.

[3] 3. As we have already said, an insurance company, under the authority conferred by section 6900, has no power to make a contract to pay out of the proceeds of its stock, a commission for securing its subscription. While in this case we might rest upon the statement of Mr. Gardner that he had no claim other than under the terms of the so-called contract we have mentioned, he claims to have advanced about \$17,000 for promotion expenses, and had the right to use the company's money to pay his debts to that extent. In connection with this claim it is proper to notice the fact that the preliminary certificate was not issued until April 24, 1909, while the resolution, which was never voted on, was introduced at a meeting of the corporators held on March 31, 1909, and slept quietly until the appointment of this receiver. Mr. Gardner testified that he advanced money to the company, which, of course, meant the promoters, in December, 1908, and January, February, March, and April, 1909, before any stock was sold or offered for sale, and that no part of it had been refunded to him by the company on November 17th, when the \$10,000 was paid defendant. It appeared that no part of it was paid to the preliminary corporation, but was simply a fund for the advancement of a scheme which existed only in contemplation of the promoters, of whom Gardner was one, and had not yet acquired the right to do anything, even in the line of the limited powers of the subsequent organization. The court very properly held that it did not constitute an indebtedness of the company, and struck out the statement. The preliminary corporation had no power to assume an indebtedness contracted by the promoters; and, had the money been afterward used in connection with securing subscriptions to the stock, the subscribers would be under no obligation to return it. The so-called contract or resolution of the promoters, of March 31, 1909, which Mr. Gardner admits was the foundation upon which his entire activity was exerted, provided that he should "pay the expense of every kind and nature incurred in the sale of the company's stock," and the right to money advanced to pay these expenses would, as to the company, fall with

the contract itself. The disposition of the money which may be left after the subscribers shall be satisfied is not before us.

4. Mr. Steele was called as a witness in behalf of defendant, and during his examination the court held that it was not competent to show that either Mr. Gardner or the insurance company was indebted to him on account of commission for the sale of stock. He was asked, "For what were they indebted to you?" The court remarked, "If it is on account of stock, you had better not bring it out." Defendant's counsel then said, "Strike out that question." Having held that the company had no power to contract for the payment of commissions for the sale of its stock, it follows that the court was right in its ruling. By withdrawing the question the defendant admitted, in effect, that the purpose of the evidence sought to be introduced was to prove an indebtedness of that character.

The judgment of the trial court is affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

FIRST NAT. BANK OF STRONGHURST, ILL., v. KIRBY et ux. (No. 19027.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Motion for Rehearing
Overruled Dec. 20, 1916.)

1. DOWER \Leftrightarrow 49(4)—POWER OF DISPOSAL.

In view of Rev. St. 1909, § 2788, providing that the wife may relinquish her dower by joint deed with the husband acknowledged and certified, and section 8304, providing that a married woman shall be deemed a feme sole, so as to carry on business, did not enable her by a simple deed without acknowledgment and certification, to pass her inchoate right of dower in real estate owned by the husband.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 158-162, 165, 166, 174; Dec. Dig. \Leftrightarrow 49(4).]

2. DOWER \Leftrightarrow 29—NATURE OF INTEREST.

An inchoate right of dower prior to the death of husband is a contingent right and in no sense vested, but a mere expectancy or possibility incident to the marriage relation, contingent on survival.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 81; Dec. Dig. \Leftrightarrow 29.

For other definitions, see Words and Phrases, First and Second Series, Dower.]

Appeal from Circuit Court, Knox County; Charles D. Stewart, Judge.

Suit by the First National Bank of Stronghurst, Ill., against Charles W. Kirby and wife. Judgment for defendant Charles W. Kirby and for plaintiff against defendant Adda Kirby, and she appeals. Reversed and remanded, with directions.

See, also, 175 S. W. 926.

This is the second action brought by plaintiff against defendants in the circuit court of Knox county, Mo., to foreclose the same mortgage on 200 acres of land in said county, the legal title to which stood in the name of defendant Charles W. Kirby at the time of the execution of said mortgage. The defendants are husband and wife, and reside at Stronghurst, Ill. Plaintiff is engaged in the banking business in said city.

On October 15, 1909, defendants executed and delivered to Elmer E. Taylor four promissory notes, aggregating \$7,500, due five years after date, which were attempted to be secured by a mortgage for said amount on the Knox county land aforesaid. Said notes and mortgage were signed by defendants, but the mortgage was never acknowledged. The above notes and mortgage were duly assigned to the plaintiff, and the latter is still the record owner thereof.

On April 12, 1911, plaintiff instituted in the circuit court of Knox county aforesaid an action, numbered in said court 6901, against the present defendants, to foreclose said mortgage. Defendant Adda Kirby filed her separate answer in said cause, and alleged therein that at the time said mortgage was signed she was the wife of her codefendant; that they were then the owners of said 200 acres by the entirety; that the loan was for the sole use of her husband, and that she received no part of the money advanced; that the deed was never acknowledged by her; that the money loaned by Taylor to her husband belonged to plaintiff, and that the loan was made through Taylor to avoid the provision of the national bank act (Act June 3, 1864, c. 106, 13 Stat. 99), limiting the amount the bank might loan to one person to 10 per cent. upon its capital, which was only \$35,000; that the plaintiff had no lawful authority to loan upon Missouri lands as security; that for these reasons the mortgage was void, and she asked that the same be canceled. Elmer E. Taylor was the cashier of plaintiff, and the \$7,500 loaned was the property of the latter.

On December 22, 1911, the circuit court, in disposing of case 6901, rendered a judgment and decree of foreclosure against the interest of defendant Charles W. Kirby in the land aforesaid, but as a part of the same judgment decreed that said mortgage was never acknowledged by said defendants or either of them, and that said "mortgage deed is null and void and of no effect as to the interest of said Adda Kirby in and to all said real estate." The plaintiff in said cause filed a motion for a new trial, setting up that the judgment on all issues should have been for plaintiff against both defendants, which was overruled, and an appeal taken to this court. We reversed and remanded the cause, for the reason that there was no final judgment rendered in the case discharging Adda Kirby

from the suit, or even awarding her costs. 175 S. W. 928. We likewise held that:

"No cause of action existed in favor of the plaintiff at the time the suit was brought." 175 S. W. 928.

The case having been tried throughout on the theory that defendants were tenants by the entirety, we expressed our views of the law upon this subject, but did not consider or decide whether the inchoate right of dower of defendant Adda Kirby was conveyed by said mortgage.

On March 23, 1915, plaintiff instituted in the circuit court of Knox county aforesaid the present action against Kirby and wife to foreclose said mortgage, the foregoing notes having become due, and the defendants filed separate answers in said cause.

The opinion and mandate of this court in case 6901 was filed in the circuit court of Knox county on May 1, 1915. On June 10, 1915, plaintiff dismissed said cause as to defendant Adda Kirby.

Charles W. Kirby filed his separate answer in the present suit on June 7, 1915, and pleaded former adjudication.

(1) The separate answer of Adda Kirby filed herein, among other things, sets out the proceedings in case 6901, supra, which culminated in a decree of foreclosure of her husband's interest in said land, which was not appealed from. (2) She pleads said judgment in her own behalf, holding said mortgage to be null and void as to her interest in said land. (3) She avers that John W. Harkness and wife on March 2, 1896, conveyed the land in controversy to Charles W. Kirby, and that she signed said notes solely as the wife of said codefendant. (4) She alleges that she has no interest in said land that is subject to sale under said trust deed or any decree rendered thereon, etc. (5) She avers that said cause 6901 was, on June 10, 1915, dismissed as to her, and that, as plaintiff foreclosed its deed of trust as to the interest of Charles W. Kirby in said land, it cannot split its cause of action and foreclose said deed of trust as to her inchoate right of dower in said land, or any other interest she may have therein.

Plaintiff's reply, sets out in substance the proceedings in case 6901 aforesaid.

The testimony taken in the trial of case 6901 was preserved by bill of exceptions and offered in evidence without objection in the present case. J. C. Dorian testified at the former trial, as shown by above bill of exceptions, that \$500 would be a reasonable attorney's fee for foreclosing said mortgage, when contested.

At the conclusion of the testimony defendant Charles W. Kirby interposed a demurrer to the evidence, which was overruled. Defendant Adda Kirby asked the court, before a decision was announced, to find the facts as stated in her written request, numbered 1 to 8, inclusive. Paragraph 2 of the pro-

posed finding of facts asks the court to determine:

"(2) Whether the defendant Adda Kirby has any other or greater right in the real estate in question than an inchoate right of dower?"

The court refused to answer this question, and an exception was saved as to its ruling thereon. Thereupon defendant Adda Kirby asked 14 instructions, numbered from 1 to 14, inclusive. The first and tenth were given as asked, and the remainder refused. The first, in substance, declared that the mortgage in controversy was never acknowledged by Adda Kirby. The tenth, in substance, declared that the present suit could not be maintained against defendant Charles W. Kirby.

The trial court in its decree, after setting out its findings of facts as to the uncontroverted testimony, found that the above mortgage was never acknowledged by defendants or either of them,

"but the court finds and holds that said deed of trust or mortgage deed is a good and sufficient conveyance as between the parties to this suit, and that same is in full force and effect as a deed of trust or mortgage and is binding upon the interests of said defendants in and to all above-described real estate."

The court found that the defendant Charles W. Kirby should go hence without day and recover his costs. The court further found:

"That the said deed of trust or mortgage deed is in full force and effect, and is binding upon the interest of the defendant Adda Kirby; that all of her interest of whatsoever kind or nature in and to the real estate described in said deed of trust or mortgage deed * * * be sold by the sheriff of Knox county, Mo., at public vendue, to the highest bidder," etc.

An attorneys' fee of \$500 was taxed in favor of plaintiff's counsel for prosecuting this action.

Defendant Adda Kirby in due time filed her motions for a new trial and in arrest of judgment. Both motions were overruled, and the cause duly appealed by her to this court.

O'Harras, Wood & Walker, of Keokuk, Iowa, J. C. Dorian, of Edina, and Boyd & McKinley, of Keokuk, Iowa, for appellant. F. H. McCullough, of Edina, and W. C. Ivins, of Stronghurst, Ill., for respondent.

RAILEY, C. (after stating the facts as above). I. It is insisted by appellant that the execution by herself and husband of the unacknowledged mortgage read in evidence and sought to be foreclosed in this action was ineffectual to pass her inchoate right of dower in the land described therein. On the other hand, respondent contends that section 8304, R. S. 1909, made the wife's inchoate right of dower a part of her estate and conferred upon her the right to sell and dispose of the same by an unacknowledged deed, without any reference to her husband.

We have examined with care and a great deal of interest, the laws of many states relating to married women, but have been unable to find therein any principles announced

which have not already been considered by the appellate courts of this state in dealing with the above subject. It would serve no good purpose to review the legislation in this state relating to the law of married women, as the subject was fully considered in the two cases of *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13, and *Farmers' Exchange Bank v. Hageluku*, 165 Mo. 443, 65 S. W. 728, 88 Am. St. Rep. 434. In each of these cases the wife undertook to convey her legal estate, without her husband joining in the conveyance. In each case the wife had acquired title to the real estate attempted to be conveyed after the passage of the married woman's act, *supra*.

In *Brown v. Dressler*, Judge Brace, speaking for this division, ruled that a married woman could convey her real estate held as in common only by jointly with her husband executing, acknowledging, and certifying the conveyance, as required by section 2396, R. S. 1889. All the then members of this court concurred in Judge Brace's opinion. The same legal proposition came before the court en banc in the *Hageluku* Case, *supra*, and the *Brown-Dressler* decision was in terms overruled, in an opinion filed by Judge Sherwood, to which Judges Brace, Valliant, and Gantt dissented.

While the principles of law declared in the *Hageluku* Case have since been followed by this court, and are now considered as settled, yet a careful consideration of these two cases will indicate that the able members of the Supreme Court who were then on the bench were nearly evenly divided over the question as to whether the wife could convey her legal estate acquired subsequently to the adoption of the married woman's act of 1889 without her husband joining in a deed and acknowledging same with the wife.

[1] We are now asked to go one step further, and hold that the General Assembly of this state, in the adoption of section 8304, *supra*, intended to make the wife's inchoate right of dower a part of her separate or legal estate, with the right to sell and dispose of same, without her husband joining in the conveyance, and without any acknowledgment upon the part of either. If section 8304, *supra*, contemplated that the wife, under the circumstances of this case, should be placed upon the same plane as an unmarried woman, with full power and authority to sell and convey her inchoate right of dower, without her husband joining in the conveyance, and without any acknowledgment of the instrument on her part, it would undoubtedly follow that such inchoate right of dower could be levied upon and sold under an execution issued in due form against the wife. Should the inchoate right of dower be sold under execution against her, and a deed be made to the purchaser therefor, it would practically destroy in many cases the commercial value of the fee-simple title. The owner of the fee, in case he desired to sell,

would be left at the mercy of an unfriendly owner of the inchoate right of dower, and might be compelled to pay an exorbitant consideration for a release of such interest. Was it not the intention of the lawmaking power to require the husband and wife to join in a deed when disposing of the inchoate right of dower, in connection with the estate conveyed, in order to avoid the injurious consequences that might follow, and especially as above indicated? Section 8304, *supra*, does not require the husband to join the wife in respect to any conveyance made thereunder. The requirement so to do, where the inchoate right of dower is attempted to be disposed of, is found in section 2788, R. S. 1900, where it is said:

"A husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed acknowledged and certified as herein provided."

Section 901, R. S. 1899, was repealed by the act of 1905 (page 94) and said section 2788 enacted in lieu thereof. Hence we find that the General Assembly in 1905, after the passage of the married woman's act of 1889 in the form of a new enactment, still required the husband and wife to join in the conveyance where the inchoate right of dower is conveyed, and to have the conveyance acknowledged by both. While the Legislature, in the repeal of section 901, R. S. 1899, and the enactment of 1905 in lieu thereof, as it appears in section 2788, R. S. 1900, used the same language, in regard to requiring husband and wife to join in the conveyance and acknowledge same when the inchoate right of dower is attempted to be disposed of, as appeared in the statute under the head of "Conveyances," which were in existence prior to the adoption of the married woman's act, yet it is persuasive evidence of the fact that the attention of the General Assembly was called to this re-enactment of the old law, notwithstanding the married woman's act, previously adopted. If the lawmakers had intended that the inchoate right of dower might be disposed of by the wife, as contemplated in section 8304, *supra*, it would have been an easy matter to have said so, and to have refrained from re-enacting the old law, which required the husband and wife to join in the deed and acknowledge same, etc.

[2] We have no disposition to curtail by judicial construction the beneficent provisions of section 8304, *supra*, enacted for the benefit of married women, in respect to their contractual and property rights. Nor, on the other hand, are we allowed to invade the province of the lawmaking power, and give to said section a construction at variance with the intention of the lawmakers in respect to same. Appellant simply had an inchoate right of dower in the real estate described in the mortgage. It is a contingent right, the value of which depends whol-

ly upon the death of the husband. *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38. It may be terminated at any time by the death of the wife. It is in no sense a vested right growing out of the contract of marriage, but is a mere expectancy or possibility incident to the marriage relation, contingent on her surviving the husband.

The General Assembly of this state, after adopting the married woman's act of 1889, continued throughout subsequent revisions section 2788, R. S. 1909, and other sections, which contemplate that the wife, in order to convey her inchoate right of dower, must join in a deed with the husband and both must acknowledge same. We think it would be doing an injustice to the lawmakers of this state to hold that in the enactment of section 8304, supra, it was intended to classify the inchoate right of dower as the separate property or legal estate of a married woman, so as to make it liable on execution for the payment of her debts.

It was frankly admitted by respondent's counsel at the oral argument before us that the inchoate right of dower belonging to a married woman could not be levied upon and sold under execution for the payment of her debts, but it was contended that she had the legal right, under section 8304, supra, to sell or dispose of same if she saw fit to do so. This latter contention does not appeal to us as being sound. If the Legislature, in the enactment of section 8304, intended that the inchoate right of dower should be classed as a part of the married woman's property attempted to be covered by said section, then she has the legal right to convey same by her own unacknowledged deed, without any reference to her husband. Considering the dower interest as property, under said section, it is clearly vendible under execution against the wife; and it would be illogical to hold otherwise. We are satisfied that the Legislature never intended section 8304, supra, to cover the dower interest of a married woman in her husband's real estate, but, on the contrary, intended that the conveyance of same should be governed by the provisions of section 2788, R. S. 1909, which requires the husband and wife to join in the deed and acknowledge same.

On the undisputed facts disclosed by the record, we hold, as a matter of law, that the act of appellant in signing the unacknowledged mortgage in controversy was ineffectual to pass her inchoate right of dower in the real estate described in the mortgage.

II. We have carefully read and considered all of the authorities in the respective briefs on file, as well as those referred to by counsel for respondent since the oral argument of this cause. The Missouri cases cited do not deal with the question as to whether section 8304, supra, authorizes a married woman to convey her inchoate right of dower

in her husband's real estate, without joining the husband in a conveyance, etc. On the contrary, the cases to which we are referred relate to the right of the wife to dispose of her legal estate without joining her husband in the conveyance of same.

The case of *Bank of Stronghurst v. Kirby*, 175 S. W. 926, was disposed of in the trial court on the theory that these defendants were the owners of the land described in the mortgage as tenants by the entirety. The case was tried here upon the same theory. We reversed and remanded the case because it was prematurely brought, and because no final judgment had been rendered disposing of Mrs. Kirby's rights in the litigation. In discussing the issues which we anticipated would come up on a retrial of the case, we held that, if appellant and her husband were tenants by the entirety, then her act in signing the unacknowledged mortgage with her husband, and delivering same to plaintiff, passed her interest as tenant by the entirety. The pleadings, however, in the present case, concede that appellant has only an inchoate right of dower in the land described in said mortgage. We neither considered nor passed upon the question now before us in the former litigation. We are satisfied with the conclusion reached in the former case on the record presented therein.

The Illinois cases cited by respondent's counsel have no application to the case in hand, for the obvious reason that section 17 of the Illinois married woman's act of 1874, Laws 1874, pp. 275, 276 (*Bute v. Kneale*, 109 Ill. 656), in express terms authorizes the husband and wife to convey the latter's interest in his land by both joining in a deed therefor, although it may not be acknowledged by her; but the same section provides that:

"In all cases where the interest of the husband in any tract or parcel of land has been divested, by process of law, or otherwise, the wife may, by deed duly executed and acknowledged, release and convey to the purchaser" all her interest in such land.

Mr. Justice Mulkey, in *Bute v. Kneale et al.*, 109 Ill. loc. cit. 657, in discussing the effect of said last-quoted portion of section 17, supra, said:

"But in such case her deed must be duly acknowledged and properly certified, as required by the statute; otherwise it will be inoperative."

This was one of the cases to which we were referred by respondent's counsel since the oral argument of the case.

We find nothing in the cases cited by respondent which would warrant us to affirm judgment in this cause.

III. Having reached the conclusion that respondent is not entitled to maintain this action, we hereby reverse and remand the cause, with directions to the trial court to set aside its judgment in behalf of plaintiff

against this appellant, and to dismiss this cause as to appellant, at the cost of plaintiff.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All concur.

STATE ex rel. KERN, Treasurer of Drainage Dist. No. 1, v. STONE, County Treasurer. (No. 19649.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1916. Motion for Rehearing Overruled Dec. 20, 1916.)

1. MANDAMUS \S 10—CLEAR LEGAL TITLE.

For mandamus to issue, relator must have a clear legal right to the thing demanded, and it must be the imperative duty of respondent to perform the act required.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 37; Dec. Dig. \S 10.]

2. JUDGMENT \S 875(1)—RES JUDICATA—PERSONS CONCLUDED.

Whenever a party is interested in the subject-matter of pending litigation, and is placed in the control and management of the defense thereof, he is just as much bound by the judgment in the cause as the real defendant in whose name the defense is made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1190, 1194; Dec. Dig. \S 675(1).]

3. MANDAMUS \S 5—ANOTHER ACTION PENDING.

Where a drainage district took charge of and conducted the defense of the action of a drainage contractor against the county, it was bound by the money judgment against the county directing that the judgment "be paid and discharged from and out of the funds raised against lands in the drainage district," and the drainage district could not, while appeal was pending from such judgment, maintain mandamus against the county or its treasurer to turn over to it funds claimed by the contractor as applicable to such judgment, to apply the funds to another purpose, such as the maintenance of the drainage ditch.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 35; Dec. Dig. \S 5.]

4. COURTS \S 493(1) — INDEPENDENT JURISDICTION OF UNITED STATES AND STATE COURTS.

When either a state or federal court takes into its jurisdiction a specific thing, that res is withdrawn from the judicial power of the other.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1346, 1348; Dec. Dig. \S 493(1).]

Appeal from Circuit Court, Bates County; Charles A. Calvird, Judge.

Action by the State, on the relation of J. F. Kern, Treasurer of Drainage District No. 1 of Bates County, against John Stone, Treasurer of Bates County. From judgment for respondent, relator appeals. Affirmed.

This is a mandamus proceeding, brought by relator as treasurer of drainage district No. 1, in Bates county, Mo., against respondent, as the treasurer of said county, to compel the latter to turn over to relator, as treasurer aforesaid, \$29,016.16, held by him under

an order of the county court of said county, together with \$1,700 alleged to have been received by said county as interest, on account of the proceeds of sale of drainage bonds.

The record before us is very meager and unsatisfactory, but as the proceedings in the federal court by Wills & Sons v. Bates County, prior to the rendition of the last judgment in said court, are reported in full, in the two cases of Wills et al. v. Bates County et al. (O. C.) 170 Fed. 812, and Bates County, Mo., v. Wills et al., 190 Fed. 522, 111 C. C. A. 354, we will set out some of the facts more in detail, as shown in said reports, than they appear in the record before us, in order that we may be fully advised as to the merits of the present controversy.

Certain citizens of Bates county aforesaid organized drainage district No. 1, under article 4, c. 41, R. S. 1900, known as the "County Court Law." The county court of said county, acting for the drainage district, let a contract, through Bell, the engineer, to Timothy Foohey & Sons, for the construction of a ditch in said county, divided into three sections. The contract and bond given by the contractors were subsequently approved by the county court. On the day of the execution of said contract, Foohey & Sons, assigned and transferred to A. V. Wills & Sons the portion of the contract relating to section No. 3. Wills & Sons obligated themselves to perform the contract relative to section 3, and the work which was done upon said last-named section was performed by them. Separate estimates were made by the engineer of work done by Wills & Sons, as the same progressed, to August, 1908, and 90 per cent. of the total amount was paid by the county court; 10 per cent. being reserved.

During the progress of the work and on the 6th day of August, 1908, the records of the county court show that Wills & Sons stated to said court that they found in the land required to be excavated a large amount of stone, which was not covered by the terms of their contract, and that they could not remove the same under said agreement. It was finally agreed between Wills & Sons and the county court that the work should be continued as formerly by Wills & Sons, without prejudice as to their right to refuse to move the stone, and without prejudice as to the right of the county to contest the claim of Wills & Sons, in respect to said matter. Thereafter Wills & Sons removed said material from the ditch, except the stone, which they insisted they were not required to remove; the county court insisting that they were required, under the contract, to remove same.

On April 3, 1909, Wills & Sons brought suit in the federal court against Bates county and drainage district No. 1 (190 Fed. 523, 111 C. C. A. 354) to recover \$58,000, which

they claimed to be due them for said work. Mr. Smith, who is counsel for relator in this action, appeared in behalf of Bates county and said district, and filed separate demurrers to plaintiffs' petition, in behalf of said defendants. Judge Philip, in disposing of the separate demurrer of the drainage district, in 170 Fed. loc. cit. 813, 814, said:

"Without entering into any detailed discussion, I am of opinion that the demurrer is well taken as to the defendant drainage district. The whole scope and tenor of the statute under which the contract was made indicate that it was made, in effect, under orders of the county court of Bates county, in pursuance of a power conferred upon it by the Legislature. * * * I am therefore unable to see that any judgment could be rendered against the drainage district for the work done by the plaintiffs. The demurrer, therefore, on behalf of the drainage district, is well taken."

The county's separate demurrer to the petition was overruled. It then filed an answer, denying liability, and claimed therein that plaintiffs, under the contract, were required to remove all the material from the ditch, including stone; that they had not done so; and that the engineer had not given any estimates for unpaid work.

At the trial but little evidence was offered, for the reason that the trial court expressed the view that the agreement of August 6, 1908, constituted a new contract which entitled plaintiffs to recover the full amount of the balance due for the work which they had performed, and directed a verdict in favor of plaintiffs and against the county for that amount. Judge Munger, upon the county's appeal from the above judgment, held that:

"The judgment in this case awarded them the entire amount, and to the extent that it exceeded 90 per cent. was clearly erroneous. * * * The evidence does not show that the fund applicable for the payment was exhausted or was insufficient to pay for the completion of the work."

The above judgment was reversed, and a new trial ordered.

Before the second trial, drainage district No. 1 had reorganized under the act of 1913 (Acts 1913, p. 233) as a circuit court district, and this was pleaded by the county as a defense in the last trial before the district court, but the court held that the county was still the proper party to be sued, instead of the district.

Upon the last trial the jury assessed the damages of Wills & Sons at \$42,609.08, and assessed the defendant's damages at \$11,610.77, and thereupon judgment was entered in said court as follows:

"It is therefore considered, ordered, and adjudged that the plaintiffs A. V. Wills, W. V. Wills and Emmett Wills have and recover of and from the defendant Bates county, Mo., thirty thousand nine hundred ninety-eight and $\frac{21}{100}$ dollars (\$30,998.31) so found to be due, together with their costs herein expended, and have execution therefor, the same to be paid and discharged from and out of the funds raised or to be raised by benefit assessments upon and against the lands in drainage district No. 1, Bates county, Mo."

From this judgment an appeal was taken by defendant to the United States Circuit Court of Appeals (238 Fed. —), where the case is still pending.

It appears from the record and briefs on file that the first funds raised by the district by bond issue amounted to \$356,000, and that they were issued in the construction of the drainage system.

It is averred in the petition, in respect to the money sued for, that:

"This fund was a part of a fund of \$170,000 that had been raised by a second bond issue for the doing of additional work, not yet completed, in digging ditches, building bridges, and repairing dikes and other works for the reclamation of lands in the district."

The defendant's return, in this case, among other things, alleges that:

"It is admitted that the funds raised from the bond issue from which the construction work done by Wills & Sons was to be paid had been entirely exhausted, leaving no money in that fund out of which to pay the judgment in their favor, but it is averred that the second fund was raised for the purpose of deepening original ditch and doing new work in the system, but that the work contemplated in the plan for reclamation and for the doing of which the second bond issue was made had been completed, leaving the amount in dispute as a surplus, and that out of this surplus the drainage district was intending to do maintenance work. That Wills & Sons were claiming that this surplus was applicable to the payment of their claim, and that pending the appeal from that judgment the money could not be safely turned over by defendant."

Relator was sworn as a witness, and testified that:

"The board of supervisors has had charge of the defense of the case in the United States court since the reorganization. I remember Mr. Chastain told me if the board would put up a bond to hold the county harmless, the county court would turn the money over, but that would not get us anywhere. If we had the money, we would go ahead and finish the ditch."

The evidence is undisputed that ever since the reorganization of drainage district No. 1 and before the last trial in the United States court, the drainage district, through its board of supervisors, has had charge of the defense of the Wills Case now pending in the Court of Appeals.

The trial court found the issues herein for defendant, denied the writ of mandamus, and entered its judgment in behalf of respondent.

Relator appealed the case to this court.

Thomas J. Smith, of Butler, for appellant. De Witt C. Chastain, of Butler, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. In order that a writ of mandamus may be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of respondent to perform the act required. State v. City of Willow Springs, 183 S. W. loc. cit. 592, 593; State ex inf. v. Kansas City Gas Company, 254 Mo. loc. cit. 532, 163 S. W. 864; State ex rel. v. Hudson,

226 Mo. loc. cit. 265, 126 S. W. 733; State ex rel. v. Bridge Co., 206 Mo. loc. cit. 134, 103 S. W. 1052; State ex rel. v. McIntosh, 205 Mo. loc. cit. 610, 103 S. W. 1071; State ex rel. v. Lesueur, 136 Mo. loc. cit. 459, 38 S. W. 325; State ex rel. Thomas v. Williams, 99 Mo. loc. cit. 303, 12 S. W. 905; State ex rel. Snyder v. Newman, 91 Mo. loc. cit. 451, 3 S. W. 849; Ex parte Ashcraft, 193 Mo. App. 486, 186 S. W. loc. cit. 533; State ex rel. v. Appling, 191 Mo. App. loc. cit. 592, 593, 177 S. W. 751.

In the litigation heretofore mentioned, the United States District Court had jurisdiction over the subject-matter under consideration and also over the persons of Wills & Sons, as well as Bates county, Mo. The drainage district was originally joined as a codefendant with the county, and was removed from said proceedings, through its own action. The county and drainage district possessed a common interest, which had for its purpose, the defeat of the Wills demand. The county's interest is best represented by Judge Munger, in Bates County, Mo., v. Wills, 190 Fed. loc. cit. 526, 527, 111 C. C. A. 358, where it is said:

"The first contention made here upon the part of the county is that it in no manner is liable upon the contract, that the contract was not one made by the county for and on its behalf, but was a contract of the drainage district, and that the drainage district alone is liable. Viewing the legislation of the state relative to these drainage districts, we think it apparent that drainage districts were merely political subdivisions of the county for the special purposes of drainage, and were not at the time the contract was entered into created corporations capable of suing and being sued. The whole proceeding for the establishment of drainage districts, construction of ditches, assessing property therefor, and providing the funds to pay for construction, was vested in the county court. The statute expressly required that the engineer should make the contract for and on behalf of the county.

"We think it apparent that the contract in question was a special contract of the county, differing from its general contracts, in that the funds for the payment of the enterprise were to be collected from the portion of the county only that derived special benefit from the improvement; that the district formation was for the purpose of designating the territorial part of the county to be assessed for the payment thereof."

It is undisputed that since the reorganization of the drainage district, the latter, through its board of supervisors, has had the entire control and management of the Wills Case now pending in the federal court. 238 Fed.—. At the last trial, when judgment was entered against the county, the drainage district had charge of the case, and in the name of the county urged that it was a necessary and proper party to defend the case, but the federal court overruled this contention, and decided that the county was still the proper party to defend the action. The drainage district, in the name of the county, appealed from the last judgment of the federal court, and still has the management and control of the defense in said cause. The above judgment, among other

things, recites, that it is "to be paid and discharged from and out of the funds raised or to be raised by benefit assessments upon and against the lands in drainage district No. 1, Bates county, Mo."

[2, 3] Said district, in view of the facts aforesaid, was just as much bound by the above judgment as Bates county. Whenever a party is interested in the subject-matter of pending litigation, and is placed in the control and management of the defense therein, he is just as much bound by the judgment in the cause as the real defendant, in whose name the defense is made. Titus v. Development Co., 264 Mo. loc. cit. 249, 174 S. W. 432; Wilson v. Drainage District, 257 Mo. loc. cit. 283, 165 S. W. 734; Davidson v. Real Estate & Investment Co., 249 Mo. 474, 503, 155 S. W. 1; Landis v. Hamilton, 77 Mo. 554; Wood v. Ensel, 63 Mo. 193, 194; Strong et al. v. Phoenix Ins. Co., 62 Mo. loc. cit. 299, 21 Am. Rep. 417; Harvie v. Turner, 46 Mo. loc. cit. 448; State, to Use, v. Coste et al., 36 Mo. 437, 438, 88 Am. Dec. 148; Sturdivant Bank v. Hutters, 87 Mo. App. 539, 540; State ex rel. Reeves v. Barker, 26 Mo. App. 487. If the drainage district had been joined as a defendant, in the action now pending in the federal Court of Appeals, and judgment had been rendered against it as well as the county, it would be too plain for argument that the drainage district could not successfully maintain a mandamus proceeding in the state circuit court, against the county, or its treasurer, with above action still pending, to compel the latter to turn over to it the funds attempted to be charged with the payment of said judgment. On the facts disclosed by the record, the drainage district is just as much bound by said judgment as if it were a party thereto, and hence is clearly not entitled to maintain this action.

[4] II. The district court in the case of Wills & Sons v. Bates County, Mo., specified that its judgment for \$30,998.31 should be paid "out of the funds raised or to be raised by benefit assessments upon and against the lands in drainage district No. 1, Bates county, Mo." We are asked by relator to ignore the above judgment and litigation, and to compel Bates county, through its treasurer, to pay over to him the money in controversy, in order that it may be used for purposes other than the payment of above judgment, if affirmed. We express no opinion as to the rulings of the federal court in the case now pending therein.

In State ex rel. v. Williams, 221 Mo. loc. cit. 254, 120 S. W. 747, Judge Gantt, speaking for the court en banc, quoted with approval from the opinion of the Supreme Court of the United States in Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390, as follows:

"These courts do not belong to the same system so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common

superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

After a full consideration of this subject, Judge Gantt (221 Mo. on page 257, 120 S. W. 748) said:

"Jealous as the states are, and of right ought to be, of the powers reserved to them in our dual form of government, it is still the duty of the officials of the state to recognize these powers, which have been granted to the federal government by the states in the formation of our Constitution, and to uphold and respect them so long as the federal authorities keep within the orbits prescribed for them by the organic law."

The principles announced by the court en banc in the Williams Case, supra, have never been overruled or modified, and hence preclude the relator from maintaining this action.

III. On the record in this cause, the conclusion reached by the circuit court is correct, and should be sustained.

The judgment below is accordingly affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All concur, except WOODSON, J., not sitting.

LA VAULX et al. v. McDONALD et al. (No. 17567.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Rehearing Denied
Dec. 20, 1916.)

1. WILLS — NATURE AND EXTENT OF TESTAMENTARY POWERS.

The law favors the right of testamentary disposition subject to the common interests pertaining to the marriage relation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. —1.]

2. WILLS — APPLICATION TO WILLS IN GENERAL.

The intention of the testator governs the construction of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. —439.]

3. WILLS — CONSTRUCTION—CONSTRUCTION AS A WHOLE.

The intention of the testator is to be gathered from the whole will and all its parts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. —470.]

4. WILLS — CONSTRUCTION—APPLICATION TO WILLS IN GENERAL.

While the rules of testamentary construction may be considered in arriving at testator's intention, the language of the will, when explicit, must govern.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972, 973, 976; Dec. Dig. —455.]

5. WILLS — CONSTRUCTION—VESTED OR CONTINGENT ESTATES.

Testator devised certain property to trustees, and directed that "said trustees shall divide each year the" income "into as many shares of equal amount as will allow one share for my wife and one share for each of my children who shall be living at the time of my death, and shall pay over such shares each year to my wife and children respectively." * * * If any of my children shall die, without issue, the share of each child in said income shall be divided among my other children. Upon the death of my wife the share of the interest and rents payable to her shall be equally divided among my other children. * * *

This trust is to continue during the lives of my wife and children, but when any of my children shall die leaving issue, the trust as to that child's share shall cease, and each issue shall immediately take in full absolute legal title the share of the trust fund and property to which such child was then entitled, and the trustees shall convey it accordingly, and if all the children died without issue, the surviving child to dispose of the same by will. Held, that no interest in the property itself became vested in the issue of testator's children at the time of his death; that testator intended to include interests arising in his children through his widow's share, as well as the shares directly devised to them, and that upon the death of the widow, her share of the interests and rents payable to her by the trustee from the trust estate became payable to the only surviving child of testator, the trust continuing for that purpose; and that the children and descendants of deceased children of testator, having already received their share, would not take a further share in the corpus set apart to the widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1436, 1487; Dec. Dig. —630(13).]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Suit in partition by Clotilde de La Vaulx and others against Jesse McDonald and others. Interlocutory decree in favor of plaintiffs. All defendants except Jesse McDonald appeal from order overruling motion for new trial. Reversed and remanded.

This is a suit in partition brought to the October term, 1911, of the circuit court for the city of St. Louis. At the December term the usual interlocutory decree was entered, finding the facts in favor of the plaintiffs and against the defendants, determining the rights and interests of the several parties to the suit, directing that partition be made in kind in accordance with the prayer of the petition, and appointing commissioners for that purpose. The defendants Robert L. Stevens, by Charles D. Stevens, guardian ad litem, and Susan F. Stevens, Charles D. Stevens, Lena Stevens, Dillon T. Stevens, Barbara F. Stevens, Frank H. Stevens, Fannie A. Stevens, and Charles D. Stevens, trustee, filed in due time their motions for a new trial, which were overruled and exceptions saved to such ruling. The same defendants thereupon took their appeal to this court. The land involved is a part of the estate of which Patrick Dillon, of the city of St. Louis, died seised January 19, 1851, leaving a will made on the 12th day of January, 1850, the

construction of which involves the only questions raised by this appeal. The will, omitting formal parts having no relation to these questions, is as follows:

"I devise and bequeath to Ferdinand Provenchere and Barton Bates, during their joint lives, and to the survivor of them and his heirs, all my real estate, wheresoever situated, and by whatsoever title held, together with all moneys and effects which may be in the hands of my executors, after the administration of my estate shall be closed; intending hereby to embrace every description of real estate to which I may be in any manner entitled at the time of my death, and every description of personal property, or effects which may remain after my estate shall be settled up, in trust, that the said Provenchere and Bates shall, at the times, and in the manner and upon the terms they shall judge best for my estate, sell and convey all my real estate which may be out of the limits of the township of St. Louis, and shall, as speedily as may be practicable, reduce into cash, all effects which they may receive from my executors, and also reduce into cash, the amount of such sales of real estate; and the said trustees may, if at any time they think it for the interest of my estate, sell at the times, and in the manner, and upon the terms they shall judge best, the following real estate within the township of St. Louis, in the county of St. Louis; that is, a lot or piece of ground in the city of St. Louis, bounded as follows: Beginning at the intersection of the south line of Hickory street with the west line of St. Ange avenue, and running thence southwardly along St. Ange avenue to Park avenue, thence westwardly along the northern line of Park avenue, four hundred and seventy-seven and a half feet, thence northwardly, parallel to St. Ange avenue to Hickory street, thence eastwardly, along Hickory street to the beginning; or said trustees may lease said lot or piece of ground as is hereafter provided, other lands within the township of St. Louis in the county of St. Louis shall be leased; and the said trustees shall from time to time, as they receive any money under this trust, either from the sales of property, or otherwise, proceed to loan the same on good security, and for the best interest that may be procured. The said trustees shall also proceed to lease all the other real estate within the limits of the township of St. Louis to proper tenants, for any terms of years not exceeding twenty, and upon the most favorable terms they can procure, of which they are to judge, and shall collect and receive the rents, issues and profits thereof. The said trustees shall divide each year the amount received for interest upon loans and for rents of real estate into as many shares of equal amount as will allow one share for my wife, and one share for each of my children who shall be living at the time of my death, and shall pay over such shares each year to my wife and children, respectively; the shares of such of the children as may be minors being paid to their guardians. If any of my children should die without issue, the share of such child in the said income shall be divided among my other children. Upon the death of my wife the share of the interest and rents payable to her shall be equally divided among my children. The shares in the said income which are devised to my daughters, who are at my death married, or who may thereafter be married, as well as such shares as are their own original shares of the said income, as the portions which may come to them from my wife's share, or from any child dying without issue, are to be annually paid to them for their sole and separate use, free from any control or claim of their husbands; and it is my express will, that the annual income which may accrue to my children, shall not in any mode be anticipated; nor shall the same be in any way assigned, transferred, conveyed or incumbered, and in case

either of my children, and if a daughter whether married or unmarried, and whether with or without the consent of her husband, shall make any assignment, conveyance or incumbrance of his or her interest in my estate, or any part thereof, or of his or her interest in the annual income thereof, or any part of such income, then the interest of such daughter in the trust fund and the income thereof, or the interest of such son in the trust fund and the income thereof, shall immediately cease and determine and such share and the income thereof shall be held by the trustees, and shall accumulate during the life of such child, and upon his or her death, shall be paid over, disposed of, and conveyed as is herein directed, in case of the death of any of my children. This trust is to continue during the lives of my wife and children, but when any of my children shall die leaving issue, the trust as to that child's share shall cease, and such issue shall immediately take in full absolute legal title the share of the trust fund and property to which such child was then entitled, and the trustees shall convey it accordingly; but such death and conveyance shall not revoke any lease made by said trustees under the power hereinbefore granted, the term of which was not then expired. If all my children die without issue, the trustees shall convey the trust fund and property in such manner and to such persons as may be directed by the last will of my last surviving child, provided such child shall be of the age of legal majority; and such surviving child is hereby authorized to devise and bequeath the said trust fund and property."

Mr. Dillon left surviving him his widow, Eliza J. Dillon, and Martha Eads and Susan E. Stevens, children by a former wife, and Arthur J. Dillon, John A. Dillon, and Eliza J. de La Vaulx, children by the last wife. Mrs. Eads died October 12, 1852, leaving her husband, James B. Eads (who died in 1887), and certain children and grandchildren, respondents in this appeal. Mrs. Stevens is still living, and, with her children and grandchildren claiming interests in privity with her, is appellant. Arthur J. Dillon died in 1864, unmarried and leaving no issue. John A. Dillon died October 14, 1902, leaving seven children, who are parties, claiming with respondents. Eliza J. de La Vaulx (a widow) died April 8, 1909, leaving Clotilde de La Vaulx and Louise de La Vaulx, her only children, and plaintiffs and respondents in this case. Jesse McDonald is sole trustee under the Dillon will, and in that capacity, as well as in the capacity of husband of Gertrude McDonald, one of the children of John A. Dillon, is made a defendant, but does not join in this appeal.

The foregoing statement sufficiently shows the general alignment of the parties in this court. Mrs. Stevens, her children, and claimants in privity with them are the appellants, while all others interested as beneficiaries under the will of Patrick M. Dillon are respondents.

In a suit brought to the June term, 1908, of the circuit court for the city of St. Louis by the seven McDonald children against James M. Carpenter and Jesse A. McDonald, trustees under the Dillon will and others interested in the estate, a portion of the land involved was set off to the plaintiffs, while the remainder, representing in value eleven-

fifteenths of all the lands involved in said proceeding, was set off to said trustees to hold under the provisions of the will. This was done in pursuance of the following findings made by the court in that case:

"That said Patrick M. Dillon left surviving him his widow, defendant Eliza J. Dillon, and five children, to wit, defendant Susan E. Stevens, defendant Eliza J. de La Vault, deceased since the institution of this action, Martha N. Eads, Arthur J. Dillon, and John Dillon; that, Martha N. Eads died prior to the institution of this suit and prior to the death of Arthur J. Dillon, who died in the year 1864 without wife or issue; that subsequent to the death of Martha N. Eads, who left issue surviving, namely, defendant Eliza Eads How and Martha Switzer, who died in the year 1901, leaving her surviving defendant Edward M. Switzer, her husband, and defendants Martha Switzer, Edward M. Switzer, Jr., John S. Switzer and Eads Switzer, the then duly appointed, qualified, and acting trustees under the will of the said Patrick M. Dillon, deceased, duly set apart from the body of said estate and duly conveyed by proper conveyances to said defendant Eliza Eads How and Martha Switzer the one-sixth interest in said estate to which they were then entitled as in said will and by the terms thereof provided.

"The court further finds that the interest of Arthur J. Dillon in and to the estate of the said Patrick M. Dillon, by the terms of the will of said Patrick M. Dillon, passed, upon the death of said Arthur J. Dillon without leaving wife or issue, to and vested in his sisters and brother him surviving.

"The court further finds that John A. Dillon died October 14, 1903, leaving issue as follows: Gertrude M. McDonald, John A. Dillon, Jr., Maud M. Dillon, Arthur J. Dillon, Blanche M. Dillon, Genevieve D. Beadel, and Ethel Dillon; that said plaintiffs are seised in fee as tenants in common of an undivided four-fifteenths interest in and to the pieces and parcels of land hereinbefore described."

The foregoing statement presents all the facts necessary to the consideration of the questions raised in this appeal. The contention between the parties is thus stated by the respondents.

"The only contentions between the parties were as to the present ownership of one-sixth share of the said estate which was formerly held in trust for the widow, Eliza J. Dillon, and from which she received the income during her lifetime. It is the contention of the plaintiffs that the said share of the widow should be equally divided among the children and the descendants of the deceased children of Patrick M. Dillon per stirpes; and it is the contention of the defendant Stevens that the share of the widow belongs to the only surviving child of Patrick M. Dillon, Susan D. Stevens, and upon the death of said Susan D. Stevens that share, together with her original share, will belong to her surviving issue."

This is repeated in substantially the same language by appellant. The decree appealed from is in accordance with the contention of the plaintiff as stated.

James C. Jones, Jr., Jones, Hocker, Hawes & Angert and Schnurmacher & Rassieur, all of St. Louis, for appellants. Stewart, Bryan & Williams and Judson, Green & Henry, all of St. Louis, for respondents.

BROWN, C. (after stating the facts as above). [1] I. This is one of those frequent cases in which, from time immemorial, the

courts have been asked to unclasp the dead hand of a testator from the property which he may have spent his life in accumulating, and over which he has been reluctant to surrender his control. While our laws do not recognize the continued ownership of the dead, they are liberal with respect to the right of testamentary disposition, subject to the common interests pertaining to the marriage relation. In the exercise of this right the testator may provide for the future devolution of the estate by creating contingent and executory interests to take effect after his death at any time within the period permitted by the laws prohibiting perpetuities.

[2, 3] It has been said that "the intention of the testator is the soul of the will," and that this intention must be gathered from the four corners of the instrument. It is our simple duty to ascertain, from the will before us, whether the testator intended by its terms that the interests of his grandchildren in that portion of his estate devoted to the production of an income for his wife during her life should become vested in them at his death or only at her death. In other words whether their interests were vested or contingent.

[4] The law aids us in arriving at our conclusion with certain simple and useful rules. For instance: We may start with the presumption that the testator intended to dispose of his entire estate, that he intended to approximate equality of distribution among those having equal claims upon his consideration, and will assume that the law favors vested estates. These do not mean that the testator has not a perfect right to dispose of a part of his estate, and leave the remainder to the operation of the statutes of descents and distributions; or to take into consideration the circumstances, capabilities, and necessities of his friends and relations and his feeling towards them; or even to follow the leading of his caprice. They mean that in cases of doubt they may be thrown into the balance in weighing the probabilities of his intent. The language of this will, being explicit and carefully chosen, is, we think, the safest guide to the intention of the testator.

II. Proceeding to the analysis of the will, we are justified by the record in assuming that the estate disposed of was extensive and valuable, including many tracts of land in the city of St. Louis, both improved and unimproved, among which were the lands involved in this suit. There is no data relating to the amount of his personal property. The will was made January 12, 1850. At that time he had two married daughters by a former marriage, Martha N. Eads, wife of James B. Eads, and Susan E. Stevens, wife of Charles W. Stevens, both of whom had living children, and two sons and one daughter, by the last wife, namely, Arthur J., John A., and Eliza J., who afterwards married Roger de La Vault. Mrs. Stevens is now the

only survivor of these children, and the controversy is between her and her descendants, and the descendants of the testator through the other children we have named, all of whom were living at his death, which occurred January 19, 1851. Up to this time the will was under the control of the testator, and could be remodeled, corrected, or otherwise altered to conform to his maturer judgment or wishes. The instrument was evidently the handiwork of a lawyer familiar with the language used to give certainty in the creation of the legal and equitable estates and uses with which it deals. The general scheme or plan in the mind of the testator appears plainly from the instrument. It was (1) to provide a yearly income which he deemed sufficient for the support of his wife during her life; (2) to prevent the dissipation of the estate by his children by placing the title beyond their reach; (3) to have managers for the estate in whose ability and prudence he had more confidence than in his children, and whose conduct could be controlled by the courts; (4) to insure the support of his children by preventing them from anticipating any portion of the income. As these objects were accomplished in the case of each of his children, he took his hand from the share of the property which had been devoted to its accomplishment, and let it go untrammelled to the next taker. His love was such that he was unwilling to permit his children to plunge into the current of active life depending on their own efforts for safety. If they were to learn to swim, they must do so with both feet planted upon the solid ground of an assured income. His anxiety to prevent the vesting of interests which might jeopardize this income gives rise to interesting questions which we will now consider.

III. The entire legal title, with the exclusive possessory right, was vested in the trustees at the death of testator, and continues in them to the exclusion of every other possessory interest until the trust should cease. Their duty was to manage the entire estate, to collect the income, to divide it yearly "into as many shares of equal amount as will allow one share for my wife, and one share for each of my children *who shall be living at the time of my death*, and shall pay over such shares each year to my wife and children, respectively." Although in the foregoing quotation we have adopted the words of the testator, we have used our own italics, to direct attention to the fact that the recipients of the gift were to include only such children as should be living at the time of his death, and that while his attention was fixed upon the possibility that he might survive either or both his daughters having families at the time he wrote the will, he showed no inclination to provide in any way for the participation of their children in the support that was to be provided for the mothers should they survive him. In this and the

provisions immediately succeeding he was dealing with the income only, and not with the body of the estate which he had devised to the trustees; with the children only who should survive him, and not with the grandchildren he then had or those who might thereafter be born. Continuing the same subject, the will proceeds:

"If any of my children should die without issue the share of such child in the said income shall be divided among my other children. Upon the death of my wife the share of the interests and rents payable to her shall be equally divided among my children."

Neither of the two propositions included in the foregoing quotation refers to anything but *income*, or contemplates a division of the share to which it refers among grandchildren, as well as children of the testator entitled to such income by the terms of the will. The only difference between them is in the necessary use of the word "other" in the first, to express the same idea that is expressed in the second without it. A distinction on this ground would be a mere quibble, without either grammatical or logical foundation. The first proposition has already been interpreted by a judgment of the circuit court for the city of St. Louis in a proceeding in which all the parties to this suit were represented, and in which they all seemed to concur. It was instituted by Mrs. McDonald and the other children of John A. Dillon, son of the testator who died in 1902, against all the other parties represented in this suit, including the children and grandchildren of Mrs. Eads, who died in 1852, and whose share of one-sixth of all the lands included in the tract had been already set off in partition. The suit was to partition the remaining lands by setting off the share corresponding to the share in the income of John A. Dillon at the time of his death. Arthur J. Dillon had died without issue, and his one-sixth share of the income had been apportioned to the remaining three children of the testator, namely, Mrs. Stevens, John A. Dillon, and Mrs. de La Vaulx, being one-eighth to each. The one-sixth share of Mrs. Eads having been taken out of the trust left 15 shares to be divided, namely 3 to the widow and 4 to each of the three children who remained in the trust until the death of John A. Dillon. The final decree, setting off four-fifteenths to the children of the latter and eleven-fifteenths, representing four-fifteenths as the share of each of the living children and three-fifteenths representing the share of the widow, to the trustee to the use of the three. This decree seems to have been satisfactory to the Eads issue, who received nothing from the share of Arthur J. Dillon, as well as to the other three who received it all. Whether that decree is binding upon the parties in this proceeding or not, we think it was founded upon a proper construction of the Dillon will, and follow it in principle in this case.

There is one other provision of the will

which we think conclusively sustains this construction in its application to the widow's share. It is as follows:

"This trust is to continue during the life of my wife and children, but when any of my children shall die leaving issue, the trust as to that child's share shall cease, and such issue shall immediately take in full, absolute, legal title the share of the trust fund and property to which said child was *then* entitled."

No stronger language could be used than the expression "the trust as to that child's share shall cease." The "child's share" necessarily includes every portion that comes to him by the terms of the will. In a previous clause that part which accrued to him upon the death of the testator is called his *original* share of the income, and the remainder as the portions that may come from the death of the testator's wife or from any child dying without issue. When a child dies no further interest or share can come to him by any provision of the will. Everything that has come to him is *his* share as distinguished from the shares of the others. The careful use of the word "then" in this clause indicates that the computation of this share is not to be made as at the death of the testator, but includes all that has been acquired up to the instant of the death of the "child." After his death he can acquire nothing further. The transaction is closed, and his "share" cannot be increased.

IV. We think that the intention of the testator is plain that the interests of the children, the immediate beneficiaries in the trust created by his will, which had matured at the time of their respective deaths, should be the full measure of the rights and interests of their issue, and that he intended to, and did, apply the same rule with respect to interests arising in his children through the widow's share as to those devised directly to them.

The following distinction is suggested by the respondents in argument: They say that immediately upon the death of Mr. Dillon his will vested in each of his five children, an estate in one-sixth portion of his property, "which at common law would have been an estate tail." This estate has been truly said to have been created by the statute *de donis* (St. 13 Edw. I, c. 1), which defined it to be "where one giveth land to another and the heirs of his body issuing." At the time Patrick M. Dillon died it had been modified by statute in this state (Statutes Mo. 1845, p. 219, § 5) by providing that thereafter where any conveyance or devise shall be made, whereby the grantee or devisee should become seised, in law or equity, of an estate which under that statute would have been held an estate in fee tail, it should vest an estate for life only in the grantee or devisee, and upon his death—

"go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee, and if there be only one child, then to that one, in fee, and if any

child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs."

At the same time it was provided that (Id. § 6):

"Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor."

It makes little difference whether or not the interest devised to each of the children for life, with remainder over to the *other children* upon the contingency of the death of the child without issue, and to his issue if he died leaving issue, was a common-law estate tail in such as should leave living issue, except in so far as it affects the widow's share, the only interest with which we are concerned. Of this share the respondents say:

"The wife had an equitable life estate in the other one-sixth portion."

This estate had none of the incidents of an equitable estate tail, for the remainder was not limited to *her* issue, but to such of the issue of *her husband* as were designated by the will to take it. Had she died, as was naturally enough to be anticipated, before any of the children, one-fifth of her share of the income would have been added to the share of each of the children, and would have passed, in remainder, as their respective original shares subject to the contingency of issue or no issue, *living at the time of their death*, as provided in section 6 of the statute just quoted.

The questions presented in the construction of this will have been frequently before this court; and, while there may be some apparent inconsistency in the decisions, they have resulted largely from the fact that each instrument presents its own peculiarities of expression. That this will clearly expressed the intention of the testator that the remainder devised to the issue of his children should vest only on the death of such children is, at present, the well-established doctrine in this state. *Emison v. Whittlesey*, 55 Mo. 254; *De Lassus v. Gatewood*, 71 Mo. 371; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Buxton v. Kroeger*, 219 Mo. 224, 117 S. W. 1147; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; *Eckle v. Ryland*, 256 Mo. 424, 165 S. W. 1035; *Stockwell v. Stockwell*, 262 Mo. 671, 172 S. W. 73.

In the light of these authorities we again call attention to the technical skill exhibited in the framing of this will. The legal title is carefully and skillfully vested in the trustees. No right to the possession or enjoyment of any part of the fund was given to either the wife or children of the testator other than to receive from the hand of the trustees the portion of the income allotted to them respectively. When he came to the

disposition to the issue of his children, he still maintained the style and used the discriminating language of the expert conveyancer. He said:

"When any of my children shall die leaving issue, the trust as to that child's share shall cease, and such issue shall *immediately* take in full absolute legal title the share of the trust fund and property to which such child was then entitled, and the trustee shall convey it accordingly."

In striking contrast to this language he had already said:

"If any of my children should die without issue the share of such child in the said income shall be divided among my other children,"

—and had made a correlative disposition of the interest of his wife in the *income* which protected the productive fund from acquisition by her issue by another husband. The scheme which we are asked to change is a carefully conceived and symmetrical one, expressed in language which we cannot hope to excel.

In *Buxton v. Kroeger*, *supra*, a very similar trust to similar uses, created by deed, was involved. The conveyance was by husband and wife to her sole and separate use, benefit, and enjoyment for life, and should he survive her, to his use during life, and after the death of the survivor of the two, to the children born or to be born of the marriage, naming four already born, the trustee to manage the property and collect the income, pay the net income over to the children until ten years after the youngest should become of age, when he should make final settlement with each of the children, paying over to them for life, and to the heirs at law of such of them as might be dead, their respective equal shares of the income. The deed then continued:

"And thereupon this trust shall cease and be determined, and the title to said real estate and every part and portion thereof, not disposed of as hereinbefore provided, shall without any act to be done or performed by said trustee or his successor in trust, pass to and become fully vested in fee simple in said children then living, and in the heirs at law of such of said children as may then be dead."

In holding the interest of the children to be a contingent remainder, the court, after referring to the rule that in the interpretation of such instruments the proper construction must be sought from a consideration of the entire writing, said:

"If these cases are to be longer followed and regarded as a guide to this court, we are unable to see how the provisions of this clause in the deed can be ignored. With the plain and unambiguous terms of this clause there is no necessity for surmises or speculations as to the time when the title passed to this real estate. It is the only one in which the title to the remainder of this real estate is dealt with, and it expressly provides that after the expiration of ten years from the time the youngest child becomes of age the title shall pass to and become fully vested in fee simple in the children of the grantors then living, and in the heirs at law of such of said children as may then be dead."

In the late case of *Eckle v. Ryland*, *supra*, in discussing a similar provision, we arrived at the same conclusion.

These cases are simply expressions of the rule that in the construction of such instruments, when the court finds a lawful intention definitely and certainly expressed, its labor is done, and it only remains to so adjudge. It is no part of its jurisdiction to make deeds and wills for those perfectly competent to act for themselves.

[5] It follows that no interest in the lands involved in this suit became vested in the issue of the children of the testator at the time of his death, and that upon the death of the widow her share of the interest and rents payable to her by the trustee from the trust estate became payable to the surviving daughter; the trust continuing for that purpose. The interlocutory decree appealed from being inconsistent with the rights and interests of the parties in that respect, the said decree is reversed, and the cause remanded for further proceedings in accordance with the views here expressed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

VOLK v. ZEPP. (No. 14,474.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. MASTER AND SERVANT ⇨80(4)—ACTION FOR WAGES—SUFFICIENCY OF COMPLAINT.

A servant's complaint for wages, alleging that defendants are indebted to her for work and labor performed at their instance, and that they agreed to pay her certain specified amounts, states a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 113; Dec. Dig. ⇨80(4).]

2. MASTER AND SERVANT ⇨80(5)—ACTION FOR WAGES—VARIANCE.

In a servant's action for wages there is no fatal variance between allegations that defendants were copartners under a certain name and proof that they did business under such name although their partnership agreement used a slightly different name.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 114; Dec. Dig. ⇨80(5).]

3. APPEAL AND ERROR ⇨197(1), 253—RE-SERVING GROUNDS FOR REVIEW—OBJECTIONS—VARIANCE.

Alleged variance between the allegations and proof is not available in the Court of Appeals, where no objection was made or exceptions taken in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1485, 1488, 1491-1493; Dec. Dig. ⇨197(1), 253; Pleading, Cent. Dig. § 1438.]

4. TRIAL ⇨296(1)—INSTRUCTION — ACTION FOR WAGES.

In a servant's action for wages, an instruction that defendants were partners if they combined for common profit, etc., is not erroneous,

where another portion of the charge covered defendant's contention that any partnership had previously been dissolved, especially where the complainant's allegation of partnership was not denied under oath, as required by Rev. St. 1909, § 1985.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707; Dec. Dig. ¶296(1).]

5. TRIAL ¶210(2)—ACTION FOR WAGES—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In a servant's action for wages, giving the usual instruction as to disregarding the testimony of a witness willfully testifying falsely, is not erroneous, where there was a direct conflict in the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 491; Dec. Dig. ¶210(2).]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by Ethel Volk against Louis F. Zepp and William H. Schoenlau. Judgment for plaintiff, and defendant Zepp appeals. Affirmed.

T. J. Rowe, of St. Louis, for appellant. John W. Calhoun, of St. Louis, for respondent.

ALLEN, J. This is an action originally instituted against defendant Zepp and one William H. Schoenlau, as copartners in the conducting of a restaurant and summer garden business in the city of St. Louis. During the pendency of the suit defendant Schoenlau became a bankrupt, and the cause abated as to him. The seventh count of the petition—the only count with which we are here concerned—alleges that at all the times mentioned in the petition the defendants, Zepp and Schoenlau, were copartners doing business under the name of William H. Schoenlau; that the defendants are indebted to plaintiff in the sum of \$670, "for work and labor performed for them by her at their special instance and request, and for which they agreed to pay to the plaintiff as follows: For work and labor performed by her for them for the months of April, May, June, July, August, and September, 1911, at the rate of \$100 per month, and for the month of October, 1911, at the rate of \$40 per month, and from the 1st to the 23d day of November, 1911, \$80, making a total of \$670, for which plaintiff prays judgment against the defendants, and for her costs. The separate answer of defendant Zepp to this count of the petition is a general denial, coupled with a specific denial that said defendant is indebted to plaintiff in any sum for work and labor performed by her, at his special instance and request, or for or on any account whatsoever. The trial before the court and a jury resulted in a verdict and judgment in favor of plaintiff and against defendant Zepp for \$670, and the case is here on the appeal of said defendant.

[1] It is argued for appellant that the seventh count of the petition fails to state a cause of action. We see no merit in this

contention. This count alleges that the defendants are indebted to plaintiff in the sum of \$670 for work and labor performed for them by plaintiff, at their special instance and request, and alleges that defendants agreed to pay plaintiff for work and labor performed by her for certain months at the rate of \$100 per month, and for a certain further period at the rate of \$40. It contains all of the essential elements of a cause of action for work and labor performed at the instance and request of defendants, and for which they are alleged to have agreed to pay certain sums of money.

[2, 3] It is further urged that the court erred in refusing to direct a verdict for appellant at the close of the entire case, as requested by him, because of a fatal variance between the allegations of the petition and the proof, in that the petition alleges that Zepp and Schoenlau were copartners doing business under the name of William H. Schoenlau, whereas the partnership contract shown to have been entered into between the defendants on January 24, 1908, provided for the formation of a copartnership under the firm name of William H. Schoenlau & Co. This contention is likewise without merit. Though the partnership agreement provided that the parties would operate under the name of Wm. H. Schoenlau & Co., the evidence is that the business was actually conducted under the name of Wm. H. Schoenlau. And if there could be said to be any variance between the allegata and the probata, appellant has not taken the requisite steps to avail himself of it. See *Fisher & Co. v. Realty Co.*, 159 Mo. 562, 62 S. W. 443; *Rundelman v. Bolter Works Co.*, 178 Mo. App. 642, 161 S. W. 609.

The first instruction given for plaintiff is complained of on the ground that there was no evidence to warrant the giving thereof. It is unnecessary to set out the instruction or to dwell upon this assignment of error, for it is plain that the evidence was ample to support the instruction.

[4] The third instruction given for plaintiff told the jury that if they believed from the evidence that the defendant Zepp and William H. Schoenlau agreed, on or before January 24, 1908, to combine their property, labor, or skill, in the transaction of any lawful business for the common profit of said Zepp and Schoenlau, such persons were partners. The instruction is assailed for the reason that it failed to reckon with the testimony of defendant Zepp to the effect that the copartnership existing between him and Schoenlau was dissolved in 1909, which, however, was denied by Schoenlau, testifying as a witness for plaintiff. But this instruction did not purport to cover the entire case, and the matter which appellant says should have been included within the instruction was covered by an instruction given for defendant.

Furthermore, appellant and Schoenlau were originally sued as being copartners at the time of the rendition of plaintiff's services, and it does not appear that the existence of the partnership was denied under oath. See section 1985, Rev. Stat. 1909.

[8] An instruction, given by the court of its own motion, is also complained of. It is the usual instruction on the credibility of witnesses, and, among other things, tells the jury that if they believe that any witness has knowingly sworn falsely to any material fact, they are at liberty to reject all or any portion of the testimony of such witness. In certain particulars the testimony for appellant is in direct conflict with that for plaintiff; and, under the circumstances, it was not error to give this instruction. See *Price v. Hiram Lloyd Bldg. & Const. Co.*, 191 Mo. App. loc. cit. 404, 177 S. W. 700, and cases cited.

As no reversible error appears in the record, the judgment should be affirmed; and it is accordingly so ordered.

REYNOLDS, P. J., and THOMPSON, J., concur.

MERKEL v. ST. LOUIS HIDE & TALLOW CO. (No. 14521.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. SALES — §33 — REQUISITES OF CONTRACT — QUASI CONTRACTS.

Where plaintiff who had purchased his father's business of collecting and selling grease, sold a quantity to defendants, the latter supposing they were still buying of the father, the law will imply a contract on defendant's part to pay plaintiff the reasonable value of the goods received, and an action of quantum meruit therefor will be sustained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 60; Dec. Dig. §33.]

2. INTEREST — §21 — RIGHTS AND LIABILITIES IN GENERAL — VERDICTS, FINDINGS AND AWARDS.

Where defendant did not make tender of any amount to plaintiff, the fact that plaintiff was found not to be entitled to the full amount claimed will not bar recovery for interest upon the sum recovered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 42; Dec. Dig. §21.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by John Merkel, Jr., against the St. Louis Hide & Tallow Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dwight D. Currie and W. C. Connett, both of St. Louis, for appellant. William Hilkerbaumer, of St. Louis, for respondent.

ALLEN, J. This is an action instituted in the circuit court of the city of St. Louis upon an account, filed with the petition, for certain quantities of grease, fat, etc., alleged

to have been sold and delivered to the defendant corporation, on certain specified dates beginning February 3, 1913, and ending April 6, 1913. The prices charged in the account, totaling \$409.90, are alleged to be the reasonable value of the various items thereof. It is averred that no part of the account has been paid; that plaintiff demanded payment thereof on April 15, 1913, but that defendant neglected and refused to pay the same. Judgment is prayed for \$409.90, with interest from April 15, 1913. The answer is a general denial. The trial, before the court without the intervention of a jury, a jury having been waived, resulted in a judgment for plaintiff for \$361.48, with interest from the institution of the suit, making a total of \$382.85. From this judgment the defendant prosecutes the appeal before us.

It appears that for many years prior to November 1, 1911, John Merkel, Sr., the father of this plaintiff, was engaged in the business of collecting grease, fats, etc., purchased from restaurant proprietors and others, and that during such time he regularly made sales thereof to defendant. For perhaps ten years prior to the date mentioned plaintiff drove his father's wagon and made deliveries to defendant for which the father was paid by defendant monthly. The custom was for defendant to determine the net weight of the goods received, upon delivery, issuing a slip or statement showing the same, and to pay by check on or about the 10th of each month for all deliveries made during the previous month. On November 1, 1913, the father sold his business, and the equipment for conducting the same, to plaintiff, who continued thereafter to conduct the business in the manner in which it theretofore had been carried on. Plaintiff continued to make deliveries to defendant in person, and received from defendant statements of the character mentioned. It appears that plaintiff's father continued to make the collections from defendant, but that after plaintiff acquired his business the monthly checks issued by defendant, or their proceeds, were turned over to plaintiff, except that in a few instances the father, it is said, with plaintiff's consent, retained checks to be applied on the purchase price of the business sold by him to plaintiff or to repay money borrowed from him by plaintiff.

It appears that the defendant did not know that plaintiff had purchased his father's business, and that he was dealing in grease, fats, etc., on his own account, until a dispute arose respecting the amount due from defendant for deliveries during the month of February, 1913. Plaintiff refused to receive a check which defendant had given his father on March 10, 1913, in payment of the account for the previous month, on the ground that defendant had made an unwarranted deduction in settling for some grease that plaintiff

had delivered to defendant on February 24, 1913. It is unnecessary to rehearse the details of the controversy that thus arose. Plaintiff continued to make deliveries until April 6, 1913, and on May 16, 1913, instituted this action.

As the case was tried below by the court without a jury, and no declarations of law were requested or given, and the court merely entered a general judgment without making any special findings, the judgment cannot be disturbed if it can be sustained upon any tenable theory.

The only point made by appellant's learned counsel—except as to the allowance of interest—is that inasmuch as defendant had never entered into any contractual relations with this plaintiff, and did not knowingly deal with plaintiff, but supposed that its dealings were with plaintiff's father, it is not liable to respond to plaintiff in this action. It is said:

"A party cannot be forced to accept of a contract not of his own choosing in the first instance, and his right of choice in this regard is not impaired by any substituted agreement to which he does not yield an intelligent and subsequent assent."

[1] Even under appellant's theory it could not escape payment for that portion of the account which accrued after the time when defendant learned that plaintiff was making deliveries on his own account. But the doctrine upon which appellant relies cannot be here invoked to defeat a recovery by plaintiff for the reasonable value of plaintiff's goods received and retained by defendant. It is by no means essential that plaintiff establish either an express contract, as such, between the parties, or adduce proof of facts from which the existence of an actual contract may be inferred. In this connection see *Weinsberg v. Cordage Co.*, 135 Mo. App. 553, 118 S. W. 461; *Greensfelder v. Witte Hardware Co.*, 189 Mo. App. 576, 175 S. W. 275. The action proceeds in quantum meruit for the recovery of the reasonable value of the goods accepted and retained by defendant, as being the extent of the benefits thus conferred upon defendant. And a recovery may be had upon what is termed a "quasi contract," or a contract strictly implied by law. Even though it be true, as appellant says, that the defendant did not request plaintiff to deliver to it the goods in question, it does not follow that the law will imply no promise on defendant's part to pay for the benefits which defendant has received. The law will create a promise, under circumstances of this character, whenever equity and good conscience require one. Under such circumstances, the question is not what was the intention of the party benefited, but what in equity and good conscience he ought to do. See *Anderson v. Caldwell*, 242 Mo. 201, 146 S. W. 444; *Lawson*

on Contracts (2d Ed.) § 47. It is said by a leading writer on the subject that:

"By far the most important and most numerous illustrations of the scope of quasi contracts are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another." Keener on Quasi Contracts, page 19.

The matter might be quite otherwise, at least to a part of the account, were the circumstances such that by virtue of the relations existing between defendant and plaintiff's father it would be inequitable and unjust to allow a recovery by plaintiff in his own behalf. But there are no such facts present. Plaintiff's father, testifying as a witness in the case, disclaimed any interest in the matter whatsoever; and defendant has paid no one for the goods which it received. There is nothing present to relieve defendant from the obligation which the law will cast upon it to pay plaintiff the reasonable value of the benefits thus conferred upon it.

We are not here concerned with the merits of the controversy concerning the item of February 24, 1913. Plaintiff did not recover the full amount claimed to be due on his account, viz., \$409.90, but had judgment for \$361.48, with interest. There is sufficient evidence in the record to support such recovery, as being the reasonable value of the goods delivered or the extent of the benefits thereby conferred upon defendant.

[2] The point is raised that interest is not recoverable for the reason that plaintiff, it is said, demanded payment of the full amount of his account, as alleged, and not the amount to which he was found to be entitled. But there is no merit in this contention, for the reason that defendant did not, at any time, make tender of any amount to plaintiff.

It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and THOMPSON, J., concur.

REBER v. BELL TELEPHONE CO. OF MISSOURI. (No. 14436.)

(St. Louis Court of Appeals. Missouri. Nov. 6, 1916.)

1. TRESPASS § 81—JOINT AND SEVERAL LIABILITY.

When a trespass is committed by co-operation or by the joint act of two or more persons, each is liable for the injury done by all, and all who aid and abet in the commission are equally liable therefor.

[Ed. Note.—For other cases, see TRESPASS, Cent. Dig. § 70; Dec. Dig. § 81.]

2. TRESPASS § 81—JOINT AND SEVERAL LIABILITY—INJURY TO SHADE TREES.

Where the servants of both a telephone company and electric light company, acting together in the furtherance of a common object, entered upon plaintiff's premises and cut and disfigured her shade trees to extend wires through

them, both companies and all who participated in the acts as their agents were jointly and severally liable therefor.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 70; Dec. Dig. ¶31.]

3. TELEGRAPHS AND TELEPHONES ¶10(15) — USE OF STREETS — RIGHTS OF ABUTTING OWNERS—SHADE TREES.

A telephone company's rights as a quasi public corporation to erect poles along the street and string wires under license from the municipality were subject to the rights of abutting property owners to maintain trees projecting over the public street.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. ¶10(15).]

4. TELEGRAPHS AND TELEPHONES ¶15(3) — USE OF STREETS—INJURY TO SHADE TREES.

A telephone company, desiring to string wires along a street, could not take the law into its own hands, and disfigure, mutilate, and damage the trees of abutting landowners at will, without being liable in damages therefor.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. ¶15(3).]

5. TELEGRAPHS AND TELEPHONES ¶20(2) — INJURY TO SHADE TREES—RIGHTS OF ABUTTING OWNERS.

It is no defense to action for damages against a telephone company for cutting shade trees that a street commissioner of the city was present, giving orders and directions regarding such cutting, it not appearing that the commissioner had authority to direct such cutting, nor that the branches were cut for any other purpose than to aid the telephone company in the prosecution of its business in a way most convenient to it.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 18; Dec. Dig. ¶20(2).]

6. TELEGRAPHS AND TELEPHONES ¶20(6) — CUTTING SHADE TREES—DAMAGES.

Where a telephone company seriously injures valuable shade trees of a landowner by cutting a space for its wires to pass through them, a verdict for punitive damages may be justified.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. ¶20(6).]

7. DAMAGES ¶87(2) — PUNITIVE DAMAGES — NECESSITY OF ACTUAL DAMAGE—EXTENT.

Nominal actual damages will support a verdict for punitive damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 191; Dec. Dig. ¶87(2).]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by Margaret M. Reber against the Bell Telephone Company. From order granting plaintiff new trial, defendant appeals. Affirmed.

Holland, Rutledge & Lashly, of St. Louis, for appellant. C. A. Newton, of St. Louis, Edwin W. Mills, of Clayton, and C. S. Reber, of St. Louis, for respondent.

ALLEN, J. This is an action to recover damages for injuries done to certain shade trees belonging to plaintiff, situated upon her property in Webster Groves, Mo., abutting on the north line of Lockwood avenue,

a public street extending from east to west in said city. It appears that certain telegraph poles of defendant had for years stood in Lockwood avenue near the northern edge of the roadway, i. e., somewhat south of the north curb, that Lockwood avenue was improved, necessitating the removal of these poles, and that defendant thereupon erected new poles north of the curb line. The old poles were about 30 feet in height, whereas the new poles erected north of the curb line were about 45 feet in height. Plaintiff's trees—said to have been large handsome shade trees—stood north of the curb line on plaintiff's land, but branches thereof extended beyond the sidewalk and curb into the street, and, it seems, interfered with the stringing of wires along these new poles in the manner in which defendant, for its convenience, proposed and desired to string such wires. Defendant did not obtain permission to cut the branches of these trees for the purpose of extending its wires through them, but on or about December 1, 1908, at a time when a caretaker in charge of the premises was absent, defendant's agents and servants entered upon plaintiff's premises and cut, mutilated, and disfigured the trees, causing much damage thereto. And there is evidence that the work of removing branches from the trees was unskillfully done, causing unnecessary injury even for defendant's purposes. It appears that wires of the Suburban Electric Light & Power Company, a corporation not a party to the suit, had been strung along and carried by the old poles, and were to be placed upon the new poles together with defendant's wires; that at the time of the alleged trespass aforesaid some servants of the last-named company took part in cutting and removing the branches from the trees. It is said that some linemen of the Suburban Electric Light & Power Company, in charge of a foreman, happened to be passing at the time, and the foreman deemed it advisable to stop and assist defendant's agents and servants in the doing of this work. There is also testimony that one Safford, said to have been a street commissioner of the city of Webster Groves, who died prior to the trial below, was present, giving orders and directions respecting the cutting of branches from plaintiff's trees. At the close of the evidence the court peremptorily instructed the jury to return a verdict for plaintiff for nominal damages only, which the jury accordingly did. Thereafter the court, on plaintiff's motion, granted plaintiff a new trial, from which order granting a new trial the defendant prosecutes the appeal now before us.

The court's action in granting a new trial for error in giving the instruction compelling a verdict for plaintiff for nominal damages only was manifestly correct. Defendant,

appellant here, takes the position that plaintiff cannot complain of the giving of that instruction, for the reason that while the testimony showed that some of the cutting of the trees on plaintiff's property was done by linemen in the employ of defendant, there was no testimony that this was done under defendant's direction. But this entirely overlooks and fails to reckon with the great mass of evidence in the case, showing not only that the cutting and mutilation of the trees was done, in a very considerable part at least, by defendant's agents and servants, but was done under circumstances which legitimately afford the inference that such agents and servants were acting within the scope of their employment as defendant's employés, in pursuit of their master's business and at their master's direction.

[1,2] Evidently the trial court gave the instruction to find a verdict for nominal damages only upon the theory that, since the evidence showed that some of the damage done to plaintiff's trees was done by servants of defendant and some by servants of the Suburban Electric Light & Power Company, plaintiff could not recover substantial damages without adducing evidence tending to show the extent of the injury separately inflicted by defendant's servants. This, however, was a misconception of the legal effect of the evidence adduced; and the court cured its error by granting a new trial. The evidence makes it appear that servants of defendant and those of another company were jointly engaged in a common enterprise, in the prosecution of which they jointly committed a trespass upon plaintiff's property. The employés of the two companies, acting in concert for the accomplishment of a common purpose and design, cut from plaintiff's trees numerous branches which were hauled from the premises in defendant's wagons driven by its employés.

"The law is well settled that when a trespass is committed by co-operation, or by the joint act of two or more persons, each is liable for the injury done by all and all who aid and abet in the commission are equally liable therefor." *Walters v. Hamilton*, 75 Mo. App. 287, loc. cit. 243, 244.

The evidence shows that the servants of both companies, acting together in the furtherance of a common purpose or object, committed the trespass and caused the damage of which plaintiff complains. Both companies, therefore, and all who as their agents participated therein, are jointly and severally liable therefor. See *Walters v. Hamilton*, supra; *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290; *Cooper v. Johnson*, 81 Mo. 483; *Dyer v. Tyrrell*, 142 Mo. App. 467, 127 S. W. 114; *Robinson v. Mining Co.*, 178 Mo. App. 541, 163 S. W. 885; *Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93; *Addison on Torts* (8th Ed. 1912) p. 118.

[3,4] Defendant, as a quasi public corporation, was entitled to erect its poles along

the street and string wires thereon, under license from the municipality, but this right was subject to that of plaintiff, as an abutting property owner, to maintain trees situated as were these. And in no event could defendant take the law into its own hands, and disfigure, mutilate, and damage her trees at will, without being liable to respond in damages therefor. See *McAntire v. Joplin Telephone Co.*, 75 Mo. App. 535; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *Reinhoff v. Gas & Electric Co.*, 177 Mo. App. 417, 162 S. W. 761.

It is said that the wires in question could have been placed on the new poles at a height of 30 feet—the height of the old poles—without any material interference by the limbs of these trees. And it appears that defendant might have maintained its wires at the new level of 45 feet without damaging plaintiff's trees, by use of a cable at this place. And it has been held that such measures, where practical, must be resorted to, even though they are more expensive or less convenient, in order to avoid the cutting of trees of abutting property owners. See *Van Siclen v. Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210, affirmed in 168 N. Y. 650, 61 N. E. 1135; *Moore v. Carolina Light & Power Co.*, 163 N. C. 300, 79 S. E. 596. But in the case before us, whatever may have been defendant's rights, had it taken lawful steps to secure them, it is entirely clear that if, in disregard of plaintiff's rights, defendant, taking the law into its own hands, cut and injured plaintiff's trees in order to place its wires as it chose, it thereby made itself liable to plaintiff for the damage thus occasioned.

[5] It is further argued that defendant is not liable because of the evidence making it appear that a street commissioner of the city of Webster Groves was present, giving orders and directions regarding the cutting of plaintiff's trees. But it is plainly manifest that the mere presence of the street commissioner, and his participation, if any, in the trespass, can afford no protection to defendant under the circumstances. It does not appear that the street commissioner had any authority whatsoever to direct the cutting of limbs from these trees for the purpose of enabling defendant to string its wires along its new poles, at the new level of 45 feet. There is no evidence whatsoever that the trees interfered in any way with the use of the street by the public; but it does appear that they were ornamental shade trees, such as add much to the beauty and attractiveness of a street. The right, if any, of a street commissioner of a city such as Webster Groves to trim trees of an abutting property owner when the branches thereof extend into the street and interfere with its use by the public is a matter with which we are not here concerned. So far as this record discloses, the branches of these trees in-

terfered only with the defendant in the prosecution of its business in the way most convenient to it. And they were cut to enable defendant to so prosecute its business. (In this connection see *Memphis Telephone Co. v. Hunt*, 84 Tenn. (16 Lea) 456, 1 S. W. 159.

[6, 7] The evidence is further of such character as to warrant a jury in returning a verdict for punitive damages against defendant as for wilful and malicious trespass. See *Moore v. Power & Light Co.*, supra; *Telephone & Telegraph Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163; *Bright v. Bell*, 113 La. 1078, 37 South. 976; *Cumberland Telephone & Telegraph Co. v. Cassidy*, 78 Miss. 666, 29 South. 762; *Jennings v. Appleman*, 159 Mo. App. 12, 139 S. W. 817; *McMillen v. Elder*, 160 Mo. App. 399, 140 S. W. 917. Indeed had plaintiff only made out a case for nominal compensatory damages, this would not necessarily have prevented the recovery of punitive damages by her. As to whether or not punitive damages may be recovered where only nominal compensatory damages are allowable, the authorities are conflicting; but it is now the settled law of this state that a verdict for nominal actual damages will support a verdict for punitive damages. *Lampert v. Drug Co.*, 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351.

The action of the circuit court in granting a new trial is affirmed.

REYNOLDS, P. J., concurs.

**CHRISTOPHER-SIMPSON IRON WORKS
CO. et al. v. BAJOHR et al.
(No. 14457.)**

(St. Louis Court of Appeals. Missouri. Nov. 6, 1916. Rehearing Denied Dec. 30, 1916.)

1. FRAUDULENT CONVEYANCES ⇨57(1)—INSOLVENCY.

Where it appears that the alleged fraudulent transfer was made when transferor was not insolvent and such transfer did not render him insolvent, the conveyance cannot be set aside as in fraud of creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 138-141, 153, 157, 158; Dec. Dig. ⇨57(1).]

2. FRAUDULENT CONVEYANCES ⇨57(4)—SOLVENCY OF GRANTOR.

That a grantor ultimately became insolvent does not render transfer when he was solvent fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 150-152, 154; Dec. Dig. ⇨57(4).]

3. FRAUDULENT CONVEYANCES ⇨273—BURDEN OF PROOF.

The burden is upon one attacking a transfer as fraudulent to show that the transfer was made with intent to defraud, hinder, or delay the grantor's creditors, and that such was its effect.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 805; Dec. Dig. ⇨273.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"Not to be officially published."

Action by the Christopher-Simpson Iron Works Company and others against Clara Bajohr and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Kortjohn & Kortjohn, Kurt Von Reppert, and Taylor Young, all of St. Louis, for appellants. Wm. L. Bohnenkamp and Eugene Tittman, both of St. Louis, for respondents.

ALLEN, J. This is a suit in equity, instituted on January 18, 1913, wherein plaintiffs seek to have the defendants, the widow and children of one Carl Bajohr, deceased, account for certain property alleged to have been transferred to them by the said Carl Bajohr during his lifetime in fraud of the rights of plaintiffs as Bajohr's creditors. The trial court, sitting as a chancellor, found the issues for defendants, dismissing plaintiffs' bill, and the case is here on plaintiffs' appeal.

It appears that prior to March 30, 1908, Carl Bajohr subscribed for certain stock in the German-American Realty & Investment Company upon its organization, which subscription was not paid up; and that on the date last mentioned plaintiffs, creditors of said corporation, recovered a judgment against it upon which an execution was issued which was returned unsatisfied. Thereafter plaintiffs prosecuted an independent action against Bajohr and other subscribers to the capital stock of the German-American Realty & Investment Company. Bajohr died during the pendency of the last-mentioned suit, to wit, on November 30, 1910, and the cause was revived against his executrix. This suit resulted in a decree and judgment, rendered on July 10, 1911, in favor of the plaintiffs therein and against the executrix, as such, and other defendants. Upon the filing of this decree in the probate court of the City of St. Louis a claim was thereafter allowed in plaintiffs' favor against the estate of Carl Bajohr, deceased, which claim is said to remain unsatisfied.

Prior to October 9, 1908, Carl Bajohr was engaged in conducting, in his own name, a lightning rod business in the city of St. Louis. It appears, however, that the business had been launched and established, for the most part at least, with funds of defendant Mrs. Clara Bajohr, she having money of her own which she had brought to this country, and her husband being without means. On or about the last-mentioned date a corporation known as the Carl Bajohr Lightning Conductor Company was organized, under the laws of the state of Missouri, with a capital stock of \$25,000, divided into 250 shares of the par value of \$100, to which corporation the said business, and the property employed

therein, including certain patent rights, were conveyed. The evidence touching the issuance of the stock of this corporation in the first instance, and the alleged subsequent transfer of certain stock by Carl Bajohr, is by no means clear. But it appears that Bajohr actually retained but one share, and that the remainder was issued or transferred to these defendants; Clara Bajohr, the wife, receiving nearly all thereof. The corporation's books were not in evidence; and Mrs. Bajohr was not called as a witness, though plaintiffs put in evidence a transcript of her testimony in another cause which had previously been tried in the circuit court and was then pending on appeal in the Supreme Court and which has since been decided by the latter. See *Bajohr v. Bajohr* (Mo. Sup.) 184 S. W. 76.

Plaintiffs alleged in substance that the transfer of the said property to the corporation as organized, and the issuance and transfer of the stock thereof to these defendants, were fraudulent and void as to plaintiffs. And it is averred in general terms that Carl Bajohr fraudulently conveyed to defendant Clara Bajohr all of his property not transferred to the corporation.

We have carefully considered all of the evidence contained in the record before us, the details of which it is unnecessary to here set forth. It is clear that the record contains nothing tending to show any fraudulent transfer of property to these defendants by Carl Bajohr, unless it be that the evidence relating to the organization of the Carl Bajohr Lightning Conductor Company and the issuance and transfer of the stock thereof can be said to show such fraudulent disposition of assets of Carl Bajohr at the time as to entitle plaintiffs to follow the same into the hands of these defendants. And the contention that the evidence on this score warrants a decree in plaintiffs' behalf is sufficiently disposed of by the learned trial judge in a memorandum filed by him in disposing of the case, which is as follows:

"After a careful consideration of the evidence in this cause, the court is of opinion that the bill must be dismissed for the reason that the evidence wholly fails to disclose what is unquestionably a necessary precedent in every proceeding to set aside a transfer as fraudulent, namely, that the deceased, Carl Bajohr, was either insolvent at the time of the transfer, or that the transfer itself rendered him insolvent.

"There is no direct evidence as to the date of any transfer, or that there was a transfer at any time other than the incorporation of the Carl Bajohr Lightning Conductor Company; and under the evidence it is only fair to assume that the transfer of the stock in that company to the defendant, if made at any time by the deceased with the intent to defraud his creditors, was made at or about the time of said incorporation. This, the record shows, was in 1908; and yet the evidence unquestionably discloses the fact that for a year thereafter, and really up to the time of the decedent's death, he continued to carry a bank account in his own name, in which the balances had varied from, say, nothing to \$5,000, and

that as late as July 8, 1909, or more than a year after the alleged fraudulent transfer, the deceased had a balance in bank in his own name in the sum of \$5,000. In addition to this, the evidence discloses the fact that the deceased at all times, and up to his death, had certain realty in his own name.

"Under these circumstances, whatever may have been the actual intent of the deceased as to transferring his assets for the purpose of concealing them from his creditors, or in fraud of his creditors, it is clear that the transfer alleged and proven left the deceased solvent; and for that reason, under all the authorities, the transfer cannot be set aside."

[1-3] To this we may add that plaintiffs' case proceeds upon the theory that the property in the hands of Carl Bajohr on and prior to October 9, 1908, was, for the most part at least, his individual property, and not that of his wife, Clara Bajohr. This is largely refuted by the evidence; but under plaintiffs' own theory the evidence fails to make out a case of fraudulent disposition of assets such as to warrant a court of equity in granting plaintiffs the relief sought. Under that theory it is clear, as the trial court states, that Carl Bajohr was not insolvent at the time of the alleged fraudulent transfer, and that such transfer did not render him insolvent. And the fact that he, or his estate, ultimately became insolvent, if this be true, does not render the alleged transfer fraudulent as to these plaintiffs. See *Clark v. Lewis*, 215 Mo. 173, 114 S. W. 604. The burden was upon plaintiffs to show that the alleged transfer of assets was made with the intent to defraud, hinder, or delay his creditors, and that such was the effect thereof. That burden plaintiffs have not successfully carried.

The judgment of the circuit court should be affirmed, and it is so ordered.

REYNOLDS, P. J., concurs.

BOOMSHAFT v. KLAUBER. (No. 14506.)
(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. TRIAL \S 253(3)—INSTRUCTIONS—CONFORMITY TO ISSUES.

In action for slander, there being a conflict as to whether the slanderous words were spoken in the hearing of a party other than the plaintiff, an instruction covering the whole case conditioning recovery on the utterance of the slanderous words, and omitting to state that the jury must find that the words spoken were heard by a third person to warrant plaintiffs' recovery, was reversible error, although failure of the petition to state a cause of action because not alleging publication, or the introduction of testimony as to publication thereunder, was not objected to by defendant until he moved in arrest of judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 616; Dec. Dig. \S 253(3).]

2. TRIAL \S 296(2)—INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

Such error was not cured by defendant's instructions assuming as a fact that the words

spoken were heard by others, since the first instruction failed to present to the jury's consideration an essential element of plaintiff's cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. ¶296(2).]

3. TRIAL ¶233(3) — INSTRUCTIONS — REFERRING TO PLEADINGS.

In action for slander, an instruction that, if defendant spoke the slanderous words "as charged in the petition," the law presumes they were spoken maliciously, etc., was improper because of the use of the words "as charged in the petition."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529; Dec. Dig. ¶233(3).]

Appeal from St. Louis Circuit Court; George O. Hitchcock, Judge.

Action by Jennie Boomshaft against Daniel W. Klauber. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Chester H. Krum, of St. Louis, for appellant. H. A. Yonge and Gustave Cytron, both of St. Louis, for respondent.

REYNOLDS, P. J. Action for slander. The petition charges that in a certain discourse which the defendant had with plaintiff, relating to a certain load of scrap iron purchased by plaintiff, "and in the presence of divers good and worthy citizens of this state (defendant) falsely and maliciously said, rehearsed and proclaimed and loudly published these false, slanderous, malicious and opprobrious words of and concerning the plaintiff: 'I'll fix you. You ——— of a ——— and thief;' thereby charging plaintiff with having committed the crime of larceny." It is charged that defendant used these words falsely and maliciously and rehearsed and proclaimed and loudly published these false scandalous, malicious and opprobrious words of and concerning plaintiff and that thereby defendant had charged plaintiff with having committed the crime of larceny. Averring injury to her name, etc., plaintiff prays judgment for actual and compensatory damages in the sum of \$5,000.

(The words which we have supplied by dashes were given in full in the petition and in evidence, as well as in the instructions, and while vile and obscene are not counted upon as slander, so that it is unnecessary to set them out.)

The answer was a general denial.

There was a trial before the court and a jury and a verdict for plaintiff for \$150 actual and \$250 punitive damages. When this verdict came in defendant in due time moved for a new trial on the ground that the court had erred in giving improper instructions asked by plaintiff and in giving others of its own motion, and that the verdict of the jury was against the evidence and the weight of the evidence. Defendant also filed a motion in arrest on the ground that the petition "does not state facts sufficient to constitute a cause of action in this: That while it is

averred in the petition that the words complained of were spoken in the presence of divers good and worthy citizens of this state, it is nowhere averred that such persons either heard the words as spoken or understood them when they heard them." Pending the consideration of these motions for new trial and in arrest, plaintiff moved the court to be allowed to amend her petition by inserting the words "and hearing" after the word "presence," making the averment read:

"In a certain discourse, which said defendant had with plaintiff relating to a certain load of scrap iron, purchased by plaintiff, and in the presence and hearing of divers good citizens of this state," etc. (Italics ours.)

It is set out in this motion that the omission of the words "and hearing," from the petition was first called to the attention of plaintiff and the court by the defendant's motion in arrest of judgment; that the defendant did not file any demurrer to the petition, or object to the introduction of any evidence thereto, on the ground that it failed to state a cause of action, as alleged in his motion in arrest of judgment, and had raised the question of the omission of those words in the petition for the first time in his motion in arrest of judgment; and because the omission from plaintiff's petition was cured by proper instructions to the jury and the evidence adduced at the trial, without objection by defendant. The court sustained this motion and permitted the petition to be amended by the insertion of the words "and hearing" at the place referred to and overruled both the motion for new trial and in arrest, defendant excepting to all of this action of the court. Judgment thereupon followed on the verdict heretofore set out. From this defendant has duly appealed.

The learned counsel for appellant relies upon five points for the reversal of the judgment. The third point is that the instruction as to the speaking of the words, given for respondent, was erroneous in that it omitted to instruct the jury that the words spoken were spoken in the hearing of others. The fourth point is that the trial court erred in permitting the amendment to be made to the petition by the insertion of the words "and hearing."

In the view we take of the case the only point necessary to determine is the third.

There was evidence tending to show that plaintiff's husband was a dealer in scrap iron or junk, in the city of St. Louis, defendant apparently being a much larger dealer in these articles than plaintiff's husband. For brevity, we refer to the premises and business of plaintiff's husband as that of plaintiff, although plaintiff refers to it as "their" business, premises, etc. On the day of the utterance of what is counted on as the slander, defendant had been on a street car and saw one of his drivers, driving a team with a wagon attached, going south on

Broadway. He remained on the car until he came to his own place of business and there was informed that one of his drivers had driven off with a load of iron belonging to defendant. Defendant at once ran to catch a Broadway car on Seventh Street; missing that, he ran along Broadway and came to an entrance to the yard of plaintiff's place of business by which people drive into the yard with wagons. He saw his driver with a wagon loaded with scrap iron belonging to him in the yard, and called to him, "This is a nice way that you are doing." As soon as the driver saw defendant coming into the yard, he jumped off the wagon and ran away and was not present at the difficulty between plaintiff and defendant. Defendant testified that plaintiff's husband was there at the time at scales which were in the yard. In this, however, he is contradicted by plaintiff and by a colored man, who was in the employ of plaintiff, and there is no pretense that plaintiff's husband heard or took any part in the conversation or quarrel which took place between plaintiff and defendant. There was, however, a colored man in the employ of plaintiff in the yard, handling a wheel barrow on which the scrap iron, as it was taken out of the wagon by defendant's driver, was loaded, to be carried to plaintiff's scales and there weighed. According to the testimony of defendant this colored man, as soon as defendant came into the yard, ran across Broadway and was not in the yard and not present and in hearing at the time of the occurrence between plaintiff and defendant. On this point the testimony of defendant was positive; that is, he testified that neither the colored man nor anyone else was present or within hearing when the conversation took place between himself and the plaintiff. According to the defendant, plaintiff herself was not in the yard when he first went in there and accosted his driver but was in her house and came out after her colored employé had left. According to plaintiff, however, about nine o'clock in the morning of the day of the happening of the incident, a man drove up to their premises with a load of scrap iron and asked her if she would buy the iron. She said that she would, and told the driver to go out to his wagon and she would send a man out, referring to the colored man who worked for her. She accordingly sent this colored man out with a wheel barrow to help the driver unload and put the iron in the yard. This colored man testified that he took one wheel barrow load of iron and put it on the scales, and while he went out to get the rest of the iron defendant came through the yard very fast. Plaintiff testified that she did not see defendant as he entered, as she had her back turned to the scales, and that defendant ran over to the scales and said something that she did not hear. When plaintiff heard defendant talk-

ing she started towards him, when defendant said to her, "What business you have to buy my iron?" Plaintiff said, "I didn't know it was your iron." Defendant said, "Why, you are a liar, you did know it was my iron." Plaintiff said, "No, sir; I did not." Defendant said, "Why, everybody knows Klauber's team; everybody in St. Louis knows Klauber's team." Plaintiff said, "I didn't see any name on your team. I seen it was a coal wagon standing there. I didn't know whether it was your team or anyone else's. If you don't fuss, you can have it back." To which defendant said, "No I don't want it back. I will fix you, you ——— of a ——— and thief." Defendant then walked up and down the yard and kept on talking and, according to plaintiff and the colored man, repeated the offensive words several times, walking up and down the yard and talking to himself. According to plaintiff and the colored man, defendant "was awful mad" and red in the face. Defendant finally left the yard and went out on the street. The colored man testified very positively that he was present and heard the defendant use the language counted on, and he repeated it word for word as testified to by plaintiff.

[1] It thus appears that there was a sharp conflict in the testimony on behalf of plaintiff and that of defendant as to whether the slanderous words were spoken in the hearing of a party other than plaintiff. On that state of the evidence the court, at the instance of plaintiff, gave the instruction complained of, that instruction telling the jury that if they found from the evidence that on the day named, "and in the presence of one or more persons, in a conversation then and there had between plaintiff and defendant in reference to some scrap iron purchased or about to be purchased by plaintiff, which defendant claimed was his iron, the defendant falsely and maliciously used and spoke the words of and concerning the plaintiff (quoting them), your verdict must be for the plaintiff." It will be noted that this instruction did not direct the jury to find that the words spoken had been heard by any third person.

It is further to be noted that the averments in the motion made by plaintiff for leave to amend the petition by interlining the words, "and hearing," correctly state the matters therein set out as to what had occurred at the trial of the case up to the time of filing that motion, save as to what the instruction required.

Newell, in his work on *Slander & Libel* (3d Ed.) § 234, p. 279, says:

"It is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself. The communication, whether it be in words or by signs, gestures or caricature, must be intelligible to such third person. If the words used

be in the vernacular of the place of publication, it will be presumed that such third person understood them until the contrary be proved. And it will be presumed that he understood them in the sense which such words properly bear in their ordinary signification, unless some reason appear for assigning them a different meaning."

Townsend on Slander & Libel (4th Ed.) p. 83, § 95, says:

"Every communication of language by one to another is a publication. But to constitute an *actionable publication*, that is, such a publication as may confer a remedy by civil action, it is essential that there be a publication to a *third person*, that is, to some person other than the author or publisher and he whom or whose affairs the language concerns. * * * No possible form of words can confer a right of action for slander or libel, unless there has been a publication to some third person."

At page 88, § 107, the same author says:

"The requisites of an *oral publication* are: (1) that the language be spoken to or in the presence of at least some one third person. * * * No possible form of words can be the basis of an action for slander if at the time of their utterance the only persons present are the speaker and the person to whom or whose affairs the language concerns. (2) The third person present must *hear* the language spoken. Whether the third person present at the speaking did or did not hear the language spoken is, in every case, a question of fact. And this is not the less the rule because where the speaking is in the presence of a third person, under such circumstances that he might have heard what was spoken, he may, as a rule of evidence, be assumed to have heard it, until it be shown that he did not hear. The burden is on him who alleges a publication to establish that the third person heard the language spoken. (3) The third person must understand the language (section 96)."

Referring to this last or third element, it is said by the same author at section 96:

"There cannot properly be said to be a communication of language by one to another, unless that other understands the signification or meaning of the language sought to be communicated. When we say the language must be understood by the one to whom it is published, we mean only that the matter published must be in a language to which the person to whom it is published can interpret to some meaning. To one who does not understand the language in which a publication is made, it is as to him nothing more than unmeaning sounds or signs, and not language."

(The italics in the foregoing citations from Townsend are those of that text-writer.)

Our own court in *Gold v. S. Pian Time Payment Jewelry Co.*, 185 Mo. App. 154, 145 S. W. 1174; *Traylor v. White*, 185 Mo. App. 325, 170 S. W. 412; *Walker v. White*, 192 Mo. App. 13, 178 S. W. 254, and *Frazier v. Grob*, not yet officially reported, but see 183 S. W. 1083, as also *Wright v. Great Northern Ry. Co.*, 186 S. W. 1085, having under consideration the subject of libel or slander, has so held. So our Supreme Court held in *Caruth v. Richeson*, 90 Mo. 186, 9 S. W. 633, and the Kansas City Court of Appeals in *Cameron v. Cameron*, 162 Mo. App. 110, loc. cit. 114, 144 S. W. 171. In the cases of *Traylor v. White*, supra, and *Walker v. White*, supra, an examination of our files show that the petitions in the cases averred that the

words spoken and published of and concerning the plaintiff by the defendant were spoken "in the presence and hearing of divers persons;" and in each of them, as will be seen by reference to the decisions as reported, there was evidence that the actionable words had been spoken not only in the presence, but in the hearing of divers and sundry persons other than the plaintiffs. But in each case instructions given on behalf of plaintiffs and purporting to cover the whole case were held to be erroneous in that they authorized a verdict for plaintiffs on a mere finding that the defendants had uttered the words of and concerning plaintiffs, without also requiring the jury to find that the words were spoken in the presence of and heard and understood by others, although the evidence there showed that the words were spoken in the hearing of others and that they understood them.

Our court, in *Traylor v. White*, supra, 185 Mo. App. loc. cit. 330, 170 S. W. 413, said:

"It is certain there can be no slander without publication of the words spoken. It must be shown that the slanderous matter was communicated to some third person, who understood it, since, otherwise, there is no publication."

[2] In those cases it was urged, as here, that the error in plaintiff's instructions had been cured by defendant's instructions, which assume that the words spoken were heard by others. That may also be said, and so it is urged, in the case at bar as to the instructions given in behalf of defendant, one of them telling the jury that although they may believe that the defendant used of and concerning the plaintiff the word "thief," as alleged in the petition, "yet if the jury believe from the circumstances and the connection in which the word was used and the other words with which it was associated that it was merely used as a term of abuse and not intended as the truth, or that the words were understood by the hearers as mere terms of abuse and not as being intended to charge as a fact that plaintiff was a thief, then the jury should find for the defendant." So that we have here the same situation presented as in the cases of *Traylor* and *Walker*, above cited, that is, instructions given at the instance of defendant which included as a fact to be found that the words had been uttered in the hearing of others. Our court held in each of the cases that this did not cure the defect in the instructions of the plaintiffs, those instructions undertaking to cover the whole case. That is the situation here. We feel bound by authority to hold that the instruction here given at the instance of plaintiff, and which we have set out substantially as given, demands a reversal of the judgment in this case.

Whether, under the provisions of section 1848, Revised Statutes 1909, an amendment to the petition can be made after verdict, we

need not here decide. See, however, *Budd et al. v. Hoffheimer*, 52 Mo. 297, loc. cit. 303; *Blair v. Chicago & Alton R. R. Co.*, 89 Mo. 383, loc. cit. 389, 894, 1 S. W. 350; *Cabanne v. Spaulding et al.*, 14 Mo. App. 312, loc. cit. 314, the latter construing what are now sections 1848 and 1851, Revised Statutes 1909, as also *Bricken v. Cross*, 163 Mo. 449, loc. cit. 457, 84 S. W. 99.

The difficulty that meets us here, and it is fatal to respondent, is, that the jury never passed upon the case as it was presented with this amendment, which consisted in inserting in the petition, and after verdict, the words, "and hearing." Whether the slanderous words were uttered in the hearing of any party other than plaintiff was sharply controverted in the case at bar. The plaintiff and her employé, the colored man, it is true, testified that the words were uttered in the presence of this colored man and were heard by him. It is also true that no objection was made at the trial to this line of testimony, nor was the petition, as it stood before the amendment, attacked at the trial nor until afterwards, when it was attacked by the motion in arrest, filed after verdict. But it is also true that the defendant flatly and most positively denied that anyone was present but himself and the plaintiff, or within hearing of them, at the time he is alleged to have uttered the words complained of, coupling that with a denial of ever having uttered the slanderous word, or any one of like import. It was, therefore for the jury, under such a state of facts, to have determined this matter on the credibility of the witnesses. The Kansas City Court of Appeals in *Cameron v. Cameron*, supra, 162 Mo. App. loc. cit. 114, 144 S. W. 171, where a third person, one Curry, admitted by both parties to the action to have been present during the conversation when the slanderous words were said to have been uttered, and who testified that he heard and understood all that was said, but denied that the defendant had uttered the slanderous words, held that his denial "was not conclusive and possessed no greater evidentiary force than that of offering opposition to the affirmation of plaintiff that the words were spoken and were heard and understood by Curry. The question of the credibility of the defendant and his witness as well as the truth of their account of the quarrel were issues of fact for the jury to solve." It was therefore held in that case, that the court did not err in overruling the demurrer to the evidence on the ground that the third person denied that the slanderous language had been used. But in the case at bar the court, in the instruction given at the instance of plaintiff, and which as before said, purported to cover the whole case, did not submit to the jury the determination of the credibility of the testimony as between plaintiff and her

witness on the one side and that of the defendant on the other, as to whether that witness or any party other than plaintiff had heard the slanderous word. That was of the very gist of the action—the very foundation of the claim of "actionable publication." True the court told the jury that plaintiff was entitled to recover, if the slanderous word was spoken "in the presence of one or more persons." It might well be that they were spoken in the presence of a third party, but where, as here, the defendant emphatically denied that any third party heard the conversation or was present who could possibly have heard the language used, it was for the jury to determine that very important fact. By this instruction, as asked and given at the instance of plaintiff, the verdict of the jury is not responsive to this very material issue.

[3] As the cause is to be remanded it is well to call attention to an error in the second instruction, not indeed raised by learned counsel for appellant before us, but which we notice ourselves so that, if another trial is had, it will not be repeated. That error is in the second instruction given at the instance of plaintiff, which told the jury that if it found from the evidence that defendant "spoke the slanderous words as charged in the petition, then the law presumes they were spoken maliciously, and it is unnecessary to prove any express malice in order to warrant a verdict for plaintiff." The phrase, "as charged in the petition," in this instruction is improper. So it has been held in case after case by our courts.

For the error which we have pointed out in the main instruction which was given at the instance of plaintiff, we are compelled to reverse the judgment.

That is accordingly done and the cause remanded.

ALLEN and THOMPSON, JJ., concur.

BERGLAR v. UNIVERSITY CITY. (No. 14289.)

(St. Louis Court of Appeals. Missouri. Nov. 6, 1916. Rehearing Denied Dec. 30, 1916.)

1. PLEADING §370—RAISING "ISSUE."

Under Rev. St. 1909, §§ 1950, 1951, defining and classifying issues, and prescribing when an issue of law arises, an issue does not arise until demurrer or answer is filed; an "issue" being: First, of law, ordinarily raised by demurrer; and, second, of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1210; Dec. Dig. § 370.]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

2. PLEADING §85(4)—TIME FOR FILING ANSWER—RULE IN PARTICULAR CASE.

In an action against a city, where defendant objected to going to trial on June 26th because plaintiff had not filed her amended petition until June 23d, nearly a month after the time allowed

by the court, and because defendant had been granted five days thereafter to file its answer, it was error to force defendant to file answer and to go to trial before the expiration of the five-day period.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 174, 176, 177; Dec. Dig. ☞ 85(4).]

3. MUNICIPAL CORPORATIONS ☞404(5) — CHANGING GRADE OF SIDEWALK—VARIANCE IN PROOF — ORDINANCES — "CHANGE OF GRADE."

Where the cause of action pleaded against a city was that plaintiff had been damaged by changing the grade of the sidewalk in front of her property, ordinances introduced in evidence, not purporting to change the grade, but distinctly providing for the establishment of a grade, were inadmissible, since they did not sustain the averment that by them the grade had been changed, as to establish the grade of a street or of a sidewalk is one thing, while to change a grade from one previously established is an entirely different matter; "change of grade" meaning to change it from that previously established or in use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 993-995; Dec. Dig. ☞404(5).]

For other definitions, see Words and Phrases, First and Second Series, Change.]

4. APPEAL AND ERROR ☞1178(8) — DISPOSITION—REMAND FOR AMENDMENT.

In action against a city for damages from change of grade of the sidewalk in front of plaintiff's property, judgment for plaintiff will not be reversed without remand because the ordinances introduced by her did not purport to change the grade, but provided for the establishment of a grade, since the ends of justice require that plaintiff be given an opportunity to amend if she is so advised, and to make her allegations and proof harmonize.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4616-4619; Dec. Dig. ☞1178(8).]

5. MUNICIPAL CORPORATIONS ☞404(5) — CHANGING GRADE OF SIDEWALK—EVIDENCE — ORDINANCES—SPECIAL PLEADING.

In a property owner's action against a city for damages from changing grade of the sidewalk, ordinances relative to the doing of the work, which were not in terms pleaded, were admissible, under a proper petition, to show the fact that the work had been done by authority of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 993-995; Dec. Dig. ☞404(5).]

Appeal from St. Louis Circuit Court; G. A. Wurdeman, Judge.

"Not to be officially reported."

Action by Elizabeth J. Berglar against the City of University City. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

T. H. Sprinkle and J. W. Lewis, both of St. Louis, for appellant. John B. Denvir, Jr., of St. Louis, for respondent.

REYNOLDS, P. J. Action by plaintiff against the City of University City for damages alleged to have been sustained by reason of changing the grade of the sidewalk in front of plaintiff's property. The amend-

ed petition upon which the case was tried, after averring the incorporation of defendant and that plaintiff is the owner of three lots on the south side of Maple avenue, in an addition to University City, and charging that the lots were improved with a valuable residence, together with outbuildings, shade trees and ornamental shrubbery and walks, avers that Maple avenue is an old established road in St. Louis county graded and macadamized at the time plaintiff purchased the lots and improvements, and that the improvements were made with reference to the then grade of the road, the lots being on that grade; that on April 28th, 1909, the city duly passed an ordinance changing the grade of Maple avenue so as to lower that road five and a half feet in front of plaintiff's property. The ordinance is set out, it being numbered 38 and entitled, "An ordinance to establish the grades of certain streets and alleys of University City." The second section of the ordinance established the grade of Maple avenue where it runs in front of plaintiff's lots. It is then averred that notwithstanding the passage of this ordinance, which it is averred was approved April 30th, 1909, nothing was done by the defendant city to make Maple avenue conform to the grade as thus established and that the surface grade of Maple avenue remains as it was before the passage of the ordinance. It is further averred that on or about October 24th, 1911, defendant duly passed an ordinance changing the grade of the sidewalk along the south side of Maple avenue so as to lower the grade of the sidewalk in front of plaintiff's property five feet. The ordinance, numbered 152, is set out and is entitled, "An ordinance establishing the grade of the sidewalk on the south side of Maple avenue between Sutter avenue and the easterly city limits." The first section of the ordinance establishes the grade of the sidewalk on the south side of Maple avenue between the points named "at one and a half foot above the established grade of Maple avenue between the points mentioned at a point one foot out from the property line." This ordinance was approved October 25th, 1911. It is further averred that the changing of the grade of the sidewalk as provided for in this last mentioned ordinance was thereafter made by defendant and the sidewalk in front of plaintiff's property lowered five feet below the former grade of the sidewalk; that by reason of this change of grade and the lowering of the sidewalk, plaintiff has been deprived of ingress to and egress from her property, and that the change was made by defendant contrary to law and without ascertaining or paying in advance the damages that would result to plaintiff's property therefrom, and that plaintiff has sustained actual damages in the sum of \$3,000; that by reason of the fact of the sidewalk being lowered without lowering Maple ave-

nue in accordance with the grade established by ordinance No. 38, the sidewalk as so lowered became a mere ditch in which water, mud, refuse and filth of all kinds accumulated and now accumulates; that this sidewalk is impassable for a long time after a rainfall and that for a period of many months plaintiff has been compelled to enter and leave her property by way of the alley in the rear. Charging that the lowering of the sidewalk was without just cause or excuse, and with such reckless disregard of the rights of plaintiff as to render the acts of defendant wilful and malicious, punitive damages are claimed in the sum of \$1,000 in addition to the actual damages sustained, and judgment is prayed accordingly.

It appears that the cause was set for trial on June 25th, 1913, but the docket for that day went over to June 26th, and that defendant objected to going to trial at that time for the reason that plaintiff had not filed her amended petition until June 23rd, 1913, nearly a month after the time allowed by the court, and that defendant had been granted five days thereafter to file its answer, which time, it is alleged, would not expire until June 28th, 1913, and defendant had not filed its answer when the cause was called for trial and that the issues had not then been made up.

It further appears that when this cause had been set for trial on June 25th, that another cause, in which one Burns was plaintiff and the City of University City defendant, and in which the parties were represented by the same counsel as in the case at bar, was also set for trial the same day but after this cause, and that counsel in the two cases, as the court was advised, had agreed that the Burns Case should be tried before the instant case. Counsel called the attention of the court to the fact that in the Burns Case he had waived the five days granted him to plead and had filed his answer therein, and had made preparations to try that, but had not pleaded in and was not ready to try this Berglar Case. The court, however, ruled that as the Berglar Case was ahead of the Burns Case on the docket for trial, it would have to be tried first. Counsel for defendant, calling the court's attention to the record in the case showing that the amended petition in the Berglar Case, which was to have been filed at a day named, had not been filed in accordance with the order of the court but that on May 27th the plaintiff was granted ten days' additional time to file an amended petition, which she had not filed until June 23rd, long after the ten days had expired and only two days before the cause had been set for trial, asked that the trial of the Berglar Case be postponed at least until after the Burns Case, in which the witnesses were all present, had been first tried. Whereupon the court stated to the attorney for defendant that he "could file his affidavit." To this

counsel replied that he did not know what affidavit was necessary to be filed, as the court hardly expected an attorney to file an affidavit advising the court of its own orders. Counsel for plaintiff insisting on a trial, the court announced that as this, the Berglar Case, was the first on the docket, it would have to be tried first. Excepting to this ruling of the court, defendant thereupon filed its answer, which was in the nature of a general denial, and the cause proceeded to trial before the court and a jury. The trial resulted in a verdict in favor of plaintiff in the sum of \$1,500 actual damages, no punitive damages being awarded. Plaintiff filed a motion for new trial, among other grounds alleging error in forcing the defendant to trial and also attacking the verdict as against the weight of the evidence and the law under the evidence, and as excessive. Error was also assigned on instructions given and refused and on the admission of evidence. The court announced that he would sustain the motion for new trial unless a remittitur of \$500 was entered. That being done, the motion for new trial was overruled. A motion in arrest was also filed and overruled. Exceptions were saved to the action of the court in overruling both of these motions, and judgment being entered for \$1,000 in favor of plaintiff, defendant has duly appealed to our court.

When this case was first argued and submitted to us we affirmed the judgment. Appellant filed a motion for rehearing, which we sustained, vacating our former judgment of affirmance, and setting the case down for re-argument. It was accordingly re-argued orally, counsel for appellant also filing a printed argument and brief.

On consideration of the case we have concluded that our former action in affirming the judgment was erroneous.

On a review of the proceedings connected with the insistence of counsel for appellant that the case was not at issue when he was forced into a trial, we have concluded that it was not a case, as indicated by the learned trial court, for the interposition of an affidavit for continuance or for postponement on the ground of surprise, as seems to have been the view taken by the learned trial court.

It is said by our court in *Nichols v. Headley Grocer Co.*, 66 Mo. App. 321, loc. cit. 323:

"While it is well settled that the granting of a continuance is to a great extent within the discretion of the trial court, it is equally well settled that such discretion is judicial in its character and subject to review on appeal."

[1, 2] Our statute, section 1859, Revised Statutes 1909, is mandatory in that it provides:

"If any amendment be made to any pleading, the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer or reply to the pleading so amended."

Under its leave to answer, defendant was entitled to five days in which to answer the amended petition. It is not until a demurrer or answer is filed that the "issue" may be said to have arisen, an issue being, first, of law, which is ordinarily raised by demurrer, and, second, of fact. Sections 1950, 1951, Revised Statutes 1909. Our statute, section 1799, Revised Statutes 1909, providing for pleading by the defendant, confers upon the defendant the right to plead. In certain counties, as in St. Louis County, the defendant is to demur or answer to the petition on or before the third day of the term at which he is bound to appear, "unless longer time be granted by the court." So that the right to plead within the time granted either by a general rule of court or a rule in that particular case, is a substantial right, by which a party is given his "day in court," which cannot be taken away from him, save in the manner provided by statute. When the defendant in this case was granted five days in which to plead to the amended answer of plaintiff, it had that time as of right, not only to plead but to prepare for trial, and it was error to force it to trial before that time had expired. Especially is that true in this case where it clearly appears that plaintiff herself was in default as to the time of her pleading and could have been cast for that, if counsel for defendant had insisted, unless the court, for good cause shown, had determined otherwise. But in no event, could the defendant be cast or held to be in fault or forced to a trial when neither an issue of law or of fact was presented and it was not in default, the time which the court had itself granted to make that issue not having expired.

We are compelled to hold that it was an abuse of discretion on the part of the learned trial court to force the defendant to trial under the circumstances here present.

[3] We have further concluded that the objections made by defendant to the introduction of the ordinances providing for the establishment of the grade of Maple avenue and of the sidewalk or pavement in that avenue should have been sustained. The cause of action pleaded is, that the defendant corporation has passed certain ordinances "changing the grade of Maple avenue so as to lower said road five and a half feet in front of plaintiff's property," and it is there further pleaded that the defendant corporation had passed an ordinance "changing the grade of the sidewalk along the south side of Maple avenue so as to lower the grade of said sidewalk five feet in front of plaintiff's property," and that "the change of grade of said sidewalk was thereafter made by defendant and said sidewalk lowered five feet in front of plaintiff's property below the former grade of said sidewalk; that by reason of said change of grade and the lowering of said sidewalk plaintiff has been deprived of ingress to and egress from said property;

that said change of grade was made," etc. The ordinances offered and introduced did not purport to change the grade of either the street or sidewalk, but distinctly provided for the establishment of a grade. No other inference can be drawn from them. Defendant, when these ordinances were offered, made proper objection to them as departing from the averments in the petition, and as irrelevant and immaterial to the case as pleaded. The objection being overruled, defendant duly saved its exceptions. The objections made should have been sustained.

To establish the grade of a street or of a sidewalk is one thing; to change a grade from one previously established, is an entirely different matter. Change of grade means to change it from that previously established or in use. *Warren v. Henly*, 31 Iowa, 31; *Hendrick's Appeal*, 103 Pa. 358; *Goodrich v. City of Omaha*, 10 Neb. 98, 4 N. W. 424. Our own courts recognize a distinction between the establishment of a grade and the change of an established grade, as see *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180, 24 S. W. 777, 41 Am. St. Rep. 648; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; *Cole v. City of St. Louis*, 132 Mo. 633, 34 S. W. 469; *Fuess v. Kansas City et al.*, 191 Mo. 692, 90 S. W. 1029; *Quinn v. City of Columbia*, 152 Mo. App. 511, 133 S. W. 663.

In the case at bar it does not appear that prior to the enactment of the ordinances herein referred to, there had ever been a legally established grade for Maple avenue or the sidewalk adjoining it.

There was evidence introduced at the trial of this case tending to show what the actual grades of Maple avenue and of its sidewalk had been prior to the passage of the ordinances referred to, but whether those were legally, lawfully established grades or natural grades as to either the street or the sidewalk, does not appear by any probative evidence in the case; and the ordinances offered and admitted, on their face, established a grade as if none had been before then established.

We hold that the ordinances offered and introduced did not sustain the averment that by them the grade had been changed.

[4] We cannot sustain the contention of the learned counsel for appellant, that the judgment of the circuit court should be reversed without remanding the cause. The ends of justice and the proper conduct of a trial require that plaintiff be given an opportunity to amend, if she is so advised, and to make her allegations and proof harmonize.

We do not think it necessary to pass on the other errors assigned, either as to the question of estoppel, or the amount of the verdict, or the admission of evidence, other than here

noted, as on a new trial none of these questions may arise in their present form.

[5] We add this, however, that we see no error in the introduction, assuming that proper amendments have been made in the petition, to other ordinances relative to the doing of the work, which ordinances were not in terms pleaded. These other ordinances were admissible, amendments being made to the petition, as they relate to what was done toward the construction of the sidewalk, such as material and the like, the letting of the contract for the work, etc. They were introduced, as we understand, for the purpose of showing the fact that the work had been done by authority of the city, on the sidewalk as lowered; while in themselves they give no right of action, they were admissible in evidence for that purpose and it was not necessary to plead them specifically.

It follows also from what we have said, that the instruction given by the court at the instance of plaintiff, in that it was founded on ordinances establishing the grade of the street and sidewalk, was erroneous.

The judgment of the circuit court is reversed and the cause remanded.

ALLEN, J., concurs in the result.

MARKOW v. GROSS-O'REILLY CHANDELLIER CO. (No. 14467.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. MASTER AND SERVANT ⇨189(2)—INJURIES TO SERVANT—FELLOW SERVANTS.

That plaintiff's fellow servant had authority to give directions to workmen as to what work should first be done and had control over a can in which alcohol was kept, with authority to have it repaired when needed, was sufficient to constitute him the defendant's representative, and defendant is charged with the fellow servant's negligence in ordering plaintiff to solder the can, which the fellow servant knew contained alcohol.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 437, 439-444; Dec. Dig. ⇨189(2).]

2. MASTER AND SERVANT ⇨185(23) — INJURIES TO SERVANT—DANGEROUS AGENCY.

Where the master in the prosecution of his business keeps a dangerous substance where employees are required to work, the careless or improper handling of which would affect the safety of his servants while engaged in their ordinary duties, his duty with respect to the custody and control thereof is nondelegable in its nature, and hence cannot be shifted to servants in his employ.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 412; Dec. Dig. ⇨185(23).]

3. MASTER AND SERVANT ⇨289(22) — INJURIES TO SERVANT—QUESTION FOR JURY.

In a servant's action for injuries, whether plaintiff was negligent in failing to exercise ordinary care to discover the presence of alcohol in a can placed before him by a fellow servant,

standing in the relation of vice principal, to be soldered, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113; Dec. Dig. ⇨289(22).]

4. APPEAL AND ERROR ⇨927(5)—REVIEW—DEMURRER TO THE EVIDENCE.

On appeal from defendant's demurrer to the evidence, for the purpose of the demurrer, the evidence is to be viewed in the light most favorable to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. ⇨927(5).]

5. MASTER AND SERVANT ⇨296(8)—INJURIES TO SERVANT—INSTRUCTIONS.

In a servant's action for injuries, an instruction that, if the plaintiff knew that a can, given him to be soldered, was used to hold wood alcohol, and that plaintiff knew, or with the exercise of ordinary care might have known, that the can contained wood alcohol, and that he knew that wood alcohol was a highly dangerous explosive, and that he attempted to solder the can while it so contained alcohol, causing it to explode and injure him, he could not recover directed a verdict for defendant only upon a finding that plaintiff knew, or by the exercise of ordinary care might have known, that the can contained wood alcohol.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1185; Dec. Dig. ⇨296(8).]

6. APPEAL AND ERROR ⇨237(2) — OBJECTIONS IN LOWER COURT—MOTION TO STRIKE.

In a servant's action for injuries caused by the explosion of a can containing alcohol which the plaintiff was soldering, where plaintiff testified, over objection, to statements alleged to have been made by a fellow servant, who had ordered him to repair the can while they both were working for defendant, and on cross-examination plaintiff testified that the statements were made two weeks or more after the accident, but defendant did not then move to strike out the testimony given in direct examination, as it appeared competent when given for the purpose for which it was received, defendant is not in a position to complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇨237(2); Trial, Cent. Dig. § 235.]

Appeal from St. Louis Circuit Court, Geo. C. Hitchcock, Judge.

"Not to be officially published."

Action by Harry Markow against the Gross-O'Reilly Chandelier Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. P. McCammon, of St. Louis, and R. M. Sheppard, of Joplin, for appellant. Fauntleroy, Cullen & Hay, of St. Louis, for respondent.

ALLEN, J. This is an action to recover damages for personal injuries suffered by plaintiff while in the employ of the defendant company as its servant, alleged to have been occasioned by the negligence of defendant. The trial, before the court and a jury, resulted in a verdict and judgment for plaintiff, and the defendant prosecutes the appeal.

On March 17, 1913, the defendant was engaged in manufacturing lighting fixtures in the city of St. Louis, where it maintained a

factory or shop. Plaintiff was a "solderer and fitter" in defendant's employ, and in performing his duties used a soldering iron, the point of which was heated by an alcohol blow torch furnished by defendant. In the room in which he worked, where were a number of other workmen engaged in similar work, the defendant kept beneath a bench a can containing alcohol, from which the workmen in the room obtained alcohol from time to time for use in their blow torches. There is evidence for plaintiff that two cans were kept under the bench mentioned, one of them ordinarily being empty. Defendant's main supply of alcohol was kept in a tank in the basement of the building, under lock and key.

One Clarence Finot, a young man in defendant's employ, who acted as timekeeper and also performed certain other duties, was intrusted by defendant with control over defendant's supply of alcohol. He carried the key to the tank in the basement, and was charged with the duty of keeping on hand a supply of alcohol in a can in the room in which plaintiff worked. He testified that it was also his duty to keep such can in repair, and to keep "the alcohol out of the way of the men in their work; * * * keep it from being exposed to the heat of the men who were working there." There is considerable testimony in the record relative to the other duties performed by Finot. It appears that he acted as a messenger for defendant's general foreman in conveying and delivering to the workmen the foreman's orders, and that he bought material for the workmen to work upon, or parts to be assembled. Plaintiff testified that Finot would frequently tell him and other workmen what work was first to be done, but that he never gave plaintiff any directions as to the manner in which plaintiff should do his work; that if plaintiff wanted any "parts" he would direct Finot to bring them; that Finot "assisted" all of the men who were assembling the fixtures; and that they would frequently give directions or "orders" to him as to what was needed.

The evidence discloses that on the day above mentioned, while plaintiff was at work at his bench with his blow torch and soldering outfit, Finot came to him with the can—or one of the cans—in which alcohol was kept in the room, as above mentioned, placed this can on the bench before plaintiff, and told him to solder a tip on the spout thereof. Plaintiff's testimony is to the effect that Finot placed the can before him in a position ready for plaintiff to do the necessary work thereon without in any wise moving the can, and that he at once turned from the other work in which he was engaged and proceeded to carry out Finot's direction. The can in fact contained a quantity of alcohol, which was ignited from the heat of plaintiff's blow torch, causing the can to explode, and plaintiff was thereby severely burned and seriously injured. Finot's testimony is to the effect

that when he thus placed the can before plaintiff he asked plaintiff whether or not it would explode, thus indicating that it contained alcohol; but this plaintiff denies.

[1] The first assignment of error pertains to the action of the trial court in overruling the demurrer to the evidence interposed by the defendant. It is argued that the demurrer should have been sustained for the reason that plaintiff and Finot were fellow servants, and that consequently defendant is not liable for Finot's negligence, if any, in placing the can upon plaintiff's work bench for work to be done thereon by a blow torch when it contained alcohol. As to this it may be said that the evidence adduced, to the effect that the defendant conferred upon Finot authority to give directions to the workmen as to what work should first be done, coupled with the control given him over this can and the authority to have the same repaired when needed, would appear to be sufficient to constitute him the master's representative with respect to the doing of the particular work which he directed plaintiff to do at the time in question. "It is ruled that they are fellow servants who, under the direction and management of the master himself, or by some servant placed by the latter over them, are engaged in the prosecution of the same common work, and without any dependence upon or relation to each other except as collaborators without rank, and that he is a vice principal who is intrusted by the master with power to superintend, direct, or control the workman in his work, and that for negligence in such superintendence, direction, or control, the master is liable." See *Burkard v. Rope Co.*, 217 Mo. loc. cit. 482, 117 S. W. 41, and authorities there cited. Though Finot and plaintiff may have been fellow servants with respect to some, or indeed many, of the duties performed by them, respectively, it appears that Finot was possessed of such apparent authority to direct or control plaintiff as to make it obligatory upon plaintiff to obey an order or direction of the character in question. And, this being true, defendant is chargeable with the negligent order or direction given plaintiff to solder a tip upon the spout of this can which, as Finot knew, contained alcohol, a "highly dangerous explosive."

The "dual capacity" doctrine is firmly implanted in our law of master and servant. See *Radtke v. Basket & Box Co.*, 229 Mo. loc. cit. 23, 129 S. W. 508; *Fogarty v. Transfer Co.*, 180 Mo. 490, 79 S. W. 664, 1 Ann. Cas. 136; *Bane v. Irwin*, 172 Mo. 307, 72 S. W. 522; *Blen v. Transit Co.*, 108 Mo. App. 399, 83 S. W. 986; *McIntyre v. Tebbetts*, 140 Mo. App. 116, 120 S. W. 621; *English v. Rand Shoe Co.*, 145 Mo. App. 439, 122 S. W. 747; *Mertz v. Rope Co.*, 174 Mo. App. 94, 156 S. W. 807. And it is well established in this state that it is the character of the act on the part of a servant occupying such dual capacity, and

not the rank of the servant, which must determine the question of liability or nonliability of the master for the servant's negligence in a particular instance. See *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. loc. cit. 314, 91 S. W. 460; *English v. Shoe Co.*, supra, and cases cited; *Mertz v. Rope Co.*, supra.

Under the evidence adduced the act of Finot here in question, in directing plaintiff to solder a tip on this can, appears to have been of such character as to fall within the scope of his duties in the capacity of a vice principal or representative of the master, making his negligence in the performance thereof the master's negligence.

[2] Furthermore, it appears beyond doubt that defendant intrusted Finot with the exclusive control over both the tank of alcohol in the basement and that kept in a can, or cans, in the room in which plaintiff worked. According to his own testimony it was his duty, among other things, to keep the can containing alcohol "out of the way of the men in their work; * * * keep it from being exposed to the heat of the men who were working there." That alcohol is "a highly dangerous explosive" is admitted by defendant's answer. The fact that the workmen doing such work as was plaintiff were using blow torches, developing intense heat, rendered it necessary to keep defendant's supply of alcohol in the room away from the heat of such torches when they were in use; and this duty defendant undertook to delegate to Finot. It has been held, and correctly we believe, that where the master in the prosecution of his business keeps about the premises where employes are required to work a dangerous substance of this character, the careless or improper handling of which will affect the safety of his servants while engaged in their ordinary duties, the law casts upon him a duty with respect to the custody and control thereof which is non-delegable in its nature, and hence cannot be shifted to a servant in his employ. See *Rush v. Spokane Falls & N. Ry. Co.*, 23 Wash. 501, 63 Pac. 500; *Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 301, 164 S. W. 971. We need not here rest our ruling upon this ground, however, in view of what we have said above.

[3] It is also earnestly insisted that the evidence convicts plaintiff of contributory negligence as a matter of law, and that for this reason defendant's demurrer to the evidence should have been sustained. To this we cannot assent. It is true, as appellant says, that, granting that plaintiff was not warned as to the contents of the can, he knew that it was a can used for alcohol, and plaintiff, as he admitted, could have discovered the presence of the alcohol therein by picking up the same and shaking it; and this he did not do. However, the can was placed before plaintiff, according to his testimony, in the precise way in which it was

necessary to place it in order for him to work upon it as directed, no handling or moving thereof being necessary. To convict plaintiff of negligence as a matter of law, we must be prepared to say that it conclusively appears, leaving no possible room for reasonable minds to differ on the subject, that no reasonably prudent man, under the circumstances, would have proceeded to work upon the can without moving or shaking it in order to ascertain whether or not it contained alcohol. This, we think, we would not be justified in declaring. We are of the opinion that the question of plaintiff's negligence was a matter to be referred to the jury to pass judgment thereon; that the jury might reasonably and properly find that plaintiff was justified in relying upon the presumption that Finot would not negligently place before his blow torch a can containing a highly explosive substance.

[4] The evidence is to be viewed in the light most favorable to plaintiff for the purpose of the demurrer, and, so viewing it, we must proceed upon the assumption that plaintiff did not know that the can contained alcohol at the time in question; that there were two cans kept under the bench mentioned, one ordinarily being empty; and that Finot placed one of these cans upon plaintiff's bench in precisely the proper position for plaintiff to work upon as directed. Assuming the truth of these matters, if plaintiff was negligent, it was in failing to exercise ordinary care to discover the presence of alcohol in the can; and, under the circumstances, it would have been error, in our opinion, for the trial court to have taken the case from the jury on the ground that plaintiff's negligence appeared as a matter of law.

We think that the demurrer was well ruled.

[5] At defendant's request the court instructed the jury that, if plaintiff knew that the can was used to hold wood alcohol, and "that plaintiff knew, or with the exercise of ordinary care might have known, that said can contained wood alcohol, and that plaintiff knew that wood alcohol was a highly dangerous explosive," and that plaintiff attempted to solder a tip upon the can while it so contained alcohol, causing it to explode and injure him, then he could not recover. Appellant says that "every fact which this instruction required the jury to find was admitted to be true by the plaintiff," wherefore it is evident that the case should not have been submitted to the jury at all. But this instruction directs a verdict for plaintiff only upon a finding that plaintiff "knew, or by the exercise of ordinary care might have known," that the can contained alcohol. According to his testimony he did not know that fact; and it was for the jury to say whether or not he exercised ordinary care to discover it.

[6] Another assignment of error pertains to the ruling of the trial court in admitting

certain testimony. During the course of his direct examination, plaintiff testified to certain statements of Finot, made, as plaintiff said, while plaintiff and Finot were working for defendant. This testimony was admitted, over defendant's objections, to show Finot's knowledge of the explosive character of alcohol; and it in fact tended to show the same. On cross-examination of plaintiff, defendant's counsel elicited from him testimony to the effect that the statement said to have been made by Finot, as above stated, was made two weeks or more after the accident, while plaintiff was confined in a hospital. Defendant, however, did not then move to strike out plaintiff's said testimony, given on direct examination; and, as it appeared competent, when given, for the purpose for which it was received, defendant is not now in a position to complain of the court's ruling.

We perceive no reversible error in the record, and the judgment is accordingly affirmed.

REYNOLDS, P. J., and THOMPSON, J., concur.

ST. LOUIS CARBONATING & MFG. CO. v. LOEVENHART. (No. 14470.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. SALES ⇨124—RESCISSION—TENDER.

The tender of the property by the buyer to the seller in the answer in an action to recover the price is not sufficient, since until there is a tender there can be no cause of action or defense founded on rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. ⇨124.]

2. SALES ⇨121—RESCISSION—WAIVER.

Where the buyer of showcases told the seller that the work was unsatisfactory and ordered him to take them back, his action in retaining the showcases and using them as his own until the bringing of an action to recover the price waived all rights to rescind the contract derived from his tender.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 296-301; Dec. Dig. ⇨121.]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

"Not to be officially published."

Action by the St. Louis Carbonating & Manufacturing Company against Jacob H. Loevenhart. From a judgment of the circuit court for plaintiff on appeal from a judgment of the justice's court for plaintiff and from the overruling of a motion for a new trial, defendant appeals. Affirmed.

Albert C. Davis and Chester H. Krum, both of St. Louis, for appellant. Davis Biggs, of St. Louis, for respondent.

REYNOLDS, P. J. Action by plaintiff, a corporation, against the defendant to recover the price of certain show cases manufactured for and sold to defendant by plaintiff on an

agreed price. The contract was in the shape of letters exchanged between plaintiff and architects acting as agents for defendant. Plaintiff's letter to the architects was to the effect that it proposed to furnish show cases according to the specifications of the architects "for the sum of \$875, and show case tables as per your specifications, for the sum of \$1,145," 25 per cent. cash when the proposal was accepted and the balance when the fixtures were delivered and set up ready for use. The architects acknowledged the receipt of the letter, accepting the proposal as to the show cases, specifying that they were to be completed on or before the 1st of September, 1912. There was some delay in the completion and installation of the show cases and they were not set up until some little time afterwards, but no point is made on this delay.

The action was originally commenced before a justice of the peace by plaintiff filing a statement setting out the contract, acknowledging the receipt of the 25 per cent. paid, averring that the show cases had been furnished by plaintiff to defendant and set up complete and ready for use, and claiming there was a balance of \$506; \$8 of this was waived and judgment was asked for \$500.

To this statement the defendant answered, alleging that plaintiff had failed and neglected and refused to furnish to and set up for defendant show cases as in the petition described, according to the contract and plans and specifications furnished plaintiff by the defendant and that as furnished by plaintiff the show cases are defective, and are not put together in proper manner; that there are large cracks in the joints, etc., and they are of no value and are not made in a first-class manner, nor are they satisfactory to the defendant as contracted by plaintiff, and defendant in his answer, tenders them to plaintiff. Defendant furthermore set up a counterclaim, but as no point is made before us on the finding of the court against defendant on his counterclaim, it is unnecessary to notice it further.

The justice found in favor of plaintiff and defendant, giving an appeal bond, appealed to the circuit court. There the case was tried before the court without a jury and resulted in a finding for plaintiff in the amount claimed and judgment was entered against defendant and against one Samuel Epstein, surety on the appeal bond. Defendant, after interposing a motion for new trial and having saved his exceptions to the action of the court in overruling that and in giving and refusing instructions, has duly appealed to our court.

If we were to pass on the weight of the evidence as to the defects in the show cases complained of by defendant, we would be inclined to say that the weight of the testimony was in favor of the defendant's contention,

but it appears from the declarations of law given on behalf of plaintiff and the one asked by defendant but refused that the learned trial court based his finding, not on the question of the defect in the show cases, but on the ground that defendant had not made and maintained a tender of the show cases; in point of fact, had retained them in his possession and in use down to the date of the trial.

The president of the plaintiff emphatically denied that there had ever been any tender back of the show cases. The only evidence on that for defendant is that given by defendant himself. His testimony as to what took place between himself and the president of the plaintiff company, at which defendant claims a tender was made by him, is, that this officer came to the store of defendant a day or so after the show cases had been installed and told defendant that he had come to collect his bill. Defendant said to him, "Why, you don't consider these cases finished, do you?" To which the representative of plaintiff answered, "Certainly they are finished, and I want my money." To this defendant said, "The job is absolutely unsatisfactory; the cases are worthless as they are; if that is the best kind of job you can give me, take them out of here." Defendant further testified that he tried to talk to this president of plaintiff but that he became very angry, so angry that defendant could not talk to him. This is all the pretense of a tender. There is uncontroverted evidence that the show cases are now in the possession and use of defendant and have been from the time of the installation down to the time of the trial.

[1] The tender made in the answer is futile. *Sturgis v. Whisler*, 145 Mo. App. 148, loc. cit. 155, 130 S. W. 111, and cases there cited.

[2] Under this state of the evidence the learned trial court could arrive at no conclusion other than that plaintiff was entitled to recover.

In *Faust v. Koers*, 111 Mo. App. 560, loc. cit. 564, 86 S. W. 278, 279, our court said:

"It is a well-settled rule of law that a vendee of personal property, who has been defrauded in a sale by the vendor, may tender back the property and rescind the contract, but if the vendor refuses to rescind and the vendee thereafter takes and uses the property as his own, he will be deemed to have waived all right derived from his tender."

See, also, *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, 120 Mo. App. 438, 96 S. W. 1040.

In *Sturgis v. Whisler*, supra, Judge Ellison, speaking for the Kansas City Court of Appeals, has said (145 Mo. App. loc. cit. 154, 130 S. W. 112):

"But we think the evidence conclusively fails to establish a proposition which, in this state, is the foundation of the right of rescission. That is, a tender of the property back to the seller, promptly on discovering the defect which is relied upon for rescission," citing many cases

The same rule was announced by our court in *Koenig v. Truscott Boat Mfg. Co.*, 155 Mo. App. 685, 135 S. W. 514. It is true that in that case, as well as in *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, supra, the remedies open to the seller are in judgment. But the rules there announced as to the rights and duties of the seller are applicable, in a way, to the defenses of the buyer.

In *Emery v. Boehmer Shoe Co.*, 167 Mo. App. 703, loc. cit. 707, 151 S. W. 174, Judge Norton, speaking for our court, says:

"Defendant had sold some of the shoes and made no effort to return all of them to plaintiffs. Indeed, it tendered only such as remained unsold in its store at the time. The law not only requires a disaffirmance of a contract of sale at the earliest practical moment after discovery of the defect, but a return of all that has been received under it and a restoration of the vendor to the condition in which he stood before the contract was made."

This proposition is too well established in our state to require the citation of further authorities. The cases covering it will be found referred to in the few cases which we have here cited.

The only declaration of law asked by the defendant was one to the effect that if the court believed from all the evidence that in the construction of the show cases plaintiff agreed to construct them to the satisfaction of defendant or his agents, the architects, and that they were not constructed to the satisfaction of either defendant or his architects, and that defendant gave notice to plaintiff, within a reasonable time after defendant had been notified by plaintiff that the work was completed, that the show cases were not satisfactory to defendant and defendant would not accept them, then the verdict will be for defendant on the defendant's cause of action. This instruction, purporting to cover the whole case, ignored the very essential and material element of the retention of the show cases by the defendant; in fact it assumes that the offer made by defendant to plaintiff with respect to the return was a sufficient tender and rescission of the contract. That, as we have said, is not the law. The declaration was properly refused.

The judgment of the circuit court is affirmed.

ALLEN and THOMPSON, JJ., concur.

WESSEL v. WM. WALTKE & CO.
(No. 14478.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. COMPROMISE AND SETTLEMENT ⇐18(1)—RESCISSON.

Although Rev. St. 1909, § 1812, providing that when a release is pleaded in bar, the reply may allege facts showing fraud, etc., in its procurement, changed the prior rule that a release can only be set aside in equity, it was not in-

tended to change the rules governing rescission of contracts of settlement for fraud.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 75-79; Dec. Dig. § 18(1).]

2. RELEASE § 53—RESCISSIION—TENDER OF CONSIDERATION.

In servant's action for injuries, where release is pleaded and timely objection is made by defendant that no tender back of the consideration by plaintiff was made, and it appears plaintiff knew the nature of the release when he signed it, the servant, not having tendered back the consideration received with interest, must plead and prove that tender was not made because it would have been useless, or some other fact showing an excuse for failure to tender.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 93; Dec. Dig. § 53.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by L. H. Wessel against William Waitke & Co. From judgment for plaintiff, defendant appeals. Reversed.

Percy Werner, of St. Louis, for appellant. Fish & Fish and Criger & Frank, all of St. Louis, for respondent.

THOMPSON, J. This was an action for personal injuries. Plaintiff secured a verdict and judgment in the lower court, defendant filed motion for new trial, which was overruled, and it appeals to this court.

On the 24th day of February, 1913, plaintiff was in the employ of defendant company, and while ascending a stairway on that day was injured by being struck on the head by the falling of a trapdoor which rested on hinges and was suspended over the stairway which ran from the basement to the first floor of the establishment in which he was employed. He was knocked to the floor by the door, rendered unconscious for some time, was removed to his boarding house a few blocks away, and was laid up about five weeks. At the end of March, 1913, he returned to his former employment and continued to work there continually until the latter part of July or the first part of August, at which time he left the employment of the defendant after some difficulty with the defendant's superintendent, and thereafter upon requesting a recommendation from defendant's superintendent, it was refused, and this suit was filed on the 8th day of September, 1913.

The evidence tended to show that during the summer of 1912 the defendant's building in which a soap factory was conducted was destroyed by fire and was rebuilt during the fall, and was not entirely completed in all its details on February 24, 1913, the date of this accident. The evidence showed that the defendant had contracted with a firm by the name of Mesker Bros. to construct and install an iron safety and trap door over the stairway in question, and that firm did construct the door and install it in position by means of hinges attached to the floor and

a rope and weight with which it was raised and lowered over the trapdoor through which one ascended and descended in passing from one floor to another. At the time of the accident this door fell as plaintiff was ascending the stairs because of the fact that the rope which held it suspended over the staircase broke. This rope was furnished by Mesker Bros., and the evidence tended to show that at the time the door fell Mesker Bros. had not entirely completed its work for the installation of said trapdoor, and that the work had not been accepted or paid for by defendant company at the time of the accident. Plaintiff was paid his wages during the time he was unable to work, and his doctor bill was also paid.

The petition claims damages from the defendant for the injuries sustained by the falling of the door upon the plaintiff's head. The defendant's answer consisted first of a general denial of liability, and second it sets forth a covenant not to sue, signed and acknowledged by the plaintiff, wherein for a consideration of \$15 the plaintiff agreed not to bring suit against this defendant. This covenant not to sue was signed on the 28th day of February, 1913, under circumstances which will be detailed hereinafter. The plaintiff's reply to the answer was as follows:

"Comes now the plaintiff in the above-entitled cause, and for his reply to defendant's answer states that within a few days after he was injured, as set out in his petition, and while he confined to his room on account of the said injuries, and while he was in no condition of body and mind to make any contract or to realize what he was doing, and while he was suffering great physical pain, and mental anguish, he was visited by a man who said he was the attorney representing Wm. Waitke & Co., the present defendant. Plaintiff further states that this man told him that he had no cause of action against Wm. Waitke & Co., but that plaintiff did have a good cause of action against the company that constructed the said trapdoor which caused the injury, and that as plaintiff had no cause of action against Wm. Waitke & Co., this man told the plaintiff that he would give him some money for medicine and other expenses until he could get well, and that then the plaintiff could sue the aforesaid construction company for damages for the injuries received by him. Plaintiff states that he did not know this man and had never seen him before, and did not realize what he was doing, and that this man handed him fifteen (\$15.00) dollars and got him to sign some paper, but did not read the same to him, nor was plaintiff permitted to read the same if he had been able to do so, nor did he leave plaintiff a copy of said paper. Plaintiff further states that the paper which he signed may be the one that the defendant mentions and sets up in its answer, but of this plaintiff is not fully advised for the reason that no copy of said paper was left with him, and he has not seen the said paper; it not having been filed with the said answer in this cause. Plaintiff further states that he signed the said paper relying on the statements of the aforesaid attorney, as far as he was able to realize its meaning, and believing that the said statements were true, as represented by the said attorney, but that the said statements made by the said attorney were false and fraudulent, and were known to be such by the said attorney."

ney at the time that he made them, and that they were made by the said attorney when this plaintiff was in no condition of body and mind to contract in regard to his aforesaid injuries, and that this fact was well known to this attorney, and that his said signature was obtained to the said instrument by false and fraudulent statements and representations, made by an attorney skilled in his profession, and who knew at the time that he was taking advantage of this plaintiff, whom he knew to be racked by suffering and pain and to be in no condition to make a contract at that time relative to his injuries. Plaintiff further states that the alleged covenant not to sue, now supposed to be set forth in the defendant's answer, was wholly without any consideration; was obtained by false and fraudulent statements and representations made by the attorney for defendants, as above set forth; and that said instrument was executed without any consideration, and is therefore absolutely null and void. Plaintiff further states that he stands ready now and has always been willing to refund to the said defendants the sum of fifteen (\$15.00) dollars, which it is alleged was given to him, and he herein agrees that the same may be deducted from any judgment or finding in his favor, if any. Wherefore, plaintiff prays that the said alleged covenant not to sue, set forth in defendant's answer, being without consideration, may be held for naught, and set aside, and that all of defendant's answer except paragraph 1 thereof be set aside and constitute no defense, and that he may have judgment as prayed for in his petition."

It appears from the evidence that on the 28th day of February, 1913, a young lawyer representing the defendant company went to the boarding place of plaintiff, together with the doctor who was treating the plaintiff. The doctor lived in the neighborhood, had a good reputation, and was present at the time the covenant was executed. With reference thereto, the plaintiff testified that his signature was attached to it, that he could read and write and remember that the doctor and young lawyer were present when he signed it, that the young lawyer was speaking about his having a claim against Mesker Bros. and that after he got out he consulted Mr. A. R. Taylor about his claim against Mesker Bros., that the young lawyer had recommended Mr. A. R. Taylor, that at the time he signed the paper he had bad spells and did not know where he was at times, was unbalanced and a sick man, and that his boarding house keeper kept cold towels on his head, that when the paper was signed, as much as he recollected about it, he thought the \$15 was given to him as a little money with which to buy things, that he signed the paper and did not read it and it was not read to him, and that he really did not know what it was for as he was in such pain and misery, that his landlady was not there at the time, that he gave her the \$15, and he found it on the bed the next morning and didn't know where it came from, and on cross-examination he said as far as he could recollect, the young lawyer stated that he should accept the \$15, and that he could not bring suit against the defendant company, that he could help him and would get him a lawyer who would bring suit for him against the people who were putting up that work, and then he signed the

paper, and that is all he stated according to his best recollection, and that the doctor was there at the time.

The young lawyer testified: That he was a graduate of the University of Missouri and had been practicing law for three years and a representative of an insurance company, and was acting for the defendant in negotiating with the plaintiff, and that before seeing the plaintiff he communicated with the plaintiff's doctor and ascertained from him that the plaintiff was perfectly normal mentally and could be seen on business, and that he went and took the doctor with him to see the plaintiff. That the plaintiff said he was alright and was getting along pretty well. That he thereupon informed the plaintiff that he had made an investigation of the facts connected with the accident, that he had come to the conclusion that the defendant company was not responsible to plaintiff for the injuries, but that the independent contractor, Mesker Bros., who were installing the door, were responsible to the plaintiff, but that he wanted to buy defendant's peace and was willing to pay him \$15 for a covenant not to sue defendant and would otherwise help him out, and the plaintiff said that was satisfactory to him, as he did not want to sue the defendant anyhow, as it had always treated him properly, that he then read carefully over to the plaintiff the covenant not to sue, and plaintiff said he was perfectly willing to sign it, and that he had plaintiff's doctor, who was present at the time, witness the instrument. The testimony of the young attorney was full and frank, and to the effect that the plaintiff knew all about what he was doing, and he signed the instrument after a complete explanation of what it contained, and that at the time he was normal and perfectly able to understand the agreement he was making.

The doctor testified that he was present at the time the covenant not to sue was signed, that he saw the plaintiff sign it, and that he was entirely rational at the time, and that the paper was read and explained to him, that he does not know whether the plaintiff read the paper or not, but he does know that the young attorney read it to him and plaintiff had the opportunity to read it himself, and that the paper was acknowledged in his presence.

It appears that in the latter part of March the plaintiff resumed work at defendant's plant. It also appears that he employed Mr. Fish as his attorney, and that he presented a claim against the independent contractor, Mesker Bros., and for some time carried on negotiations with representatives of Mesker Bros. in an attempt to settle his claim against Mesker Bros., that propositions were made by the plaintiff to Mesker Bros. and by Mesker Bros. to the plaintiff, but for some reason the parties were unable to agree. These negotiations were carried on for some considerable time. It further appears in the

evidence that after the covenant not to sue was signed by the plaintiff, he told the young lawyer, referred to above, that he was confident that he had a good case against Mesker Bros. and was going after them, and asked him to refer him to a lawyer. The attorney for Mesker Bros. further testified that in the month of May or June the plaintiff informed him that he had made a settlement with the defendant company for \$15 and that he had made the settlement because he did not want to sue the defendant, and further testified:

"He said he had released them because he could sue Mesker Bros., and I said Mesker Bros. were willing to pay any reasonable amount in settlement of the claim against them. Mr. Fish had made a very reasonable proposition."

The evidence further showed that after the plaintiff went back to work he submitted to a medical examination at the hands of a doctor representing Mesker Bros., and he told one F. D. Bryan, a fellow workman, that he had "fixed up" the matter of his claim against the defendant. He further told the credit manager of the defendant company that he had signed a paper or contract with the defendant company releasing them from liability. He told his superintendent that he had released the defendant company by a contract, and to practically all of these people he made the statement that he was pressing his claim against the independent contractor, Mesker Bros.

At the close of the plaintiff's case and again at the close of the whole case, the defendant asked for an instruction directing the jury to return a verdict in favor of the defendant under the pleadings and evidence, which the court refused to give.

The appellant contends that the reply is insufficient, and that the verdict should have been in favor of the defendant under the pleadings and evidence in this case, because of the fact that the reply and evidence does not show that before the suit was instituted there was a tender of the \$15 and interest paid by the defendant to plaintiff as a consideration for the covenant not to sue. At the outset of the case plaintiff tendered to the defendant in the presence of the jury the \$15, but without the interest. This tender was objected to by the defendant, and at the same time the defendant strenuously objected to the introduction of any evidence in the case on the ground that no tender had been made before the suit was instituted, and asked for judgment because the reply was insufficient. The objection was overruled, and defendant refused in open court to accept the tender for the reasons stated in the objection.

[1] We are therefore concerned with the point in this case as to whether or not it was necessary for the plaintiff to tender the \$15 and the interest before instituting this suit. In section 1812, R. S. 1909, it is provided

that whenever a release, composition, settlement, or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement, or other discharge was fraudulently or wrongfully procured from the plaintiff, and that the issues thus raised shall be submitted to the jury with all other issues in the case. Prior to the enactment of this section it was held that the release must be set aside in equity, but the statute has changed this making it lawful to attack a release or discharge by reply in an action at law. *Carroll v. United Railways Co.*, 157 Mo. App. 247, loc. cit. 289, 137 S. W. 303; *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, 102 S. W. 642; *State ex rel. v. Stuart*, 111 Mo. App. 478, 86 S. W. 471. But it was not meant by the statute to change the rules governing the rescission of contracts of settlement upon the ground of fraud, as was clearly pointed out in the case of *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, loc. cit. 171, 102 S. W. 642, 643, where it is said:

"It was not the purpose of the Legislature, by the enactment of that section, to change the law of accord and satisfaction, and the rules governing the rescission of contracts of settlements upon the grounds of fraud, but the clear intention was to avoid a multiplicity of suits, by authorizing the fraud issue to be tried by the jury at the same time and in the same case involving the original cause of action."

One of the earliest cases upon the subject is that of *Jarrett v. Morton*, 44 Mo. 275, where Bliss, J., speaking for the court, said:

"Before commencing proceedings on his original claim, the plaintiff should have tendered back the note received of defendant—should have repudiated the settlement—and then he would have been at liberty to impeach it if set up against his claim. But, as it is, he hangs on to it, and is not at liberty to deny its validity."

The old case of *Estes v. Reynolds*, 75 Mo. 563, loc. cit. 565, was a case to set aside or disaffirm a contract for fraud, and the court in that case said:

"A party cannot affirm a contract in part, and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter. Nor is he permitted to select his own time, consult his own convenience and watch the rise and fall of the market, before exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practiced upon him, such election in order to avail him must have the chief and essential element of promptitude, and he must put the other party in the same situation as he was before the contract was made. All the authorities speak this language. *Jarrett v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171, and cases cited."

In the case of *Retzer v. Dold Packing Co.*, 58 Mo. App. 264, the Kansas City Court of Appeals said:

"If the contract was voidable for any cause the plaintiff had the right to elect, to affirm or disaffirm it. If he affirmed and the defendant

failed to perform it in any particular his remedy would be on the agreement, but if he chose to disaffirm it and prosecute his original cause of action he must first make restitution of the consideration received under the repudiated contract."

In the case of *Carroll v. United Railways Co.*, 157 Mo. App. 247, 137 S. W. 303, this court, reviewing all of the authorities in this state and many of the authorities of foreign jurisdiction upon this subject, announced the rule in the following language through Reynolds, P. J.:

"Our own view is that the weight of authority in our state is to the effect that at law, averment and proof of tender is required prior to the accrual of a right of action, unless excused by its uselessness or impossibility."

The latest decision upon this subject in this state is that of *Reld v. St. Louis & San Francisco Railroad Co.*, 187 S. W. 15, where Blair, J., speaking for the court, said:

"In the circumstances of this case it was incumbent upon respondent, before he could attack the release for fraud in its procurement, to tender to appellant the amount received for its execution."

It follows, therefore, from the above authorities, that it was necessary for the plaintiff in this case to have tendered back to the defendant the amount he had received as a consideration for the covenant not to sue, and it seems also that the interest ought to have been tendered prior to the institution of this suit.

The learned counsel for the respondent argues that there are exceptions on this general principle that the consideration for the release with the interest must be tendered back to the defendant before institution of the suit, and they argue that it is unnecessary to make a tender where it would be useless or not accepted, and then argues that it was evident from the conduct of the defendant that a tender in this case would have been useless and would not have been accepted as being shown by the fact that the defendant relied upon the release at the trial and insisted that it was a valid and binding release, and as supporting this contention they cited the case of *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556. In that case the majority of the court, speaking through Barclay, J. (Black, Brace, and MacFarlane concurring in the result), held that a failure to make a tender before bringing suit is not fatal, if the defendant gets the benefit of a tender by being allowed the amount in the verdict. MacFarlane, Black, and Brace, JJ., concurred in holding that if no objection is made to the reply because it fails to plead a tender, and the defendant insists throughout the trial on the validity of the release, the appellate court will not set aside a verdict in which defendant has received credit for the amount of the consideration given for the release. In this case Burgess, Gantt, and Sherwood, JJ., insisted that a tender must be made before suit is brought. Now in

the present case the counsel for the defendant raised the insufficiency of the reply at the outset of the case by objecting to the introduction of any testimony including the tender, so that this case is not within the decision of MacFarlane, J., in the *Girard Case*.

This same contention was made in the *Carroll Case*, supra, to the effect that it would have been useless to make a tender because of the fact that the defendant relied upon the agreement at the trial, which shows that the defendant would not have accepted the tender. This was directly answered by Reynolds, P. J., in the following language:

"It does not seem logical to assume that because the defendant, defending against an action, after that action had been instituted and after being brought into court by process, would have declined tender of restitution if made before. Men often take positions after being brought into court that they would not have taken before that, if given the opportunity."

In this case there is no direct evidence nor any evidence by which even the slightest inference could be drawn that a tender of the consideration with interest would not have been received. After the covenant not to sue was signed there were no negotiations whatever between the plaintiff and the defendant for payment of plaintiff's claim for his injuries, and so far as the evidence shows there is not the slightest intimation that the defendant expressly or impliedly took the position that it stood upon the agreement and would under no consideration cancel it upon the tender of the consideration.

Plaintiff cites some cases of foreign jurisdictions wherein it has been held that a tender is not necessary, but they are not in accord with the rule of decisions in this state. Our attention is called by the learned counsel for the plaintiff to *Black on Rescission and Cancellation*, § 396, where it is laid down that it is not necessary to tender back the consideration where the fraud inheres in the execution of a release of a cause of action and is of such a character as to prevent the formation of a valid contract in the first instance (as where the claimant is fraudulently induced to believe that he is signing an instrument of an entirely different character and has no intention of executing a release), a plaintiff thus imposed upon, says the author, need not pay the tender or consideration received as a prerequisite to his right to sue on the cause of action released, since he neither avers a release nor seeks its cancellation, but proceeds on his cause of action as though no contract of compromise had ever been made. But in this case, the plaintiff's own evidence distinctly shows that he knew he was signing an instrument which precluded him from bringing a suit against the defendant, and further the evidence of numerous other persons distinctly discloses that the plaintiff knew the nature of the instrument he had signed and told them of it.

[2] Again we take it that where timely

objection is made by defendant, as was done here, in order for a plaintiff to bring himself within the exceptions to the rule of tender, he must affirmatively plead or set up the facts which bring him within the exception; that is, he must set forth the fact that a tender was not made because useless or some other fact showing an excuse for failure of tender and must offer evidence proving or tending to prove those facts.

It follows from what has been said above that the peremptory instruction asked for by the defendant should have been given, and the judgment is therefore reversed.

REYNOLDS, P. J., and ALLEN, J., concur.

McDONALD v. CENTRAL ILLINOIS CONST. CO. et al. (No. 15228.)

(St. Louis Court of Appeals. Missouri. Nov. 6, 1916. Rehearing Denied Dec. 30, 1916.)

1. MASTER AND SERVANT ⇨107(3)—MAKING DANGEROUS PLACE SAFE.

The rule relieving master from liability for servant's injury in making a dangerous place safe did not apply where laborer was injured by the caving in on him of an earth embankment while working at its base digging a place opposite the embankment in which to insert a plank to shore up the embankment, where the servant had no supervision over the work of shoring, no duty to inspect, no right to determine the time or manner of doing the work, and was doing a mere detail of the work under the immediate control and direction of defendant's foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 201, 255; Dec. Dig. ⇨107(3).]

2. MASTER AND SERVANT ⇨226(1)—INJURY TO SERVANT—ASSUMPTION OF RISK—MASTER'S NEGLIGENCE.

A servant never assumes the risk of his master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⇨226(1).]

3. MASTER AND SERVANT ⇨234(4)—INJURY—CONTRIBUTORY NEGLIGENCE.

Knowledge of a servant of danger in his work precludes recovery by him from injuries therefrom only when the danger was so obvious that a man of ordinary prudence, under the circumstances, would have refused to do the master's bidding.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 708; Dec. Dig. ⇨234(4).]

4. MASTER AND SERVANT ⇨289(37)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a servant engaged in shoring up an embankment was utterly inexperienced and the danger of the embankment's caving in did not appear imminent, his obeying the foreman's order to do such work did not convict him of negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1129; Dec. Dig. ⇨289(37).]

5. TRIAL ⇨191(10), 193(3)—INSTRUCTIONS—ASSUMING FACTS—NEGLIGENCE OF EMPLOYEE.

In servant's action for injuries, an instruction that in accepting employment plaintiff accepted all ordinary dangers thereof, and if the injury resulted from accident "and not the negligence of defendants," liable to occur in the work, but was an incidental risk, he could not recover, was not erroneous as indicating the judge's opinion as to the facts or assuming defendants' negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 430, 438; Dec. Dig. ⇨191(10), 193(3).]

6. MASTER AND SERVANT ⇨293(1)—INJURY TO SERVANT—INSTRUCTIONS—APPLICABILITY.

Nor did such instruction authorize a verdict for negligence not pleaded, by indicating that if defendants were guilty of any sort of negligence plaintiff could recover, notwithstanding other instructions defining "ordinary care" in the usual general terms, and stating that the omission of such care is negligence in the sense in which that word is used in these instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1148; Dec. Dig. ⇨293(1).]

7. MASTER AND SERVANT ⇨278(20)—INJURY TO SERVANT—PLEADING—NEGLIGENCE OF DEFENDANT.

A complaint in servant's action for injuries, alleging unsafe place of work, known or discoverable by defendants who negligently sent plaintiff to work without notice of any kind, although he was inexperienced to defendants' knowledge and that plaintiff's injuries resulted from the negligence of defendants "above mentioned," sufficiently alleged inexperience of plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⇨278(20).]

8. TRIAL ⇨256(13)—INSTRUCTIONS—REQUEST FOR MORE SPECIFIC INSTRUCTIONS.

In servant's action for injuries, where it appeared that though plaintiff was earning \$2 a day at the time he was injured, he subsequently did some work in a small grocery store, etc., an instruction that the damages recoverable by him were the loss of the earnings of his work as laborer caused by his injuries, based on a rate not exceeding \$2 a day, was not reversible error as not limiting his recovery to the difference between what he actually earned after injury and what he would have earned as a laborer, where defendant did not request more specific instructions on the point.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 640; Dec. Dig. ⇨256(13).]

9. TRIAL ⇨296(11)—INSTRUCTIONS—REQUESTS—MATTERS STATED BY OTHER INSTRUCTIONS.

In servant's action for injuries, refusal of instruction that plaintiff could not recover for permanent insomnia, was not reversible error where the court instructed that plaintiff could not be allowed anything for permanent nervous injuries and shock, since the latter instruction sufficiently excluded insomnia, which is but a symptom of nervous injury and shock.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 715; Dec. Dig. ⇨296(11).]

10. APPEAL AND ERROR ⇨840(4)—REVIEW—REQUESTED INSTRUCTIONS—NUMBER.

In servant's action for injuries, where defendant asked 21 instructions, the appellate court would not critically examine those refused; the number requested being so great as

to tend to produce confusion and resultant error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8306-8314; Dec. Dig. ¶ 840(4).]

11. APPEAL AND ERROR ¶ 301 — OBJECTION BELOW — VERDICT CONTRARY TO INSTRUCTIONS.

The objection that the verdict is contrary to the instructions is not available to appellants where it was not called to the attention of the trial court in the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. ¶ 801.]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by Robert B. McDonald against the Central Illinois Construction Company and another. From judgment for plaintiff, defendants appeal. Affirmed.

Roscoe Anderson, of St. Louis, and John B. Hardaway, of Springfield, Ill., for appellants. Earl M. Pirkey, of St. Louis, for respondent.

CAULFIELD, Special Judge. Suit for damages for personal injuries resulting to plaintiff in consequence of an earth embankment caving in upon him while he was working in a trench at the base. He recovered judgment for \$4,200 against the defendant Central Illinois Construction Company and St. Louis Electric Bridge Company, and both of them have appealed. This is the second time the case has been here on appeal. See 183 Mo. App. 415, 166 S. W. 1087. The suit proceeds as for the breach of the obligation of the defendants, as plaintiff's employers, to exercise reasonable care to furnish him a reasonably safe place to work, and the petition avers, also, that defendants negligently sent plaintiff into a dangerous place to work without apprising him of the danger, though he was inexperienced and ignorant in the premises and defendants knew it. The answer of the bridge company was a general denial; that of the construction company contained a general denial, an admission that plaintiff was in its employ, a plea of assumption of risk and of contributory negligence. The defendant Central Illinois Construction Company offered no evidence. The defendant St. Louis Electric Bridge Company offered none, except a portion of plaintiff's testimony given on a former trial. The facts will sufficiently appear in connection with our disposition of the questions involved.

[1] The defendants contend that the trial court erred in overruling their respective demurrers to the evidence. Under this head they suggest that inasmuch as plaintiff's work had to do with the shoring up of the bank, by the caving in of which he was injured, he was engaged in making an unsafe place safe, and therefore the rule requiring the master to furnish the servant with a safe place to work does not apply—citing

Henson v. Armour Packing Co., 113 Mo. App. 618, loc. cit. 621, 88 S. W. 166, and *Miller v. Walsh*, 145 Mo. App. 131, loc. cit. 135, 129 S. W. 458. It is true that when plaintiff was injured he was engaged as a laborer in digging a place opposite, but near, the embankment, in which, it was contemplated by defendants' foreman, the end of a plank should be inserted with a view to shoring up the embankment, but it also clearly appears that plaintiff had no supervision or control over the work of shoring, no duty to inspect, no right to determine the time or manner of doing the work, was not his own boss, and was doing a mere detail of the work under the immediate control, orders, and direction of the defendants' foreman, who had complete charge and control of the whole work. Under these circumstances the rule, urged upon us by defendants, that the master is not liable to the servant for injuries sustained while engaged in making a dangerous place safe, etc., has no application. *Corby v. Missouri & Kansas Telephone Co.*, 231 Mo. 417, 132 S. W. 712; *Reld Coal Co. v. Nichols* (Tex. Civ. App. 1911) 136 S. W. 847; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304; *Hall v. Wabash R. R. Co.*, 165 Mo. App. 114, 145 S. W. 1169.

[2-4] Nor is there any room in this case for the suggestion that plaintiff, having knowledge of the danger, assumed the risk. The evidence tends to prove that plaintiff's injuries resulted from the defendants' negligence, and the servant never assumes the risk of the master's negligence. If the plaintiff had knowledge of the danger, then that is a fact to be considered under the plea of contributory negligence, but under that head such knowledge precludes a recovery only when the danger is so obvious that a man of ordinary prudence, under the circumstances, would have refused to do the master's bidding. *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737. While the evidence tends to prove that to the experienced eye the wall was in immediate danger of falling and therefore the defendants' foreman was negligent in ordering plaintiff to work under it without at least warning him of the danger, it also discloses that plaintiff was utterly inexperienced in the premises, and that the danger was not so obvious to a man of ordinary prudence, under the circumstances, that we may declare him guilty, as matter of law, of negligence in not refusing to obey the order of his foreman. While he testified that he thought that the embankment was not safe, was dangerous, or that the defendants' foreman would not want to shore it, he also said that he did not know that it was dangerous; that he thought the foreman would not send him into the place if it was dangerous; that when they put him to work there he figured that it was safe. It appeared that the wall had stood as it was for some two months; and

taken as a whole it may be inferred that while, in a general way, plaintiff concluded that the shoring was necessary in order to make the embankment safe, there is no conclusive, if any, showing that the imminence of the danger was obvious to him or should have been.

[5] Defendants further contend that the following instruction, given by the trial court of its own motion, assumes that defendants were negligent and authorizes a verdict for negligence not pleaded:

"In accepting employment in the service of the defendants, or either of them, for the performance of the work shown in the evidence, plaintiff assumed all the ordinary dangers and hazards pertaining to such work, and should the jury find from the evidence that the injury sustained by plaintiff, if any, was the result of an accident and not the negligence of the defendants, as explained in other instructions, liable to occur in the performance of the work in which he was engaged at the time of said accident, but was a risk incident thereto, then the plaintiff cannot recover, and the jury should find for the defendant."

This form of instruction was approved in the case of *Fogus v. Chicago & A. R. R. Co.*, 50 Mo. App. 250, loc. cit. 272. It is favorable only to the defendants, and there is nothing in its language to indicate an opinion of the trial judge as to the facts. It does not assume that defendants were negligent.

[6] Nor are we persuaded that it authorizes a verdict for negligence not pleaded. To say, as in effect this instruction did say, that plaintiff could not recover if defendants were guiltless of negligence, does not convey the thought that plaintiff might recover if defendants were guilty of any negligence "under the sun." That thought was not suggested by the instruction. The instruction does not authorize a verdict at all. It does not purport and could not be taken to state the circumstances under which plaintiff might recover, but in general terms, wholly favorable only to the defendants, merely narrowed the field for consideration by the jury. And the fact that another instruction gives the usual definition in general terms of "ordinary care" and states that "the omission of such care is negligence in the sense in which that word is used in these instructions" and the fact that the word "negligence" is literally used only in the instruction under consideration do not alter our view above expressed.

[7] The court did not err in admitting evidence of plaintiff's inexperience. The petition sufficiently alleges the dangerous and unsafe condition of the place in which plaintiff was put to work, that defendants knew or by the exercise of ordinary care would have known of such condition, and negligently sent him into the place to work without protection or notice of any kind, though he

was ignorant and inexperienced in the premises, and defendants knew that he was, and that plaintiff was injured "by reason of the negligence of defendants above mentioned." This was a sufficient statement to admit evidence of plaintiff's inexperience.

[8] Defendants contend that the court erred in that part of the instruction on the measure of damages that allows the plaintiff to recover "the loss, if any, of the earnings of plaintiff's work as a laborer, which the jury may believe from the evidence plaintiff has sustained by reason of his injuries and directly caused thereby, such earnings, if any, to be based on the rate not exceeding \$2 per day." There was evidence that though plaintiff was employed as a laborer at \$2 per day at the time he was injured, and that had been his vocation prior to his injury, he did subsequently do some work (the exact nature of which is not disclosed) in a small grocery store and also worked some "at the butcher business." And defendants contend in effect that his recovery should have been limited to the difference between what he actually earned and what he would have earned as a laborer. This appears to us to be drawing too nice a distinction in the use of language. It would seem that he could have suffered no greater "loss" in his earning as a laborer than the difference mentioned, and the jury must have so understood. If the defendants wished the instructions to be more explicit in the respect complained of they should have made a request to that end.

[9, 10] Defendants complain that the trial court refused an instruction directing that plaintiff could not recover for permanent insomnia. But the court did instruct the jury that they could not allow plaintiff anything for "permanent nervous injuries and shock," and we are of the opinion that that sufficiently excluded insomnia, which is but a symptom of nervous injury and shock. Moreover, the defendants asked 21 instructions, a number so great as to tend to produce confusion and resultant error, and we are therefore not inclined to examine critically those refused.

[11] The objection that the verdict is contrary to the instructions is not available to the defendants because it was not called to the attention of the trial court in the motions for new trial.

We have duly considered the other points suggested in defendants' brief, and do not consider them worthy of extended discussion. They are without any substantial merit.

The judgment is affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE v. AMENT. (No. 12136.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

CRIMINAL LAW §1088(19)—APPEAL AND ERROR—BILLS OF EXCEPTION.

In a prosecution for gaming, where no exception to the action of the court in overruling a motion for new trial is contained in the bill of exceptions, though an exception appears in the record proper, the action of the court will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2802; Dec. Dig. §1088(19).]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

"Not to be officially published."

T. J. Ament was convicted of a misdemeanor in betting on a game of chance, and he appeals. Affirmed.

R. H. Musser, of Plattsburg, for appellant.
H. E. Perkins, of Plattsburg, for the State.

ELLISON, J. Defendant was prosecuted on information filed by the prosecuting attorney of Clinton county and convicted of a misdemeanor in betting on a game of chance. He appealed to this court.

The record proper shows a motion for new trial was duly filed and overruled. This motion is properly set out in the bill of exceptions, but no exception was taken to the action of the court in overruling it. This releases the case from any error of exception. It is true that in the record proper there appears an exception to overruling the motion. But, as has been decided time and again, that is not the place for an exception and counts for nothing.

The record proper shows nothing fatal to the judgment, and it is accordingly affirmed. All concur.

RUDOLPH WURLITZER CO. v. ROSSMANN.
(No. 14439.)

(St. Louis Court of Appeals. Missouri. Nov. 6, 1916.)

1. BILLS AND NOTES §92(5) — CONSIDERATION.

The delivery of goods to another is sufficient consideration for a note; Rev. St. 1909, § 9999, providing that absence of consideration is a defense against a person not holding in due course, not applying.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 196-198; Dec. Dig. § 92(5).]

2. ACTION §25(4)—EQUITABLE DEFENSES.

In action at law upon a note, mistakes of fact authorizing reformation in equity are no defense.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 153; Dec. Dig. §25(4).]

3. BILLS AND NOTES §123(2)—SIGNATURE—PERSONAL LIABILITY.

Under Rev. St. 1909, § 9991, providing that, where the instrument contains words indicating that the signer signs for a principal, the signer is not liable if duly authorized, but that words describing him as agent without disclosing his principal do not relieve him from lia-

bility, where notes given for a piano purchased by a corporation were signed by the corporation by its president, followed by the signature of another person, with no official designation whatever, the latter signer was liable thereon to the payee, though she was in fact the secretary of the corporation and intended to sign merely as secretary, and the payee knew her official capacity at the time of taking the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 262, 263, 265, 266; Dec. Dig. §123(2).]

4. BILLS AND NOTES §123(2)—SIGNATURE—PERSONAL LIABILITY.

Under such statute, where notes given for a piano purchased by a corporation were signed by its president as an individual and by another with the word "Secy." affixed to her name, the notes containing no other reference to a corporation, the latter signer was liable thereon to the payee, though she was in fact the secretary of the corporation, and intended to sign merely as secretary, and the payee knew her official capacity at the time of taking the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 262, 263, 265, 266; Dec. Dig. §123(2).]

5. COURTS §89—RULES OF DECISION.

Settled rules of law governing commercial paper cannot be set aside because their application in a particular case results in hardship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. §89.]

Appeal from St. Louis Circuit Court; Leo S. Rasselour, Judge.

Action by the Rudolph Wurlitzer Company against Tekla Rossmann. From judgment for plaintiff, defendant appeals. Affirmed.

Statement.

This action was brought against the appellant on nine promissory notes. The first and second are of date September 8th, 1909, each for \$60. After the date they read:

"Eleven months after date, for value received, I promise to pay to the order, of the Rudolph Wurlitzer Company sixty dollars, payable _____ at _____ with interest thereon from date at the rate of 6 per cent. per annum, with exchange at the current rate and with cost of collection and an attorney's fee in case payments shall not be made at maturity."

Following this and in the first person singular is a clause waiving the benefit of all exemption laws and authorizing any attorney at law to appear in any court of record "for me" in any action on the note, and waiving issue of service and confessing judgment, etc. This is signed:

"International Electric Piano Co.,
"M. D. Gross, Pres.
"Tekla Rossmann."

Of the remaining notes, six of them for \$50 each, and one for \$20, all dated February 4th, 1910, after the date read:

"Six months after date we promise to pay to the Rudolph Wurlitzer Company or order \$50, for value received, with interest from February 4th, 1910, at the rate of 6 per cent. per annum until paid, and we agree to pay same at 912 Pine Street."

Each of them is signed:

"M. D. Gross,
"Tekla Rossmann, Secy."

The petition counting on these nine notes, prays for judgment for the amount of them and interest, as also for attorney's fees as to the first and second.

The answer, after a general denial, and taking up each note in a separate paragraph, sets out as to the two notes for \$60 each, that appellant Rossmann, on or before September 8th, 1909, was secretary of the International Electric Piano Company, a corporation having its office in the city of St. Louis, incorporated under the laws of that state, and engaged in selling electric pianos and piano players; that on September 8th that corporation was selling almost exclusively the electric pianos made by plaintiff, it buying all of them from it; that the notes sued on are wholly and entirely without any consideration and therefore not binding on this defendant; that on September 8th, the date upon which the first two notes were executed, the International Electric Piano Company, in the ordinary course of business, bought a number of pianos from the plaintiff and gave to plaintiff a chattel mortgage and its notes as security for the purchase price of the pianos, and that these two sixty-dollar notes are notes of the International Electric Piano Company given for the purposes aforesaid, and that they were signed by defendant (appellant here) as an officer of that company, and in the ordinary course of business of that company, by authority and direction of the company and as and for an obligation of the company, intending thereby to bind the company only, all of which facts were known to plaintiff, as is alleged, and done by and with the consent of plaintiff and accepted by plaintiff as the note and obligation of the International Electric Piano Company.

It is further averred that her signatures on the notes are not her individual signatures but her signatures as an officer of the International Electric Piano Company and as and for the obligation of that company, and that no consideration moved to her for signing the notes. Further answering defendant states, on information and belief, that the plaintiff foreclosed on the chattel mortgage referred to, and in pursuance of this foreclosure sold the pianos and that the proceeds of the sale were sufficient and fully paid and satisfied the notes. Averring that no notice of protest or dishonor of these notes had ever been given defendant, she prays that she be discharged from the action with her costs.

The answer as to the remaining notes is practically identical in its averments with the foregoing, save as to the change necessary by the difference in the date, all these latter notes being dated February 4th, 1910.

It does not appear that any reply was filed but the case was treated as being at issue on the petition and answer. A jury was waived and the cause heard before the court, the notes referred to being offered in evidence, without any objection.

It was admitted that the six fifty-dollar notes and the twenty-dollar note were secured by chattel mortgages executed by the International Electric Piano Company to plaintiff, on a piano bought by the former company from the latter, and that from the selling price of the piano the plaintiff received the sum of \$280 on November 2nd, 1912. The mortgage referred to was offered in evidence but it not in the abstract. There was evidence as to the value of the services of the attorney in bringing the action, and plaintiff rested.

Defendant in her own behalf offered the record of the voluntary assignment of the International Electric Piano Company, in the proceedings under which the plaintiff had presented for allowance all the notes referred to except the first and second. This was objected to but the objection overruled. This record is not in the abstract before us, and we have no evidence of its contents or scope other than above. The two chattel mortgages referred to were also introduced but they are not before us; how and by what officers executed does not appear; it is stated, however, that they covered all the notes except the two for \$60 each.

Defendant thereupon took the stand as a witness in her own behalf and stated that her connection with the International Electric Piano Company on September 8th, 1909, and February 4th, 1910, as well as before, between and after those dates, was that of secretary; that she never had any dealings personally with plaintiff and did not personally buy any pianos from it and never owed plaintiff company anything. Admitting her signatures to the notes as signed, she testified that she never received anything personally, and she added that she had signed these notes as an officer of the company. This latter was objected to on the ground that the notes spoke for themselves. The objection was sustained, defendant excepting. Defendant repeating that she never received anything personally for the notes and was never obligated in any way to the plaintiff, stated that she had signed the chattel mortgage at the same time she had signed the notes; that when she signed these notes and when they were received by the plaintiff company, that company knew that she was an officer of the International Electric Piano Company; that that fact had been known to them for years. She further testified that the plaintiff company had been doing business with the International Electric Piano Company, certainly since 1906, possibly earlier. She was then asked:

"Can you state to the court the procedure that was followed when the International Electric Piano Company bought pianos from the Rudolph Wurlitzer Company?"

The court said:

"Is not that an effort to change the terms of this written contract?"

To which counsel for defendant said that they maintained:

"That in a note, as between the original parties, where the payee of the note knew the capacity in which the defendant in this case was signing and accepted it with that knowledge—" The Court: "Is not this changing the terms of that written contract? If the contract incorrectly recites what has taken place is not your remedy to reform it?"

The court, however, announced that it would hear the testimony subject to the objection of counsel for defendant. Witness then answered:

"The pianos have been secured by a mortgage given by the International Electric Piano Company and notes given in payment, and those notes payable different months and at different times and signed by the officers of the company."

Plaintiff, then asked if the notes were ever presented to her for payment before the winding up of the business of the International Electric Piano Company, answered, "No;" that she had never been asked to pay these notes. This was her testimony in chief.

On cross-examination defendant admitted that payment had been demanded of her on the notes before the action was commenced; that at the time of the execution of the notes one Unger was manager of the business of the International Electric Piano Company and that she (defendant) had nothing to do with the active business of the concern; that Unger had presented the notes to her for signature and that she had never had any communication personally with plaintiff. The court asked her if these notes involved had not been given in payment of the merchandise received. Witness answered that the merchandise had been received by the company but not by her, and that all she had ever learned with respect to the transactions was from some of the employees of the International Electric Piano Company, of which company Mr. Gross was president. The defendant, still on the stand as a witness, stated that she would like to show under what conditions she signed these particular notes. That was objected to and objection sustained. No exception to this ruling is noted.

Mr. Gross testified that he had been president of the International Electric Piano Company in 1909 and 1910. Shown the notes and asked under what circumstances they were signed, he answered that they were signed by himself and the defendant as officers of the company. This was objected to, but no ruling made. He was then asked to state the circumstances under which the notes had been signed and who asked him to sign. That was objected to but no ruling made nor answer given. He was then asked what the notes were given for and he answered that they had been given for pianos bought from the Rudolph Wurlitzer Company by the International Electric Piano Company; that at the time he was president and the defendant secretary of the company. Asked if he knew whether Mrs. Rossmann, the defendant, had received any money or goods or any consideration for the signing of the notes, he said he

did not know. This was the substance of all the testimony in the case.

The trial judge thereupon taking the case under advisement rendered a finding of facts not necessary to set out, it being sufficient to say that, in effect, he found that defendant was bound individually on the notes, that the consideration for the notes was the piano purchased by the International Electric Piano Company, that the notes were entitled to a credit of \$230, and allowing \$50 for an attorney's fee on the first and second notes, he rendered judgment in favor of plaintiff in the sum of \$351.64.

Defendant in due time filed a motion for new trial, assigning four grounds: First, the verdict and judgment of the court is against the evidence and the weight of the evidence; second, is against the law under the evidence; third, is against the law and the evidence; fourth, in failing to give findings of fact requested by defendant. The motion for new trial being overruled, the plaintiff excepting, duly appealed to our court.

Taylor & Mayer, Ben L. Shifrin, and Chester H. Krum, all of St. Louis, for appellant. Charles A. Houts, of St. Louis, for respondent.

Opinion.

REYNOLDS, P. J. (after stating the facts as above). It will be noticed that there is no complaint made in this motion as to the exclusion of evidence, nor does the requested finding appear.

[1] Learned counsel for appellant in his brief makes two points for reversal and we confine ourselves to them.

His first point is, that the notes were wholly without consideration, arguing that absence of consideration is a matter of defense as against any person not a holder in due course, and citing section 9999, Revised Statutes 1909, in support of this proposition. That section provides that absence or failure of consideration is a matter of defense as against any person not a holder in due course. It is also argued under this first point that respondent was not a holder in due course, the notes never having been negotiated, and it is stated that the court expressly found that no consideration passed to appellant. Disposing of this last proposition, it is sufficient to say that the court found there was consideration for the notes. Taking up the remainder of the point, while it is true that no consideration passed personally to appellant, it is abundantly clear that there was a consideration for the notes as between the two companies; in point of fact, every count of the answer admitted there was a consideration for the notes, it being averred that they were given for a piano purchased from plaintiff by the International Electric Piano Company. That the consideration did not pass to the plaintiff herself is entirely immaterial. It is hornbook law that if A purchases goods from B, for which he does not

immediately pay, and that C and D give their note to B for A's debt, the consideration between A and B is sufficient to support the note of C and D given to B on that consideration. We are therefore unable to agree with the proposition of learned counsel, that the defense interposed was clearly within the statute referred to and hence should have been sustained.

The second point argued by learned counsel for appellant is that the finding below cannot be sustained upon some hypothesis of accommodation because, first, appellant was not an accommodation maker but had "mistakenly signed without indicating in what capacity she signed;" and, second, that it is impossible to distinguish the case in principle from that of *Chicago Title & Trust Co. v. Brady*, 185 Mo. 197, loc. cit. 205, 65 S. W. 308. It is also argued under this point by learned counsel for appellant that she had "signed the note as the company's note. She omitted the proof of that fact from the face of the paper. This is all that can be figured out of the case."

[2] Admitting that plaintiff had "mistakenly signed without indicating in what capacity she signed," that mistake is to her own hurt and cannot avail her in this action. Mistakes of fact may be relieved in a court of equity, but are not cognizable by a court of law in a purely legal action. So the learned trial judge intimated; that is, if appellant had brought an action for the reformation of the notes, they still being in the hands of the original party, or of one having notice, that action might have been maintained. But she did not do that and attempted in this proceeding to vary the written contract by parol, a thing she could not do. The fact here admitted by her counsel, that appellant "had omitted proof of that fact (of her representative capacity) from the face of the paper," is fatal in this action.

There have been decisions in which it seems to have been held that a party signing a note and attaching to his signature the designation of an office he holds, cannot be held personally. But when the decisions of our own state are examined, which are claimed to so hold, it will be found that there was something in the body of the instrument itself or in the manner of the signature, to allow evidence to be introduced to explain the apparent ambiguity.

The last decision of our Supreme Court treating of this, to which our attention has been called, is that of *Sparks et al. v. Dispatch Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351. There Judge Gantt, who wrote the opinion, has carefully reviewed the authorities which are claimed to throw any light upon the point, not only in our own state but by text-writers and courts, both of the United States and of other courts. Even in that case, with all the decisions of our Supreme Court before him

on questions at all germane to the question, Judge Gantt has said (104 Mo. loc. cit. 541, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351), that the exact question presented there, that is, the liability of the defendant company on the notes signed by its president in his own name and without any reference to the corporation in the body or in the signature, had not been passed on by our Supreme Court. The *Sparks Case*, supra, was an action upon five notes, two of them ordinary promissory notes, payable at a day named and for value received, signed "Dispatch Transfer Co., by S. Jackson, President." The remaining three notes were in the ordinary form of negotiable promissory notes and signed, "S. Jackson." The plaintiff Sparks and others sued the Dispatch Transfer Company on these notes. The jury returned a verdict in favor of the plaintiff on all of them. Parol evidence was admitted at the trial to show that the defendant corporation was liable on the three notes signed by its president in his individual name without any reference in the notes themselves or in the signatures to any official character, there being evidence, however, to the effect that the mules, for the purchase of which these notes had been given, were purchased for the use of the defendant company. Judge Gantt, after stating that the precise point was new in our state, as above noted, says that it has been long settled in many of our sister states, citing a number of decisions. He refers to and quotes from *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558, as carrying the conclusion arrived at upon the examination of authorities in England and in the different states of the Union (104 Mo. loc. cit. 542, 15 S. W. 420, 12 L. R. A. 714, 24 Am. St. Rep. 351), as being to the effect "that no person can be considered a party to a bill, unless his name, or the name of the firm of which he is a partner, appear on some part of it." He states this as a rule universally accepted as law by recent text-writers, referring to them, and designates paper which contain no such indicium and is signed in that way as, "a courier without luggage," whose countenance is its passport; and, in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself." Judge Gantt adds:

"And another good reason for the rule is, that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting."

Judge Gantt further approvingly quotes *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, loc. cit. 336 (5 L. Ed. 100), this:

"But the fact that this appeared on its face to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief, that it is a corporate, and not an individual

transaction; to which must be added the circumstances, that the cashier is the drawer, and the teller, the payee; and the form of ordinary checks deviated from, by the substitution of *to order*, for *to bearer*. The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction."

The conclusion of our Supreme Court in the Sparks Case, *supra*, 104 Mo. loc. cit. 548, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351, is to the effect that in view of the law, the trial court erred in the admission of parol evidence to show that Jackson executed three of the notes sued on as notes of the corporation. That case is the converse of the one before us, but its principle is here applicable. While it was decided before the adoption in 1905 of our Negotiable Instrument Law, chap. 86, Revised Statutes 1909, we think it is in entire harmony with what is now section 9991, Revised Statutes 1909, a section in that law. By that section it is provided:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

In our judgment this section is conclusive of the proposition here involved.

[3, 4] While on the first two notes the name of the International Electric Piano Company appears, followed by the signature, "M. D. Gross, Pres.," the signature of appellant following has no official designation whatsoever and in the remaining notes no reference whatever to any corporation appears; they are ordinary promissory notes, signed, "M. D. Gross, Tekla Rossmann, Secy." Clearly on the two first notes appellant signed and is bound individually. We know of no rule which prevents an individual signing a note as maker with the corporation. That is exactly what this appellant did as to the two first notes. In the remaining seven notes the word or abbreviation "Secy." appears, but the name of the International Electric Piano Company nowhere appears, either as a party or signatory.

We are aware that there has been some diversity of opinion even since the enactment of this statute among some of the courts of states in which the Negotiable Instrument Law has been adopted, as to the proper construction of this provision, those decisions adhering to older decisions. But as we had occasion to say in *Walker v. Dunham et al.*, 135 Mo. App. 396, 115 S. W. 1086, when our state, as the result of efforts made by the members of the American Bar Association, and following many other states, adopted the Negotiable Instrument Act, the very purpose of that act was to harmonize the law and to establish uniformity of law throughout the several states of the Union on the subject of negotiable instruments. It would avail very little for our legislative branch of

the government to attempt, by legislation, to adopt a uniform system of laws on any subject and for the judicial department—the courts—to depart as widely as ever from each other as before, in construing the same provision in that law. Such a course certainly does not tend to the promotion of harmony and uniformity throughout the Union on a matter of so great importance as that involved in the construction of negotiable instruments.

The only decisions by any of our appellate courts on the point here involved, rendered since the adoption of our Negotiable Instrument Law, and on notes falling under it, are *Stephenson v. Joplin State Bank*, 160 Mo. App. 47, 141 S. W. 691, and *Myers v. Chesley*, 190 Mo. App. 371, 177 S. W. 826, decisions rendered by the Springfield Court of Appeals. In both these decisions we think that that learned body recognized the law to be as we here hold. In the *Myers Case*, *supra*, the note was held, and we think correctly, to fall within section 9991 of our Negotiable Instrument Act. In the very note there involved it appeared on its face that the defendant there had signed "for or on behalf of a (named) principal or in a representative capacity." Each of these decisions are in line with that of *Sparks v. Dispatch Transfer Co.*, *supra*, and with what we here hold.

We hold, therefore, that the learned trial court committed no error in excluding the parol evidence which was offered to vary and counteract the plain provisions of these several notes.

Learned counsel for appellant has himself stated that appellant was not an accommodation maker but that she "mistakenly signed without indicating in what capacity she signed." Her mistake is one of which she must herself suffer the consequences, unfortunate as they may be for her.

When that counsel, however, asserts under the second subdivision of his second point, that it is impossible to distinguish the case at bar in principle from that of *Chicago Title & Trust Co. v. Brady*, 165 Mo. 197, and referring, as he does, especially, to page 205, 65 S. W. 303, we are unable to agree with him. That was a case in which there was no consideration whatever. For the purpose of swelling the apparent assets of the bank, of which they were officers, Brady and another officer executed their notes to the bank. The bank subsequently becoming insolvent and going into the hands of a receiver, that receiver, the *Chicago Title & Trust Company*, sued Brady upon the notes. It was very properly held there, not only by reason of this being an accommodation paper, but because there was no consideration, that the receiver could have no higher title in the paper than the corporation it represented; could not recover as against the defendant. That is very far from the case at bar, for here, contrary to the assertion of the learned counsel for appellant, the trial court did find

as a fact and as we have before set out, that there was a consideration for the note here given; not moving, it is true, immediately to the defendant, here a party to the note, but to the corporation, and so the appellant herself pleaded.

[5] This is probably a hard case on appellant, but we, as a court, cannot disregard or set aside rules which must be applied in the construction of commercial paper by the seeming hardness of a particular case.

Without going further into the case our conclusion is that the judgment of the trial court is correct and it is accordingly affirmed.

ALLEN, J., concurs.

RENICK v. BROOKE et al. (No. 12050.)
(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. PRINCIPAL AND AGENT ¶22(1)—PROOF OF AGENCY—DECLARATIONS OF AGENT.

The fact of an alleged agency cannot be established by the mere declarations or acts of the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. ¶22(1).]

2. PRINCIPAL AND AGENT ¶19—PROOF OF AGENCY—BURDEN OF PROOF.

Since the authority of an agent must rest upon some act of a principal, the burden is upon the party asserting the agency to establish by proof an act or acts of the principal which expressly or by reasonable implication or by estoppel conferred, or should be held to have conferred, the authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 36; Dec. Dig. ¶19.]

3. PRINCIPAL AND AGENT ¶24—ACTION—QUESTION FOR JURY.

Whether an agency exists under an ascertained state of facts is a question of law, but where the evidence relating to the ultimate facts is conflicting the ascertainment of the basic facts belongs to the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 722, 723; Dec. Dig. ¶24.]

4. PRINCIPAL AND AGENT ¶23(2)—PROOF OF AGENCY—CIRCUMSTANTIAL EVIDENCE.

The fact of real or apparent agency may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ¶23(2).]

5. PRINCIPAL AND AGENT ¶25(1)—ESTOPPEL.

Though the act of a supposed agent was in fact unauthorized, an alleged principal may be bound on the principle of estoppel, as where he has placed the alleged agent in a position as to his property calculated to deceive others dealing with such person, as apparent agent in reference thereto.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 42, 45; Dec. Dig. ¶25(1).]

6. PRINCIPAL AND AGENT ¶158 — FRAUD — SALE OF AUTOMOBILE.

Where an automobile manufacturer constituted one its general agent to sell automobiles, or held such person out to the general public as possessing such authority, the company was liable in damages for such agent's false and

fraudulent representations in selling a second-hand car as a new one; such transaction being within the real or apparent scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589-593; Dec. Dig. ¶158.]

7. PRINCIPAL AND AGENT ¶20(2) — ACTION AGAINST PRINCIPAL FOR AGENT'S FRAUD — EVIDENCE.

In an action against an automobile manufacturer for agent's fraud, correspondence between the principal and the alleged agent and between the principal and third persons tending to show that the alleged agent was in fact the general agent of the principal, and was being held out to the world as such, was admissible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 38; Dec. Dig. ¶20(2).]

8. CUSTOMS AND USAGES ¶8 — VALIDITY — DISTORTION OF COMMON WORDS.

Evidence by defendant of a custom among motorcar manufacturers to use such terms as "agents" and "commissions" in a sense opposite to their legal and generally understood meaning was inadmissible; it being a palpable distortion of common terms to change an agency relationship into one of vendor and vendee.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 8-10; Dec. Dig. ¶8.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by John H. Renick against A. O. Brooke and another. From judgment for plaintiff, defendant Lexington Motor Company appeals. Affirmed.

W. W. Garnhart and C. M. Ingraham, both of Kansas City, for appellant. Cook & Gossett, of Kansas City, for respondent.

JOHNSON, J. Plaintiff began this suit in September, 1913, to recover damages for false and fraudulent representations he alleges defendants made to him respecting an automobile they delivered to him pursuant to the terms of a written contract of purchase and sale the parties entered into in February, 1911. Defendant Brooke failed to answer, and judgment by default was rendered against him. Defendant Lexington Motorcar Company answered. A trial of the issues resulted in a verdict and judgment for plaintiff in the sum of \$1,000, and the Lexington Company appealed.

The record and briefs are voluminous, but the material facts of the case are simple and may be briefly stated. The appealing defendant is the manufacturer of the "Lexington" automobile; its chief place of business being in Indiana. Brooke was the proprietor of a garage, and dealt in automobiles in Kansas City; the Lexington being the only car he sold as such dealer. Plaintiff claims defendants held Brooke out as the agent of the Lexington Company, and that, as such agent, Brooke sold a new car to him of a described model and type, for the price of \$1,700; that afterward defendants delivered a secondhand car which they had repaired and repainted and falsely represented it to be a new car.

Plaintiff relied upon this representation, accepted the proffered car, and did not discover the falsity of the representation until shortly before bringing this suit.

Defendants deny the agency of Brooke, and insist that he sold and delivered to plaintiff a repaired and repainted secondhand car which belonged to him. Brooke conducted his business in Kansas City under the name of the A. O. Brooke Automobile Company. By the terms of his contract with the Lexington Company he was given the exclusive sale of that company's cars in Kansas City and extensive contiguous territory, and his relation to that company was attempted to be defined as that of a vendee, a retail dealer, in the cars manufactured by the company. But there is much in the contract, and still more in the course of dealing between the parties indicative of the relationship of principal and agent. In advertising matter sent by the company to Brooke for distribution and in numerous letters written to him by officers of the company he is described as the "agent" and the "Western distributor" of the Lexington cars, and other terms were used and transactions conducted peculiar to such relationship. Orders for cars sold by Brooke were written on blanks furnished by the company, and in the present instance plaintiff signed an order written on such blank which purported to be an "agent's order" taken by "Agent A. O. Brooke." This order said nothing about a secondhand car, and in form and terms it appeared to be an order for a new car to be filled at the factory in Indiana and shipped "f. o. b. Kansas City."

[1, 2] Without going into further details, we find abundant evidence supporting a state of facts which would constitute Brooke the agent of the company, not only to sell, but also to deliver and collect for, Lexington cars in the territory assigned to him. And further there is evidence supporting the conclusion that the company knew Brooke was holding himself out to the world as its general agent and provided him with the means, such as advertising matter and blank contracts, to give effect to such representation. The law indulges no presumptions that an agency exists, and the fact of an alleged agency cannot be established by the mere declarations or acts of the agent. Since the authority of the agent must rest upon some act of the principal, the burden is upon the party asserting the fact of agency to establish by proof an act or acts of the principal which expressly or by reasonable implication or by estoppel conferred, or should be held to have conferred, the authority. *Mathes v. Lumber Co.*, 173 Mo. App. 239, 158 S. W. 729; *Mechem on Agency*, § 276.

[3] Whether an agency exists under an as-

certain state of facts is a question of law, but where, as here, the evidence relating to the ultimate facts is conflicting, the ascertainment of the basic facts belongs to the province of the jury. *Seehorn v. Hall*, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562.

[4, 5] The fact of agency may be established by circumstantial evidence, as may also the fact of an apparent agency, and, though the act of the supposed agent, in fact, was unauthorized, the defendant nevertheless may be bound "on the principle of estoppel, as where he has placed such other in a position as to his property which was calculated to deceive others dealing with such person as apparent agent in reference thereto." *Mosby v. Commission Co.*, 91 Mo. App. 500; *Fanning v. Cobb*, 20 Mo. App. 577; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Hoppe v. Saylor*, 53 Mo. App. 4.

[6] Upon either of the hypotheses, which, as we have said, have evidentiary support, that Brooke was the general agent of the company authorized to sell, deliver, and receive pay for his principal's merchandise, or that, at least, he was held out to the world and to plaintiff as possessing such authority, the company is bound to answer in damages for the consequences to plaintiff of his false and fraudulent representations respecting a transaction within the real or apparent scope of his authority, and the court did not err in so ruling and in refusing the company's request for a peremptory instruction.

[7, 8] The court did not err in admitting the correspondence between the company and Brooke, and between the company and third persons, which tended to show that Brooke was the general agent of the company at Kansas City and was being held out to the world as such agent. Nor did the court err in refusing to admit evidence offered by defendant of a custom among motor-car manufacturers of using such terms as "agent" and "commission" in a sense opposite to their legal and generally understood meaning. To allow such palpable distortions of common terms to change an agency relationship into one of vendor and vendee and thereby to relieve an apparent principal from the responsibilities and liabilities of such status would be violative of the plainest principles of the doctrine of custom (*Staroske v. Pub. Co.*, 235 Mo. loc. cit. 76, 138 S. W. 36), and would open the door to the perpetration of frauds and impositions upon the public.

Numerous objections are urged against the rulings on the instructions, but they are obviously ill grounded, and need not be discussed.

The case was fairly tried and submitted, and the judgment is affirmed. All concur.

**PIONEER STOCK POWDER CO. v.
BROYLES. (No. 12225.)**

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. SALES \S 53(3) — FRAUD — QUESTION FOR JURY.

In a suit on a note, the question whether defendant was deceived into giving an order for certain goods, and into executing the note therefor, by being made to think that his contract with plaintiff involved only making him agent for it, was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. $\S\S$ 150, 151; Dec. Dig. \S 53(3).]

2. SALES \S 345—RECOVERY OF PRICE—CONDITIONS PRECEDENT—PERFORMANCE OF CONTRACT.

Where defendant's note was given for a certain amount of goods to be shipped when ordered, and defendant ordered the whole amount, and plaintiff shipped only a portion, plaintiff could not recover the full amount of the note, but, if anything, only for the portion of the goods which it shipped according to contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. $\S\S$ 956-961; Dec. Dig. \S 345.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Suit by the Pioneer Stock Powder Company against H. L. Broyles. From a judgment for plaintiff for \$139.78, it appeals. Judgment affirmed.

Edwin C. Orr, of Chillicothe, for appellant.
Fred S. Hudson, of Kansas City, and Scott J. Miller, of Chillicothe, for respondent.

TRIMBLE, J. This is a suit upon a promissory note for \$390, which plaintiff claims defendant gave in payment for 5,000 pounds of stock powders and 50 gallons of "dip" which plaintiff says defendant purchased of it. The note was one of several instruments executed simultaneously, and all having reference to the same transaction. One of these was a long contract between the plaintiff and defendant upon a blank furnished and prepared by plaintiff whereby plaintiff appointed defendant as its sole agent to sell stock powders and dip in a certain territory. Another was an alleged bill of sale, signed only by plaintiff, stating that 5,000 pounds of powders and 50 gallons of dip were sold to plaintiff, and that payment for same had been made, receipt for which had been acknowledged. The third was an order signed by defendant addressed to plaintiff at Bloomington, Ill., its place of business, directing it to ship the said powders and dip to defendant at Chula, Mo. The fourth was the note sued on, which plaintiff says was the way in which defendant made the payment the receipt of which is acknowledged in the bill of sale.

The defendant admits that the signature to the note is his, but as a part of his defense set up in his answer that the note was obtained through fraud, deceit, and trickery, he thinking he was merely making a contract to sell plaintiff's powders as their agent, and

that he was being appointed as such sole agent within a certain territory for the term of one year, and having no idea or intention of buying the powders himself and becoming liable therefor. At the conclusion of the testimony, the court gave a peremptory instruction to the jury to find for plaintiff in the sum of \$139.78. This sum was the amount due from defendant for the quantity of stuff shown by plaintiff's evidence to have been shipped to him at the price specified in the written contract. Thereupon the jury brought in a verdict for plaintiff in the above sum. Plaintiff has appealed.

[1] The contract appointing defendant as plaintiff's sole agent for a year is, as stated, long, and so drawn as to lead one to think it involved nothing else beyond making defendant an agent for the company and that in performing his duties he would be selling the powders for it, and not buying the powders himself and then retailing them out. And there is room for the defendant's contention that the minds of the parties never met on the proposition that he was making an outright purchase of such a large amount of powders, and that he was overreached and deceived into giving an order for the same and in executing his note therefor. The evidence of plaintiff as to the negotiations surrounding and involved in the execution of the instruments gives room for an inference that, in reality, the outright purchase of this large amount of stuff by defendant was not in the contemplation of both parties. However, this feature of defendant's defense could not be passed upon or decided peremptorily and as a matter of law by the trial court, but would have had to be submitted to the jury as a question of fact for them to decide. Hence we need not go into the question of fraud or no fraud. If that were the only ground upon which defendant can stand, the case would have to be reversed and remanded.

[2] But there is a wholly different ground upon which the court's action can be sustained, and that is this: The plaintiff's own evidence shows that the note in question was one of the numerous instruments executed simultaneously and dealing with the same subject-matter, and that the note was given for the purchase price of the said powders. Now, these instruments also show that plaintiff was to ship whatever stuff defendant bought whenever the same was ordered. And the order which defendant gave simultaneously with the execution of the note directed plaintiff to ship the full 5,000 pounds of powders and the 50 gallons of dip. But according to plaintiff's own evidence it never did this, but only shipped a certain portion thereof, and it was for payment of this conceded portion that the court directed a verdict for plaintiff at the agreed contract price. It being conceded by plaintiff that the note was

given for a certain amount of stuff to be shipped when ordered, and it being conceded that defendant ordered the whole amount, and that plaintiff never shipped but a portion thereof, it is clear that plaintiff is not entitled to recover the full amount due on the note, but is entitled to recover, if at all, only for that portion which it did ship according to contract. This, of course, is on the theory that no fraud was practiced upon defendant in securing his signature to the note. But defendant does not complain of the judgment since he has not appealed.

In this view of the matter it is not necessary to go into the various questions presented in appellant's brief, since, whatever be our views upon them, the plaintiff is not entitled to recover any more than he already has obtained.

The judgment is affirmed. All concur.

LAFEVER v. PRYOR et al. (No. 12222.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. TRIAL \S 191(10)—INSTRUCTIONS—ASSUMING NEGLIGENCE.

Where plaintiff was injured in loading a timber for defendant, an instruction assuming that defendant was negligent was erroneous, and should have stated what constitutes negligence and required the jury to find negligence from the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 429; Dec. Dig. \S 191(10); Negligence, Cent. Dig. \S 358.]

2. MASTER AND SERVANT \S 293(1)—INJURIES TO SERVANT—INSTRUCTIONS.

Where, in action to recover for plaintiff's injuries, the negligence claimed was the failure of defendant's foreman to warn plaintiff before he did, it was erroneous not to submit this issue to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1148; Dec. Dig. \S 293 (1).]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by James Lafever against Edward B. Pryor and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

J. L. Minnis, of St. Louis, J. M. Davis & Sons, of Chillicothe, and S. J. & G. C. Jones, of Carrollton, for appellants. Scott J. Miller, of Chillicothe, for respondent.

ELLISON, P. J. Defendant is receiver of an interstate railway carrier, and plaintiff was in his employ as a section man. He was injured while engaged in such service, and brought this action for damages. He recovered in the trial court.

It appears that plaintiff, with several other workmen, all under the direction of a foreman, was engaged in loading a timber 1 foot square and 20 feet long onto a flat

car for the purpose of being transported to another place. A box car stood next to the flat car. One end of the timber had been placed on the flat car, and to lift the other end around onto the car plaintiff, with two or more of his fellow workmen, was on the inside, so that in swinging the timber it caught plaintiff's shoulder against the box car and injured it.

The negligence charged is that:

The "bridge timber, under the directions of said boss, was negligently and carelessly handled in such a way, in the loading of the same, as to catch this plaintiff between the side of the box car and freight car upon which said timber was being loaded in its careless and negligent manner, and did catch this plaintiff's shoulder between said timber and said box car, and did mash," etc.

It appears that the foreman saw there was danger and called to the men to "look out," when the others dropped below the timber and escaped, but plaintiff, not doing so, was caught. It is said by plaintiff in the briefs that the foreman should have called sooner. Defendant pleaded contributory negligence.

[1] Instruction No. 1 for plaintiff is erroneous in assuming that defendant was negligent. That, of course, was the chief issue, and the instruction should have been so worded as to require the jury to find negligence. If the instruction had not assumed that defendant was guilty of negligence, it would still be erroneous in not stating to the jury what would constitute negligence; plaintiff not having done so in either of his other instructions. *Magrane v. Railway Co.*, 183 Mo. 119, 182, 81 S. W. 1158; *Casey v. Bridge Co.*, 114 Mo. App. 47, 65, 89 S. W. 330.

[2] While the petition is most general in the statement of negligence, yet the evidence conveyed more information, and the negligence shown seems to have been the failure of the foreman to notify plaintiff sooner than he did. This and whatever else the testimony tended to specify were made issues by the evidence, and should have been submitted to the jury, but nothing of that sort was done by the plaintiff. *Allen v. Transit Co.*, 183 Mo. 411, 435, 81 S. W. 1142; *Feldewerth v. Railroad*, 181 Mo. App. 630, 640, 641, 164 S. W. 711.

The judgment is reversed, and the cause remanded. All concur.

KRUCKER v. CITY OF ST. JOSEPH. (No. 12151.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. MUNICIPAL CORPORATIONS \S 771—LIABILITY FOR ICE ON THE SIDEWALK.

Where ice on sidewalks is an inevitable condition at times during the winter, when this condition is general all over a city, there is no liability because of it, but if it is exceptional and allowed to become hazardous for other cause than its natural formation as by ridges or separate raised or uneven surfaces, so as to endanger

pedestrians, the city is liable for injuries caused thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1627; Dec. Dig. ¶ 771.]

2. MUNICIPAL CORPORATIONS ¶812(7) — ICE ON SIDEWALK—NOTICE OF INJURY—STATUTE.

Under Rev. St. 1909, § 8863, requiring notice to the mayor of the city of personal injuries within 60 days of their occurrence, stating the place, time, character, and circumstances of the injury as a condition precedent to an action against the city, while reasonable accuracy in stating the place of injury is sufficient, a notice to the defendant city that plaintiff was injured by slipping on the ice on the sidewalk on the west side of a street between two other streets, which would cover a distance of 420 feet, with nothing else to assist the city in locating the place, was insufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1702; Dec. Dig. ¶ 812(7).]

Appeal from Circuit Court, Buchanan County; T. B. Allen, Judge.

Action by John E. Krucker against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Reversed.

Charles L. Faust, City Counselor, and Merrill E. Otis, First Asst. City Counselor, both of St. Joseph, for appellant. R. O. Bell, Sam Wilcox, and L. E. Thompson, all of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for injuries received from a fall on one of defendant's sidewalks. He recovered judgment in the circuit court. The statute (section 8863, R. S. 1909) requires that in order to maintain an action against a city for personal injuries, the complaining party must give a verified written notice to the mayor of the city within 60 days of the occurrence for which damages are claimed, "stating the place where, the time when such injury was received, and the character and circumstances of the injury." In this instance plaintiff gave the following notice addressed to the mayor, the day before the expiration of the time limited:

"You are hereby notified and informed that the undersigned, John E. Krucker, was injured on the 6th day of January, 1915, by slipping on the ice on the sidewalk on the west side of 24th street between Jackson street and Vories street about 6:30 a. m. Said injury consists of a broken fibula and lacerations and ruptures of the ligaments and muscles in and about the ankle. You are further informed that the undersigned will claim damages on account of the said injury from the city of St. Joseph."

"John E. Krucker."

The courts of this and other states have rigidly enforced the statute requiring this notice within the time limited, though they have held that a reasonable compliance, with reference to the contents of the notice, considering the object of the law, is all that is necessary.

[1] The object of the statute is to afford the city a designation of the place, so that it may examine it and become informed as to

the legality and good faith of the claimant's demand, and of the extent of its own liability. It will be observed that the above notice fixes the place as on the sidewalk on the west side of Twenty-Fourth street between Jackson and Vories streets. It is not to be denied that ice on sidewalks is an inevitable condition at times during the winter season in this climate. When this condition is general over the city there is no help for it, nor liability because of it. But if it is exceptional and is allowed to become hazardous from other causes than its natural formation, the case is different. If, for instance, it is allowed to form in ridges, or separate raised or uneven surfaces, so as to endanger pedestrians there is liability. So, therefore, when plaintiff stated to the mayor that the place of his injury was on ice on the sidewalk on the west side of Twenty-Fourth street between Jackson and Vories, and nothing more, he gave little, or no opportunity for the city to ascertain whether it was at a place where it would be liable. The least distance stated in evidence between the two streets was 420 feet, and a number of residences were between those points. The evidence showed that some of the people had cleared their walks entire, some had done so partially by shoveling out a pathway, and others had done nothing, and that at the latter places, and points where no one lived, pedestrians had walked in the slush, which left uneven places at points along the walk, and which, when frozen into ice, was rough and dangerous. Naming the place as between two streets over 400 feet apart would not be fatal looseness of description if plaintiff had stated something more which would have served as a guide to the city when it came to examine. The notice shows on its face that it was given 59 days after the occurrence, when all evidence of ice or snow had disappeared. Now suppose that the notice had stated some point at, or near which, the injury occurred, not necessarily by feet and inches, but with reasonable accuracy; the city, it may be, could have learned the walk was not in the condition asserted, and that there was no liability.

[2] Plaintiff has cited us to many cases where the place stated in the notice was on the sidewalk between two streets, but in most of these there was something else which had the effect to locate the place and afford the city something definite enough to be a guide to investigation. Thus, in *City of Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76, the place was stated to be between two points, quite a distance apart, but it was definitely designated as a hole in the sidewalk into which the injured party could step, and the case showed there was but the one hole between the points. There will be found in that case several instances given which bear out the distinction we are endeavoring to state, among others is *Lowe v. Clinton*, 133 Mass. 526,

where the distance between the two points mentioned was 50 rods; but the notice pointed out that the cause of the injury was a stump projecting 4 inches above the walk, and there was but one stump between the points. So in *Beyer v. Tonawanda*, 183 N. Y. 338, 76 N. E. 214, a "decayed and defective portion of the sidewalk" marked the place. And in *Werner v. City of Rochester*, 77 Hun, 33, 28 N. Y. Supp. 226, "a pile of dirt" on which the complainant was hurt identified the spot. While we do not wish to be understood as saying we would, or would not, go so far as did the court in *Purdy v. City of New York*, 193 N. Y. 521, 86 N. E. 560, and *Cronin v. Boston*, 135 Mass. 110, yet those cases can be read with profit, on the necessity for a notice which will meet the object of the statute.

The cases in the Courts of Appeals in this state have followed *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123. In that case, in the respect here considered, the notice is not set out, but the object of the statute is declared in general terms by the statement that it should be substantially complied with. And in *Walker v. City of New York*, 150 App. Div. 280, 134 N. Y. Supp. 689, is found a good illustration of the difference between a good and a bad notice.

None of the cases cited by plaintiff from the courts of this state meet the defective character of notice given in this one.

The judgment must be reversed. All concur.

STIMSON v. BRINKMAN. (No. 14472.)
(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. TRIAL \S 253(10) — ACTION FOR COMMISSIONS—INSTRUCTIONS.

In action by a salesman under written contract for commissions, the first count of the complaint, alleging his commencing work and rendering services and subsequent discharge and claiming salary unpaid, and the second count, claiming damages for discharge, an instruction, covering the whole case, that if his contract was delivered conditionally, plaintiff could not recover, was error, as failing to notice plaintiff's contention that he had actually entered upon the employment and performed services under his contract; there being evidence to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 621, 622; Dec. Dig. \S 253(10).]

2. CONTRACTS \S 28(3)—DELIVERY.

In the absence of fraud or mistake, delivery of a written contract by one party to the other, if not delivered in escrow, establishes the fact of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 133-140, 1820, 1821; Dec. Dig. \S 28(3).]

3. EVIDENCE \S 444(2) — PAROL EVIDENCE — DELIVERY OF CONTRACT.

The fact of a conditional delivery of a written contract to a party to it cannot be proved

by parol, since such proof would contradict the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1936, 2049; Dec. Dig. \S 444(2).]

4. EVIDENCE \S 444(2) — PAROL EVIDENCE — DELIVERY OF CONTRACT.

Where a salesman's written contract of employment was unambiguous, proof that it was delivered on condition that another contract should be drawn up later, more fully expressing the agreements of the parties, was inadmissible in action on the original contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1936, 2049; Dec. Dig. \S 444(2).]

5. APPEAL AND ERROR \S 260(2)—NECESSITY OF EXCEPTIONS—EXCLUSION OF EVIDENCE.

The exclusion of a deposition offered in evidence cannot be reviewed, in the absence of any exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1504, 1505; Dec. Dig. \S 260(2).]

6. APPEAL AND ERROR \S 683—RECORD.

The exclusion of deposition of defendant, offered to contradict defendant's testimony at the trial, could not be reviewed, where there was nothing in the record in any manner authenticating the paper offered as a deposition, and it did not appear that defendant had signed it, or that signature was waived, or that it was taken as provided by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2714, 2717, 2718, 2907; Dec. Dig. \S 683.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by J. H. Stimson against George C. Brinkman. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Jeffries & Corum, of St. Louis, for appellant. A. M. Frumberg and A. R. Russell, both of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff brought this action against defendant, doing business under the trade name of George C. Brinkman Motor Car Company, on a paper writing in the form of a letter addressed to plaintiff by defendant and which is as follows:

"The following is in accordance with our verbal understanding and agreement. You are to enter my employ as salesman and manager of the truck and delivery wagon department of the George C. Brinkman Motor Car Company on a basis of 5 per cent. gross on all sales made in said department, whether sold by you in person or otherwise. You are to receive at the end of each and every week the sum of fifty dollars (\$50.00) which is to be charged against your commission account. Whatever balance there is standing to the credit of your account at the end of the year shall be paid to you at that time. All necessary street expenses shall be borne by the George C. Brinkman Motor Car Company and refunded to you at the end of each week. A truck with driver shall be furnished you whenever necessary for demonstrating purposes. This agreement shall continue for the period dating from August 5th, 1912, to January 1st, 1914."

This is signed by defendant in his business name, dated July 22nd, 1912. Below the

signature of the defendant plaintiff wrote, "Accepted July 27th, 1912, J. H. Stimson."

The petition is in two counts, the first averring the entering into of the written contract above referred to, states that under it plaintiff was to receive for his services \$50 a week together with all necessary street expenses, payable at the end of each week; that plaintiff began work as a salesman and manager of the truck and delivery wagon department of defendant, in accordance with the terms of this contract, on August 5th, 1912, and continued to work in that capacity until the week ending September 14th, 1912, when he was discharged by defendant without cause and without any fault upon the part of plaintiff. Claiming that there is now due him the sum of \$50 by way of salary for the week ending September 14th, 1912, the first count claims judgment for that amount.

The second count of the petition, setting out the same contract, avers that plaintiff, relying upon the terms and conditions of the contract, gave up the position which he then held with another and began to work as a salesman and manager of the truck and delivery wagon department of defendant and continued to work in that capacity until the close of the week ending September 14th, 1912, at which time, it is averred, he was discharged without cause and without fault on his part, and averring that he has at all times complied with his obligations under the terms of the contract, charges that defendant, in discharging plaintiff without cause and in violation of the contract, had damaged him in the sum of \$3375, for which, in the second count, he demands judgment.

The answer, after a general denial, admits that defendant employed plaintiff as a salesman and that he signed the instrument mentioned in the petition, but denies the contract was a binding contract, or had ever been delivered to plaintiff as a contract, or that plaintiff entered into his employ thereunder; avers that this instrument was drawn up preliminary to the execution of a formal agreement to be made between the parties and was never intended to become effective as a contract between the parties; that defendant was induced to sign it on the representation of plaintiff that plaintiff merely wished to show the paper to his then employers so that plaintiff could obtain an amicable adjustment with them and be able sooner to enter the employment of defendant; that thereafter defendant had another and formal contract prepared which plaintiff refused to execute and refused to cancel the instrument before then executed. The answer further sets out that defendant had discharged plaintiff from his employment on September 7th, 1912, because plaintiff had not shown that he was competent and had failed to fulfill the duties of his employment or to observe the rules and regulations of the defendant in the conduct of its business.

This answer was not verified. Counterclaims are also interposed. As defendant dismissed these at the trial it is unnecessary to notice them.

At a trial before the court and jury the finding was for the defendant on both counts of the petition, and judgment following, plaintiff has appealed.

The principal error assigned is to the giving of an instruction at the instance of defendant, which is to the effect that if the jury believed and found from the evidence that it was mutually understood between the parties that the writing offered in evidence (that is, the paper which we have before set out), should be signed by defendant for the purpose only of permitting plaintiff to show his former employer that he had procured employment with defendant, and that it was mutually understood and agreed by both parties that this writing should have no force or effect as such between themselves, *"and that it was agreed and understood by both, that the written contract should be prepared, containing the true understanding and agreement between the parties, and if you find that thereafter defendant did prepare, or cause to be prepared, a written contract, and presented same to plaintiff for his signature, and that plaintiff refused to sign said contract, you will find for the defendant on both counts of plaintiff's petition."*

[1] It is argued that, as this instruction purported to cover the whole case, it was fatally defective, in that it failed to take any notice of the contention of plaintiff that he had actually entered upon the employment and performed services under this contract, there being evidence to that effect. The instruction is open to this objection and is fatally defective for this omission.

[2, 3] It is also insisted by defendant that this contract was delivered conditionally and parol evidence was admitted to prove that. That was error. While there is wide diversity of opinion among the courts on admitting parol evidence to prove that delivery was conditional, it is settled in our state that, absent fraud, or mistake, delivery of the paper by one party to the other, if not delivered in escrow, establishes the fact of a contract, and the fact of a conditional delivery to a party to the contract cannot be proved by parol, as that is, in effect, to contradict the written contract by parol. *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823. That, says Judge Barclay, who had dissented in the *Hurt* Case, in *Holmes v. Faris*, 97 Mo. App. 305, loc. cit. 313, 71 S. W. 116, is now the settled law of our state.

[4] The contract as signed was free from ambiguity and must be held to have expressed the agreement between the parties, and the fact that another was to be executed, which in fact never happened, in no manner invalidates the one which was executed, the execution of which is not denied. *Gale v. J. Kennard & Sons Carpet Co.*, 182 Mo. App.

498; loc. cit. 518, 165 S. W. 842, and cases there cited. Hence all that part of the instruction we have underlined was erroneous.

At the instance of plaintiff the court instructed the jury that if they believed from the evidence that plaintiff entered defendant's employ on or about August 5th, 1912, "under the terms and conditions of the written contract described in plaintiff's petition, then in determining the issues in this case you must exclude from your consideration any prior agreements contradicting the terms and conditions of said written contract."

That was a correct statement of the law applicable and is utterly inconsistent with that before quoted as given for defendant.

[5, 6] Another error urged is to the exclusion of the deposition of defendant, which it appears had been taken in the case and which was offered in evidence by plaintiff apparently in contradiction of defendant's testimony at this trial. A careful reading of the abstract furnished by appellant discloses no exception whatever to the ruling of the trial court in excluding the deposition when it was offered. Furthermore, we cannot pass on that deposition, even if exceptions had been properly saved to its exclusion, for the very sufficient reason that there is nothing in this record in any manner authenticating the paper offered as a deposition. It does not even appear that defendant had signed it, or that signature was waived, or that it was taken as provided by law. As far as here appears the action of the trial court in excluding it, was not error.

For the errors before pointed out, the judgment of the circuit court is reversed and the cause remanded.

ALLEN and THOMPSON, JJ., concur.

UNITED STATES FIDELITY & GUARANTY CO. v. W. P. CARMICHAEL CO. (No. 12015.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

1. APPEAL AND ERROR 6-1015(3)—REVIEW—MOTION GRANTING NEW TRIAL.

Where a new trial is granted on the ground that the verdict is contrary to the evidence and the weight of the evidence, the order will not be disturbed by the appellate court, if there was any substantial evidence against the verdict, unless on the record no other verdict could have been rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866; Dec. Dig. 6-1015(3).]

2. INSURANCE 6-668(14)—GUARANTY INSURANCE—NOTICE OF INJURY—SUFFICIENCY.

In an action to recover premiums on policies of indemnity insurance, where defendant filed a counterclaim for an amount paid by him to compromise a claim for injuries which the plaintiff had refused to defend, evidence of the defendant's stenographer that she remembered the accident, and that, while she had no specific and

separate recollection of mailing a notice of this accident to the plaintiff, she always mailed notices of accidents and did mail this one, held sufficient to take the question of whether or not the notice was mailed to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1747, 1749, 1750, 1766, 1768; Dec. Dig. 6-668(14).]

3. INSURANCE 6-535—INDEMNITY INSURANCE—PROVISION FOR NOTICE.

A provision for notice of accidents in an employer's liability policy is of the essence of the contract, and a breach of such provision by the assured would prevent a recovery under the policy on the ground of nonperformance of a condition precedent, although the policy contains no stipulation for forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1322; Dec. Dig. 6-535.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by the United States Fidelity & Guaranty Company against the W. P. Carmichael Company. From an order granting plaintiff's motion for a new trial after verdict for defendant, defendant appeals. Affirmed.

Haff, Meservey, German & Michaels, of Kansas City, for appellant. Ball & Ryland, of Kansas City, for respondent.

JOHNSON, J. Plaintiff is an insurance indemnity company and on defendant's application issued to it two policies of insurance; one against loss by reason of accidents to its own employes, and the other against loss by reason of accidents to persons not its employes. This action was instituted by petition in two counts for unpaid balance of premiums due on the policies. Defendant had refused to pay these premiums for the reason that plaintiff had refused to defend a certain action by one Boardman against defendant for an accident happening to him as a result of defendant's negligence while performing certain public work, whereby defendant was compelled to defend itself, which it did by compromising with him for \$1,613.14. Defendant therefore filed its counterclaim to plaintiff's petition in that sum. A verdict was returned for defendant on its counterclaim, less the premiums claimed in the petition. Plaintiff asked and was granted a new trial, and defendant appealed from that order.

The trial court stated the following reasons for granting a new trial, viz.:

"For giving and refusing instructions for defendant. For the reason that plaintiff under the pleadings and the evidence was entitled to a peremptory instruction on defendant's counterclaim, for the reason that the counterclaim was based on a contract alleging specific performance on the part of defendant of the conditions of said contract, and there being no proof offered of the compliance with the provisions of the contract creating a liability under which defendant claimed in its counterclaim. (And) That the verdict is contrary to the evidence and the weight of the evidence."

[1] The last reason assigned by the court will compel us to support the order for a new

trial if there was any substantial evidence against the verdict, unless, on the record, no other verdict could have been rendered save one in favor of the counterclaim.

The policy to which the counterclaim applies contains a clause requiring notice, in these words:

"Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company, at its home office or to the agent who has countersigned this policy."

Plaintiff claims that this provision was not complied with, and considers that, thereby, defendant lost its right to be indemnified, while defendant insists that, from three independent standpoints, such provision presents no hindrance to its claim: First, that it gave the notice as required; second, that notice was waived; and, third, that though it did not give notice, and though there was no waiver, there is no provision in the policy for a forfeiture for such default.

[2] The proof of notice, if defendant's office clerk and stenographer is to be believed, was convincing. She testified explicitly that she wrote and mailed the notice immediately after the accident; directed, stamped, and mailed it to plaintiff's agent. She stated she distinctly remembered the Boardman accident, that she always mailed notices, and that she did so in this case, but that she had no specific and separate recollection of putting this particular notice in the mail.

In 29 Cyc. 240, 241, it is stated that:

"On an issue as to whether notice of the assessment was given, evidence of the secretary, whose duty it was to make and mail notices, as to his methods in preparing and sending them, is admissible, although he has no distinct recollection of sending the particular notice in question."

To the same effect is 7 Encyc. of Evidence, 716, and cases there cited.

In *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. 454, the court said:

"The financier, whose duty it is to forward notices, could not and would not testify positively and specifically that he mailed a notice to Backdahl, but he swore to sending notices of this particular assessment to all of the members of the lodge, as he supposed, and as he evidently intended to do, including notice to Backdahl, 'if he was not overlooked.' From this the jury might find that notice was sent to Backdahl."

The same view of the law is expressed in the following cases: *Pier v. Heinrichshoffen*, 67 Mo. 168, 29 Am. Rep. 501; *Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Goucher v. Carthage Novelty Co.*, 116 Mo. App. 103, 91 S. W. 447; *Ward v. Transfer Co.*, 119 Mo. App. 83, 95 S. W. 964; *Grain Co. v. Railway*, 120 Mo. App. 203, 96 S. W. 681. In the case last cited we observed that:

If "plaintiffs had been able to produce the stenographer and she had testified that, although she had no recollection of the particulars, she invariably prepared and mailed in the chute all letters received by her for mailing, the evidence would have been sufficient."

In the present case the testimony of the stenographer fully met this requirement and

was endowed with enough probative force to carry to the jury, as an issue of fact, the question of whether or not the notice was mailed as she claims it was. The court erred in sustaining the motion for a new trial on the ground that there was "no proof offered of the compliance with the provisions of the contract creating a liability under which defendant claimed in its counterclaim."

But we cannot interfere with the ruling granting a new trial of this issue on the ground that the verdict is against the weight of the evidence, and the judgment should be affirmed unless we find that counsel for defendant are right in either of the contentions: First, that it should be declared, as a matter of law, that plaintiff waived the giving of notice; and, second, that the absence from the policy of a provision for forfeiture for failure to give notice would preclude plaintiff from declaring a forfeiture on such ground.

There is evidence of a waiver of notice, but the evidence as a whole is conflicting, and the triers of fact would be justified by substantial evidence in deciding that issue either way. We do not share the view defendant's counsel entertain respecting the meaning of plaintiff's letter to defendant, dated March 5, 1912, six months after Boardman's injury. The opening statement in that letter will bear the interpretation of an admission that the notice was given in time, but is just as consistent with the contention of plaintiff that it was not given in time. On the facts, the whole case seems to turn on the weight to be accorded the stenographer's testimony, and the question of waiver, as well as that of whether or not the notice was mailed on or about September 4, 1911, involves issues of fact as to which the trial judge, in passing on the motion for a new trial, well might have concluded, as he did, that the weight of the evidence was on the side of plaintiff.

[3] The second point, that the absence from the policy of a stipulation for a forfeiture, if immediate notice is not given, prevents plaintiff from interposing a defense predicated on the failure to give such notice in time, must be ruled against defendant. In *Box Company v. Insurance Co.*, 170 Mo. App. 361, 156 S. W. 740, we applied the rule, which we found supported by the great weight of authority, that a provision for notice in an employer's liability policy is of the essence of the contract, and that a breach of such provision by the assured will prevent a recovery under the policy, not on the ground of forfeiture, but on the ground of nonperformance of a condition precedent, and we pointed out the consistency of this rule with the rule applied by the Supreme Court in *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 75 S. W. 1102. The defense of nonperformance of the stipulation for notice is available to plaintiff.

Obviously the trial court acted within the bounds of its discretion in granting a new

trial on the ground that the verdict was against the weight of the evidence, and we are without power to interfere with that ruling.

The judgment is affirmed. All concur.

SUNDERLAND BROS. CO. v. BALTIMORE & O. S. W. R. CO. (No. 14485.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. COURTS — 489(9) — INTERSTATE COMMERCE — JURISDICTION OF STATE COURT.

Where a shipment of coal by rail was interstate, any complaint based on the illegality or impropriety of the published rate was not within the jurisdiction of the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326; Dec. Dig. 489(9).]

2. COURTS — 489(9) — STATE OR FEDERAL COURTS — CARRIAGE OF GOODS — EXCESSIVE CHARGE — JURISDICTION OF STATE COURT.

The cause of action of a shipper of coal against a railroad to recover the five cents excessive freight charge per ton exacted over the contract obligation of the road to carry for 35 cents a ton was within the jurisdiction of the state courts, though the charge was made on interstate shipments.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326; Dec. Dig. 489(9).]

3. CARRIERS — 30 — CARRIAGE OF GOODS — RATES — TARIFF SHEET — CONSTRUCTION.

Where the tariff sheet of a railroad named the rates on coal from two points on its line to a common destination within the same state, the higher rate being charged for the shorter haul, the further clause appearing on the sheet, "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line, * * * the shorter being entirely included within the longer distance," did not affect the named rates, and was not an offer to transport coal from the farther point at the same rate charged from the point nearer the common destination, though the ultimate destination of the shipments was beyond the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. 30.]

4. CARRIERS — 35 — RATES — CONTRACT — DEVIATION FROM ESTABLISHED RATES.

A railroad, under the law, could not, by special contract with a shipper of coal, or otherwise, bind itself to deviate from the established rate per ton between certain points duly promulgated and in effect during a certain period.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. 35.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by the Sunderland Bros. Company against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Richard A. Jones, of St. Louis, and McGilton, Gaines & Smith, of Omaha, Neb., for appellant. Fordyce, Holliday & White and Kramer, Kramer & Campbell, all of St. Louis (Edward Barton, of Cincinnati, Ohio, of counsel), for respondent.

ALLEN, J. This is an action instituted in the circuit court of the city of St. Louis to recover certain alleged "overcharges" of freight on coal shipped by plaintiff over defendant's line of railway. The cause, being one for compulsory reference, was referred to Edgar R. Rombauer, Esq., of the St. Louis bar, to try all of the issues. The referee duly filed his report, stating his findings of fact and conclusions of law, and recommending judgment for defendant. To this report plaintiff filed exceptions, which were overruled. The court thereupon entered judgment for defendant, in accordance with the recommendation of the referee, and plaintiff appealed to this court.

Plaintiff is a corporation of the state of Nebraska. Its corporate name was originally "Omaha Coal, Coke & Lime Company," but this was subsequently changed to "Sunderland Bros. Company." The defendant is a corporation of the state of Ohio, doing business as a common carrier in various states, and engaged in operating its railroad in the state of Illinois through the towns of Breese and Trenton to East St. Louis, all being points within the last-mentioned state. During 1900 and 1901 plaintiff made certain shipments of coal over defendant's railroad from Trenton to East St. Louis, destined for points beyond the state of Illinois, to wit, points in states lying to the northwest thereof. Breese, Ill., is a point on defendant's line of railway approximately eight miles east of Trenton, the latter being about 36 miles east of East St. Louis. Consequently shipments from Trenton to East St. Louis were made over the same line of defendant's road, and in the same direction, as shipments from Breese to East St. Louis; that from Breese being the longer haul.

During the period in which plaintiff made the shipments with which we are now concerned, the defendant had in effect a tariff from Trenton to East St. Louis, shown by a certain tariff sheet, in evidence, issued by defendant on January 1, 1900. We deem it unnecessary to set out this tariff sheet in full. It applied on coal, in carload lots, "minimum 20 tons." It sets out the names of a number of stations on defendant's line of railway east of East St. Louis, and designates the freight rates on coal (carloads, minimum 20 tons) from said points to East St. Louis. The rate appearing therein on coal from Trenton to East St. Louis is 40 cents per ton; while the rate named on coal from Breese to East St. Louis is 35 cents per ton. Following the names of the various stations, with the respective rates on coal as aforesaid, the tariff sheet contains the words: "Subject to rules of classification." Then follows this clause, viz.: "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the

shorter being entirely included within the longer distance."

Other tariff sheets of defendant were introduced in evidence by plaintiff; but, as the case was tried before the referee, as shown by his report, plaintiff ultimately confined its claim to shipments made during the time when the above-mentioned tariff sheet was in effect. The referee found that during that period plaintiff shipped over defendant's line of railway from Trenton to East St. Louis, 14,332.26 tons of coal in carload lots, each car containing a minimum of 20 tons thereof, the points of ultimate destination of such shipments being beyond the state of Illinois. On each such shipment the defendant charged the sum of 40 cents per ton freight, which was paid by plaintiff; i. e. the carrier or carriers that made delivery at the points of ultimate destination collected the freight from plaintiff's vendees who deducted the same in remitting to plaintiff. Plaintiff's claim, now in controversy, is therefore for the recovery of 5 cents per ton alleged excess freight collected by defendant on these shipments, amounting to \$716.61; plaintiff contending that on such shipments defendant could lawfully charge and receive only 35 cents per ton.

It is unnecessary to here notice the pleadings. The learned referee proceeded upon the theory that plaintiff's complaint was not founded upon the assumption or contention that defendant's rates, published in its aforesaid tariff sheet, were illegal or improper, but that plaintiff asserted a right of recovery upon the ground:

"That it contracted with defendant on a published rate for this carriage of 35 cents, and that defendant in violation of its contract obligations to carry for 35 cents exacted a charge of 40 cents for the service."

And the referee held that in any event, as the shipment was an interstate one, any complaint based upon the illegality or impropriety of the published rate would not be within the jurisdiction of the trial court.

[1] This ruling we regard as entirely sound; and hence we shall not assume the right to pass upon any question, whether apparently included within the petition or otherwise, touching the reasonableness of the rate charged and collected or the legality of such rate under the Interstate Commerce Act. The rate on coal of 40 cents per ton from Trenton to East St. Louis, appearing on the same tariff sheet with a rate on coal of 35 cents per ton for the longer haul, in the same direction, from Breese to East St. Louis, when applied to an interstate shipment, is apparently in contravention of section 4, of the Interstate Commerce Act of 1887. 24 Stat. L. 380 (U. S. Comp. St. 1913, § 8566); volume 3, Fed. Stat. Ann. p. 823. But the prohibition of that section is directed against "the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a

shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance." There is evidence to the effect that the coal mined at Trenton, to which the rate of 40 cents per ton apparently applied, was a comparatively high grade coal, used for domestic purposes and sold over an extensive territory, whereas the coal mined at and shipped from Breese was of a lower grade, used principally as "steam coal" and generally "sold locally along the line (of defendant's railway) and in St. Louis," and that, while the price of each at the mine varied from time to time, the Trenton coal was worth from 50 cents to 75 cents more per ton than the Breese coal. But whether the difference in the character and value of the two coals, or other circumstances and conditions present, were such as to justify a classification placing a higher rate on Trenton coal from Trenton to East St. Louis and on Breese coal from Breese to East St. Louis, in interstate shipments, is a matter with which we have here no concern. It is quite clear, as stated by the referee, that, if any question of this character can be said to have been originally presented in the case, the lower court had no jurisdiction to determine it. See *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 428, 27 Sup. Ct. 350, 61 L. Ed. 553, 9 Ann. Cas. 1075; *Robinson v. B. & O. Railroad Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288.

[2] Plaintiff contends, however, that by the tariff sheet aforesaid the defendant advertised and offered to transport coal from Trenton to East St. Louis, on interstate shipments, at the rate of 35 cents per ton; whereas, upon interstate shipments tendered by plaintiff and accepted by defendant, while such tariff sheet was in force and effect, defendant, in violation of its contract obligations in the premises, wrongfully exacted a freight charge of 40 cents per ton for such carriage. The cause of action thus counted upon is undoubtedly within the jurisdiction of our state courts. See *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Illinois Central Railroad Co. v. Mulberry Hill Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306.

[3] The question therefore with which we are concerned is whether defendant, through its published tariff sheet, when construed as a whole, should be held to have offered to carry coal from Trenton to East St. Louis at the rate of 35 cents per ton in interstate traffic. The tariff sheet definitely specifies a rate of 40 cents per ton from Trenton to East St. Louis. It is not stated whether this is to apply to interstate or intrastate shipments, or both. However, the tariff sheet recites that:

"On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance."

And, inasmuch as the rate named from Breese to East St. Louis is 35 cents, plaintiff argues that when the tariff sheet as a whole is construed it must be taken to mean that on interstate shipments the rate from Trenton to East St. Louis is to be 35 cents. It is pointed out that only in this one instance does the tariff sheet, in the column of rates, specify a greater rate for a shorter than for a longer distance; and it is insisted that by inserting the clause above quoted, it was plainly indicated and intended that on interstate shipments from Trenton to East St. Louis the specified rate from Breese to East St. Louis, viz. 35 cents per ton, would apply.

In this connection it is to be observed that a statute of the state of Illinois shown in evidence, and which was in force at the time with which we are here concerned, makes it an offense for a railroad corporation to charge, collect or receive "for the transportation of any passenger, or freight of any description, * * * the same, or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation, in the same direction, of any passenger, or like quantity of freight of the same class, over a greater distance of the same railroad." See 3 Star & Curtis Ill. Stat. Ann. § 166 et seq., c. 114, p. 3309 et seq. Appellant contends that the scope of this statute is considerably different from that of the corresponding provisions of the Interstate Commerce Act. But, be this as it may, the tariff sheet above mentioned, specifying a 40-cent rate from Trenton to East St. Louis and at the same time a 35-cent rate from Breese to East St. Louis, if intended to apply to intrastate shipments, is apparently in contravention of this statute, just as it appears *prima facie* to be in contravention of the Interstate Commerce Act if applicable to interstate shipments. And in this connection the referee pertinently says:

"Whether such apparent disregard of the law is justified or not by the difference in the grades of coal, and whether the defendant, if it had the right to make a different classification, did or did not make such classification, is not now the question. The sole question is: Did the defendant, by this tariff sheet, offer to carry plaintiff's coal for interstate shipment for 35 cents a ton from Trenton to East St. Louis? If such construction is placed upon the tariff sheet, then it would be just as logical in view of the Illinois statute to place a similar construction thereon as to intrastate shipments, a construction that would eliminate the 40-cent rate from the tariff sheet altogether."

It is true that the tariff sheet makes no reference to the Illinois statute, while it does contain a clause calling attention, in a general way, to the above-mentioned prohibition of the Interstate Commerce Act. But we take it that it matters not that the tariff sheet made reference to the federal law, and not to the state law. Necessarily the pertinent provisions of the former are to be read into the tariff sheet if applied to

interstate shipments, and, on the other hand the state law touching the matter must become an integral part of the tariff sheet if applied to intrastate shipments. What defendant's object was in placing upon the tariff sheet the clause mentioned, referring to the provisions of the Interstate Commerce Act, we cannot say. In our opinion, that clause added nothing whatsoever to the tariff sheet. That document plainly specifies a rate of 40 cents per ton on coal from Trenton to East St. Louis. And this, we think, cannot be said to have been eliminated or altered by the mere recital therein that on interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance.

We are therefore of the opinion that the tariff sheet in question cannot be construed as an offer by defendant to transport coal from Trenton to East St. Louis at the rate of 35 cents per ton. If defendant was not justified under the law in fixing the rate at 40 cents per ton, as specified, in interstate shipments, the matter is one which cannot be reached in this action.

[4] It is contended that defendant, by certain acts on its part, placed a construction on the tariff sheet such as that for which plaintiff contends, and should now be held to that construction. It is unnecessary to review these matters in detail, as to which there is considerable argument pro and con. It is sufficient to say that defendant is at any rate correct in the contention that under the law it could not, by special contract with plaintiff or otherwise, bind itself to deviate from the established rate duly promulgated and in effect during the period mentioned. See *Dunne & Grace v. Railroad*, 166 Mo. App. loc. cit. 377, 148 S. W. 997, and cases cited.

It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and THOMPSON, J., concur.

STOBILE v. McMAHON. (No. 14471.)
(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. MASTER AND SERVANT — § 265(5) — INJURIES TO SERVANT — EVIDENCE — *RES IPSA LOQUITUR*.

In a servant's action for injuries where the petition alleged that defendant's foreman negligently allowed plaintiff's place to work to become unsafe and dangerous by permitting a hoisting engine to be operated over plaintiff while he was performing work which he had been ordered by the foreman to do, the case being predicated upon the duty of the master to exercise ordinary care to furnish and maintain a reasonably safe place for the servant to work, the doctrine of *res ipsa loquitur* was not invoked and does not apply.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 893, 955; Dec. Dig. § 265(5).]

2. MASTER AND SERVANT — 101, 102(8) — INJURIES TO SERVANT — DUTY OF MASTER.

It is not only the duty of the master to exercise reasonable and ordinary care to furnish the servant a reasonably safe place in which to work, but to keep it reasonably safe for him to perform the labor required of him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. — 101, 102(8).]

8. DAMAGES — 168(2) — EVIDENCE — ADMISSIBILITY.

In a servant's action for injuries where there was no claim, in the petition or for an instruction on measure of damages, for loss of services, evidence tending to show that the plaintiff had not been working and was unable to work, since he had left the hospital, was to show the permanency and extent of his injuries and disabilities; it being clear in view of the pleading and instruction that it was admitted for that purpose only.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 480, 485, 486; Dec. Dig. — 168(2).]

4. EVIDENCE — 505 — OPINION EVIDENCE — EXPERT TESTIMONY.

In a servant's action for injuries, a physician's statement in answer to a question as to whether plaintiff will be able to continuously do hard labor, was admissible as a matter for the witness' expert opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2308; Dec. Dig. — 505.]

5. MASTER AND SERVANT — 291(4) — INJURIES TO SERVANT — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In a servant's action for injuries, an instruction containing the words "negligently and carelessly allowed the hoisting machine and bucket to be operated on a dump near the plaintiff" was not erroneous as broadening the allegations of the petition in adding the words "and bucket" to the words "hoisting machine," since the hoisting machine set forth in the petition included both the cable and the bucket.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1186; Dec. Dig. — 291(4).]

6. TRIAL — 296(3) — INSTRUCTIONS — ERROR CURED BY FURTHER INSTRUCTIONS.

In a servant's action for injuries, error in an instruction "that the law required the defendant not only to furnish a reasonably safe place to work, but also required him to keep it so," was cured by the latter part of the instruction, that if the jury found that the defendant's foreman neglected to adopt suitable precautions for plaintiff's protection to keep his place of work reasonably safe, etc., the plaintiff did not assume the risk of such injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. — 296(3).]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

"To be officially published."

Action by Benedetto Stobile against John F. McMahon. From a judgment for plaintiff, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

D. T. Mason, of St. Louis, and R. M. Sheppard, of Joplin, for appellant. Charles P. Comer, of St. Louis, for respondent.

THOMPSON, J. This is an action for damages for personal injuries. The plaintiff secured a verdict and judgment in the

trial court. A motion for a new trial was filed by defendant, which was overruled by the court, and he appealed.

The petition in the case was as follows:

"Plaintiff states that on or about the — day of March, 1913, he was in the employ of the defendant, and while pursuing the duties of such employment defendant's foreman in charge of and directing plaintiff's work ordered plaintiff to assist in removing a large timber from one place to another. That while plaintiff was obeying said order defendant's foreman negligently allowed plaintiff's place to work to become unsafe and dangerous in that said foreman negligently and carelessly, and in disregard of plaintiff's safety, allowed and permitted a hoisting machine to be operated near plaintiff, thereby striking plaintiff with same and breaking, mangling, and crushing plaintiff's leg. Plaintiff states that as a result of said negligence and injury plaintiff has, does, and will ever suffer great physical and mental pain and bodily weakness, and has been permanently injured. That as a result of said negligence and injury plaintiff has, does, and will ever expend large sums of money and incur indebtedness in and about the treatment of said injuries, suffering, and weakness."

The answer was a general denial and a plea of assumption of risk. The evidence tended to show that during the month of March, 1913, when the plaintiff was injured, the defendant was engaged in constructing a sewer in the northwest part of the city of St. Louis. At the time of the injury, defendant and his men were engaged in the digging of a ditch 130 or 140 feet long and some 17 feet wide. At one end of this ditch was an engine which furnished the power for a hoisting machine composed of a cable and bucket. This cable extended over the ditch from the end where the engine was placed to a point near the other end of the ditch where the excavating was being done. The dirt was taken from the ditch by means of a bucket which was attached to the end of the cable and which upon being filled was hoisted out of the ditch and thence backward towards the engine where the bucket would be lowered and dumped. This dump, at the time of the accident involved in this case, was about 15 feet high and 17 or 18 feet wide, and 40 or 50 feet long, and was narrower at the top and sloped to the bottom. The dirt from the ditch was brought back along the cable in the bucket, as aforesaid. When the bucket was over that part of the dump where it was to be emptied it was lowered to the top of the dump where a man located for that purpose would trip the bucket—that is, with a stick would knock loose a catch on the side of the bucket so that it would turn upside down and the dirt would fall from the bucket on top of the dump. Occasionally when the bucket had been tripped by the man on top of the dump all of the earth therein would not come out of the bucket, and on those occasions it would be dragged or jolted along the top of the dump in order to shake out of it the remaining earth or dirt.

The evidence showed that the operation of the hoisting machine which was composed of the cable and bucket was guided by a man, known as a signal man, who stood at one side of the ditch and with an electric button signaled the engineer. A signal would be given by this man to the engineer when the bucket was filled in the ditch and ready for hoisting. After the bucket was hoisted, another signal would be given by this man to the engineer, to draw in the bucket over the dump, and then when the bucket had reached the right spot on the dump, the signal man would signal to the engineer to lower the bucket where it was dumped. On the day of the accident, the plaintiff was working in that part of the ditch where the dirt was being hoisted out by means of the hoisting machine and bucket. The defendant had in charge of the work a foreman. This foreman ordered the plaintiff and another man to come up out of the ditch and go to the place where this earth was being dumped and take some timbers away from the foot of the dump. While the plaintiff and the other laborer were obeying the order of the foreman, and while working at the foot of the dump in removing these timbers, which were partially covered by dirt of the dump, the hoisting machine was kept operated, and upon the bucket being lowered to the top of the dump, and after it was tripped by the man on top of the dump, and while it was being dragged along on top of the dump for the purpose of jolting out the remaining earth therein, it rolled down the side of the dump and struck the plaintiff, breaking his leg in three places between the knee and the ankle, and for this and other injuries received by being struck by the bucket the plaintiff brings this suit.

Defendant's foreman and defendant's signal man, above referred to, at the time the foreman gave the order mentioned above to the plaintiff to remove the timbers, were standing close together on top of the ground right over the excavation where plaintiff was working. The foreman who gave the order above mentioned testified:

"The machinery was in good working order, the bell system was in good order, the signal man did obey his orders; that when he ordered these men to go in and get those timbers out of the dump he did not tell the signal man not to operate the bucket while they were getting them out and that it was a mistake to do it that way; that he didn't say anything to anybody about not operating the bucket while those men were in there."

The man who was working on top of the dump, whose business it was to trip the bucket and let out the dirt, testified as follows:

"I had been working on the dump two months. John (meaning the plaintiff) had come up there to get the timbers before. He sent John, generally, or somebody else, most every day. At any time before, when John came up there after timbers, the bucket was never dumped up over him. * * * They always waited until the man got away from the bottom of the dump

before they dumped the bucket and started it back."

At the instance and request of the plaintiff, the court gave the following instructions:

"Instruction No. 1.

"The court instructs the jury that if you find and believe from the evidence that on or about the ____ day of March, 1913, the plaintiff was in the employ of the defendant, and while pursuing the duties of such employment, defendant's foreman in charge of and directing plaintiff's work, ordered plaintiff to assist in removing timbers from the foot of the dump mentioned in the evidence, and that while plaintiff was obeying such order, defendant's foreman negligently allowed plaintiff's place to work, in removing said timbers, to become unsafe and dangerous by negligently and carelessly allowing the hoisting machine and bucket to be operated on said dump near plaintiff, thereby striking plaintiff and injuring him with same, then your verdict should be for the plaintiff, unless you further find and believe the risk of such danger and injury was one assumed by plaintiff, as hereinafter explained in other instructions.

"Instruction No. 2.

"The court instructs the jury that the plaintiff in working for the defendant assumed only the risks ordinarily and usually belonging to the business, after defendant had done what the law required of him. The law required the defendant not only to furnish plaintiff a reasonably safe place to work, but also required him to keep it so, and if you find and believe from the evidence that defendant's foreman allowed a hoisting machine to be operated near plaintiff while removing said timbers, thereby injuring plaintiff, and that in so doing said foreman neglected to adopt suitable precautions for plaintiff's protection, to keep the plaintiff's place to work reasonably safe, and the plaintiff was injured as a result of such neglect, the plaintiff did not assume the risk of such injury."

Point I.

[1] The appellant insists that the trial court erred in allowing any evidence to be introduced under the petition on the ground that it does not state facts sufficient to constitute a cause of action against the defendant. The appellant's argument upon this point is based on the idea that the petition is drawn on the theory that the doctrine *res ipsa loquitur* applies in the case, and that the doctrine does not apply in this sort of a case, and cites many authorities supporting the proposition that the doctrine of *res ipsa loquitur* does not apply in this case. We fully agree with the learned counsel that the doctrine of *res ipsa loquitur* cannot be invoked in this case, but the counsel for the appellant is mistaken when he argues that the petition is drawn upon that theory. The petition sets out that the defendant's foreman negligently allowed plaintiff's place to work to become unsafe and dangerous in that the said foreman negligently and carelessly allowed and permitted the hoisting machine to be operated while plaintiff was performing the work he had been ordered to do. It is therefore plainly to be seen that the negligence charged in the petition consisted of the failure on the part of defendant to exercise reasonable

and ordinary care to furnish to the plaintiff a reasonably safe place in which to do the work he was directed to do. As stated before, the authorities cited by the learned counsel for the appellant on this proposition are not in point. They simply hold that in this kind of a case the doctrine of *res ipsa loquitur* cannot be invoked, but they clearly have no application to this case for the reason that this case is predicated upon the duty of the master to exercise ordinary care to furnish and maintain a reasonably safe place for the servants to work. *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292; *Bradley v. C., M. & St. P. Ry. Co.*, 138 Mo. 293, 39 S. W. 703; *Benedict v. C. G. W. Ry.*, 104 Mo. App. 218, 78 S. W. 60.

In the case of *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292, a painter was ordered by his foreman to work on a car, and while the painter was performing the work he was ordered to do he was injured by a switching crew moving the car. In that case the Supreme Court, speaking through Gantt, C. J., said:

"But there is another view upon which the plaintiff was entitled to have his case submitted to the jury. It is the duty of the master to provide and maintain a reasonably safe place for his servant to work. *Wendler v. Furnishing Company*, 165 Mo. 527 [65 S. W. 787]; *Herdler v. Stove & Range Co.*, 136 Mo. 3 [37 S. W. 115]; *Moore v. Railroad*, 85 Mo. 588; *Curtis v. McNair*, 173 Mo. loc. cit. 280 [73 S. W. 107]; *Purcell v. Shoe Co.*, 187 Mo. loc. cit. 285 [86 S. W. 121]. When the defendant, through the paint boss, Mehlin, sent the plaintiff to work upon the unfinished car, on one of its tracks, it was its duty to provide against other cars running down against the car upon which he was working and to see that other cars which were pulled out were not attached to the car upon which he was working without giving him warning of its intention to move the said car. While the servant in entering the service of the master assumes the risks that ordinarily and usually are incident to the business being conducted by the master, the servant does not assume the risk arising from the master's neglect to adopt suitable precaution for his safety. The duty of the master in this regard is a continuing one and it will not suffice to say that when plaintiff went to work on the car it was a reasonably safe place. If the place was afterwards rendered unsafe by the negligent act of the defendant in sending a switching crew in there who negligently pulled the car upon which plaintiff was working without giving him warning of their intention to move it, then defendant was liable for the consequence of the negligent act of the switchman. The plaintiff had the right to presume, in the absence of knowledge to the contrary, that the defendant would furnish him a reasonably safe place to work, and that he would not imperil his safety by sending its servants in there to move the car upon which he was working without notifying him. *Doyle v. M., K. & T. Trust Co.*, 140 Mo. 1 [41 S. W. 255]."

In the case of *Bradley v. C., M. & St. P. Ry.*, 138 Mo. 293, 39 S. W. 703, it is said:

"It cannot be fairly said in the circumstances that plaintiff assumed all the risks of injury from falling earth. He only assumed such risks as were incident to the work as conducted by defendant. Defendant impliedly agreed, when it

employed plaintiff and put him at a dangerous place to work, that it would use reasonable care to prevent the caving of the embankment upon him. The circumstances, in our opinion, do not take this case out of the general rule that the master is bound to use reasonable care to keep the place to be used by the servant, in the prosecution of the work assigned to him, in as safe a condition as the nature and character of the work would permit. Whether defendant did its duty in that respect, in this case, was, we think, a question for the jury. The evidence tends to prove that the bank was left undermined, and 'bulging out' for three or four hours before the shovel was moved up to it, or at least before the earth fell. Whether the dangerous condition was such as could have been seen by reasonable examination was a question also for the jury. If its dangerous condition was known to defendant there was negligence in not righting it. If the condition was observable from reasonable inspection there was negligence in not knowing it, if, in fact, it was unknown."

[2] From the above authorities and the cases therein cited it is readily seen that it is not only the duty of the master to exercise reasonable and ordinary care to furnish the servant a reasonably safe place in which to work, but to keep it reasonably safe for the servant to perform the labor required of him. It follows, therefore, from what has been said in the above authorities that the petition stated a cause of action and the court committed no error in allowing evidence to be introduced to support it.

Point II.

The appellant insists that the court committed error in overruling defendant's motion in arrest of judgment, because the petition was not sufficient to support the verdict of the jury. What has been said above disposes of this point, for it is our opinion that the petition does state a cause of action.

Point III.

[3] The appellant complains that the trial court erred in allowing in the evidence, over objection, testimony tending to show that the plaintiff had not been working, and was unable to work, since he had left the hospital where he was taken upon receiving the injuries. The reason given by the appellant for error in this particular is based upon the ground that there is no claim in the petition for loss of services, and that, therefore, the evidence was incompetent. A careful reading of the record shows that this evidence was admitted by the trial court simply to show the permanency and extent of plaintiff's injuries and disabilities, which were set forth in the petition, and for this purpose it was clearly admissible. In the instruction on the measure of damages, given on behalf of plaintiff, no claim was made that plaintiff was entitled to recover for any loss of services, so that it is very clear that no error was committed by the trial court in allowing this testimony, and it is equally clear that the trial court admitted the evidence to show only the extent and

permanency of plaintiff's injuries, and not for the purpose of allowing a recovery for the loss of services.

Point IV.

During the course of the trial one Dr. Frazer testified that he had many years' experience as a physician and surgeon, and had taught in many medical colleges, and further testified as follows:

"Q. Now, I will ask you to tell the jury what your opinion is with reference to the permanency of that injury. (Objected to.)

"The Court: Have you examined him—the plaintiff? A. Yes, sir.

"The Court: When? A. The 29th of December, 1913.

"The Court: He may answer. (To which ruling of the court counsel for defendant then and there duly excepted.) A. This is a permanent injury. Q. What is your opinion with reference to this man's leg becoming normal and as to his being able to perform heavy labor? (Objected to because under the pleadings there is no issue made as to plaintiff being rendered unable to perform heavy labor or that he has lost or will lose in the future any services of any kind or character. Objection overruled; to which ruling of the court counsel for defendant then and there duly excepted.) A. In shape and in color of the skin—condition of the skin—it will never become normal. He will be able to walk on it; as time goes on he will be able to do some work, but never able to sustain any great weight for any considerable length of time on the extremity. Q. With reference to heavy lifting or heavy labor, will he ever be able to do such work as he could before? (Objected to because it calls for a conclusion of the witness and calls for the witness to determine a fact which should be submitted to the jury, and for the further reason that under the pleadings in this case it is incompetent, irrelevant and immaterial, there being no charge or allegation in the petition that the plaintiff had lost or would in the future lose any labor by reason of his injuries; and for the further reason that the question should have called upon the witness to give his reasons and not to have stated a fact which should have been left to the jury. Objection overruled; to which ruling of the court counsel for defendant then and there duly excepted.) A. He will not be able to continuously do hard labor. So far as the shape of the leg, or its configuration, is concerned it will never be normal again. There will always be more or less swelling around the ankle joint. The bones themselves will never be quite normal, because where the union has taken place a callous has been formed and thrown out, absorbing the softer tissues in the leg, the muscles particularly. It will be impossible for this man to do hard work, that is, continuously. It may be, in the course of long years, for a length of time, for maybe a few hours in a day, that he can put some weight on that extremity."

[4] The appellant complains that the court erred in allowing the physician and surgeon to answer the last question on the ground that it calls for a conclusion of the witness, and is not an opinion, and cites many authorities, among them being the following: *Holtzen v. Railroad*, 159 Mo. App. loc. cit. 374, 140 S. W. 787; *Thomas v. Metropolitan Street Railway Co.*, 125 Mo. App. 131, 100 S. W. 1121; *Glasgow v. Railroad*, 191 Mo. 347, 89 S. W. 915. These cases do lay down the principle that an expert witness or a phy-

sician can only give his opinion and cannot testify to conclusions, but we believe that they have no application to the point involved here, for it is clear upon the reading of the testimony of the doctor that the question calls for his opinion as to whether or not the plaintiff would be able to do heavy lifting or heavy labor or work as he could before he was injured; and it is clearly a matter for expert testimony.

Point V.

[5] Instruction No. 1 given for the plaintiff contains the words "negligently and carelessly allowed the hoisting machine and bucket to be operated on said dump near plaintiff." The appellant contends that this instruction is broader than the petition in that the words "and bucket" are added to the words "hoisting machine," the charge in the petition being "negligently and carelessly and in disregard of plaintiff's safety allowed and permitted a hoisting machine to be operated near plaintiff." This point is very technical, and is, we believe, without merit. The evidence clearly shows that the bucket was a part of the hoisting machine just as the cable to which the bucket was attached was a part of the hoisting machine. The instruction fits, exactly, the evidence which was introduced on the charge in the petition. The hoisting machine was composed of a cable and the bucket, which were operated by the engine and, of course, the words "hoisting machine" set forth in the petition includes both the cable and the bucket. Viewed in this light, we do not believe that the addition of the words "and bucket" added to the words "hoisting machine" can be considered as broadening the allegations of the petition or allowing plaintiff to recover on some grounds of neglect not set forth in the petition, and could in no way possibly have misled the jury. The principle contended for by the learned counsel for the appellant that the instructions should not be broader than the petition is, broadly speaking, the law, but we do not believe that the cases cited are applicable to this instruction.

Point VI.

[6] The appellant contends that the court erred in giving instruction No. 2 on behalf of the plaintiff, and argues that it is wrong because it contained the following general declaration of law:

"That the law required the defendant not only to furnish plaintiff a reasonably safe place to work, but also required him to keep it so."

The point being that it is not the absolute duty of the master to furnish a reasonably safe place for the servant to work, but it is only his duty to exercise reasonable and ordinary care to furnish the servant with a reasonably safe place in which to work—citing *Pruett v. Campbell Lumber Co.*, 188 Mo. App. 347, 174 S. W. 164; *Haas v. Car &*

Foundry Co., 176 Mo. App. 826, 157 S. W. 1036; Glasscock v. Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364; Bradley v. C., M. & St. P. R. R. Co., 138 Mo. 296, 39 S. W. 763, and others. The above cases undoubtedly establish the rule that it is simply the duty of the master to exercise reasonable and ordinary care to furnish a reasonably safe place for the servant to work. But the whole instruction must be read together, and we believe that the latter part of the instruction, and the part immediately following the words complained of, cured the general statement of the law in that it applies the instruction specifically to the facts of the case and brings it within the correct rule of law.

In the case of Pruett v. Campbell Lumber Co., 188 Mo. App. 847, 174 S. W. 164, Judge Allen, speaking for this court, said:

"It is quite apparent that the judgment must be reversed because of error in giving plaintiff's first instruction, the only instruction purporting to cover the question of defendant's liability. This instruction authorizes a recovery if the jury find that plaintiff's injury, if any, 'was due to the negligence and carelessness of the defendant company in not furnishing plaintiff with a reasonably safe place to work.' Not only does this instruction proceed upon the theory that it is the absolute duty of the master to furnish the servant a reasonably safe place to work; whereas the master's duty is to exercise ordinary care to that end, but it is a mere general declaration of what purports to be the law applicable to a master and servant case, without any application whatsoever to the facts in evidence. It fails to require the jury to find the specific negligence charged, which is alleged to have rendered unsafe the place in which plaintiff was required to work, but, on the contrary, permits a recovery if the jury believe that the defendant in any way failed to furnish plaintiff with a reasonably safe place in which to work. Such instructions have been repeatedly condemned. See *Feldewerth v. Wabash R. Co.*, 181 Mo. App. 630, 164 S. W. 711, and authorities there cited."

In the case at bar the instruction complained of does not cover the entire case and direct the verdict, but only covers the question of the assumption of risk. Instruction No. 1, given on behalf of plaintiff, covered the entire case and directed the verdict, and instruction No. 2, while stating the principle broadly in the first part of the instruction, continues by applying the facts in the case to the correct rule of law. We believe, therefore, that both of the objections raised by Judge Allen in the Pruett Case, supra, were complied with. The latter part of the instruction told the jury, that if they found that defendant's foreman neglected (that is, failed to exercise ordinary care) to adopt suitable precautions for plaintiff's protection, to keep the plaintiff's place of work reasonably safe, and the plaintiff was injured as a result of such neglect (that is, failure to exercise ordinary care), the plaintiff did not assume the risk of such injury. We believe that the application of the rule to the facts as set forth in this part of the instruction cured the defect in the instruction complained of. This instruction on the assumption

of risk is within the rule, and almost in the very words laid down in the case of Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292, quoted from at length above.

In the case of Pendegrass v. Railroad, 179 Mo. App. 517, 162 S. W. 712, this court held that an instruction which in substance told the jury that it was defendant's duty to furnish appliances "such as a ladder for means of ingress and egress to and from said pump that were reasonably safe, secure and sufficient for the transaction of its business," was cured by the latter part of the same instruction which told the jury that if they should find that defendant neglected its duty in this behalf, etc., and that there was a defective or insufficient crosspiece or rung upon the ladder, and that defendant knew thereof "or by the exercise of ordinary care and prudence could have known the same," and that by reason thereof such crosspiece or rung of the ladder broke and gave way, and thereby caused plaintiff to fall, and that plaintiff exercised ordinary care for his own safety, then the verdict should be for plaintiff. Judge Allen, speaking for this court, said:

"This instruction is assailed upon the ground that it places upon defendant the absolute duty to furnish plaintiff a reasonably safe appliance or place to work; whereas, the law requires only that defendant use ordinary care to furnish a reasonably safe appliance or place to work. It is, of course, quite true, as appellant asserts, that the master is not an insurer of the absolute safety of the appliance furnished the servant, or of the place furnished him to work. The master's duty is unquestionably to exercise ordinary care to such end. However, we think that the instruction under consideration is not open to the attack made upon it. It is true that the earlier part of the instruction tells the jury that it was defendant's duty to furnish appliances, etc., that were reasonably safe and sufficient. Further on in the instruction, however, the jury are required to find that the defendant either knew of such unsafe or insufficient condition thereof, or by the exercise of ordinary care and prudence could have known of the same. See *Garard v. Coke & Coal Co.*, 207 Mo. 242, 105 S. W. 767."

In the case of *Garard v. Coal & Coke Co.*, 207 Mo. 242, 105 S. W. 767, Graves, J., speaking for the court, said:

"The contention is that this instruction states too broadly the measure of duty owing by the defendant to the plaintiff. In other words, defendant says that this instruction makes it the absolute duty of defendant to furnish plaintiff a reasonably safe entry, whereas the law only requires the defendant to use ordinary care to keep the entry way in a reasonably safe condition. The criticism is directed to the first paragraph of the instruction. This court upheld a verdict in a case where a very similar instruction was given. *Smith v. Fordyce*, 190 Mo. loc. cit. 12 [88 S. W. 679]. The first part of the instruction in the *Smith Case*, supra, was fully as strong as the instruction now in question. But aside from this, when the whole instruction is read together, we think the law was properly declared. The broad statement of general principles is modified by the second paragraph of the instruction. In the case of *Bradley v. Railroad*, 138 Mo. loc. cit. 308 [39 S. W. 763], where there was under consideration a very similar instruction, upon this point, that is, as to

the modification of the broad general statement in the first part of the instruction by a second and subsequent clause, where the application of the law is made to the facts, we said: 'It seems to us that this part of the instruction explains, qualifies and renders harmless what precedes it. It points out what omissions of duty on the part of defendant will constitute a neglect to provide a safe place for plaintiff to work in the circumstances in this case.' So in this instruction. The broad statement of duty contained in the first paragraph is modified by the explanatory language of the second paragraph. The instruction will not be condemned for the reason urged first by defendant."

We believe that the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

SCHLAMP v. MANEWAL et al. (No. 14,469.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. **BILLS AND NOTES** \Leftrightarrow 351—**ACCOMMODATION MAKER.**

Where, contrary to the agreement upon which a neighbor, for accommodation, signed a note as joint maker, that the accommodated maker should discount it at a bank for cash, the accommodated maker negotiated it after maturity for corporate stock, the accommodation maker was not liable to a transferee after maturity, under Rev. St. 1909, § 10028, providing for nonnegotiability of a note in the hands of one not a holder in due course; there having been a diversion of the note by the accommodated party from the purpose for which it was originally made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 878-881, 882½-885; Dec. Dig. \Leftrightarrow 351.]

2. **EVIDENCE** \Leftrightarrow 420(7)—**PAROL EVIDENCE—CONSIDERATION.**

Parol evidence is admissible against one not holding in due course to show that a note was signed for accommodation and was to be used for a certain purpose only, notwithstanding such evidence varies the agreement to pay money absolutely.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1800, 1804, 1943; Dec. Dig. \Leftrightarrow 420(7).]

Appeal from St. Louis Circuit Court; William M. Kinsey, Judge.

Action by P. M. Schlamp against L. A. Manewal and another. From judgment for the named defendant and against the other defendant, plaintiff appeals. Affirmed.

Thomas D. Cannon, of St. Louis, for appellant. Vital Garesche, of St. Louis, for respondents.

THOMPSON, J. The plaintiff sued the defendants upon the following note:

"\$1,000.00. St. Louis, May 8, 1912.

"Ninety days after date we promise to pay to the order of P. M. Schlamp, one thousand and no/100 dollars, for value received, negotiable and payable without defalcation or discount, with interest at the rate of per cent. per annum from Payable at

Emil Schlamp,
"L. A. Manewal."

The jury returned a verdict in favor of the plaintiff and against the defendant Emil Schlamp, but further found in favor of defendant L. A. Manewal, and against the plaintiff. Plaintiff filed a motion for a new trial, which was overruled, and he has perfected his appeal to this court. The trial court directed the jury to return its verdict against the defendant Emil Schlamp.

The evidence on the part of the defendant L. A. Manewal tended to show that at the time the note in suit was executed he was a neighbor and a friend of Emil Schlamp, the other defendant; that the said Emil Schlamp came to him for the purpose of borrowing \$1,000 for use for his family, but Manewal informed said Emil Schlamp that he was unable to lend him the money at that time; that thereupon the said Emil Schlamp requested Manewal to sign a note together with him, payable to the order of P. M. Schlamp, the plaintiff herein. On the assurance or statement from the said Emil Schlamp that he, together with his nephew, plaintiff herein, could discount such a note at a bank in Henderson, Ky., where the plaintiff was well known, the defendant Manewal signed the note, which is the note here sued on, and delivered the same to Emil Schlamp, the other defendant, who in turn immediately or shortly after its execution turned it over to the plaintiff P. M. Schlamp, who tried to discount it in Henderson, Ky., but failed. Thereupon he, the plaintiff, indorsed the note "without recourse" and returned the same to Emil Schlamp. Manewal testified that after the failure of the plaintiff to discount the note at Henderson, Ky., he was informed by Emil Schlamp of the failure to so discount the note, and informed him (Manewal) that he (Emil Schlamp) had destroyed the note. Manewal further testified, over objection of plaintiff, that at the time the note in question was executed by him it was agreed between him and Emil Schlamp that the said note was to be discounted only for cash. After the note had been returned by the plaintiff to the defendant Emil Schlamp, it seems that, instead of said note being destroyed, the said Emil Schlamp retained the same in his possession, and in August, 1912, and two days after it was due on its face, he delivered it over to the plaintiff in this case and took from him in payment thereof 100 shares of the capital stock of the par value of \$10 each in a corporation known as the Vaza Company, which at that time was being promoted by the plaintiff.

The above facts were practically conceded by the plaintiff, except that he testified that he did not know that the defendant Manewal had signed the note as an accommodation for Emil Schlamp, but did know that Emil Schlamp was to receive the money upon the note being discounted, but understood from Emil Schlamp that the note was given to him

signed by Manewal to adjust some account or business dealings between him and Manewal. He also testified that the stock above referred to was worth par at the time he acquired the note. After the note was turned over by Emil Schlamp to plaintiff, in August, 1912, it remained in the possession of the plaintiff until some time in January or February, 1913, when he presented it through a bank for collection to Manewal, and upon payment being refused instituted this suit on said note.

The defendant Manewal set up in his answer that he had signed the note for the accommodation of Emil Schlamp in order that said Emil Schlamp and the plaintiff might have the note discounted at a bank in Henderson, Ky., and it was understood that the note was to be so discounted for cash only, and that when this was not done the purpose for which the note was given failed, and upon it being negotiated by Emil Schlamp to the plaintiff after its maturity for stock there was a diversion of the note from its original purpose which relieved the defendant Manewal from liability thereon.

The deposition of Emil Schlamp was introduced in the evidence by the plaintiff as an admission against interest, and was received by the lower court for that purpose only. Inasmuch as Emil Schlamp did not appeal, the deposition thus introduced is not before this court at this time.

[1] At the close of the case the court refused to give a peremptory instruction to find for the plaintiff and against the defendant Manewal, and gave of its own motion the following instruction:

"You are still further instructed that, if you believe and find from the evidence in this case that the note sued on was signed by the defendant L. A. Manewal with Emil Schlamp, for the purpose of raising money thereon for the use of said Emil Schlamp, that no consideration for said note was then either given or intended to be given by the payee therein, P. M. Schlamp, the plaintiff herein, and that said note was delivered by Emil Schlamp to plaintiff, in the first instance, for the sole purpose of having the same discounted for the benefit of said Emil Schlamp by a bank at Henderson, Ky., that plaintiff took said note from Emil Schlamp for that purpose only, and endeavored to have the same discounted, but failed, and thereafter, and before the maturity of said note, returned the same to the possession of said Emil Schlamp, one of the makers, and that the said Emil Schlamp continued to hold said note up to and after the date of its maturity, and that after the date of its maturity the defendant Emil Schlamp negotiated and delivered said note for the first time to the plaintiff for value, and received therefor the Vasa stock mentioned in the evidence, and if you still further find that the defendant L. A. Manewal did not authorize the negotiation and delivery of said note after its maturity, and did not know that it had been so negotiated and delivered to the plaintiff after maturity until long after such negotiation and delivery, and that he received none of the stock or the proceeds thereof taken over by said Emil Schlamp for said note, then your verdict should be for the defendant L. A. Manewal."

The learned counsel for the appellant assigns as error the giving by the court of the

above instruction. This raises the question as to whether or not there was a diversion of the note from its original purpose. If there was a material diversion, and the plaintiff had acquired the note with full knowledge of the purpose for which it was issued before maturity, then under the authorities he could not hold the accommodation maker, and it follows that, if there was a diversion of the note by the accommodated party from the purpose for which it was originally made, and the plaintiff acquired it after its maturity, he was bound to know of the diversion, and would not be permitted to say that he did not know of it. Daniels on Negotiable Instruments, (6th Ed.) p. 931; section 10028, R. S. Mo. 1909; Norton on Bills and Notes (3d Ed.) p. 180; St. Louis National Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773; Farmers' National Bank v. Dreyfuss, 82 Mo. App. 399; Berkeley & Harrison v. Tinsley, 88 Va. 1001, 14 S. E. 842; Grand River College v. Robertson, 67 Mo. App. 329.

In Hickerson v. Raiguel, 2 Heisk. (Tenn.) 239, it is said:

"The proof shows that, when complainant indorsed the bill, he did so upon the express condition that, if the Planters' Bank did not discount the bill on that day, his liability as indorser was to cease, and the bill was either to be returned or destroyed. It is wholly immaterial whether complainant knew the use which Sheid proposed to make of the money or not. He was indorsing without consideration, and for the accommodation of Sheid, and had the right to annex such terms and conditions to his liability as he saw proper. Perkins v. Ament, 2 Head (Tenn.) 110; Bank of Tennessee v. Johnson, 1 Swan (Tenn.) 217. It is clear that, when the Planters' Bank refused to discount the bill, and the day had expired during which it was to be presented, the liability of complainant was terminated. The only liability which could then be created must have arisen from the transfer of the bill, in the due course of trade, to some innocent purchaser, for value. But the proof shows that when Sheid offered to transfer the bill to Clements, who was acting as the agent of Raiguel & Co., in the collection of their execution, he informed him of the terms and conditions which complainant had annexed to his indorsement. It follows that Clements took the bill with full notice that Sheid had no authority to use it for any purpose and in any way. As Clements was acting as the agent of Raiguel & Co., they would be affected with the notice which their agent had."

In Daniel on Negotiable Instruments (6th Ed.) p. 930, it is said:

"And if any one purchase accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated, he is not a bona fide holder as against the party who lent his name for accommodation."

The above instruction, in substance, told the jury that, if they found from the evidence that the note was signed by the defendants for the sole purpose of raising money for the use of Emil Schlamp by discounting the same at a bank at Henderson, Ky., and that the plaintiff received the note from Emil Schlamp for that purpose only, and endeavored to discount the note, but failed to accomplish that purpose and returned it to

Emil Schlamp, and that Emil Schlamp, after maturity of the same, turned it over to the plaintiff and took therefor stock in a certain corporation, and this was done without the consent of the defendant Manewal, then the plaintiff could not recover against Manewal. This instruction is evidently based upon the principle that there was a diversion of the note by the accommodated party from the purpose for which the accommodation party signed it, and, it being delivered or turned over to the plaintiff after its maturity, he was bound to know of the diversion. We think that the learned trial court was correct in so instructing the jury. The defendant Manewal might have been perfectly willing to lend his credit to the accommodated party in the form of an accommodation note to be immediately discounted for cash to be used for the support of the family of the accommodated party, and at the same time he might have been very unwilling to lend his credit to the accommodated party in the form of a signature on a note in order that the accommodated party might use that note for the purpose of speculating in stock of a corporation just being floated upon the market. If the note in suit was issued for the purpose set out in this instruction, then upon the failure to discount it for cash at the bank at Henderson, Ky., the whole purpose for which it was issued failed, and the accommodated party would have no authority or right to use it for the purpose of making a speculation in stock.

The plaintiff contends that the answer avers no defense, and that the plaintiff was entitled to an instruction to the jury to return a verdict against the defendant Manewal. We have given this matter the utmost consideration and thorough investigation of the authorities, and we cannot agree with the learned counsel for the plaintiff, for the reason that we are of the opinion that the answer sufficiently states the defense of diversion, and it was proper to put this defense to the jury, as was done in the instruction mentioned above.

[2] What is said above entirely disposes of all of the assignments of error, with the exception of the assignment that parol evidence was not admissible to show the purpose for which the paper was signed by this accommodation maker, in that it would vary the terms of the note or agreement and make what appears to be an agreement to pay money absolute only an agreement to pay upon condition. This point was squarely passed upon in the case of the *St. Louis National Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773. In that case Flanagan had signed a note for the accommodation of one Florida, who diverted it from the purpose for which it was originally intended, and turned it over to the plaintiff's bank. In an exhaustive opinion by Gantt, P. J., among other things, the court said:

"There was no error in permitting Flanagan to testify not only that he was a mere accommodation maker of the note, but the purpose for which Florida stated he wanted the discount when he obtained Flanagan's signature. He was attempting to show a diversion of the note, and the initial step was to show its original purpose, and notice to plaintiff of that purpose. The evidence was material and competent, though he might fail to satisfy the court of the diversion."

To the same effect are the following authorities: *Farmers' National Bank v. Dreyfus*, 82 Mo. App. 399; *Grand River College v. Robertson*, 67 Mo. App. 329; *Williams v. Alnutt*, 72 Mo. App. 62; *Shantz v. Striner*, 167 Mo. App. 635, 150 S. W. 727.

In view of these authorities, we rule, therefore, that the parol evidence was clearly competent in this case.

Plaintiff was the payee in the note. He acquired it after maturity. As above stated, he therefore stands in no better position than if he had acquired it before maturity knowing all of the defenses available to defendant Manewal.

The judgment is therefore affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

HICKS v. METROPOLITAN LIFE INS. CO. (No. 14516.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. INSURANCE — 650 — LIFE INSURANCE — FAILURE TO INCORPORATE APPLICATION IN POLICY — STATUTE.

In an action on a life policy, where neither the application nor the substance thereof was attached to or indorsed upon the policy, as required by Rev. St. 1909, § 6978, the defense predicated upon alleged misrepresentations by the insured in obtaining the policy, consisting of alleged false answers in the written application therefor, was not available to defendant, and the court should have excluded the application on plaintiff's objection.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1671, 1672; Dec. Dig. —650.]

2. INSURANCE — 136(4) — LIFE INSURANCE — CONDITION OF POLICY — STATUTE.

A condition of a life policy that no obligation was assumed by insurer unless on the day of issuance the insured was alive and in sound health was controlled by Rev. St. 1909, § 6987, providing that no misrepresentation made in obtaining a policy of life insurance shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, so that the condition was unavailing to defeat the insurance, unless at the time of the issuance or delivery of the policy the assured was afflicted with a disease which caused or contributed to cause, her death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 228; Dec. Dig. —136(4).]

3. INSURANCE — 668(7) — LIFE INSURANCE — HEALTH OF INSURED AT ISSUANCE OF POLICY — QUESTION FOR JURY.

In an action on a life policy, question whether insured was in sound health when the policy was issued *held* for the jury under the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737-1740, 1753-1760; Dec. Dig. —668(7).]

4. WITNESSES — 219(5) — INCOMPETENCY OF PHYSICIAN — WAIVER — STATUTE.

In an action on a life policy, where insured's physician was placed on the stand, and, after defendant's counsel had asked him a few preliminary questions, plaintiff's counsel, interposing a general objection, obtained permission to question the witness and propounded to him certain questions, plaintiff did not thereby waive the privilege of Rev. St. 1909, § 6362, providing that a physician or surgeon shall be incompetent to testify concerning any information he may have acquired from any patient in his professional character which was necessary to enable him to prescribe for such patient, since plaintiff's counsel sought merely to lay a foundation for his objection to the competency of the witness, later more fully made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 781, 782; Dec. Dig. —219(5).]

5. WITNESSES — 219(5) — INCOMPETENCY OF PHYSICIAN — WAIVER — PROOFS OF DEATH.

The beneficiary of a life policy did not waive her privilege to claim the incompetency of deceased's physician as a witness, under Rev. St. 1909, § 6362, by filing the certificate of the physician as part of the proofs of death, pursuant to a clause in the policy, providing that proofs of death should be made on blanks furnished by the company and contain answers to each question propounded to the claimant, physician, and other persons, and that all the contents of such proofs should be evidence of the

facts stated in behalf of, but not against, the company.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 781, 782; Dec. Dig. —219(5).]

6. EVIDENCE — 215(1) — ADMISSIONS — PHYSICIAN'S CERTIFICATE.

A certificate of insured's physician, constituting part of the proofs of death, is admissible, in an action against the insurer, on the ground that the answers therein contained constitute admissions on the beneficiary's part, subject, however, to contradiction or explanation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 754; Dec. Dig. —215(1).]

7. APPEAL AND ERROR — 501(1), 662(3) — BILL OF EXCEPTIONS — PRESUMPTION OF VERITY.

A bill of exceptions imports verity as it stands, and can alone be looked to by the Court of Appeals concerning matters of exception, so that, where it fails to show any exception saved to the action of the trial court in overruling defendant's objections to any remarks of plaintiff's counsel that could be called prejudicial, the Court of Appeals must rule an assignment of error predicated on such remarks against defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300, 2302, 2852; Dec. Dig. —501(1), 662(3).]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Lucinda Hicks against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Fordyce, Holliday & White, and W. R. Mayne, all of St. Louis, for appellant. James J. O'Donohoe, of St. Louis, for respondent.

ALLEN, J. This is an action originating before a justice of the peace, on a policy of insurance issued on November 11, 1912, insuring the life of one Sadie Griffin in favor of plaintiff, the mother of the insured, named as beneficiary therein. The insured died on September 24, 1913; and shortly thereafter plaintiff duly furnished defendant with proofs of death, and demanded payment of the amount of the policy, but defendant refused to pay the same. Plaintiff prevailed before the justice of the peace, and on defendant's appeal to the circuit court, and a trial there de novo before the court and a jury, there was a verdict and judgment for plaintiff in the sum of \$279.70, being the amount of insurance provided for by the policy, with interest thereon, together with 10 per cent. damages and an attorney's fee of \$100 as for vexatious refusal to pay. From this judgment defendant has brought the case here by appeal.

Plaintiff, to sustain the issues on her part, introduced the policy sued upon, showed that the premiums had been duly paid thereon, made proof of the death of the insured on September 24, 1913, and of the demand made upon defendant company and its refusal to pay. Testimony was also adduced in plaintiff's behalf respecting the value of the services of plaintiff's attorney in the action. The defendant filed no answer, but sought to

show that the insured procured the issuance of the policy by material misrepresentations respecting her health at and prior to the issuance thereof, and that no obligation was assumed by defendant under the policy, according to its terms, for the reason that the insured was not in sound health at the date of its issuance and delivery. Over plaintiff's objections, defendant introduced the proofs of death, consisting of a sworn statement of plaintiff, together with a certificate of one Dr. Mueller, the physician who attended the insured in her last illness; both of these being on blanks furnished by the defendant company and consisting of answers made to questions propounded by defendant. And likewise, over plaintiff's objections, the defendant introduced a certified copy of the certificate of death filed with the state board of health under the provisions of section 6684, Revised Statutes 1909, and also the written application signed by the insured when she made application for the policy. Defendant then called Dr. Mueller as a witness in its behalf, and sought to elicit from him testimony respecting the condition of the insured's health at or prior to the issuance of the policy. It appears that his knowledge on the subject had been acquired in his professional capacity as the insured's physician, and, upon objection of plaintiff's counsel on this ground, his testimony was excluded. Defendant tendered into court the amount of the premiums which had been paid to it upon the policy. In rebuttal plaintiff adduced testimony tending to show that the insured appeared to be in good health at the time of the issuance of the policy. Plaintiff then called as a witness defendant's medical examiner who examined plaintiff at the time of her application for the insurance and reported thereon to defendant; and plaintiff put in evidence the written report of the examination signed by the witness.

[1] I. Appellant assigns as error the action of the trial court in overruling its demurrer to the evidence. Appellant's contention in this regard proceeds upon the theory that the evidence conclusively establishes that, on the date of the policy and at the time of the application therefor, the insured was afflicted with the disease which it is said resulted in her death, to wit, a stricture of the rectum or tuberculosis of the rectum. As to this it should be stated at the outset that the defense predicated upon alleged misrepresentations made by the insured in obtaining the policy of insurance, consisting of alleged false answers in the written application therefor, was not available to defendant under the circumstances of the case, and that the trial court should have excluded this application upon plaintiff's objection thereto. This is for the reason that the record discloses that neither the application nor the substance thereof was attached to or indorsed upon the policy, as re-

quired by section 6978, Rev. Stat. 1909. By failing to comply with the statute, the defendant lost the right to avail itself of the application as a means for invalidating the policy. This we have but recently held in *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274, where, in an opinion by Reynolds, P. J., the question is fully considered and the authorities cited and discussed.

[2] But the policy itself contained a provision to the effect that no obligation was assumed by defendant thereunder unless on the day thereof the insured were alive and in sound health; and it was competent for defendant to show in defense—as it sought to do—that the insured was not only not in sound health when the policy was issued, but was suffering from the very disease which resulted in her death. However, a condition of this character contained in a life insurance policy is affected and controlled by the provisions of our so-called "misrepresentation statute," viz. section 6937, Rev. Stat. 1909. The rule of decision obtains to the effect that conditions of this character in the policy are unavailing to defeat the insurance, unless it appear that at the time of the issuance or delivery of the policy the assured was afflicted with a disease or diseases which caused or contributed to cause his death. See *Salts v. Insurance Co.*, 140 Mo. App. 142, 120 S. W. 714; *Lynch v. Insurance Co.*, 150 Mo. App. 461, 131 S. W. 145; *Dodt v. Insurance Co.*, 186 Mo. App. 168, 171 S. W. 655; *Stephens v. Insurance Co.*, 190 Mo. App. loc. cit. 678, 679, 176 S. W. 253. And whether or not the malady, if any, from which the insured was suffering at the time of the issuance or delivery of the policy, caused or contributed to cause the death is, by force of the statute controlling the matter, a question for the jury, unless indeed it be that the question is foreclosed by the effect of an admission of the plaintiff in the case, standing wholly unexplained and unrepelled by anything whatsoever, as we held in the *Stephens Case*, supra. The case before us, however, is wholly unlike the *Stephens Case*.

[3] It is true that in the certificate of Dr. Mueller, filed by plaintiff as a part of the proofs of death, the doctor states that the insured had been suffering from the very disease which caused her death for about eight or ten years. But the sworn statement of plaintiff, also filed as a part of the proofs of death, stated that the duration of the last illness was about two months. Furthermore, the report of defendant's medical examiner, showing the result of his examination of the insured at the time of the application for the policy, is to the effect that he found the insured, in his opinion, to be in good health, and that he recommended her as a first-class risk. Also there is the testimony adduced by plaintiff that the insured

appeared to be in good health when the policy was issued. Such evidence unquestionably made the case one for the jury under our law. In this connection, see the recent case of *Bruck v. Insurance Company*, 185 S. W. 753, and cases there cited.

It follows that the demurrer to the evidence was properly overruled.

[4] II. Appellant assigns as error the ruling of the trial court in sustaining plaintiff's objection to the testimony of Dr. Mueller, when called as a witness for defendant. Section 6362, Rev. Stat. 1909, provides, among other things, that a physician or surgeon shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Appellant contends, however, that the privilege vouchsafed by the statute had been waived. Such alleged waiver is predicated, for one thing, upon the fact that when Dr. Mueller was placed upon the stand, and after appellant's counsel had asked him a few preliminary questions, plaintiff's counsel, interposing a general objection, obtained permission of the court to question the witness, and proceeded to propound to him certain questions. But there is no merit in the contention that plaintiff thereby waived the privilege mentioned, for the reason that it clearly appears that plaintiff's counsel sought merely to lay a foundation for his objection later more fully made.

[5] But it is earnestly contended that the privilege in question was waived by the filing of the certificate of this physician, as a part of the proofs of death, pursuant to a clause in the policy as follows:

"Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to the claimant, physicians and other persons. * * * All the contents of such proofs of death shall be evidence of the facts herein stated in behalf of, but not against the company."

There can be no doubt that where the insured, by a distinct provision in the policy, expressly waives the benefits of all laws disqualifying a physician from testifying concerning any information obtained by him in a professional capacity, and such waiver is expressed to include any person who may have any interest in or claim under the policy, the beneficiary is bound thereby. See *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612; *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297; *Adreno v. Mutual Reserve Fund Life Ass'n* (C. C.) 34 Fed. 870. But this policy contains no such provision. It merely provides for the filing of proofs of death, on blanks to be furnished by the company, and purports to make the recitals therein contained evidence in the company's behalf. And consequently

the cases last mentioned, and other authorities of like purport which might be cited, do not here apply.

In support of its contention appellant relies upon: *Bolton v. Inter-Ocean Life & Casualty Co.*, 187 Mo. App. 187, 172 S. W. 1187; *Western Travelers' Accident Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068; 4 *Wigmore on Evidence*, § 2390. The *Bolton Case*, supra, decided by the Kansas City Court of Appeals, was a suit upon a policy of health insurance. The trial court admitted the testimony of the plaintiff's family physician, offered by defendant to show a particular fact, and this was assigned as error. The court said:

"Inasmuch as plaintiff had sent defendant this doctor's report on that sickness, we think plaintiff had waived the right to object to this witness testifying."

It was held, however, that inasmuch as the fact sought to be proved by the witness was one which plaintiff had admitted, the exclusion of the testimony in question was harmless error. What were the circumstances under which the physician's report was filed does not appear. What was said in the opinion as to waiver of the privilege was unnecessary to a determination of the controversy before the court, for the reason stated in the opinion itself. It cannot be said that the matter was one in decision in the case, for it was expressly stated to be immaterial to a decision therein. We do not regard the language thus employed as being an adjudication of the question under consideration.

In *Western Travelers' Accident Association v. Munson*, supra, proofs of death were filed, consisting of an affidavit of the plaintiff, the beneficiary, and a certificate of the attending physician, in accordance with the provisions of the membership certificate sued upon. Upon the trial the attending physician was called as a witness by the plaintiff, and, over the objection of the defendant insurance company, he was permitted to testify. Upon appeal this was held not to be error. This case is by no means persuasive in support of appellant's contention. It does not appear that the defendant was in any position to invoke the statute relied upon. See *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Groll v. Tower*, 85 Mo. loc. cit. 254, 255, 55 Am. Rep. 358. And in the cases cited in the opinion, wherein the suits were upon contracts of insurance, the policies contained express waivers, as in *Keller v. Insurance Co.*, supra, and *Modern Woodmen v. Angle*, supra.

[6] In 4 *Wigmore on Evidence*, § 2090, to which appellant refers, it is said:

"The sending of a physician's certificate, as part of the 'proofs of death,' by the beneficiary of a contract of life insurance or the representative of the insured, is a voluntary disclosure of the physician's knowledge, though made in pursuance of contract, and is therefore a waiver."

If this is to be taken to mean that the filing of a physician's certificate by a bene-

fiary, as a part of the proofs of death, pursuant to a provision of the policy, operates as a waiver of the incompetency of the physician as a witness, as appellant appears to contend, the cases cited in support of the text, viz. *Nelson v. Nederland Insurance Co.*, 110 Iowa, 600, 81 N. W. 807, and *Buffalo L. T. & S. D. Co. v. Knights Templar, etc., Ass'n*, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 899, wholly fail to support it. But we take it that the waiver mentioned is meant to apply only to the contents of the certificate itself. Such a certificate, constituting a part of the proofs of death, is admissible on the ground that the answers therein contained constitute admissions on the part of the beneficiary, subject, however, to contradiction or explanation. See *Stephens v. Insurance Co.*, supra, 190 Mo. App. loc. cit. 680, 176 S. W. 253, and cases cited. And the beneficiary cannot invoke the privilege here under consideration, and thereby render the certificate inadmissible for the purpose mentioned. But it does not follow that the filing of such certificate, in compliance with the terms of the policy, constitutes a waiver of the statutory incompetency of the physician when called as a witness by the insurance company. See *Buffalo L. T. & S. D. Co. v. Knights Templar Ass'n*, supra; *Nelson v. Nederland Insurance Co.*, supra; *Briesenmeister v. Sup. Lodge, K. of P.*, 81 Mich. 525, 45 N. W. 977; *Redmond v. Industrial Benefit Ass'n*, 78 Hun, 104, 28 N. Y. Supp. 1075, affirmed in 150 N. Y. 167, 44 N. E. 709; 40 Cyc. 2400.

"The statements in the proofs of death furnished by the beneficiary in a policy of life insurance on the patient's life are a waiver of the privilege only in so far as such statements refer to the matter claimed to be privileged." 40 Cyc. p. 2400.

Such certificates are not admitted upon the theory that the statements of the physician therein contained may be received as evidence coming from him to establish the truth of the matters therein stated, but upon the theory that the statements in the certificate, filed as a part of the proofs of death, are to be taken as admissions made by the beneficiary and to be reckoned with as such in the case. Such admissions are not incompetent, though made through the medium of the certificate of an attending physician; but the filing of such a certificate, in order to comply with the provisions of the policy respecting proofs of death, does not operate as a waiver of the incompetency of the physician as a witness. See *Buffalo L. T. & S. D. Co.*, supra; *Nelson v. Nederland Insurance Co.*, supra.

No valid reason appears for holding that by filing this certificate, required by the policy to be filed, the plaintiff, for whose benefit the contract of insurance was made by the insured, waived the right to invoke the statute which renders the attending physician incompetent to testify concerning any information acquired while attending the insured in a professional capacity. The case

is not one where the statutory veil of secrecy thrown about the sickroom is voluntarily lifted by one otherwise entitled to invoke the privilege, as in *Epstein v. Railroad*, 250 Mo. 1, 156 S. W. 699; *State v. Long*, 257 Mo. 199, 165 S. W. 748; *Michaels v. Harvey*, 179 S. W. 735; *McPherson v. Harvey*, 183 S. W. 653; *Priebe v. Crandall*, 187 S. W. 605. And to hold that a waiver of the incompetency of the physician arises from the mere fact of the filing of this certificate in order to comply with the terms of the policy would be to run counter to the established rule of decision generally prevailing on the subject.

We, therefore, rule this assignment of error against the appellant; and, for the reasons indicated above, we do not regard this ruling as "contrary to the decision" of the Kansas City Court of Appeals in *Bolton v. Inter-Ocean Life & Casualty Co.*, supra.

III. Appellant complains of the action of the trial court in authorizing the jury to allow plaintiff 10 per cent. damages and an attorney's fee, as for vexatious refusal, on the part of defendant, to pay the amount of the insurance, under the provisions of section 7068, Rev. Stat. 1909. Our courts have gone very far in leaving the matter of the awarding of damages and attorney's fees under the statute, as for vexatious refusal to pay, to the discretion of the jury, to be determined upon a survey of all of the facts and circumstances in the case touching the conduct of the insurance company in the premises. See *Brown v. Railway Passenger Assurance Co.*, 45 Mo. loc. cit. 227; *Keller v. Home Life Ins. Co.*, 198 Mo. loc. cit. 460, 95 S. W. 908; *Barber v. Hartford Life Ins. Co.*, 187 S. W. loc. cit. 873; *Coscarella v. Insurance Co.*, 175 Mo. App. 130, 157 S. W. 873; *Stix v. Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870; *Jaggi v. Insurance Co.*, 191 Mo. App. loc. cit. 391, 392, 177 S. W. 1064. But, assuming that the question is one for the jury only when the facts and circumstances of the case, when viewed in their entirety, afford some substantial evidence to support an inference that the refusal to pay was unjustifiable and vexatious (see *Weston v. Insurance Co.*, 191 Mo. App. 282, 177 S. W. 792; *Patterson v. Insurance Co.*, 174 Mo. App. loc. cit. 44, 160 S. W. 59; *Jaggi v. Insurance Co.*, supra), we are of the opinion that in the instant case the trial court committed no error in submitting the question to the jury. We cannot say, as a matter of law, that the evidence wholly fails to support an inference that the delay was unwarranted and vexatious within the meaning of the statute.

IV. The trial court modified two instructions offered by defendant, by striking out certain words therefrom, and gave the instructions as modified. This is assigned as error. It is unnecessary to set out the instructions, or to discuss the matter at length. It appears quite clear that the action of the court complained of could have constituted reversible error, if at all, only upon the the-

ory that the question of misrepresentations on the part of the insured, in procuring the policy, was an issue in the case. And for the reason stated above, this defense was one not available to defendant.

[7] V. Appellant also assigns as error the action of the trial court in permitting plaintiff's counsel, unrebuked, to make certain "inflammatory and unwarrantable" remarks in argument to the jury. But the record before us, and by which alone we can be guided, shows no exception taken to the action of the court in overruling defendant's objections to the remarks of plaintiff's counsel, save in one instance alone, where the remark objected to cannot be said to have been prejudicial. The abstract of the bill of exceptions before us shows that in preparing the bill defendant's counsel inserted, in proper places therefor, statements to the effect that exceptions were duly saved to the various rulings of the court complained of in this connection, but that the trial judge, before signing the bill, struck out all of the same, save in the one in-

stance mentioned. It is said that exceptions were in fact duly saved to all these rulings, at the trial, and that the said action of the trial judge in thus settling the bill of exceptions was wholly unwarranted. But this is a matter not before us for review. Appellant has brought here this bill of exceptions, signed by the trial judge. As it stands it imports verity, and can alone be looked to by us concerning matters of exception. See *Murphy v. Cooperage Co.*, 168 Mo. App. 11, 151 S. W. 191. And as it fails to show any exception saved to the action of the court in overruling defendant's objections to any remarks of plaintiff's counsel that could be denominated prejudicial, we must rule this assignment of error against appellant.

Since we have found no reversible error in the record, the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and THOMPSON, J., concur.

MAGGARD v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 9, 1917.)

ESCAPE §2—OFFENSE — STATUTE — “FORCIBLY.”

Ky. St. § 1338, provides that, if one lawfully arrested upon a charge of a violation of the criminal or penal laws forcibly or by bribery effects his escape from the officer, he shall be confined in jail, etc. *Held*, that the word “forcibly” is not confined to strictly physical force, but includes all acts and conduct of the prisoner directed against or in opposition to any resistance which the officer may lawfully exercise in preventing an escape, and would include a mere fleeing from the officer; but where the officer having defendant in charge stepped into a yard, and, while he waited outside, defendant went into the house and departed for his home, leaving word to notify the officer thereof, and was not seen again or pursued, there was no escape.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 3; Dec. Dig. §2.

For other definitions, see *Words and Phrases*, First and Second Series, *Forcibly*.]

Appeal from Circuit Court, Leslie County.

Floyd Maggard was convicted of forcibly escaping from the custody of an officer while under arrest for shooting at random on the public highway.

His motion for a new trial was overruled, and he appeals. Reversed, with directions.

H. C. Eversole, of Annville, and J. M. Baker, of Cutshin, for appellant. M. M. Logan, Atty. Gen., and D. O. Myatt, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. The appellant, Floyd Maggard, was indicted, tried, and convicted in the Leslie circuit court for the offense of forcibly escaping from the custody of an officer while under arrest for shooting at random on the public highway; the offense being one of those denounced by section 1338 of the Kentucky statutes. His punishment was fixed by the verdict of the jury, upon which judgment was rendered at confinement in the county jail for six months, and, his motion for a new trial having been overruled, he prosecutes this appeal.

Several grounds are relied upon for a reversal, but under the view which we take of the case we do not deem it necessary to consider any of them but the one complaining of the refusal of the court to direct the jury to find the defendant not guilty.

After the appellant, to whom we shall refer as defendant, had been apprehended by the deputy sheriff who arrested him, the officer started with him to the nearest justice of the peace, and on the way they stopped at the home of a citizen, and while in his yard, in the language of the deputy sheriff testifying in behalf of the commonwealth, “Maggard stepped into the house while witness waited in the yard; that he did not see any more of him, and on inquiry learned that he was gone.” He further testified that he did not pursue the defendant, Maggard, or make

any attempt to rearrest or obtain possession of him as a prisoner.

The testimony given by the defendant is almost literally the same as that testified to by the officer, with the additional testimony that the defendant asked persons in the house to notify the officer that he, the defendant, had gone to his home, and that he saw no more of the deputy sheriff, nor did he hear any further of the charge upon which he was arrested, or of the alleged charge of escaping from the officer, until after the indictment was found against him.

The statute *supra* under which the indictment was found is:

“If a prisoner confined on a sentence of imprisonment, or to be whipped, or under a *capias*, escapes jail, or if a person lawfully arrested upon a charge for a violation of the criminal or penal laws forcibly or by bribery effects his escape from the officer or guard, he shall be confined in jail not less than six nor more than twelve months.”

From it we see that there are two classes of escapes by prisoners dealt with. One is the escape of the prisoner from the place of his lawful confinement, which means incarceration, and the other is the escaping of a prisoner while under arrest by an officer for the violation of some criminal or penal law. The offense under the first classification is complete, and the offender commits it by merely escaping, while in the latter class, in order for the offense to be committed, the escaping of the offender from the custody of the officer must be done either forcibly or by bribery. Manifestly it is the latter offense, if any, which the defendant committed, and if committed at all it was done forcibly, as there is no pretense that it was committed by bribery. So the question is: Does the testimony show that the escape with which the defendant is charged was forcibly effected?

It is perfectly clear that the Legislature in enacting the section creating the offense intended to give some force and effect to the word “forcibly”; for, if not, it would not have been made essential to the commission of one form of escape denounced by the section, and not the other. In other words, it is manifest that the escape of a prisoner from an officer who had just arrested him under some criminal charge, in order to be criminal, must have been effected or made in a different way from the escape of a prisoner confined under sentence of law, and this difference is that the former character of escape must be either forcibly or by bribery, while no such essentials are necessary for the commission of the latter character of escape. It is evident that the legislative purpose was not to punish the defendant for making his escape, but to punish the acts by and through which it was effected, and which constitutes the force with which it was effected, as hereinafter defined, while in the other class of escape mentioned in the section the punish-

ment is directed at the mere act of escaping, whether by force or otherwise.

It then becomes necessary to ascertain what the Legislature meant by the use of the term "forcibly" in the statute under consideration. Manifestly, the purpose of the Legislature in requiring the escape of the person arrested to be forcibly made in order for the offense to be committed was to punish the person arrested for such conduct as would constitute an assault upon the officer, which would necessarily be the exercise of force, and the further purpose to deter him from committing such acts as would justify the officer in doing violence to him in order to prevent his escape or to effect his recapture. Therefore whatever conduct on behalf of the prisoner which would be calculated to produce either of these consequences would necessarily come within the meaning of the word "forcibly" as used in the statute. As a corollary of this, conduct on his part not calculated to produce either of such consequences would not be forcible.

The statute should be given a liberal construction, and the word being considered should not be given a narrow or contracted meaning so as to confine its application to strictly physical force, but it should be defined so as to include all actions and conduct of the prisoner which are directed against or in opposition to any character of resistance which the officer may lawfully exercise in an effort to prevent the escape. This would include fleeing of the prisoner from the officer over the latter's protest and in defiance of his commands, although no physical force other than that which might be used while fleeing from the officer was exercised by the prisoner. But with this liberal definition we are unable to find wherein the conduct of the defendant constituted a forcibly committed escape. He went out of the presence of the officer into the house, from which he departed for his home, with the consent of the officer. It is not even shown that he promised the officer that he would return and place himself in the latter's custody. At most, it was but a breach of confidence which the officer reposed in him. The facts furnish none of the reasons which, as we have seen, no doubt prompted the Legislature in creating the offense.

To hold in this case that the defendant forcibly effected his escape would render the use of the word "forcibly," as used in the statute, nugatory, and would place the character of escape with which the defendant is charged on a par with the other character of escape made by an incarcerated prisoner, as denounced in the first part of the section under consideration.

The conduct of the defendant, if he intended to effect a permanent escape at all, was but the practicing of a clever ruse, cunningly devised and clandestinely executed, and

which evidenced a desire to avoid force rather than to employ it. It showed the antithesis of force.

We therefore conclude that the court erred in refusing to instruct the jury to find the defendant not guilty, and the judgment is reversed, with directions to proceed in accordance with this opinion.

VANOVER v. STEELE et al.

(Court of Appeals of Kentucky. Jan. 9, 1917.
Extension and Modification of Opinion,
Feb. 13, 1917.)

1. BASTARDS — EVIDENCE — PRESUMPTION.

Evidence that plaintiff's mother was legally married to the man whose heir plaintiff claimed to be, that there was opportunity for intercourse within the period of gestation before plaintiff's birth, and that neither was impotent, raises a conclusive presumption that plaintiff was legitimate, though before his birth a divorce was granted against plaintiff's mother for adultery.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. —3.]

2. PLEADING — EXHIBITS — WRITTEN EVIDENCES AS OF TITLE.

The failure of plaintiff in partition to file written evidences of his title to the land, as required by Civ. Code Prac. § 499, does not warrant a dismissal of the petition where no motion for dismissal was made, but defendants pleaded that the one whom plaintiff claimed as his ancestor was the owner of the land at his death.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1418-1420; Dec. Dig. —423.]

3. DESCENT AND DISTRIBUTION — DETERMINATION OF HEIRSHIP — EVIDENCE.

In partition, evidence held to show that brother of plaintiff was an infant when he died, so that his interest in the land inherited from his father passed to his brother, under Ky. St. § 1401, instead of to his mother, under section 1303.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 235; Dec. Dig. —71(8).]

4. JUDGMENT — CONCLUSIVENESS.

An agreed judgment declaring certain land to have descended to plaintiff's grantor does not bar partition by the real heir, who was not a party to the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. —707.]

5. PARTITION — IMMATERIAL ISSUES.

In partition by an heir, it is immaterial whether a conveyance of the widow's dower interest was void because she had remarried, and her husband had not joined, since plaintiff could not recover any share of her interest.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 188; Dec. Dig. —65.]

6. DESCENT AND DISTRIBUTION — PROPERTY INVOLVED — ORAL CONTRACT.

Where the father of plaintiff and defendants, his half-brothers, in a suit for partition had an unenforceable oral contract for the purchase of certain land on which only a small payment yet remained to be made, and after the father's death one half-brother paid the balance and secured a conveyance to himself, and his brothers, plaintiff inherited no interest therein from his father.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 33-39; Dec. Dig. —8.]

7. DESCENT AND DISTRIBUTION §15—PROPERTY OF INFANT—STATUTE — PROPERTY DERIVED FROM GRANDFATHER.

On the death of an infant intestate without issue, property acquired by him from his paternal grandfather, who died after the death of the infant's father and before the infant, descends to the infant's mother, under Ky. St. § 1393, not to his brothers, under section 1401, which would give to his brothers property which he derived from his father.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. §15.]

Appeal from Circuit Court, Pike County.

Petition by Samuel Vanover, by his next friend, against George Steele and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

A. F. Childers, of Pikeville, for appellant. J. S. Cline and Roscoe Vanover, both of Pikeville, for appellees.

CLARKE, J. W. B. Vanover died intestate in 1902 or 1903, a resident of Pike county, Ky., the owner and in possession of several tracts of land. He had been married three times, all three of his wives surviving him, the first two having been divorced. His first wife is now Dicey Osborn, his second wife is now Lottie Blankenship, and his third wife London Estep. As a result of the first marriage three sons, Crit Vanover, Denny Vanover, and W. H. Vanover, were born. W. B. Vanover was married to his second wife, Lottie, on the 11th day of April, 1901, divorced from her, upon the ground of her adultery, in October, 1901, and within a few days thereafter married his third wife, with whom he was living at the time of his death.

In 1908 William Vanover, Sr., the father of W. B. Vanover, died intestate, the owner and in possession of a tract of land in Pike county. On the 11th day of January, 1902, the second wife of W. B. Vanover, Lottie, gave birth to a son, Samuel. In 1912 this son of W. B. Vanover's second wife, Lottie, who was born just nine months after her marriage to W. B. Vanover, claiming to be the son of W. B. Vanover, and suing by his mother, Lottie Blankenship, as next friend, instituted three separate actions in the Pike circuit court for the sale and partition of the lands left by W. B. Vanover and William Vanover, Sr., alleging that, as the son and heir of W. B. Vanover, he was the owner of an undivided one-third interest in the lands of W. B. Vanover and an undivided one-sixteenth interest in the lands of William Vanover, Sr.

After the death of W. B. Vanover, and prior to the institution of these three suits, the lands of W. B. Vanover had been sold and conveyed to his widow, London Estep, two of the sons by the first marriage, Crit Vanover and Denny Vanover, and Dicey Osborn, the first wife, who attempted to convey, as his sole heir, the interest of her third son, W. H. Vanover, who died after his fa-

ther's death. All of the parties having any interest in the several tracts, as heirs or purchasers from heirs of W. B. Vanover and William Vanover, Sr., were made defendants to these actions, respectively.

As a defense to these actions, which were consolidated below and tried together, it was denied that the plaintiff, Samuel Vanover, was the son or heir of W. B. Vanover, or that he had any interest in any of said lands. This was the principal defense to each of these actions, and, if sustained, defeats all claim of appellant to any of the lands involved. To this question we shall therefore first address our attention, although other collateral questions will have to be decided, in view of our conclusion that Samuel Vanover is a legitimate child and heir of W. B. Vanover.

[1] The rule is now thoroughly established in this state, and, with but slight variations, in all other jurisdictions, that in order to bastardize a child born in wedlock, or thereafter within the period of gestation, it must be shown by those asserting illegitimacy that for some reason, such as nonaccess or impotency, or the like, the husband could not possibly have been the father of the child. The rule was stated in the syllabus of *Sargent v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036, 23 Ky. Law. Rep. 2226, thus:

"As a general rule, a child born in lawful wedlock, when its mother is living with her husband, and they have opportunity for coition, is conclusively presumed to be legitimate; and, while exceptions are allowed to this rule, the burden of proof in such a case is upon the one asserting illegitimacy, it being necessary for him to show that the husband could not possibly have been the father of the child."

See, also, *Dannell v. Dannell*, 4 Bush, 51; *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102, 11 Ky. Law. Rep. 631.

It is satisfactorily shown in the evidence, practically without contradiction, that Samuel Vanover was born to Lottie Vanover in exactly nine months from the date of her marriage to W. B. Vanover, and that W. B. Vanover and Lottie Vanover lived together as husband and wife for from two to four months from the date of their marriage, and there is no attempt to show impotency, nonaccess, or any other reason why W. B. Vanover could not reasonably have been the father of this child. The proof upon which the illegitimacy of the child is predicated consists of the fact that W. B. Vanover procured a divorce from the mother upon proof of her adultery, within a short time before and after his marriage to her; that he denied his parentage of the child; that the reputation for chastity of the mother was, and had been for a long time theretofore, bad; and that it was rumored in the neighborhood that another was the father of the child. This evidence, at most, does no more than create a suspicion that W. B. Vanover may not have been the father of the child, but it is totally inadequate and insufficient

to overcome the legal presumption of legitimacy always and everywhere indulged where the possibility of legitimacy exists, as is conclusively proven to have existed here. It therefore results that the chancellor erred in dismissing appellant's petition, if it did so upon the ground of the child's illegitimacy.

[2] 2. It is urged by counsel for appellees that the chancellor may and should have dismissed the petition because of the failure of appellant to file written evidence of title to the land, as required by section 499 of the Civil Code of Practice. But this failure is also insufficient to warrant a dismissal, because, in order to take advantage of the failure to file the written evidences of title, as required by the Code, a motion to that effect must have been made in the trial court. *Bar-tee v. Edmunds*, 96 S. W. 535, 29 Ky. Law Rep. 872. Moreover, appellees plead that W. B. Vanover and William Vanover, Sr., from whom they deduce their title, were the owners, respectively, of the tracts of land in controversy when they died, and from which they attempt to exclude appellant upon the ground that he is not the heir of W. B. Vanover, by which pleadings it is conceded that the title to the lands involved was in the common source from which both parties claim title; and appellees cannot now sustain an erroneous judgment by reason of the failure of appellant to file written evidences of title, the right to insist upon which they waived by failure to make the question in the trial court.

[3] 3. W. H. Vanover, one of the three sons by the first marriage, died June 19, 1910, and thereafter Dicey Osborn, his mother, attempted to convey to the appellee Steele his undivided interest in the lands in controversy, upon the theory that she was his sole heir. This would have been true if he had been of age when he died (Ky. St. § 1393), but, if he died before attaining his majority, his interest in the lands derived from his father descended to his brothers rather than his mother (Ky. St. §§ 1401). Crit Vanover and Denny Vanover each testified that W. H. Vanover was 19 years 1 month and 14 days of age when he died. They fix his age by reference to their own ages. His mother states that he was born on the 5th day of May, but she cannot give the year. She testified, however, that he was not 21 years of age at his death, but was then about 17 years of age. No record was made of his birth, but these parties, his brothers and mother, are the only witnesses who even attempted to state that they knew his age. Several witnesses testified that their information was that he was of age when he died. One witness stated that Dicey Osborn, his mother, had told her that he was 21 years old on May 5th before he died June 19, 1910. The preponderance of the evidence is clearly that W. H. Vanover was not of legal age when he died. His brothers, rather than his mother, are therefore his heirs, his half-brother, Samuel Vanover, however, taking

only half a share with his brothers of the whole blood. Ky. St. § 1395; *Talbott v. Talbott*, 17 B. Mon. 1; *Milner v. Calvert*, 1 Metc. 472; *King v. Middlesborough T. & L. Co.*, 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. Law Rep. 1859.

[4] The fact that an agreed judgment in the case of *Crit Vanover v. Steele* adjudged the interest of W. H. Vanover in certain land involved here to have descended to his mother, Dicey Osborn, is not a bar to these actions, because the plaintiff here, Samuel Vanover, was not a party to that action.

[5] 4. Counsel for appellant insist that the deed to appellee Steele, who purchased of the widow, now London Estepp, her dower interest in the lands owned by W. B. Vanover at his death, is void, because at the time the conveyance was made therefor London Estepp was a married woman, and her husband did not join in the deed, as required by statute. While it is not entirely clear, on the evidence, that she was a married woman at the time she made this deed, whether she was or not, or whether the deed to Steele of the dower interest was void, is immaterial in this action, because appellant is not entitled to any part of her interest in the land, and is entitled to recover only his own interest therein, which is subject to her dower rights.

[6] 5. The small tract of land upon which W. B. Vanover was residing when he died and upon which Steele now resides, containing about 15 or 16 acres, was purchased by verbal contract from one Damron, to whom W. B. Vanover had paid all of the agreed purchase price except \$40. While W. B. Vanover had the possession of this land, he did not have title thereto, nor a contract upon which he could have enforced a conveyance of same to him. After his death upon the payment of the balance of the purchase money by Crit Vanover, Damron conveyed this tract of land to Crit Vanover, Denny Vanover, and W. H. Vanover. Steele thereafter acquired the interests of Crit and Denny Vanover in the land, but did not obtain the interest of W. H. Vanover, as we have seen the deed from Dicey Osborn was ineffectual to convey the interest of W. H. Vanover. We therefore conclude that in this tract Samuel Vanover inherited no interest from his father, who never had title thereto, but did inherit from his brother, W. H. Vanover, who owned a third interest therein.

For the reasons indicated, the judgment is reversed, with directions to enter a judgment in favor of appellant in accordance with his opinion.

Extension and Modification of Opinion.

[7] The statements in the fifth paragraph of the opinion rendered herein January 9, 1917, that the deed to appellee from Dicey Osborn was ineffectual to convey the interest of W. H. Vanover, and that Samuel Vanover in-

herited, from his brother, W. H. Vanover, any interest in the 15 or 16 acre tract therein mentioned, are palpably erroneous. As W. B. Vanover, the father of Samuel Vanover, never had title to the land, it manifestly was not derived from him by W. H. Vanover, and section 1401, Ky. St., does not apply, but W. H. Vanover's interest therein descended to his mother, Dicey Osborn, under section 1393 of the Statutes, and passed under her deed to Steele. It is also true that W. H. Vanover's interest in the lands of his grandfather, William Vanover, Sr., who died subsequently to W. B. Vanover, but before W. H. Vanover, descended to his mother, Dicey Osborn (Smith v. Smith, 2 Bush, 520), and that Samuel Vanover took only such interest in said lands, as he inherited directly from his grandfather.

To the extent indicated, the opinion heretofore rendered herein is extended and modified.

MARZ v. CITY OF NEWPORT.

(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. MUNICIPAL CORPORATIONS ⚡321(1)—IMPROVEMENTS—STREETS.

The power to open and improve streets is discretionary with the municipal authorities, and is not subject to judicial review, except where the municipal authorities have acted fraudulently.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 837; Dec. Dig. ⚡321(1).]

2. MUNICIPAL CORPORATIONS ⚡323(1) — STREET IMPROVEMENTS—INJUNCTION.

That the contract awarded provided for a wood block pavement when a vitrified brick pavement would be cheaper is not ground for an injunction, where the council acted in good faith and there was no showing of any abuse of discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 842, 844, 845; Dec. Dig. ⚡323(1).]

3. MUNICIPAL CORPORATIONS ⚡323(3) — STREET IMPROVEMENTS—STREET RAILWAY.

Under Ky. St. § 3096, providing that the cost of paving a part of a street occupied by a street railway company shall be paid by the company when it is required so to do by law or by its franchise or by a contract with the city a petition to enjoin the construction of a street improvement, not showing that the company was required to pave any part of the street, but alleging that it was operating without a license, failed to show any illegality in the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 846; Dec. Dig. ⚡323(3).]

4. MUNICIPAL CORPORATIONS ⚡323(3) — STREET IMPROVEMENT—COST.

A petition in an action to enjoin the construction of a street merely alleging that the city had failed to set aside any moneys to meet any liability or to make any provision for the payment, and that there was no money available therefor in any city fund, without alleging what sums were or would be in the different funds or what part of such funds were available to pay the particular claim, did not show

any ground for injunction, even if the improvement would impose liability upon the city under Const. §§ 157, 158, for which it did not then have any available funds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 846; Dec. Dig. ⚡323(3).]

Appeal from Circuit Court, Campbell County.

Action for injunction by Theodore Marz against the City of Newport. Judgment for defendant, on sustaining a demurrer to the petition, and plaintiff appeals. Affirmed.

Ramsey Washington and Howard M. Benton, both of Newport, for appellant. Brent Spence and Barbour & Bassmann, all of Newport, for appellee.

MILLER, J. By this action Theodore Marz, a citizen and taxpayer of the city of Newport, and the owner of a house and lot on East Tenth street in said city, seeks to enjoin the construction of that street in front of his property. He also asks that the contract entered into by the city of Newport with Metzel & O'Hearn, contractors, for that purpose, be declared invalid. The contract requires the street to be constructed at the cost of the abutting property owners.

It is not contended that the statutory requirements necessary under the charter were not fully complied with. It is insisted, however, that the court should enjoin the execution of this contract: (1) Because, as awarded, it provided for the improvement by wood blocks, when a better and a lower bid was received for improvement by vitrified brick, and that the action of the commissioners in that respect was arbitrary and injudicious; (2) because the contract fails to show whether the street car company's tracks now located on the north side of East Tenth street shall be permitted to remain there or be relaid in the central portion of the street, or whether the street car company shall be charged with its proportionate expense of the improvement; and (3) because said improvement will impose a liability of \$3,000 upon the city, which did not, at the time of making the contract, have that amount of money in the general or contingent fund, or in any other available fund in the city, out of which the same could be paid. The court sustained a demurrer to the petition as amended; and, upon plaintiff's failure to further amend, the petition was dismissed, and he appeals.

1. There is no allegation in the petition, or in the amendments thereto, that there was any irregularity in the proceedings of the city in reference to the estimates, the passage of the ordinance, the acceptance of the bid, or in the making of the contract. Neither is there any allegation that the board of commissioners, in letting the contract, acted fraudulently or in bad faith.

[1] It is a fundamental rule that discretionary powers vested in public officers are not subject to judicial control, and that un-

less legal limitations exist, the power to open, improve, pave, and maintain streets, establish sewers and drains, and secure public improvements of all kinds is discretionary with the proper municipal authorities; and, if the governing law has been observed, their action in that respect is not subject to judicial review, except in cases expressly provided by law. *McQuillin on Municipal Corporations*, § 1834. It is only in cases where the municipal authorities have acted fraudulently that their action can be reviewed by the courts. *Meyer v. City of Covington*, 103 Ky. 546, 45 S. W. 769, 20 Ky. Law Rep. 239; *Bullitt v. Selvage*, 47 S. W. 255, 20 Ky. Law Rep. 599; *Trapp v. City of Newport*, 115 Ky. 840, 74 S. W. 1109, 25 Ky. Law Rep. 224; *Campbell v. Southern Bitulithic Co.*, 106 S. W. 1189, 32 Ky. Law Rep. 799; *Louisville Steam Forge Co. v. Gast*, 115 S. W. 761.

[2] Furthermore, the city had the discretion as to the kind of pavement that should be laid; and, the fact that the bid accepted was for a wood block pavement, or that a vitrified brick pavement would be cheaper, is immaterial where the council acts in good faith, and there is no showing of abuse of aldermanic discretion, or a violation of the statute. *Campbell v. Southern Bitulithic Co.*, supra. And, since the charge of arbitrariness upon the part of the defendant is limited to their action in selecting a wooden instead of a vitrified pavement—an entirely lawful act—it amounts to nothing.

[3] 2. Sections 3096 and 3097 of the Kentucky Statutes are invoked by appellant to sustain his case. The petition alleges that no part of the improvement has been assessed against the street railway company, which is operating without a franchise.

Section 3096, supra, provides that the cost of paving the portion of a street occupied by a street railway shall be paid by the railway company when it is required by law, or by its franchise, or by a contract with the city, to pave any part of the street proposed to be improved. But, since the petition does not show that the street car company in this case is either required by law, or by its franchise, or by contract with the city, to pave any part of the street in question, it fails to show any irregularity or illegality in the contract, in this respect. On the contrary, the petition alleges that the street car company is operating without a franchise, and fails to affirmatively allege any contract or show any law requiring it to pay any portion of the cost.

[4] 3. Assuming for the argument only that the cost of constructing the street in question would be an obligation of the city of Newport within the meaning of sections 157 and 158 of the Constitution, the petition, nevertheless, does not affirmatively show that the city did not, at the time the contract was made, have on hand as much as \$3,000 with which to pay this obligation, after paying its

current expenses. The petition, as twice amended, merely alleges that the city had failed to set aside any moneys to meet said liability, or to make any provisions for its payment, and that there were no moneys available in any fund of the city out of which said cost could be paid. It is nowhere alleged what sums of money are, or will be, in the various funds of the city during the fiscal year, or what part of said funds are available to pay this particular claim. No facts are stated to justify this legal conclusion. Good pleading required the plaintiff to show by his petition the amounts in the various funds of the city of Newport, and leave it for the court to say whether the funds therein contained would be sufficient or available for the purpose of paying this obligation.

Judgment affirmed.

McAFEE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 9, 1917.)

1. SUNDAY — "WORK OF NECESSITY."

Under the Sunday Law (Ky. St. § 1321), excepting "work of necessity," that failure to do something may cause interruption or delay in the ordinary course of business, or some inconvenience to the individual affected, will not make the doing of the thing a work of necessity, but it must be something not to do which would work severe hardship or loss or unusual discomfort or inconvenience either to the individual who does the thing complained of or to the person or persons for whom he does it.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. § 7.]

For other definitions, see Words and Phrases, First and Second Series, Necessity.]

2. SUNDAY — "SALES"—"WORK OF NECESSITY."

The selling on Sunday by a confectioner of soda water, soft drinks, coco-cola, cigars, and tobacco is a violation of the Sunday law (Ky. St. § 1321), notwithstanding incidental sale of such edibles as sandwiches, canned goods, etc.; such business not being a "work of necessity," like conducting a restaurant exclusively.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. § 7.]

Appeal from Circuit Court, Mercer County. Gilbert McAfee was convicted of violating the Sunday statute, and appeals. Affirmed.

E. H. Gaither, of Harrodsburg, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant was indicted for doing work or business on Sunday in violation of section 1321 of the Kentucky Statutes, reading:

"No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity, or work required in the maintenance or operation of a ferry, skiff or steamboat, or steam or street railroads. If any person on the Sabbath day shall himself be found at his own, or at any other trade or calling, or shall employ his apprentices, or other person, in labor or other business, whether the same be for profit or amusement, unless such as is permitted above,

he shall be fined not less than two nor more than fifty dollars for each offense. Every person or apprentice so employed shall be deemed a separate offense. Persons who are members of a religious society, who observe as a Sabbath any other day in the week than Sunday, shall not be liable to the penalty prescribed in this section, if they observe as a Sabbath one day in each seven, as herein provided."

The indictment charged that:

McAfee did "unlawfully and willfully, on Sunday, October 16th, have open for business, the same being the Sabbath day, and engaged in work and business at his soda fountain and confectionery and store in Salvisa, and then and there engage in the barter and sale of merchandise and soda water and soft drinks, and sold candy, which was not a necessity, to Aubrey Kennedy, for pay, and was engaged at his trade and calling and labor and business for profit, and on said date kept open said place for business and engaged in work as aforesaid, and said operation of said soda fountain and keeping open of said confectionery and store and the sale of merchandise and soda water and soft drinks and candy therein was not a work of necessity or charity or required in the maintenance of a ferry, skiff, or steamboat or steam street railway, and said Gilbert McAfee was not then and there a member of a religious society who observed as a Sabbath day or any other day in the week than Sunday."

The case was submitted to the court under an agreed statement of facts which showed that:

"McAfee has a pool room and refreshment stand, selling soda water, soft drinks, coco-cola, cigars, and tobacco, also sandwiches and various kinds of canned goods, cheese and crackers, fruits and candies, located in Mercer county, Ky. The pool room is separate from the refreshment room by a partition, and is not opened on Sunday. On Sundays the defendant sells to those who request it soda water, soft drinks, cigars, candies, tobaccos, ice cream, sandwiches, and other things above mentioned, and the defendant made the sale charged in the indictment. Salvisa, where said business is conducted, is a place of about 300 inhabitants, and there is no restaurant in the town, but there is a boarding house serving meals at regular hours. The defendant and one servant were employed in said business at the time charged in the indictment. Defendant is not a member of any religious society observing any day other than Sunday as the Sabbath."

Under the indictment and on this agreed statement of facts the court imposed a fine of \$100, and McAfee appeals, insisting that on the agreed state of facts there should have been a judgment of acquittal.

The offense of which McAfee was found guilty was not that of selling candy to Kennedy on Sunday, but that of engaging on the Sabbath day in his trade or calling, which was, as appears from the indictment as well as the agreed facts, the keeping of a place of business in the village of Salvisa at which he sold on Sunday and other days "soda water, soft drinks, coco-cola, cigars and tobacco, also sandwiches and various kinds of canned goods, cheese and crackers, fruits and candies." Therefore the guilt or innocence of McAfee is not to be determined by the circumstance that he sold Kennedy candy, but by the general character of work or business in which he was engaged on the Sabbath day.

On the facts agreed to it is the contention of his counsel that McAfee, when the ar-

ticles that he kept for sale and sold are considered as a whole, really conducted nothing more than a restaurant at which persons who might want a meal or lunch could get it, and therefore the work or business in which he was engaged on Sunday was, in the meaning of the statute, a work of necessity under the rule laid down in *Com. v. London et al.*, 149 Ky. 372, 149 S. W. 852, and so he should have been acquitted. In that case the indictment charged that:

London and his partner were engaged "in conducting a general confectionery business in Danville, Ky., and in the sale of candy, some fruits, chocolate, ice creams, pies, bread and butter sandwiches, coffee and soda water, and they were so engaged at the time and times of the violations of the law hereinafter complained of."

And the court, after holding that, under the facts stated in the indictment, to which a demurrer was sustained, the question whether London and his partner had violated the Sunday statute was a question of law, reached the conclusion that they were only conducting a restaurant or eating place, and said:

"The only question left for determination is: Did the lower court properly conclude that appellees had a right to keep their place of business open and sell bread, butter, sandwiches, chocolate, and coffee? In disposing of these articles, appellees were doing the business of a restaurant keeper. They are charged in the petition, however, with keeping a confectionery, but the petition also specifically names the articles which they sold, and which we think, for all intents and purposes, would class them as restaurant keepers. The public, specially the traveling public, of necessity, has to obtain something to eat on the Sabbath, and appellees had as much right to keep their house open and furnish the articles named to the public as did any hotel or other place in Danville."

After assuming, as the court did, that London and his partner, under the facts stated in the indictment, were engaged in the business of keeping a restaurant, the decision that they were not guilty of violating the Sunday statute was undoubtedly correct, as it has always been the settled rule in the construction of Sunday statutes that the keeping open on the Sabbath day of hotels, boarding houses, and restaurants for the accommodation of the public is a work of necessity; and so the proprietor of such an establishment is exempt from the operation of the statute when the business in which he is engaged is confined exclusively to furnishing food for the public. 37 Cyc. 553; 27 A. & E. Ency. of Law, 400.

The reason why persons who are engaged exclusively in conducting hotels, boarding houses, and restaurants at which the public may obtain food on Sunday are exempt from the operation of the statute when their work or business is confined to the furnishing of food are so obvious that it is not necessary to extend this opinion in setting them out, but we do not think that McAfee was engaged in the exclusive business of keeping a restaurant or in the exclusive business of furnishing meals or food for the accommodation

of the public. On the contrary, we think his business was that of a small grocer or confectioner, engaged in the business of keeping a store at which any person who wanted to buy tobacco, cigars, canned goods, or any of the articles mentioned in the agreed facts could obtain them on Sunday as well as on other days. It may be conceded that a person who was hungry might get from McAfee cheese or crackers or a can of oysters or sardines, and so he might get these at any ordinary grocery establishment where such articles are usually sold in connection with other things kept in such a store.

If McAfee can claim immunity from the operation of the Sunday law on the ground of necessity, it would follow that any persons who kept for sale articles of prepared food, such as cheese, crackers, and canned goods in connection with other articles usually had for sale in grocery or confectionery stores, could keep their places of business open on Sunday and conduct their business on that day in the same manner that they did on other days of the week. It is also manifest that, if this useful and beneficent statute is to accomplish the purpose of its enactment, it cannot be so construed. Such a construction would entirely defeat as to a large class of people the object of the statute, which should be given a reasonable construction, and one that will carry out the legislative intent in its adoption. And this intent was to compel observance of the Sabbath day by all persons without reference to the trade business or occupation they engaged in and to forbid the doing of any work or business on that day except the ordinary household offices or other work of necessity or charity, unless the work was one of the employments specifically excepted in the statute.

Statutes like this are in force in every state, and the only difficulty that has come about in their construction or enforcement in respect to the particular matter now being considered grows out of differences of opinion as to what constitutes works of necessity. All the courts are agreed that the statute is constitutional and that it should be liberally construed so as to effectuate its purposes, but there is oftentimes no little perplexity in determining whether the particular act under investigation was or not a work of necessity, and this has induced the courts generally, when there is reasonable doubt as to whether the work was or not one of necessity, to treat the question as one of fact and determine it according to the facts of the particular case, and this, we think is manifestly the correct rule to be adopted in cases of doubt. *L. & N. R. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274, 13 Ky. Law Rep. 439; *Com. v. C. & O. Ry. Co.*, 128 Ky. 542, 108 S. W. 851, 32 Ky. Law Rep. 1400; *Gray v. Com.*, 171 Ky. 269, 188 S. W. 354.

In the London Case, however, the question was held to be one of law, but this was be-

cause the court in that case came to the conclusion that the facts stated in the indictment were of such a nature as to leave no room for doubt that London was engaged in a work of necessity. It is true the court in the London Case said:

"And we are asked to hold on the facts stated that appellees, as a matter of law, are guilty of a violation of the statute. The construction of a statute is a matter for the courts—a matter of law. The construction of this statute depends upon the meaning given to the vital word, 'necessity,' as used in the statute. The petition having set out specifically what appellees did on the Sabbath day in question, it was for the court, on demurrer, to say whether or not those things were denounced by the statute, construing it according to the common sense of the country."

But this expression must, of course, be read in connection with the context, and when so read it is plain that the court meant, when there was no room for honest difference of opinion as to the effect of the facts, the question whether the statute had been violated was one purely of law.

[1] It is also well settled by the current of authority that the necessity that will excuse engaging in work or business on the Sabbath day need not be a physical necessity or an imperative or overpowering necessity. It need be only a reasonable necessity, and one that is created by some real or unexpected emergency or uncommon or extraordinary condition. The fact that the failure to do something may cause interruption or delay in the ordinary course of business, or some discomfort or inconvenience to the individual affected or the public, will not make the doing of the thing a work of necessity. It must be something that not to do would work severe hardship or loss or unusual discomfort or inconvenience either to the individual who does the thing complained of or to the person or persons for whom he does it. *Com. v. White*, 190 Mass. 578, 77 N. E. 638, 5 L. R. A. (N. S.) 320; *Quarles v. State*, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192; *Western Union Telegraph Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *State v. James*, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277; *City of Gulfport v. Stratakis*, 90 Miss. 489, 43 South. 812, 13 Ann. Cas. 856; *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 432; *Pate v. Wright*, 30 Ind. 476, 95 Am. Dec. 705.

It is also true that conditions and emergencies are continually arising that make it necessary to engage in work or business on Sunday either for the benefit of the person actually engaged in the work or business or for the benefit of some other person affected by the condition or emergency. And so the question as to whether a particular work or business that is engaged in on Sunday is or is not a work of necessity is inevitably in many cases a matter of such doubt that it would not be possible for the courts to lay

down with reasonable fairness and accuracy the line that separates works of necessity from works that are not necessary. The condition then being one that makes it impracticable for the courts to establish any fixed standard of right or wrong, the best rule that can be laid down, as said in *Com. v. L. & N. R. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475, is to regard that as a work or business of necessity which the common sense and sound morality of the community would regard as necessary, and this to be determined in cases of doubt by the facts and circumstances of each particular case.

[2] Measured by these general rules, it is perfectly plain that the business in which McAfee was engaged was not a work of necessity. There is no showing in the record, nor could there well be, according to any reasonable judgment, that it was necessary that McAfee, to save himself from serious or unexpected loss, or the public from unusual discomfort or inconvenience, should keep his store open on Sunday and offer for sale the articles he had in stock.

It is, however, pressed on our attention that, as McAfee kept for sale articles of prepared food, such as sandwiches, cheese, and the like, and the poor man is as much entitled to sandwiches or cheese as the rich man is to chops, steak, eggs, or other expensive articles of food, no distinction can in reason be made between the small and obscure place for the convenience of the poor and the large, pretentious place for the convenience of the rich, or the village restaurant and the city café, and therefore he should have the right to conduct his business on Sunday.

It is, of course, true that no distinction should be made between the city and the village restaurant or eating house. One has precisely the same standing under this statute as the other, and the conducting of each is regarded as a work of necessity, but the fault in the argument of counsel lies in its inapplicability to the facts of the case, because McAfee was not conducting an eating house or restaurant for the convenience of the poor or the rich or the public who might want a meal or something to eat. His establishment was simply a small grocery or confectionery, such as may be seen in almost every town or village in the state. It was not kept open on Sunday to furnish food for the hungry public, but purely as a matter of business for profit to the owner. It was conducted precisely on Sunday as it was on Monday and other week days, and so on Sunday McAfee followed his usual trade or calling. Plainly the owner of a store, stand, or establishment of any kind at which soda water, soft drinks, cigars, tobacco, fruits, canned goods, and other like articles are sold who keeps it open for business on Sunday is engaged in a work or business prohibited on the Sabbath day, or else the reasonable meaning of the statute must be put aside and a construction adopted that would be utterly opposed to the rules that, so far as

our investigation goes, have always obtained in the construction of Sunday laws.

Our attention has also been directed to the fact that there have been many and radical changes in the social, economic, and business condition of the state since this statute was first enacted, and this, of course, is a matter of common knowledge. And the suggestion is made that the statute should be given such a construction as will reasonably conform it to present conditions and make it reasonably adaptable to the desires and wants of the people of to-day, and therefore, as the public generally have become accustomed to buying on Sunday such things as McAfee kept for sale, the selling articles like these should be treated as one of the necessities of modern habits of life. But in our opinion these changed and ever-changing conditions in the customs, manners, and habits of the people cannot be allowed to alter the meaning or impair the efficiency of this statute. It must be given the same construction and effect to-day that it had yesterday, and in all cases such a necessity must exist to excuse the doing of work or business on Sunday as must have existed to excuse the doing of work or business on Sunday in more primitive times. But to meet the demands of new conditions and changing modes and habits of life, the scope and operation of the statute is constantly broadening, so that it may reach out and be applied to these new conditions as they come up, and yet not depart from the rule that nothing short of necessity will excuse the doing of the work or business on the Sabbath day. As new developments in social, business, and economic life are constantly bringing into view new customs, trades, and callings, the statute as it reads must be applied to these new conditions, and the work or business subjected to the never-changing test of necessity, judged by the facts and circumstances of the case under investigation.

We are also asked to set down some rule for the guidance of those who wish to carry on, as McAfee did, their trade or business on Sunday, and decide what articles McAfee might, for example, sell without violating the statute. But this we must decline to do, because, as we have said, each case must, in the nature of things, be determined by the facts and circumstances surrounding it. It might under some circumstances be a work of necessity for the storekeeper like McAfee to open his place of business on Sunday for the sale of one or more of the many things that he had in stock, and under other circumstances it might be a violation of the Sunday law to sell any of them.

It is sufficient for the purposes of this case to say that McAfee does not rest his defense upon the ground that it was a work of necessity to sell sandwiches or cheese and crackers or sardines or oysters, but upon the ground that the conduct of his business was a work of necessity, and, having found that it was not, the judgment is affirmed.

STOVALL v. MAYHEW.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. LIFE ESTATES \S 27(3)—SALE BY ORDER OF COURT—TITLE ACQUIRED BY PURCHASER.

The sale of land by a commissioner in satisfaction of a judgment passes only such title as the defendant had, and where defendant's title was merely a life estate, the purchaser at the commissioner's sale and his subsequent grantees acquired only a life estate in the land.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 53; Dec. Dig. \S 27(3).]

2. LIFE ESTATES \S 17—IMPROVEMENTS.

A life tenant cannot charge the remainder or the remainderman with improvements made on the land, notwithstanding that such life tenant believed that he had an absolute title to the property.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 37, 38, 42; Dec. Dig. \S 17.]

Appeal from Circuit Court, Allen County.

Action by Grover C. Stovall against Charlie Mayhew. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

N. F. Harper, Gilliam & Gilliam, and F. R. Goad, all of Scottsville, for appellant. Oliver & Dixon, of Scottsville, for appellee.

CLAY, C. On July 20, 1891, L. S. Clark and wife conveyed a tract of land in Allen county to Malvinia P. Stovall for life, with remainder to her infant son, Grover C. Stovall. Subsequently the land was sold in an action brought by L. S. Clark, Plaintiff, v. Mallie Stovall, Defendant, and the title conveyed by the commissioner to the purchaser subsequently passed to Charlie Mayhew. Malvinia P. Stovall died in the year 1912. Shortly thereafter Grover C. Stovall, who was an infant when the commissioner's deed was executed, brought suit against Charles Mayhew to recover the land. Mayhew filed an answer and counterclaim, denying plaintiff's title and pleading title in himself, and asked that his title be quieted. Judgment was rendered dismissing Stovall's petition and quieting the title of Mayhew. On appeal the judgment was reversed on the ground that the infant remainderman, who was not a party to the suit of L. S. Clark, Plaintiff, v. Mallie Stovall, Defendant, was not divested of title by that proceeding, and that upon his mother's death he was entitled to recover the property, and the cause remanded, with directions to enter judgment in favor of the infant. On the return of the case judgment was entered in favor of the infant, as directed by the mandate.

Thereafter Mayhew brought this suit against Grover C. Stovall, the plaintiff in the former action, to recover the value of the improvements placed on the land by Mayhew and predecessors in title and for the enforcement of his alleged lien on the land therefor. Stovall interposed a plea of *res judicata*, based on the judgment rendered in the suit which he brought against Mayhew to re-

cover the land. He also pleaded a counterclaim for rents accruing since Mayhew had been in the possession of the land, and alleged to amount to the sum of \$600. On final hearing the chancellor rendered judgment in favor of Mayhew for the sum of \$250 and awarded him a lien on the land. Stovall appeals.

[1] In view of the conclusion of the court, we deem it unnecessary to determine whether the claim for improvements is one which should have been presented in the suit brought by Stovall against Mayhew to recover the land, and is therefore concluded by the judgment rendered in that action. The only title which the purchaser acquired under the deed made by the commissioner in the suit of L. S. Clark, Plaintiff, v. Mallie Stovall, Defendant, was that owned by Mallie Stovall, who had a mere life estate in the land. Therefore Mayhew, who subsequently acquired the title of the purchaser, was himself a mere life tenant.

[2] It is the settled rule in this state that a life tenant cannot improve the land and make it a charge on the estate in remainder, or a personal charge against the remainderman himself, and the mere fact that the life tenant may have supposed that he had the absolute title to the property does not prevent the application of the rule. *Johnson v. Stewart*, 8 Ky. Law Rep. 857; *Nineteenth & Jefferson Street Presbyterian Church v. Fithian*, 29 S. W. 143, 16 Ky. Law Rep. 581. It follows that a contrary ruling by the chancellor is erroneous.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CHRISTIAN'S ADM'X v. ENNIS.

(Court of Appeals of Kentucky. Jan. 9, 1917.)

1. DEPOSITIONS \S 17—RIGHT OF DEFENDANT TO TAKE PLAINTIFF'S DEPOSITION.

Civ. Code Prac. \S 606, subsec. 8, providing that a party may be examined as on cross-examination by the adverse party either orally or by deposition, gives to a party the unrestricted right to take the deposition of the adverse party before trial, even though the witness does not belong to the class named in section 554, specifying cases where a deposition may be read upon a trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 11, 12; Dec. Dig. \S 17.]

2. APPEAL AND ERROR \S 236(1)—OBJECTIONS BELOW — FAILURE TO REQUEST CONTINUANCE.

Refusal of defendant to give his deposition required under Civ. Code Prac. \S 606, subsec. 8, as to examination of adverse party before trial, was not ground for reversal, where plaintiff went into trial without moving for continuance to take the deposition of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1384; Dec. Dig. \S 236(1).]

3. MASTER AND SERVANT \S 101, 102(8)—SAFE PLACE FOR WORK—DUTY OF MASTER.

The duty of the master to furnish a reasonably safe place for work applies only to the

place which the servant is required to use for the purpose of performing his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. ¶101, 102(8).]

4. MASTER AND SERVANT ¶233(2) — SAFE PLACE FOR WORK — CONTRIBUTORY NEGLIGENCE.

Where a stonemason in a stoneyard was provided with a shed for stonemasonry and had no duty in connection with a derrick in the yard or near thereto, the refusal of the servant to use the place provided and his voluntary going near the derrick after warning precluded recovery for his death from the fall of the derrick.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 702; Dec. Dig. ¶233(2).]

Appeal from Circuit Court, Warren County.

Action by J. M. Christian's administratrix against W. T. Ennis. From judgment for defendant, plaintiff appeals. Affirmed.

Procter & Gardner, of Bowling Green, for appellant. Bradburn & Basham, of Bowling Green, for appellee.

CLAY, C. J. M. Christian was killed while in the employ of W. T. Ennis, who operated a stoneyard in the city of Bowling Green. His administratrix brought this suit to recover damages for his death. From a judgment based on a directed verdict in favor of the defendant, plaintiff appeals.

1. The first error assigned is the refusal of the defendant to give his deposition. In response to a notice to take his deposition, the defendant appeared before an examiner for Warren county and refused to give his deposition, on the ground that he lived in Bowling Green, the place of the trial, and would be present and testify at the trial if called by plaintiff. The question whether defendant should give his deposition was certified to the trial court. The court held that under the facts shown the defendant could not be required to give his deposition. Subsection 8, § 606, of the Civil Code provides:

"A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony."

Section 554 of the Civil Code provides:

"A deposition may be read upon the trial of an issue in any action, if, at the time of the trial, the witness reside twenty miles or more from the place where the court sits in which the action is pending; or be absent from this state; or be its Governor, secretary, register, auditor or treasurer; or a judge or clerk of a court; or a postmaster, or a president, cashier, teller or clerk of a bank; or a practicing physician, surgeon or lawyer; or a keeper, officer or guard of the penitentiary; or be dead; or be of unsound mind, having been of sound mind when his deposition was taken; or be prevented from attending the trial by infirmity or imprisonment; or be in the military service of the United States or of this state."

[1] It is the rule in this state that subsection 8, § 606, of the Civil Code, supra, gives

to a party the unrestricted right to take the deposition of the adverse party before trial, even though the witness does not belong to the class named in section 554 of the Civil Code, supra, and his deposition may not be admissible in evidence. Kentucky Utilities Co. v. McCarty's Adm'r, 169 Ky. 38, 183 S. W. 237; Owensboro City Ry. Co. v. Rowland, 152 Ky. 175, 153 S. W. 206. We have also held that, where a party refuses to give his deposition, it is error to refuse a continuance asked for by the other party in order to give him an opportunity to take the deposition. Western Union Telegraph Co. v. Williams, 129 Ky. 515, 112 S. W. 651, 33 Ky. Law Rep. 1062, 19 L. R. A. (N. S.) 409. In this case plaintiff went into trial without moving for a continuance for the purpose of taking the deposition of the defendant. Under these circumstances, the refusal of defendant to give his deposition is not ground for reversal.

[2] 2. It is next insisted that the court erred in awarding the defendant a peremptory instruction. It appears that decedent was a stonemason of several years' experience, and that he was killed by being struck by the mast pole of a derrick which was being used to handle stone. There was some evidence to the effect that the guy wires supporting the pole were defective, and that the defendant had given directions not to operate the derrick because it was in a dangerous condition. In addition to this evidence, Tiltman Preston, who was the only eyewitness of the accident and who was introduced by the plaintiff, testified in substance as follows: He and the decedent were engaged in cutting stone. The defendant had provided them with a shed under which to cut the stone. This shed was about 60 feet from the derrick. He and the decedent had nothing to do with the handling of the stone. The stone was brought to them on a tramway by the laborers. The defendant was not present when the accident occurred. The decedent and witness had moved their bankers out from under the shed into the open and were cutting stone there. Decedent's banker was nearer to the derrick than witness'. Two laborers were using the derrick for the purpose of loading stone into a wagon. Witness called to the decedent to get out of the way. The decedent came back, and the stone swung around over his banker. After the stone passed decedent started back. Thereupon the two laborers and witness each called to the decedent to get back. Instead of doing so decedent passed by his banker towards the base of the derrick. The derrick fell and decedent was struck by the mast pole. Had decedent remained under the shed, or at the place where he first went when witness called to him to get back, decedent would have been unharmed. After describing the guy wires, witness further stated that the derrick had lifted stone four

times the weight of the one they were loading when the decedent was hurt.

Plaintiff's case is predicated on the assumption that the dangerous and defective condition of the derrick rendered his place of work unsafe, and that his duties required him to work in the vicinity of the derrick. The evidence utterly fails to show that decedent had any duty to perform, either in connection with the derrick or in close proximity thereto. On the contrary, it shows that the stone was brought to him by other laborers, and that he had nothing to do with the handling of the derrick. It was also shown that the master had provided him with a shed under which to work; that this shed was 60 feet distant from the derrick, and had had decedent remained there he would not have been injured. Notwithstanding this fact, he not only left the shed and used a more dangerous place of his own selection, but, in the face of a warning from those present, actually started towards the base of the derrick, when the mast pole fell and killed him. The duty of the master to use ordinary care to furnish a reasonably safe place for work applies only to the place which the servant is required to use for the purpose of performing his duty.

[3, 4] When, as in this case, the master has performed this duty and the servant refuses to use the place so provided, and voluntarily uses a more dangerous place of his own selection, he does so at his own peril, and the master is not liable. *Broadway Coal Mining Company v. Render*, 119 S. W. 198; *L. H. & St. L. Ry. Co. v. Wright*, 170 Ky. 230, 185 S. W. 861.

Judgment affirmed.

HARTUNG v. TEN BROECK TYRE CO.

(Court of Appeals of Kentucky. Jan. 11, 1917.)

1. MASTER AND SERVANT §285(5)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

While the doctrine *res ipsa loquitur* applies to masters and servants, it does not apply with the same weight as in other cases, since the master need not furnish absolutely safe appliances with which to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 898, 955; Dec. Dig. §285(5).]

2. MASTER AND SERVANT §278(3)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

When the servant sues for injury due to defective appliances, the mere breaking of the tool does not of itself make a *prima facie* case, but the master must have known, or have been able, with ordinary care, to have known of the defect; the inference of negligence arising from surrounding circumstances, and not the occurrence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 958; Dec. Dig. §278(3).]

3. MASTER AND SERVANT §278(5)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

Where the injured servant was in charge of a machine and had used it but a short time be-

fore the accident, and testified that he knew, when he started to use it, that it was all right, and there was no defect discoverable by the exercise of ordinary care, the master was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 961; Dec. Dig. §278(5).]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Fourth Division. Action by Leonard Hartung against the Ten Broeck Tyre Company. From judgment on directed verdict for defendant, plaintiff appeals. Affirmed.

D. Moxley, of Louisville, for appellant. O'Neal & O'Neal and C. H. Searcy, all of Louisville, for appellee.

OLAY, C. Plaintiff, Leonard Hartung, who was injured while in the employ of the Ten Broeck Tyre Company, brought this suit against the company to recover damages. The trial court directed a verdict in favor of the defendant, and plaintiff appeals. The only question involved is whether there was sufficient evidence of negligence to take the case to the jury.

The accident happened under the following circumstances: Plaintiff had been in defendant's employ for several months. For about four months next preceding the accident he had been working on a vulcanizing machine, with Charles A. Campbell as his foreman and James Brown as his superintendent. The vulcanizer is a large kettle covered by a cast-iron lid. Two men were required to open the vulcanizer, one to lift the lid in front, and the other to press down the lever attached to the lid in the rear. This lever extended about three feet back of the vulcanizer. A large weight was attached to the end of the lever and held in place by means of a set screw. On the occasion of the injury Campbell was engaged in lifting the lid, while plaintiff was engaged in pressing down the lever. According to plaintiff's evidence, he caught hold of the weight and pressed on it until it reached a point about four inches from the floor. Thereupon the weight came off, and the lever flew up and struck him in the breast and injured him. Plaintiff says that he was a common laborer, and it was no part of his duty to keep the machine in order. What caused the weight to come off he did not know. He had operated the lever several hundred times before that, and had seen nothing the matter with it. Indeed, he had operated the lever about a half hour before the accident, and at that time it worked all right. W. A. Fegenbush, who was the chief engineer of the company, explained the operation of the vulcanizer and the manner in which the weight was attached to the lever. While the company had no particular system of inspection that he knew of, he had placed the set screw and had examined it several times since it was placed. It was the operator's duty to report when

repairs were needed and witness then made the repairs. When the accident happened the machine was a little over six months old. He had frequently passed by the machine and had seen nothing the matter with it. The set screw might have been loosened the very time plaintiff was operating the lever, and the fact that the weight remained on the lever until within four inches of the floor showed that the set screw was tight and was holding the weight thereon up to that time.

[1] While it is the rule in this state that that the doctrine of *res ipsa loquitur* applies to a case of master and servant, it does not apply with the same fullness and weight as in cases where the relation of master and servant does not exist. The master is not required to furnish the servant absolutely safe appliances with which to work. He discharges the full measure of his duty when he exercises ordinary care to furnish appliances which are reasonably safe.

[2] When, therefore, the servant seeks to recover for injury growing out of defective or unsafe appliances, the mere fact that a piece of machinery breaks or comes apart is not of itself sufficient to make out a *prima facie* case against the master. It must further appear that the master knew of the defective or unsafe condition of the machinery, or could have known of it by the exercise of ordinary care. Hence it is generally held in the case of master and servant that the inference of negligence is deducible, not from the mere happening of the accident, but from the attending circumstances. If, therefore, the attending circumstances are such as to show that the defective or unsafe condition of the machinery was such as would have been revealed by a reasonable inspection, proof of the accident and of such circumstances is sufficient to take the case to the jury. *Lile v. Louisville Railway Company*, 161 Ky. 347, 170 S. W. 936, Ann. Cas. 1916B, 750; *Thomas v. National Concrete Const. Co.*, 166 Ky. 512, 179 S. W. 439; *B. & O. R. Co. v. Smith*, 169 Ky. 593, 184 S. W. 1108; *Shinn Glove Company v. Sanders*, 147 Ky. 349, 144 S. W. 11; *Huddleston's Adm'r v. Straight Creek Coal & Coke Company*, 138 Ky. 506, 128 S. W. 589.

[3] In the present case the plaintiff was himself in charge of the vulcanizer by which he was injured. He himself had not only operated the lever several hundred times, but had operated it the very morning of, and a short time before, the accident. He admits that during all that time the lever operated all right, and he saw nothing wrong with it. In answer to the question, "And clear up to the moment the accident occurred, as you bore down on this weight, you noticed nothing wrong with the set screw or machine?" he said, "I knew there was nothing the matter with it." Not only so, but the uncontradicted evidence further shows that

the set screw may have become loosened by plaintiff's bearing down on the weight at the very time the accident occurred. Hence we have a case where the attending circumstances offered in evidence not only fail to show such a defective or unsafe condition of the machinery as would have been revealed by proper inspection, but tends strongly to establish the contrary. In our opinion, there was not sufficient evidence of negligence on the part of the defendant to take the case to the jury.

Judgment affirmed.

LAMPE v. CITY OF NEWPORT et al.
(Court of Appeals of Kentucky. Jan. 11, 1917.)

1. MUNICIPAL CORPORATIONS—§162(5)—OFFICERS—RIGHT TO SALARY.

Where the commissioner of a city accepted the office of city engineer, and entered upon the discharge of its duties, and another was elected his successor as commissioner, qualified as such, and was ready, able, and willing to perform the duties of the office, the city engineer was not entitled to draw salary as commissioner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 864; Dec. Dig. § 162(5).]

2. INJUNCTION—§88—RESTRAINING PAYMENT OF SALARY BY CITY OFFICIALS.

Where a city commissioner accepted the office of city engineer, and another was elected his successor as commissioner, and qualified as such, the latter could restrain the city officials from paying to the former commissioner, who vacated his office by accepting that of engineer, the salary attached to the office of commissioner.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 160; Dec. Dig. § 88.]

Petition by Fred H. J. Lampe against the City of Newport and others. On motion to dissolve a restraining order. Motion overruled.

George Veith and James O. Wright, both of Newport, for plaintiff. L. J. Crawford, of Newport, for defendants.

CARROLL, J. This case comes before me on a motion to dissolve a restraining order issued by the Judge of the Campbell circuit court on a petition filed in that court by Lampe against the city of Newport, Livingston as mayor, McCrea, Riesenbergh, and Ebert, as commissioners of the city, and Joseph G. Hermann, restraining the municipal authorities from paying to Hermann salary as commissioner of the city. The only record before me consists of the petition, and a general demurrer filed by the defendants that does not appear to have been disposed of by the court, and the restraining order granted by the court.

The petition charged, in substance, that at the regular election held in November, 1915, the defendant Livingston was elected to the office of mayor for a term of four years from and after the first Monday in January, 1916, and the defendants McCrea, Riesenbergh,

Ebert, and Hermann were elected to the offices of commissioner of said city for a term of two years from and after the first Monday in January, 1916, and that the said mayor and commissioners accepted the offices to which they were elected and entered upon the discharge of their duties thereof, and that all of them except Hermann are rightfully holding said offices.

It further charged that on the 27th of January, 1916, there was a vacancy in the office of engineer of the city of Bellevue, Campbell county, Ky., and upon that day the board of council of the said city by an election then and there duly held elected the said Hermann to fill said vacancy for two years from and after said date, and that on February 10, 1916, Hermann accepted the office of engineer for said city, and at once entered upon the discharge of the duties of the office, and has continued in said office and in the discharge of the duties of said office from said date continuously to the present time.

It was further averred that the office of commissioner for the city of Newport and the office of city engineer for the city of Bellevue are incompatible offices, and that Hermann, by accepting the office of city engineer for the city of Bellevue, vacated his office as commissioner for the city of Newport, and that from and after February 10, 1916, the office of commissioner for the city of Newport, theretofore held by Hermann, had been and was vacant until November 7, 1916, at which time, as averred, Lampe was duly and regularly elected to the office of commissioner of said city for the term ending January 8, 1918, in the place of Hermann, and that on the 11th day of November, 1916, he qualified as such commissioner in the manner required by law.

It was further averred that on November 14, 1916, Lampe demanded of Hermann the possession of the office, but that Hermann wrongfully refused to admit him to the possession of the office, and himself remained in the possession thereof.

It is also alleged that Hermann, after the election and qualification of Lampe, was usurping the office of commissioner to which Lampe was entitled, and that Hermann was claiming and receiving from the city of Newport the salary attached to the office without having any right thereto, as the same was due and payable to Lampe; that since November 7, 1916, Hermann has received of said salary, which is \$3,000 a year, \$191.67, and, unless enjoined and restrained, he will claim, take, and receive from the city the entire salary accruing during the pendency of this action and up until the 8th day of January, 1918.

After charging that Hermann was insolvent, the prayer of the petition was for a judgment against Hermann for \$191.67, and that the defendants, the city of Newport, the mayor, Livingston, and the commissioners,

McCrea, Riesenbergs and Ebert, be enjoined and restrained from paying to Hermann any money for or on account of salary or for services which Hermann may claim to have rendered the city as its commissioner after November 7, 1916. After this, on motion of the plaintiff, so much of the action as sought a personal judgment against Hermann for \$191.67 was discontinued, so that the only question is, Did the court commit error in restraining the city, the mayor, and the commissioners from paying to Hermann any money or salary for or on account of services which he may claim to have rendered the city as one of its commissioners, accruing after November 7, 1916?

[1] It is the contention of counsel for Hermann that, pending a contest over an office, the person who is in possession of the office and performing the duties thereof is entitled to the salary attached to the office, although it may finally be determined in the contest proceeding that he was not entitled to the office or to the salary belonging thereto. Whether this is so or not, I could not determine without going out of the record before me. True it was said on argument that there was a contest pending for this office between Lampe and Hermann, but there is nothing in the record before me indicating that there is such a contest. The only matter I am called on to decide is whether a municipal officer who has been legally elected to an office and has executed bond and taken the oath of office required by law, and who is able, ready, and willing to discharge the duties of the office, can enjoin the municipal authorities from paying the salary to which he is entitled to some person who has without right or authority, taken possession of the office, and to whom the municipal authorities, without right or authority, are paying the salary of the office. This is the case I have. On the record before me, Hermann having vacated his office, as was held in *Commonwealth v. Livingston*, 171 Ky. 52, 186 S. W. 916, and Lampe having been elected as his successor and qualified as such, and being ready, able, and willing to perform the duties of the office, Hermann is no more entitled to draw the salary than any stranger would be, and the city authorities have no right to pay to him any part of the salary attached to the office.

Counsel for Lampe call my attention to the cases of *Gorley v. City of Louisville*, 104 Ky. 372, 47 S. W. 263, 20 Ky. Law Rep. 602, *Nall v. Coulter*, 117 Ky. 747, 78 S. W. 1110, 25 Ky. Law Rep. 1891, 4 Ann. Cas. 671, *Bradley v. City of Georgetown*, 118 Ky. 735, 82 S. W. 303, 26 Ky. Law Rep. 614, *Dolan v. City of Louisville*, 142 Ky. 818, 135 S. W. 272, and *Kammerer v. City of Louisville*, 142 Ky. 848, 135 S. W. 411, in which it was, in effect, held that where municipal or other authority was paid to a de facto officer, who was performing the duties of the office, the salary to which the de jure officer was entitled, the

de jure officer cannot, when his title to the office has been determined, recover from the municipality or state, as the case may be, the salary that was paid to the de facto officer while he was discharging the duties of the office. But I think those cases are not applicable to the question before me. They proceed upon the theory that it is important that a public office be filled so that at all times persons may be found ready and competent to exercise the official powers and duties, and that if the disbursing officers could not pay the salary to the de facto officer in possession of the office, performing his duties, although it might be subsequently determined that he was not entitled to the office, it would work great embarrassment and confusion in the conduct of public affairs. These cases further hold that the remedy of the de jure officer in such a case is to proceed against the intruder for the recovery from him of his salary, when his right to the office is established. In all of these cases the suit was by the de jure officer to recover his salary that had theretofore been paid by the municipal authorities to the de facto officer; but here Lampe is not seeking to recover from the city a salary that has been paid to a de facto officer, but only to enjoin the city from paying the salary to a person who is usurping the office. If the city is enjoined from paying to this usurper the salary of the office, it will not cause any confusion or embarrassment in the administration of the affairs of the office, because under the averments of the petition Lampe has, at all times since his election and qualification, been ready to discharge the duties of the office. It would be a most extraordinary state of affairs if under such circumstances as appear in the record Lampe could not only be kept out of his office, but defeated in his right to the salary by the acts of an insolvent usurper.

Whether a person who was, in truth, entitled to an office, although kept out of the possession of it by a contest suit, pending which a de facto officer was discharging the duties of the office, could, pending the contest, restrain the payment of the salary to the de facto officer is a question not before me in this case, and one that I do not decide.

Illustrative cases, but not particularly pertinent here, on the question of the right of a de facto officer to the salary attached to the office, and the right of a de jure officer in respect thereto, are: *Eubank v. Montgomery County*, 127 Ky. 261, 105 S. W. 418, 32 Ky. Law Rep. 91, 128 Am. St. Rep. 340, 16 Ann. Cas. 483; *Stearns v. Sims*, 24 Okl. 623, 104 Pac. 44, 24 L. R. A. (N. S.) 475; *Commissioners of El Paso County v. Rohde*, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. Rep. 134; *Peterson v. Benson*, 38 Utah, 286, 112 Pac. 801, 32 L. R. A. (N. S.) 949, Ann. Cas. 1913B, 640; *State v. Carr*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am.

St. Rep. 163; and *State v. Milne*, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724.

[2] The motion to dissolve the injunction is overruled.

CHIEF JUSTICE SETTLE and Judges THOMAS and CLARKE heard this matter with me, and concur in the order made.

SOMERSET STAVE & LUMBER CO. v. BROWN.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. JUDGMENT — JUDGMENT NOT DECIDING ISSUES.

Judgment in a suit involving mutual accounts, which decided neither the case presented by the petition nor the case shown by the counterclaim, was *prima facie* erroneous.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. ¶5.]

2. CORPORATIONS — CHANGE IN OWNERSHIP OF STOCK — EFFECT.

The fact that the ownership of a corporation's stock changed did not affect its corporate existence or its rights under a contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 529, 532, 534, 536; Dec. Dig. ¶143.]

3. ACCOUNT, ACTION ON — CASH ITEM — BURDEN OF PROOF.

In a suit for a balance due, involving mutual accounts, plaintiffs having advanced money to defendant to enable him to manufacture barrel staves for plaintiffs, the burden was on plaintiffs to establish a cash item charged against defendant.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. ¶7.]

4. CONTRACTS — PERFORMANCE BY DEFENDANT — BURDEN OF PROOF.

In an action to recover a balance due against defendant, to whom plaintiffs advanced money to enable him to manufacture barrel staves for them, defendant claiming that he furnished more staves than he was credited with, the burden was upon him to sustain his claim that plaintiffs received a number of staves in dispute, or that they were merchantable staves called for by the contract, and such as plaintiffs were required to accept.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1465, 1754, 1772; Dec. Dig. ¶322(1).]

Appeal from Circuit Court, Harlan County.

Action by the Somerset Stave & Lumber Company and others against H. C. Brown, transferred on defendant's motion to the equity docket. From a judgment dismissing the petition and defendant's counterclaim, and giving defendant judgment for his costs, plaintiff named appeals. Judgment reversed, with instructions to enter judgment as indicated.

J. S. Forester, of Harlan, for appellant. Clay & Carter, of Harlan, for appellee.

MILLER, J. By a written contract dated September 21, 1912, the appellee, H. C. Brown, agreed to manufacture into sawed whisky and oil staves for the appellant, the

Somerset Stave & Lumber Company, a certain boundary of white oak timber in Bell county, Ky., about nine miles from Miracle. The contract further provided that the Somerset Stave & Lumber Company was to furnish Brown a stave saw rig complete at Miracle for the purpose of sawing the staves; Brown to furnish his own power and set up and operate the mill at his own expense. The contract further provided that the Somerset Stave & Lumber Company should advance Brown sufficient money to enable him to set up and operate the mill and deliver the staves to the railroad at Miracle, and was to pay Brown \$57.50 per thousand for the prime whisky staves of certain specified sizes. All the second class and oil staves manufactured from said timber were to be sold at the best advantage to both parties, and the amount realized from such sale to be credited to Brown's account.

The Somerset Stave & Lumber Company furnished the stave rig complete at Miracle, as contemplated by the contract. Shortly after the contract was made J. S. Cooper and C. L. Tarter, the stockholders of the Somerset Stave & Lumber Company organized a partnership business under the trade-name of the Crescent Stave Company, which bought the stock and property of the Somerset Stave & Lumber Company, including its rights under the contract with Brown.

On March 24, 1914, the Somerset Stave & Lumber Company, the Crescent Stave Company, and J. S. Cooper and C. L. Tarter filed their petition, alleging that they had furnished to Brown, and upon his order and request, pursuant to said contract, cash amounting to \$3,092.24, and had received from the sale of 82,509 staves furnished to them by Brown the sum of \$2,464.77, leaving a balance of \$627.47 due the plaintiffs.

By his answer and counterclaim Brown admitted he had received in cash \$3,049, and by way of counterclaim he claimed: (1) That he had delivered 105,505 whisky staves of the value of \$3,153.16; (2) that he had delivered 1,159 No. 1 (extra) staves at \$49.50 per thousand, aggregating \$57.37; (3) that he had delivered 2,192 (extra) oil staves at \$17 per thousand, aggregating \$37.26; (4) that he had worked four days for the plaintiffs at \$3 per day, aggregating \$12; and (5) that he had furnished plaintiffs with bolts of the cash value of \$5—making a total claimed credit of \$3,264.79, and leaving a balance of \$215.79 due him on his counterclaim.

Upon the motion of the defendant the action was transferred to the equity docket. Fourteen depositions were taken, containing 29 exhibits, made up principally of accounts of sales of lumber and bills paid by one or other of the parties.

It will thus be seen that the plaintiffs sued for a balance of \$627.47, while the defendant counterclaimed for a balance due him of \$215.79.

[1] When the case came on for hearing, the court entered a judgment reciting that, as neither the plaintiffs nor the defendant had shown themselves entitled to the relief sought, it dismissed the petition and the counterclaim, and gave Brown judgment for his costs. From that judgment the plaintiffs prosecute this appeal. The judgment is *prima facie* erroneous, since it decided neither the case presented by the petition nor the case shown by the counterclaim.

1. By an amended answer Brown alleged that Cooper and Tarter had performed the acts stated in the petition as partners under the name and style of the Crescent Stave Company, without having filed in the office of the county clerk of Bell county, or any other county, a certificate or writing setting forth the name under which said business was conducted or transacted, accompanied by the true or real names of the partners Cooper and Tarter, as is required by section 199b of the Kentucky Statutes; and he relied upon that failure as a bar to their right to maintain this action in the name of the Crescent Stave Company.

The reply to the amended answer traversed the material allegations of that pleading, and admitted that about February 19, 1913, Cooper and Tarter bought all the stock of the Somerset Stave & Lumber Company, and alleged that they had carried out the contract in the name of said corporation.

The reply further alleged that the partnership firm known as the Crescent Stave Company had been organized by Cooper and Tarter on February 19, 1913, for the purpose of carrying on business in Pulaski, Perry, Harlan and other counties, with its principal place of business at Harlan, in Harlan county, Ky., and that on said day they had made out the certificate required by section 199b of the Kentucky Statutes, and had executed and delivered the same to the county clerk of Harlan county, who had duly filed it in his office on that day. And the reply further alleged that the contract was carried out by the plaintiffs in every respect in the name of the Somerset Stave & Lumber Company, which was in active existence at all times from the date of said contract until after the transactions with the defendant, Brown, were closed in 1913. The rejoinder traversed the reply.

Appellee relies upon *Hunter v. Big Four Auto Co.*, 162 Ky. 778, 173 S. W. 120, L. R. A. 1915D, 987, as authority for his position that the Crescent Stave Company cannot maintain this suit. The statute has, however, no application to this case. The contract was made on September 21, 1912, and this action was brought jointly in the name of the Somerset Stave & Lumber Company, the Crescent Stave Company, and J. S. Cooper and C. L. Tarter, as plaintiffs.

[2] The proof shows that the Somerset Stave & Lumber Company remained in exist-

ence throughout the period covered by the execution of this contract, and that the contract was made and executed by it. The fact that the ownership of its stock changed did not affect its corporate existence or its rights under the contract. The plea was properly disregarded.

2. Upon the merits, the appellant states its account against Brown as follows:

To cash furnished \$3,092.24
Credited by proceeds of 7 carloads aggregating 82,509 staves..... 2,464.77

Balance claimed by appellant....\$ 627.47

Brown, however, states the account as follows:

To cash received	\$3,049.00	
(1) By 109,505 staves as per contract	\$3,153.16	
(2) By 1,159 other No. 1 staves	57.37	
(3) By 2, 192 other oil staves	37.26	
(4) " 4 days labor (\$3.00)	12.00	
(5) " bolts furnished ...	5.00	3,264.79

Balance claimed by Brown \$ 215.79

The disputed items are as follows:

- A. Overcharges of cash.
- B. Number of staves; 82,509 or 105,505?
- C. Second and third items of counterclaim, \$94.63.
- D. The fourth and fifth items, aggregating \$17.00.

Of these in their order.

A. The first alleged overcharge in cash relates to \$59.65 paid by appellants to Nunely, Brown's lawyer. While the payment is not disputed, Brown insists he owed Nunely only \$39.70, and the excess of \$19.95 was unwarranted and is not a proper charge against him. Appellants concede that a part of this \$19.95 was expended by Nunely on a trip undertaken, in part at least, upon their business. In the absence of any proof as to what part was so expended, and in view of Brown's explicit account showing his indebtedness to Nunely, and his seven payments thereon, this claim by Brown will be sustained.

The second item, \$13.30, was paid by appellants for a covering for their sawmill, and is conceded in the brief to be an improper charge against Brown.

The same ruling is made as to the third item of 75 cents.

[3] The fourth item of \$9.24 cash charged against Brown is not sustained by the proof. Cain says this money was furnished to Brown, and Brown denies it. The burden being upon the plaintiffs to establish the charge, it must be denied under the proof.

Under this head Brown is given an aggregate credit of \$43.24.

B. The question as to the number of staves delivered by Brown is more difficult of solution. Under the contract appellants bought the first-class staves, but all other staves were to be sold and credited to Brown's account. The appellants bought and paid for

three carloads of No. 1 staves, and Brown loaded and shipped four carloads of second-class staves which were sold in Chicago, New York, and Cincinnati. There is no claim that the purchase price of these four carloads was not credited in full to Brown's account; that is shown and conceded.

The difference arises over 22,996 staves which Brown insists he delivered at Miracle in excess of the quantity credited by appellants. While Brown's statement of the number of staves delivered at Miracle is, in the main, sustained by the testimony of his brother, both statements are, in a measure, based upon estimates. The culls were arbitrarily estimated at 4,000. But, if it should be conceded that Brown's gross estimate of 109,505 staves, less 4,000 culls, is the correct number of staves delivered by him at Miracle, there is no proof that any portion of these disputed 22,996 staves were merchantable, or that they were received or sold by appellants. On the contrary, the proof shows they received only the staves for which they have given Brown credit. Davis, a witness for Brown, testified that there were 15,000 culls still remaining on the millyard at the time he testified.

[4] In short, the burden is upon Brown to sustain his claim that appellants received these 22,996 disputed staves, or that they were merchantable staves called for by the contract, and such as appellants were required to accept. But this he has wholly failed to show. Moreover, since all second-class staves were to be sold and credited to Brown's account, it was his duty, equally with appellants, to see that they were sold to the best advantage. The contract did not require the appellants to sell these second-class staves; and Brown fulfilled his own obligation in that respect, by loading and shipping three of the four carloads of second-class staves above referred to.

For failure to sustain his claim by proof, Brown will not be allowed any credit upon this item.

C. The second and third items, aggregating \$94.63, are claimed as credits by Brown for extra staves sold by him to appellants, and not included in the credit of 82,509 staves. The proof, however, clearly shows that these staves had been sold by the Wilsons and Miracle to Brown, but that upon Brown's refusal or failure to take them they were sold to the appellants, and that they have paid the Wilsons and Miracle for them. Brown therefore is not entitled to any credit upon these items of his counterclaim.

D. The fourth and fifth items, aggregating \$17, are conceded by appellants, and will be allowed.

The appellee will therefore be allowed the following credits upon his counterclaim:

A. Cash overcharges \$43.24
D. Items 4 and 5, supra 17.00

Total credits \$60.24

Deducting this sum of \$60.24 from \$627.47, there remains \$567.23, for which appellants may have judgment.

Judgment reversed, with instructions to enter a judgment as above indicated.

BURNS v. BURNS.

(Court of Appeals of Kentucky. Jan. 9, 1917.)

1. DIVORCE — 27(1) — CRUELTY—WHAT CONSTITUTES.

There is no settled rule as to what is necessary to show behavior of such a cruel and inhuman nature as to indicate a husband's settled aversion toward his wife, except that his behavior need not be brutal or violent.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62, 76, 81, 82; Dec. Dig. — 27(1).]

2. DIVORCE — 286 — APPEAL—JURISDICTION.

The Supreme Court has no authority to disturb a judgment for divorce granted by the trial court, and, on appeal, can only determine whether the court, under the proof, properly adjudged alimony to the plaintiff.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. — 286.]

3. DIVORCE — 286 — APPEAL—ALIMONY—REVIEW OF FACTS.

Under Ky. St. § 2121, authorizing the court to render a divorce from bed and board, not only for the statutory causes of divorce, but for such other cause as in its discretion it may deem sufficient, and where the evidence is such as would have justified a decree a mensa, the facts may be looked into upon the question of the allowance of alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. — 286.]

4. DIVORCE — 38 — GROUNDS — STATUTE — "OTHER CAUSE."

Under Ky. St. § 2121, authorizing the court to render a divorce from bed and board for the statutory causes of divorce and also "for such other cause as the court, in its discretion, may deem sufficient," the "other cause" is one which in severity rises above the ordinary, common, and trivial disputes and differences occurring between husband and wife, and falls below conduct such as to furnish cause for an absolute divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 189; Dec. Dig. — 38.]

For other definitions, see Words and Phrases, First and Second Series, Other.]

5. DIVORCE — 124 — GROUNDS — "OTHER CAUSE"—SUFFICIENCY OF EVIDENCE.

Evidence in a suit for absolute divorce held to show the existence of a cause other than the statutory grounds for divorce, authorizing the court in its discretion to grant alimony to plaintiff upon an absolute divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 392-398, 450, 455, 456; Dec. Dig. — 124.]

6. DIVORCE — 240(2) — ALIMONY—AMOUNT.

In a wife's suit for absolute divorce and for alimony, where it appeared that the husband and wife at their marriage possessed property valued at over \$3,500 to \$4,000 and that during their married life it had increased to \$18,000 above all indebtedness, a great bulk of which was either in cash or notes to which increase the wife had greatly contributed, she was entitled to alimony in the sum of \$4,000; the amount of alimony not being limited except by the court's sound discretion and by exact

justice and equity between the parties under the circumstances.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 676, 680; Dec. Dig. — 240(2).]

7. DIVORCE — 252 — PERSONAL PROPERTY — DISTRIBUTION.

In such suit an organ, a sewing machine, a number of rugs, and other household furniture purchased by the wife out of her own means should be adjudged to her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. — 252.]

8. DIVORCE — 227(1) — ALLOWANCES—COUNSEL FEE.

In a wife's suit for absolute divorce and for alimony and to recover certain personal property, etc., not presenting any difficult legal question nor requiring an unreasonable time in taking the proof, the allowance of an attorney's fee of \$300 to the wife was sufficient.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 653; Dec. Dig. — 227(1).]

Appeal from Circuit Court, Robertson County.

Suit by Iva D. Burns against J. S. Burns for an absolute divorce and for alimony, and for an amount alleged to be due her under a written contract entered into between them, and to recover certain articles of personal property. Judgment for plaintiff, granting an absolute divorce and awarding her alimony and certain property, and dismissing the petition as to all other relief prayed for, and defendant appeals, and plaintiff cross-appeals. Affirmed upon the appeal, and reversed upon the cross-appeal with directions to modify the judgment.

R. L. Northington, of Mt. Olivet, Jno. P. McCartney, of Flemingsburg, Robert Buckler, of Mt. Olivet, and Worthington, Cochran & Browning, of Maysville, for appellant. M. O. Swinford, of Cynthiana, for appellee.

THOMAS, J. The appellee, to whom we shall refer as plaintiff, filed her suit in the court below against appellant, to whom we shall refer as defendant, seeking from him an absolute divorce from their bonds of matrimony, and to recover from him the sum of \$4,000 alimony, and the further sum of \$1,500, alleged to be due her under a written contract entered into between them on November 6, 1911, and some further items for money which she claims to have advanced to her husband from time to time during their married life. She furthermore sought to recover and have restored to her the following articles of personal property, which she claimed to have purchased and placed in the home with her own means: One Davis sewing machine, one organ, five rugs, a bed, a washstand, six rockers, a dining room safe, and hall tree. She furthermore claimed that she had purchased several other articles for the home, but they are neither specified in the petition nor, so far as we are able to discover, in the proof. The grounds alleged in the petition for the divorce which she seeks by the petition and the amendment

thereto are (1) habitually behaving toward her by her husband for a period not less than six months in such cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness; and (2) living in adultery with another woman. The trial court granted to the plaintiff an absolute divorce, and adjudged to her alimony in the sum of \$3,500, and restored to her the organ, but dismissed the petition as to all other relief prayed for, and from that judgment the defendant prosecutes this appeal and the plaintiff has procured a cross-appeal in this court.

The questions presented are ones purely of fact to be gathered from the testimony in the record, with the application of the rules of law prevailing in this state in such cases. A brief statement of the facts shown by the record will be necessary to a proper understanding and adjustment of the unfortunate differences that have arisen between this husband and wife.

They were married in 1895 in Kenton-town, Ky., near where the husband lived with his mother on a farm valued at about \$4,000. At that time he was about 30 years of age, and his bride only 15 years of age. After living at this place some few years, another farm was purchased near Sardis, in Mason county to which the couple removed, and where they resided until the early part of the year 1915, when that farm was sold for \$16,700, about half of which was paid in cash, and the other in deferred payments. After the sale of the farm they moved to the town of Sardis, where they resided until the separation occurred.

Aside from cultivating the farm, for a number of years the defendant had been engaged in operating a team between the cities of Maysville and Mt. Olivet, with which he hauled freight to and fro between said places and also for intervening points. This character of work necessarily kept him away from home a considerable portion of the time, and frequently at night. Most of the times when he would be absent, including at night, his wife would be alone in the home, and this, from time to time, caused protests to be made by her, and a naturally expressed desire that this feature of her husband's business be abandoned, which, however, was never done.

The plaintiff was notified before her marriage that her prospective husband's mother would be expected to live with them as a member of the household, to which arrangement she agreed. From some cause not shown by the record, disagreements arose between the plaintiff and the mother-in-law, resulting in the latter taking up her abode with another son after some seven or eight months following the marriage.

The defendant is shown to have been an industrious, economical, and steady worker, but he was addicted to the habit of an occa-

sional use of liquor up until some few years immediately preceding August 21, 1911, after which time, and until the latter date, he consumed it in excessive quantities. This became so prevalent and common that on the day mentioned his wife left him and remained away until November 6, 1911, at which time, through the intercession of friends, the parties became reconciled and agreed to terms which were embodied in a written contract that day executed. The only stipulation of that contract with which we have any concern in this case is that providing that the husband would abstain from the use of intoxicants forever afterward "whilst they lived together as husband and wife," and if he should fail to do so he would pay to his wife the sum of \$1,500, for which he executed to her his note with the foregoing condition contained therein. He was then treated for inebriety, and so far as the proof is concerned, he scrupulously observed his promise as long as he and his wife lived together. So without having to refer to this point again, and waiving the question as to whether this is such an obligation as may be enforced in law, the judgment appealed from in so far as it denied a recovery of the \$1,500 is undeniably correct, and we will make no further reference to it, except to say that in that contract the defendant admitted that:

"His wife was legally justified in leaving him, and that she so left him because of first party's excessive use of liquors and his consequent acts of wrong treatment of her growing out of the same; that their lives were happy at all times save by the use of liquor by the first party."

There were no children born of the marriage. It is shown without contradiction that the plaintiff was a most industrious and painstaking wife. She is shown to have constantly had in mind, even to an exceptional degree, the fulfilling of the requirements which might be expected of a faithful, assisting, and economical helpmeet. She did, almost without help, all the household duties, including the cooking, and a large part of the washing. Sometimes when her husband was away she would attend to the stock on the farm, and she busied herself year after year raising poultry of different kinds, selling eggs and butter, from the proceeds of all of which she clothed herself and furnished a large portion of the clothing for her husband. Not only so, but from this source she furnished to him from time to time different sums of money as he would request, the largest amount at any one time being \$80, and ranging from that on down to a paltry sum. From this same source, also, she purchased the organ and articles of personal property before mentioned, which she asked to be restored to her in this case. Her husband, although a man of good standing, and, so far as we can detect, an honorable, upright citizen, having filled the office of sheriff of his county, was lacking in his full, congenial

affections so much necessary in a husband for the happiness of his wife. While in a way, and according to his manner, he appeared to be kind, still this was tempered with a noticeable coolness and indifference which chilled the glow of the family fireside, and while he was what is known in common parlance as "a good provider," he was not a scatterer of sunshine in the pathway of his wife. He may not be to blame for this, as such conduct is frequently the outgrowth of a disposition for which the possessor is not responsible. For instance, he would not go with his wife to church, although she seems to have desired this and was a regular attendant herself. The only public gathering which the record discloses that he ever attended with her was the funeral of a neighbor, occurring a year or more before the separation. He would seldom visit her people, and manifested indifference as to whether they visited his house. Yet in all his conduct toward his wife, except that to which we shall hereafter refer, we find nothing smacking of the dishonorable, or subject to legal criticism.

Along in the fall of 1912 the defendant began visiting the home of James Browning, who was a tenant upon a neighboring farm, which visits he claimed were for the purpose of securing Browning as a tenant on his farm. Finally this was accomplished, and Browning and his wife, Amy Browning, moved into a house upon the defendant's farm, and continued to live there until it was sold.

The proof shows that before Browning and wife, the latter of whom is about 30 years of age, moved to the defendant's premises, his visits there would be frequent and sometimes lasting more than an hour, and at times when the husband of Amy Browning would be away. At one time, it was shown by witnesses, during such visit by the defendant, the door was closed and the blinds to the windows down. After Browning and wife had moved to defendant's farm he would frequently visit their house, and would be found talking to Mrs. Browning on the back porch, sometimes sitting close together, and at least upon one occasion procured Mrs. Browning to make a covering for a plant bed without having previously asked his wife to do so. At another time, when defendant was killing hogs, he and Mrs. Browning were found in a house or cabin near by, talking to each other, while the plaintiff and Mr. Browning looked after matters growing out of the hog killing. On a number of occasions Mrs. Browning would take drives with the defendant in his buggy, and at one time rode upon his wagon, which, as we remember, was loaded with logs at the time. The year before the separation Mrs. Browning gave birth to a male child, which she named James Burns Browning. She, however, explains that she did this because she was very friendly towards both members of the Burns family. Some time before the separation the de-

fendant purchased a house and lot in the town of Sardis, which he permitted the parents of Mrs. Browning to occupy, and after his wife went away in May, 1915, he went to the Brownings to board, and subsequently moved them into his own house in Sardis, where they were living at the time of the judgment.

On the 5th day of May, 1915, the plaintiff received word that her mother was seriously ill at Cynthiana, Ky. She immediately went there, and found her mother in a hospital, and she remained with her until she died, some 15 or 20 days later, and never returned to her husband, filing this suit a short while thereafter. She claims some of the circumstances which we have related as to the conduct of defendant with Mrs. Browning were not learned by her until after she went to her mother's bedside.

A few days before the plaintiff left her home the defendant went on a trip to Ashland, Ky., for the purpose of seeing about some timber land which he either had bought or was expecting to buy, to which his wife seriously objected, because, as she claims, she had learned that if the purchase was made it would necessitate her husband spending most of his time for at least a considerable while away from home looking after the enterprise, and that he expected to carry along with him Mr. and Mrs. Browning, this being one of the most serious causes of complaint on the part of the wife.

There are many other minor circumstances, more or less suspicious in their nature, a recitation of which would lengthen this opinion beyond proper limits.

[1] As to what is necessary to show behavior of such a cruel and inhuman nature as to indicate a settled aversion on the part of the husband towards his wife, there is no settled rule, except that the behavior need not rise to the point of brutality. Many times the behavior is such, though not violent and perhaps not intended, as to amount to almost serious cruelty because of the natural effect it may be calculated to produce upon the happiness of a loyal, affectionate, and true wife. It is equally true that the law, out of regard for the frailties of humanity, will not so magnify trivial differences and disputes as to sever the bonds of matrimony, or even decree separation from bed and board therefor. It is the cases coming between these two classes that give the courts the greatest difficulty.

[2] Whether in this case the almost continued attentions of the defendant to Mrs. Browning and the many suspicious circumstances connected therewith are sufficient to establish the grounds of divorce alleged of his living in adultery we do not feel called upon to determine, inasmuch as we are not authorized to disturb the judgment of divorce granted by the trial court. The only authority we have on this appeal is to deter-

mine whether the court under the proof properly adjudged to the plaintiff alimony.

[3] Both by statute (section 2121, Kentucky Statutes) and numerous decisions of this court, if the evidence is such as to have justified a decree a mensa, the facts may be looked into upon the question of the allowance of alimony. *McClintock v. McClintock*, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127; *Freeman v. Freeman*, 11 Ky. Law Rep. 824, 13 S. W. 246; *Tilton v. Tilton*, 16 Ky. Law Rep. 538, 29 S. W. 290; *Zumbiel v. Zumbiel*, 113 Ky. 841, 69 S. W. 708, 24 Ky. Law Rep. 590, and cases therein referred to.

[4, 5] By section of the statute, supra, the court is justified in rendering the divorce from bed and board, not only for the statutory causes for divorce, but "for such other cause as the court in its discretion may deem sufficient." So, for the purpose of determining the questions before us on this appeal, it is only necessary to inquire whether the record presents "such other cause as the court in its discretion" may have been justified in granting alimony to plaintiff. Manifestly the "other cause" mentioned in the statute is one which in severity rises above the ordinary, common, and trivial disputes and differences frequently occurring between husband and wife and falling below conduct such as to furnish cause for an absolute divorce. So the question is, Do the facts of this record show such "other cause" to exist? As we have seen, there is no evidence of any actually adulterous conduct between the defendant and Mrs. Browning, but there are undoubtedly many suspicious facts and much room for conjecture. All of this was practiced by the defendant openly before the wife, and over her protest. Upon a meeting which was had, and which had been called for the purpose of discussing this matter, defendant admitted, in the presence of his brother and some neighbors, that he had been visiting the house of the Brownings and had been in the company of Mrs. Browning too much, and that he would thereafter, to use his own language, "wean off." He gave as his excuse for not quitting immediately that if he did so, it would make her mad, and perhaps result in her husband leaving him, thus depriving him of a valuable and useful work hand.

While for the sake of argument it might be said that these acts did not amount to such cruelty or behavior on his part as to justify an absolute divorce for the first ground relied upon, and that it was not sufficient to establish the second one relied upon, still we are firmly of the opinion that his conduct, in apparent disregard of his wife's wishes, and with a knowledge on his part of the effect it was having upon her, abundantly justified the separation of the two from bed and board, and the allowance of alimony to the wife. A proper respect for the feelings of his wife and her happiness, and a due regard for the marital relation, would

have admonished him: First, to refrain from engaging in his questionable attentions to Mrs. Browning and repeated seeking of her company; and, second, to immediately and willingly cease them upon his wife's tearful and pleading protest. Circumstances even less guilty in their nature have been determined by this court sufficient for the granting of a divorce a mensa, followed by alimony, as will be seen from the authorities, supra, and from which we do not deem it necessary to quote. We, therefore, conclude that the court committed no error in allowing to the plaintiff alimony.

[6] This brings us to the question as to the amount of alimony, which was fixed, as stated, in the sum of \$3,500, and which the appellant seeks to have denied in toto, or, if not, to have it reduced, but which the plaintiff, by cross-appeal, seeks to have increased. We have heretofore discussed the industry, thrift, and other characteristics of the plaintiff, and have also observed that all of the property possessed by the two at the time of the marriage was between \$3,500 and \$4,000. Without going into detail, the proof shows conclusively, to our minds, that the defendant now has at least \$16,000, or perhaps \$18,500, above all indebtedness, the great bulk of which is either cash or cash notes. The fruits of the union, then, so far as gathering together this world's goods, has been the accumulation of between \$12,000 and \$12,500, in which the wife was as faithful and as serviceable as was the husband. She has no property of her own. Her husband is yet comparatively young, strong, healthy, and vigorous. She has been granted an absolute divorce, and is not qualified educationally to do many things in which she might otherwise engage. The best part of her life has been spent in an effort to accumulate a fund for herself and husband when the "rainy day" arrived. In the amount of alimony that should be allowed there is no other limitation fixed by the law except that the court should be governed by a sound judicial discretion. This is but another name for exact justice and equity between parties under the precise circumstances presented. It is extremely doubtful that the defendant would have been enabled to add to his estate, without the assistance and co-operation of the plaintiff, anything approaching the amount he did, and it would be a harsh rule that would permit him, upon separation brought about by his conduct, to unduly share in the accumulations of their joint efforts during the marriage. In many instances, and under facts less appealing, this court has allowed to the wife as much, and sometimes more than one-third of the husband's estate. *McClintock v. McClintock*, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127; *Duval v. Duval*, 147 Ky. 427, 144 S. W. 78; *Shehan v. Shehan*, 152 Ky. 191, 153 S. W. 243; *Day v. Day*, 168 Ky. 68, 181 S. W. 937;

Pemberton v. Pemberton, 169 Ky. 476, 184 S. W. 378, and authorities therein cited.

If we should deduct the amount of property which the defendant had upon marriage, he will then have something like \$12,500, and we think that both justice and equity dictate that it would be nothing short of extreme fairness to allow the wife as much as one-third of the property representing the accumulations during their married life, which in this case would be more than \$4,000, the amount which she claimed. We, therefore, conclude that she should have been allowed \$4,000, instead of \$3,500, as alimony.

We would not be understood as fixing an inflexible rule as to the proportion of the husband's property that should be adjudged to the wife as alimony in all cases, but confine the opinion to the particular facts of this case as contained in the record.

[7] The court, by its judgment, restored to the plaintiff the organ, but declined to adjudge to her the other articles of personal property hereinbefore named and purchased by her in the manner stated. We are inclined to disagree with the court, and to adjudge that she is entitled to the articles mentioned.

[8] The plaintiff was allowed \$300 as attorney fee, which she seeks to have increased by her cross-appeal. While the evidence is somewhat lengthy, there is not shown to be any difficult legal questions, and with the proof taken in the manner shown by the record (which was by shorthand), the time required to take it was not unreasonably long. So, under the circumstances, we are inclined to the belief that the allowed fee was sufficient, and the judgment in this particular will not be disturbed.

Wherefore the judgment is affirmed upon the appeal, and reversed upon the cross-appeal, with directions to modify the judgment as herein indicated.

BURDINE v. WHITE et al.

(Court of Appeals of Kentucky. Jan. 11, 1917.)

1. NOTICE \S 1—DEFINITION.

Notice may be defined generally as that which imparts information of the fact to the one to be notified, and is divided by the law into several classes, such as actual, constructive, implied, and presumptive notice, while actual notice is susceptible of subdivisions, such as information, which of itself gives actual notification, and that which, if prosecuted with ordinary diligence, would furnish information of the fact.

[Ed. Note.—For other cases, see Notice, Dec. Dig. \S 1.

For other definitions, see Words and Phrases, First and Second Series, Notice.]

2. GARNISHMENT \S 93—FUND IN COURT—SUFFICIENCY OF NOTICE—STATUTE—"NOTICE SPECIFYING THE FUND."

Civ. Code Prac. \S 207, provides that if the property to be attached be a fund in court, the attachment shall be executed by leaving with

the clerk of the court a copy thereof, with a notice specifying the fund. A suit was filed in the circuit court to sell land belonging to a decedent, jointly owned by his heirs, for division among them, judgment ordering the sale was rendered, and the land ordered sold by the master commissioner, who did so, and took the bonds of the purchaser and reported the sale, which was confirmed. A judgment creditor of heirs entitled to participate in the proceeds served an order of attachment on the clerk of the circuit court, specifying the property of the defendants, * * * as that in the hands of the clerk and the administrator of the deceased ancestor of defendants going to or belonging to the said defendants. No intervening rights appeared, and there was no property in the court, except the fund sought to be reached, in which the defendants in the attachment were interested. The order of attachment summoned the administrator of decedent likewise as a garnishee. *Held*, that the requirement of section 207, as to specifying the fund attached, was sufficiently complied with.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 160, 174-180; Dec. Dig. \S 93.]

3. GARNISHMENT \S 93—FUND IN COURT—SEPARATE NOTICE—STATUTE.

Under Civ. Code Prac. \S 207, providing that if the property to be attached be a fund in court, the attachment shall be executed by leaving with the clerk of the court a copy thereof, with a notice specifying the fund, the notice need not be separate and apart from the order of attachment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 160, 174-180; Dec. Dig. \S 93.]

4. STATUTES \S 181(1)—CONSTRUCTION—LEGISLATIVE INTENT.

In construing a statute, the intention and purpose of the lawmaking body that enacted it will be looked to.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 259; Dec. Dig. \S 181(1).]

5. GARNISHMENT \S 58—PROPERTY IN CUSTODIA LEGIS—STATUTORY AUTHORITY.

Without statutory authority, property in custodia legis cannot be reached by garnishment proceedings.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 113; Dec. Dig. \S 58.]

6. GARNISHMENT \S 59—"FUND IN COURT"—STATUTE.

Suit was filed to sell realty which belonged to a decedent for the purpose of division among his heirs, judgment ordering the sale was rendered, and the master commissioner sold the land and took the bonds of the purchaser for the price and reported the sale, which was confirmed. *Held*, that the sale bonds, not due, or, if due, not collected, constituted a "fund in court" which could be reached by a judgment creditor of some of the heirs under Civ. Code Prac. \S 207, providing that if the property to be attached be a fund in court, the attachment shall be executed by leaving with the clerk of the court a copy thereof, with a notice specifying the fund.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 114; Dec. Dig. \S 59.]

Appeal from Circuit Court, Madison County.

Suit by George Burdine against Roy C. White and another. The attachment served on White, as clerk of the Madison circuit court, was quashed on his motion and the attachment discharged, and plaintiff moves for an appeal. Motion for appeal sustained,

appeal granted, and judgment reversed for proceedings consistent with the opinion.

Chenault, Wallace & Wallace, of Richmond, for appellant. John Noland and G. Murray Smith, both of Richmond, for appellees.

THOMAS, J. The appellant, and plaintiff below, George W. Burdine, recovered a judgment in an Illinois court against R. C. and J. M. Stapp for the sum of \$627 and cost, which was entirely unsatisfied on January 13, 1915, when this suit was filed. On September 14, 1914, a suit styled Richard Kanatzar's Heirs v. Richard Kanatzar's Heirs was filed in the Madison circuit court for the purpose of selling land which belonged to the decedent, Richard Kanatzar, jointly owned by his heirs, for the purpose of division among them. A judgment, ordering the sale of the land, was rendered in that case on October 8, 1914, and the land ordered to be sold by the master commissioner, who sold it on the 28th day of November, 1914, for the sum of \$8,919.45, for which sum he took the bonds of the purchaser and reported the sale, which was confirmed. The defendants in the Illinois judgment were heirs of Richard Kanatzar, and entitled to participate in the proceeds of the land sold under the judgment of the Madison circuit court to the extent of $\frac{1}{21}$ part thereof, which made their combined interest, after the payment of costs, the sum of \$395. The purpose of this suit was to attach their interest in the proceeds of the land. Proper allegations were made in the petition for the procuring of an attachment, and the clerk of the Madison circuit court, who is the appellee Roy C. White was made a defendant to the suit, and served with summons, as well as with an order of the attachment, as provided by section 207 of the Civil Code of Practice. In addition to the usual allegations setting up plaintiff's cause of action, the facts hereinbefore recited, pointing out the fund sought to be reached, were made in the petition. James L. Kanatzar, administrator of Richard Kanatzar, was also summoned as a garnishee, but that branch of the suit, seeking to reach funds in his hands, is not before us on this appeal.

The appellee White, clerk of the Madison circuit court, entered a motion to quash the attachment so far as he was concerned, or rather so far as it sought to reach any of the proceeds of the sale of the land, upon the ground that that provision of section 207, supra, saying "With a notice specifying the fund," had not been complied with by the officer who served the attachment, which motion was sustained, and the attachment served upon the clerk, having for its object the purpose stated, was quashed and the attachment discharged. The plaintiff has filed a transcript of the record in this court, and entered motion for an appeal. Omitting the style of the case, the name in which the attachment runs, the direction to the officer,

and the signature, the copy served upon the clerk reads:

"You are commanded to attach and safely keep the property of the defendants, R. C. Stapp and J. M. Stapp (especially that in the hands of Roy C. White, clerk of the Madison circuit court, and Jas. L. Kanatzar, as administrator of Richard Kanatzar, deceased, going to or belonging to the said R. C. Stapp and J. M. Stapp) in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff in the action, George W. Burdine, against R. C. Stapp etc., for \$634.90, with 6 per cent. interest, December 9, 1914, and \$30 for the cost thereof; and to summon the garnishees, Roy C. White, clerk Madison circuit court, and Jas. L. Kanatzar, as administrator of Richard Kanatzar, deceased, to answer in this action on the 1st day of the next February term of the Madison circuit court; and you will make due return of this order on that day.

"Witness Roy C. White, clerk of said court, this 13th day of January, 1915."

There was a written response filed to the motion made by the clerk to quash the attachment in which it appears that the defendants in the Illinois judgment were interested in no other property in the custody of the clerk except their interest as heirs in the Kanatzar suit. It was furthermore shown by the response that the clerk was notified, upon the occasion of the filing of the petition and the issuing of the attachment, of the precise fund sought to be reached; but as this was an oral notification, its sufficiency is questioned, and according to our view, it is not deemed necessary to determine the question thus raised. A demurrer to this response was sustained, followed by the judgment, supra.

It will be seen that in the face of the order of attachment there is this sentence:

"Especially that in the hands of Roy C. White, clerk of the Madison circuit court, and James L. Kanatzar, as administrator of Richard Kanatzar, deceased, going to or belonging to the said R. C. Stapp and J. M. Stapp."

There are no intervening rights of third parties involved. The question, then, is, was the requirement as to specifying the fund as provided in the section of the Code, supra, sufficiently complied with?

The precise question presented has not been passed upon by this court so far as we are aware. It is true that the question of the sufficiency of the notice required by subsection 3, of § 203, of the Civil Code was before this court in the case of Bell v. Wood, 87 Ky. 56, 7 S. W. 550, but it was there held that the phrase "with a notice specifying the property attached," required therein to be given to the person holding the attached property, applied only to attached corporeal property, and not to a debt which the one to whom the order of attachment is delivered owed to the defendant in the attachment. As the property sought to be reached in this case is not corporeal property, it is evident that the doctrine of that case can be of no service here, as section 207 does not appear to refer to corporeal property. We are driven, then, to determine, as an original proposi-

tion, what constitutes "a notice specifying the fund," as required by section 207.

[1] Notice, generally, may be defined as that which imparts information of the fact to the one to be notified, and is divided by the law into several classes, such as actual, constructive, implied, and presumptive notice. But with these divisions we are not concerned, for manifestly the notice here meant is actual notice. Even this character of notice is susceptible of subdivisions such as information, which of itself gives actual notification, and that which, if prosecuted with ordinary diligence, would furnish information of the fact.

[2] But, without pursuing the classification of actual notice, or discussing it further, we are convinced that the notification found in the face of the order of attachment involved in this case, which we have quoted above, is a substantial, if not a literal, compliance with the provisions of the section of the Code, and sufficient to fasten the property sought to be appropriated to the plaintiff's debt if it was otherwise subject to attachment.

As stated, there are no intervening rights apparent, and it is admitted that there was no property in court, except the fund sought to be reached, in which the defendants in the attachment were in any wise interested. Moreover, in the same order of attachment the administrator of the decedent is likewise summoned as a garnishee, and there can be no doubt but that these facts, coupled with the language quoted, were abundantly sufficient to have given actual notice to any one of ordinary intelligence of the purpose sought by the service of the order of attachment. By them the clerk was furnished with all the information requisite and necessary to inform him of the purpose of the attachment proceedings, and when this was done the requirement, to say the least of it, was substantially complied with.

[3] It cannot be contended, but if so it would be without merit, that the notice should be separate and apart from the order of attachment, as this would not only be absurd, but would be surrendering substance to idle form. We, therefore, conclude that the provision of the Code was sufficiently followed so as to reach the property if subject to attachment.

A second point is that the property sought to be reached, being uncollected but reported sale bonds, did not constitute, and was not "a fund in court." There can be but little doubt that it was "in court." It was incorporeal property, being a chose in action, and was evidently in custodia legis, being entirely under the control of the court. However, all property which is in custodia legis is not necessarily a fund, as for example, the land sold in the Kanatzar case was in custodia legis upon the filing of the petition and the creation of the lis pendens, still it could not be considered, at least in so far as the mean-

ing of the term as used in the section of the Code, a "fund," for at that stage of the proceeding a creditor of any of the heirs owning the land could reach their interest by the service of an attachment upon the land itself, in the usual way. The same might be true as to other corporeal (including personal) property. It might be conceded and it is true that the meaning of the word "fund" is largely governed by its context. Some definitions would confine its scope and applicability to cash only, while in other connections its meaning is broadened so as to make it include capital and other resources. Some of the definitions given by Mr. Webster are:

"Stock or capital; money and negotiable paper immediately or readily convertible into cash; available pecuniary resources."

In the case of *Marrow v. Marrow*, 45 N. C. 148, the term "funds in hand" was used in a will directing the education of the decedent's children from the proceeds of his plantation and the "funds in hand" was held to mean, not only cash on hand, but "money due the estate by bond, note, or other security." In *Words and Phrases*, vol. 4, p. 3004, it is said: "The word 'fund' in its broader meaning may include property of every kind" (citing *In re Tatum*, 61 App. Div. 513, 70 N. Y. Supp. 634).

Other cases are therein shown wherein the term is given various meanings dependent upon the connection in which it is used.

[4] In construing the meaning of a statute no rule is more fundamental or useful than that one which looks to the intention and purpose of the lawmaking body that enacted it.

[5] Without statutory authority, property in custodia legis cannot be reached by garnishment proceedings. This rule is stated in 20 Cyc. 1022, thus:

"Money or property in custodia legis cannot be reached by garnishment proceedings, in the absence of express statutory authority, since this would invade the jurisdiction of the court."

And on page 1023 it is said:

"Thus the rule is well recognized that funds, deposited with the clerk of the court by an order of the court having jurisdiction thereof, cannot be reached by garnishment proceedings by a creditor of a claimant having such funds."

To the same effect are sections 46 and 505 of Shinn on Attachment and Garnishment. With the purpose of remedying this condition of the law some of the states, including Kentucky, have enacted laws upon the subject, that of the latter being section 207 of the Civil Code.

It was held by this court in the case of *Bottoms v. McFerran*, 43 S. W. 236, 19 Ky. Law Rep. 1266, that property or resources identical with that we have here could not be reached by serving a copy of the order of attachment upon the master commissioner, the person to whom the sale bonds were made payable, because, and only because, in order to reach such property the attachment should have been served upon the clerk of the court.

It is not shown in that case whether the money had been collected by the master commissioner, but it is therein recognized that it is competent for the Legislature to say upon whom the attachment might be served in order to fasten such assets for the benefit of a creditor of one of the parties entitled to participate therein. If we were called upon to justify the act of the Legislature in designating the clerk as the one upon whom the attachment should be served, we would have but little difficulty in doing so, because he is the one in whose custody the law places the records of the proceedings out of which the fund in court arose, and he is the only person through whom the court speaks by its record. The master commissioner is but the agent of the court to obey its orders in effecting the sale.

The case of *Bottoms v. McFerran*, supra, recognizes that there is a time, after sale by the master commissioner, and before distribution of the money by him, when the proceeds of the sale of land, such as we have here, may be reached by garnishment proceedings. During that time such proceeds are in two conditions, the one not due and uncollected, and the other due and collected. It must therefore follow that the property or proceeds may be reached while in at least one of these conditions. We are unable to distinguish between the two so as to find a reason why the property may not be reached while in one as well as the other condition. To say that the statute does not apply so as to make the purchase price "a fund in court" until after the bonds have been collected and the fund converted into actual cash would frequently deprive a creditor of the opportunity of reaching it because of the great probability of its being paid out before garnishment proceedings could be instituted.

[8] Furthermore, we can see no difference as to the character of property represented by uncollected sale bonds, and that represented by uncollected notes executed to a receiver of the court under its order to lend money which the receiver may have in his hands. There can be no sort of doubt but that property thus held by the receiver constitutes "a fund in court, and would consequently be the kind of property which might be reached under the provisions of section 207. To construe the phrase in question so as not to include property represented by sale bonds which are not due or uncollected would defeat, according to our view, the purpose of the Legislature in enacting section 207, and would be extending to debtors interested in such property a favoritism not warranted by the law, or any principle of justice. We, therefore, conclude that the property represented by the sale bonds taken in the Kanatzar suit, and sought to be subjected by the attachment proceedings of the plaintiff, to the extent of the interest of R. C. and J. M. Stapp as heirs of Richard Kanatzar, although

the bonds were not due at the time of the attachment, or, if due, were not collected, constituted "a fund in court" which might be reached by the process employed.

Wherefore the motion for the appeal is sustained, the appeal granted, and the judgment reversed for proceedings consistent with this opinion.

CINCINNATI, N. O. & T. P. RY. CO. v. HANSFORD.

(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. COMMERCE §27—INTERSTATE COMMERCE—WORK OF EMPLOYE—"ENGAGED IN INTERSTATE COMMERCE."

Federal Employers' Liability Act April 22 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), does not necessarily apply to a person in all details of his employment, as he may have duties including both interstate and intrastate commerce; and, where plaintiff was regularly engaged in working on section replacing old rails with new, etc., but at time of injury was merely loading old rails lying on the right of way, he was not, at that time, "engaged in interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE §27—INTERSTATE COMMERCE—WORK OF EMPLOYE.

The test of an employee's engagement in interstate commerce at the time of his accident is whether he was then engaged in interstate transportation, or work so closely related as to be practically a part of it.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.]

3. TRIAL §169—DIRECTING VERDICT FOR DEFENDANT.

Where, in action for personal injury under federal Liability Act, admitting all of plaintiff's evidence to be true and all reasonable inference therefrom, he failed to establish his engagement in interstate commerce, and failed to amend his petition to show a common-law liability, defendant's motion for a directed verdict should have been sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. §169.]

Appeal from Circuit Court, McCreary County.

Action by James Hansford against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Edw. Colston and John Galvin, both of Cincinnati, Ohio, and Tye, Siler & Gatliff, of Williamsburg, for appellant. John W. Rawlings and Robert Harding, both of Danville, and Jno. W. Sampson, of Whitley City, for appellee.

MILLER, J. This is an appeal by the railway company from a verdict and judgment against it, whereby the appellee, Hansford, recovered \$1,000 for personal injuries. Hansford was a section hand, and was injured while loading, on a flat car, unused steel

rails which had theretofore been removed from the track and left on the right of way. Hansford brought this action under the federal Employers' Liability Act of April 22, 1908; and the principal, if not the only, ground for a reversal is that the defendant's motion for a peremptory instruction at the conclusion of the plaintiff's testimony, and all the testimony, should have been sustained, upon the ground that Hansford had wholly failed to show he was engaged in interstate commerce, at the time he was injured.

The answer in its first paragraph denies that either the plaintiff or the defendant was engaged in interstate commerce at the time of his injury; in the second paragraph it interposes the defense of assumed risk upon the part of Hansford; while the third paragraph pleads contributory negligence. It will thus be seen that the pleadings squarely make the issue as to whether either Hansford or the defendant was engaged in interstate commerce at the time of his injury, and, since the testimony upon that issue is brief, we will give it in full.

Hansford, the plaintiff, testified as follows, upon this subject:

"Q. In what work were you engaged at the time? A. Working on the section, putting in ties and moving old rails, and keeping up the road work. * * * Q. What kind of rails were you loading, and on what sort of a car? A. We were loading 88-foot rails on a flat car. Q. Where were those rails lying when you began loading them? A. By the side of the track—the passenger (passing) track. * * * Q. How many rails had you loaded at this place? A. I could not say; I never counted them, some five or six probably. Q. Where did you find these rails; were they there on the ground? A. Yes, sir."

Norris, the section foreman, testified as follows:

"Q. What was he (Hansford) doing at the time he was injured? A. We were loading rails on a flat car. * * * Q. How many rails were loaded on the car at that time? A. I don't remember exactly how many. I believe we had six whole rails and some short pieces in the pile of scrap; had, I would say, five or six. * * * Q. And these rails, I believe you say, were old, worn-out rails? A. Yes, sir. Q. Come out of the track there? A. Yes, sir. Q. And as a part of your work in replacing them with new rails, you had to move the rails away from there, or load them and have them moved away? A. Yes, sir. Q. That was all a part of your work in keeping the track in good order and condition for the passage of trains? A. Yes, sir. * * * Q. In the work in which you and plaintiff were engaged you were required to keep the roadbed up and remove the old rails that had been taken out? A. Yes, sir. Q. And put in any new rails? A. We had not put in any new rails. Q. These old rails that were taken out of the road, they supplied new ones for them? A. Not always; sometimes we have a re-lay rail and some of them were good rails, and we keep them for re-lays."

This is all the testimony relating to the character of the plaintiff's work; and, when read and considered altogether, it is plain that appellee's answer, to the effect that he was working on the section, putting in ties and moving old rails, and keeping up the road

track, was a mere description of the general character of the work he was engaged in, and not intended to mean that he was engaged in putting in ties at the time of his injury.

[1] The federal Employers' Liability Act does not necessarily apply to the same person in all the details of his employment, since one man may have duties including both interstate and intrastate commerce, and he would be subject to the act while engaged in the one, and not in the other. *Colasurdo v. Central R. R. Co.* (O. C.) 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

It will be observed that it nowhere appears that Hansford was engaged, either in taking out old rails or putting in new rails; the most that can be said from the proof is that Hansford was engaged in loading old rails that had, at some time, been taken out of the track and were lying on the right of way. This proof brings the case squarely within the decision in *I. C. Ry. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375, where it was held that a section hand, engaged in loading on a flat car, old rails from the right of way, precisely as in this case, was not engaged in interstate commerce. The *Kelly Case* is directly in point.

[2] The true test as to whether one is engaged in interstate commerce is this: Was the employé, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 558, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797. Applying this test to the facts of the case before us, it cannot be said that Hansford was engaged either in interstate transportation, or in work so closely related to it as to be practically a part of it. *I. O. Ry. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Shanks v. Delaware, L. & W. R. R. Co.*, supra.

[3] Admitting therefore, every fact shown by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff failed to establish his case, and defendant's motion for a peremptory instruction should have been sustained. This rule of practice is well established in this jurisdiction. *Fugate v. Somerset*, 97 Ky. 48, 29 S. W. 970, 16 Ky. Law. Rep. 807; *Miller v. Metropolitan Life Ins. Co.*, 89 S. W. 183, 28 Ky. Law. Rep. 223; *Southern Ry. Co. v. Goddard*, 121 Ky. 577, 89 S. W. 675, 28 Ky. Law. Rep. 523, 12 Ann. Cas. 116; *C. & N. O. & T. P. Ry. Co. v. Rue*, 142 Ky. 694, 134 S. W. 1144; *Haley's Adm'r v. C. & O. Ry. Co.*, 157 Ky. 208, 162 S. W. 827; *Kentucky Tr. & Ter. Co. v. Wilson*, 165 Ky. 128, 176 S. W. 991.

Nevertheless, under a like well-established practice, the plaintiff might have amended his

petition to conform to the proof, at any time before the submission of the case to the jury, by showing that the plaintiff's cause of action arose under the common law of the state; and that may yet be done upon a return of the case to the circuit court. *I. O. R. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375; *C. N. O. & T. P. Ry. Co. v. Tucker*, 168 Ky. 149, 181 S. W. 940. But, as he failed to do so, the court should have sustained the defendant's motion for a directed verdict to find for the defendant.

We are not unmindful that in the late case of *L. & N. R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. —, it was held as a rule of practice that, where a defendant company, in a suit of this character, did not ask to go to the jury on the question whether the plaintiff was engaged in interstate commerce, but merely asked the court to direct a verdict on the ground that it appeared as a matter of law that he was so engaged, the defendant could not complain, because, if the question had been left to the jury, and they had disbelieved the testimony tending to show that the plaintiff was engaged in interstate commerce, there would have been no error of law in allowing the verdict for the plaintiff to stand.

It has repeatedly been held that under conflicting testimony as to the nature of the plaintiff's employment, it is proper to submit to the jury for determination whether he was engaged in interstate commerce at the time of his injury. *N. Y. C. & H. R. R. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *Pennsylvania Company v. Donat*, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139; *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402.

But, if we correctly understand the opinion in the *Parker Case*, supra, it merely extends that rule by holding that where the defendant fails to ask for a submission of that question under conflicting testimony, the fact that the court, as a matter of law, erroneously treated it as intrastate commerce will not be a ground for a reversal. But that rule does not abrogate the other well-established practice that the court should direct a verdict where the testimony is all one way, and where a motion for a peremptory instruction properly raises the question of the plaintiff's right to go to the jury. To illustrate: If in the case at bar Hansford had testified that he was engaged in interstate commerce by removing rails from the track at the time of his injury, and Norris, the foreman, had contradicted him upon that point, the question of the character of his work should have been submitted to the jury. But under the proof no such issue was made, since no one testified to any fact that even tended to show that Hansford was engaged in interstate commerce, or transportation, at the time

of his injury. To further illustrate: If a case is brought under the federal law by the widow for her husband's death, claiming to be his personal representative, and it should appear upon the trial that the plaintiff was not the personal representative of her husband, would the court hesitate to direct a verdict? Or, if in such a case, it should appear that the employé had died leaving no family, parents, or dependent kin, could the case be submitted to the jury in face of section 2 of the statute, which confines the right of recovery to the surviving widow, husband, children, parents, or dependent kin of the deceased? Consequently, when plaintiff's case failed for a want of proof, under the approved practice in this state, the defendant's motion for a directed verdict was properly made, and should have been sustained. *I. O. R. R. Co. v. Kelly*, supra; *C. N. O. & T. P. Ry. Co. v. Tucker*, supra.

Judgment reversed, and action remanded for a new trial.

LUSCHER v. JULIAN'S ADM'R.

(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. INFANTS — SALE OF REAL ESTATE—POWER OF COURT.

A court's power to order the sale of an infant's real estate is derived solely from the statutes which must be strictly followed.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 82, 83, 97; Dec. Dig. —37.]

2. INFANTS — SALE OF REAL ESTATE—PROOF—"MATERIAL ALLEGATION."

Under Civ. Code Prac. § 126, providing that all material allegations against infants must be proven, though undenied, section 127, defining "material allegations" to be those necessary to support the cause of action, and section 429, requiring a petition for sale of infant's property to show the personality is insufficient, the insufficiency of the personal property must affirmatively appear.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. —39.

For other definitions, see *Words and Phrases*, First and Second Series, *Material Allegation*.]

3. INFANTS — SALE OF REAL ESTATE—PROOF.

That an infant's personality was insufficient to pay his debts is not sufficiently established where the petition refers to an administrator's settlement in proof of this fact, but the settlement was not filed until after the sale.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. —39.]

4. INFANTS — SALE OF REAL ESTATE—PROOF.

A chancellor is without authority to sell an infant's real estate for his maintenance and education except when clearly necessary and when his parents are unable to maintain and educate him.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 84; Dec. Dig. —38.]

5. INFANTS — SALE OF REAL ESTATE.

In a proceeding to sell an infant's real estate to secure funds for his maintenance, the fact that the infant's mother filed an answer after the sale, stating her inability to support

him, did not remedy the lack of proper proof when the sale was ordered.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 85-89; Dec. Dig. ¶39.]

6. DEPOSITIONS ¶19 — INTERROGATORIES — NECESSITY OF TAKING BY.

Under Civ. Code Prac. § 574, providing that if all the parties against whom deposition is read are under certain disabilities, the deposition must be taken upon interrogatories, applies where the deposition is read against only an infant defendant, although there are other parties defendant.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 80; Dec. Dig. ¶19.]

Appeal from Circuit Court, Franklin County.

Suit to sell real estate by Clarence Julian, as administrator of Charles H. Julian and guardian of Alexander Julian, Jr., against Alexander Julian, Jr., and others. From a judgment overruling his exceptions to the report of the sale, William T. Luscher, the purchaser, appeals. Reversed and remanded.

J. S. Luscher, of Louisville, for appellant.
Ira Julian, of Frankfort, for appellee.

CLAY, C. C. H. Julian died intestate a number of years ago. He left surviving him his widow, now Mrs. J. D. Stewart, and an infant son, Alexander Julian, Jr. Clarence Julian was appointed administrator of the estate of the decedent and guardian of the infant, Alexander Julian, Jr.

The decedent owned considerable estate at the time of his death. Dower was allotted to the widow. Besides other tracts of land which descended to the infant, the decedent owned a tract consisting of about 117 acres, located in Franklin county on the Louisville turnpike.

This suit was brought by Clarence Julian, as administrator of C. H. Julian and guardian of Alexander Julian, Jr., against Alexander Julian, Jr., and others to sell the above tract for the purpose of paying the debts of C. H. Julian and to provide for the maintenance and education of the infant. The land was sold, and William T. Luscher became the purchaser. From a judgment overruling his exceptions to the report of sale, the purchaser appeals.

The following facts appear in the petition:

At the time of his death C. H. Julian owned considerable personal property and several pieces of real estate. He was then indebted to George W. Chinn and Mrs. Jennie Chinn, and also to Mrs. M. B. R. Day and Mrs. Mag Crockett, now deceased, and various other persons to the amount of over \$7,794, and his personal property was wholly insufficient to pay off and discharge such indebtedness. After his qualification as administrator and guardian, plaintiff took charge of the estate of the decedent and the real estate descended to the infant, and proceeded to sell the personal property and col-

lect the proceeds. Commissioners were appointed and a tract of 285 acres assigned and conveyed to the widow as her dower interest in the estate of the decedent. Plaintiff also proceeded to rent the lands descended to the infant and manage the estate of the infant so as to provide for his maintenance and education. During the month of October, 1915, he made a final settlement of his accounts, both as administrator and guardian, in the Franklin county court. According to these settlements, the estate of the decedent was indebted to plaintiff as administrator in the sum of \$1,618.46, while plaintiff was indebted to his ward in the sum of \$157.82, subject to his commissions as guardian. These settlements are referred to and made a part of the petition, but were not filed until after the sale took place. At the time of the filing of the petition there was not sufficient personal property on hand to pay the indebtedness of the decedent, nor was there sufficient money or income from the estate of the infant to provide for his proper maintenance and education during his minority. The land sought to be sold could not be divided without materially impairing its value. The other parcels of real estate owned by the infant were such that they could not be sold for their fair value, and it was to the best interest of his estate that the tract on the Louisville pike should be sold for the payment of the debts of the decedent, and to provide for the education and maintenance of the ward. T. H. Jones was appointed warning order attorney for Mrs. J. D. Stewart, who lives in Arkansas, and filed a letter from her stating that she claimed no interest in the tract sought to be sold.

George W. Chinn and Mrs. Jennie Chinn filed answers, stating that Clarence Julian, as administrator of C. H. Julian, deceased, was indebted to them in the amounts set forth in the county court settlement of his accounts referred to and made a part of the petition. Clarence Julian, as guardian of Alexander Julian, Jr., filed an answer to the effect that the facts stated in the petition were true, and that the best interest of the infant required a sale of the real estate in question. The deposition of William Powers was taken. Powers testified that, in his opinion, the tract of land in controversy could not be divided without materially impairing its value. Later on a certified copy of the petition and summons was served upon the infant while he was temporarily in Arkansas. A guardian ad litem, who was appointed to represent the infant defendant, filed a report, stating that he had made a careful examination of all the papers on file, and that he believed it to be to the best interest of all parties concerned that the land be sold. Bond was executed pursuant to section 493 of the Civil Code and approved by the court, but was not recorded with the judgment; the

judgment merely stating, "and the bond required by section 493 of the Civil Code executed."

After the report of sale had been made and exceptions thereto had been filed, plaintiff was permitted to file a supplemental petition and copy of his settlements filed as administrator and guardian in the county court. The supplemental petition stated that Mrs. Stewart, the mother of the infant, was unable to provide for his proper maintenance and education. The supplemental report of the guardian ad litem stated that he was unable to make a defense to the action.

Upon this showing the court directed the clerk to certify to the clerk of the Franklin county court a copy of the guardian's bond theretofore approved, to be recorded in the county clerk's office, and also entered an order overruling the purchaser's exceptions to the report of sale and confirming the sale.

[1] The courts have no inherent power to order the sale of an infant's real estate. Their powers are purely statutory, and the statutes must be strictly complied with to divest the infant of title. *Ford et al. v. May et al.*, 157 Ky. 830, 164 S. W. 88; *Hays et al. v. Wicker*, 161 Ky. 706, 171 S. W. 447; *Melcher v. Yager's Guardian*, 159 Ky. 597, 167 S. W. 871; *Wyatt's Trustees et al. v. Grider et al.*, 158 Ky. 440, 165 S. W. 420.

[2] In this case it was sought to sell the tract in controversy for two purposes: (1) To pay the debts of the decedent; (2) to provide for the maintenance and education of the ward. The only heir of the decedent was an infant over 14 years of age. Section 126 of the Civil Code of Practice provides that all material allegations of the pleadings against infants must be proven, even though not denied. Section 127 defines a "material allegation" to be one necessary to support the cause of action. Section 429 sets out at length what facts must be stated in the petition for a sale of the decedent's real estate for the purpose of settling his estate. These necessary allegations are the amount of the debts, the nature and value of the property, real and personal, so far as known to the plaintiff, and whether or not the personal estate is sufficient to pay all debts.

[3] Before an infant's real estate can be ordered sold to pay the debts of his ancestor, it should affirmatively appear, at the time, that the personal property of the decedent is insufficient to pay his debts. Here the only proof of this fact was contained in the administrator's settlement, which was referred to and made a part of the petition, but not filed therewith until after the sale had taken place and exceptions thereto had been taken. As stated in the case of *Carter v. Crow's Adm'r*, 130 Ky. 41, 112 S. W. 1098:

"We are familiar with no authority which authorizes a sale of the decedent's real estate until the necessity therefor has been established by pleading and proof."

This necessity must be established by proof in the record when the sale is ordered. It is not sufficient we think to supply such proof after the sale has taken place by merely filing exhibits which should have been theretofore filed. *Clay's Guardian et al. v. Rice*, 172 Ky. 164, 189 S. W. 11.

[4, 5] When we come to consider the second ground on which the sale was prayed, we find that there was no proof that the infant was attending school or intended to attend school. Nor was there allegation or proof to show the inability of his mother to maintain and educate him. We have written that the chancellor is without authority to sell an infant's real estate for his maintenance and education, except in a case of clear necessity and a showing that his parents are unable to maintain and educate him. *Damron et al. v. Damron's Guardian*, 169 Ky. 678, 184 S. W. 1129; *Taylor et al. v. Taylor's Guardian et al.*, 149 Ky. 707, 149 S. W. 1000, Ann. Cas. 1914B, 275; *Dixon v. Hosick*, 101 Ky. 231, 41 S. W. 282, 19 Ky. Law Rep. 387; *Campbell v. Goodin*, 128 Ky. 278, 108 S. W. 248, 32 Ky. Law Rep. 1137. It is clear, therefore, that a sale for the purpose of maintenance and education was not authorized when the judgment was entered. The fact that the mother of the infant subsequently filed an answer stating that she was unable to support the infant was not sufficient to supply the omission of proper proof of this fact when the sale was ordered. *Clay's Guardian et al. v. Rice*, supra.

[6] The only proof before the court when the sale was ordered was a deposition to the effect that the land could not be divided without materially impairing its value. This deposition was not taken in interrogatories. The Code provides that if all the parties against whom a deposition is to be read are under disability, other than coverture or infancy and coverture combined, depositions must be taken upon interrogatories. Section 574 of the Civil Code; *Womble v. Trice*, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9, 23 Ky. Law Rep. 1939. While other persons were made parties defendant, the deposition was not to be read against them, but only against the infant defendant. Hence it should have been taken upon interrogatories.

We deem it unnecessary to pass on the other exceptions, in view of the fact that the matters complained of will not likely occur on another hearing.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

VOGT et al. v. CITY OF LOUISVILLE et al.
(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. TAXATION \Leftrightarrow 204(2)—EXEMPTIONS—STATUTES—STRICT CONSTRUCTION.

Exemptions from taxation must be strictly construed, and one claiming an exemption must show it to be clearly within the spirit and intent of the exception.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 322; Dec. Dig. \Leftrightarrow 204(2).]

2. TAXATION \Leftrightarrow 241(3)—EXEMPTIONS—"PURELY PUBLIC CHARITY."

A lodge which owned real estate and a building thereon and rented the rooms for lodge and religious purposes was not a purely public charity within the exemption from taxation in Const. § 170, though it distributed sums of money to its members and occasionally made donations to others, when such donations were drawn largely from the money in the treasury exceeding the needs of the lodge, which had no general public charitable purpose.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 392; Dec. Dig. \Leftrightarrow 241(3).]

For other definitions, see Words and Phrases, First and Second Series, Public Charity.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by Henry Vogt and others, as trustees of De Molay Commandery No. 12, Knights Templar, against the City of Louisville and others. Judgment dismissing the petition, and complainants appeal. Affirmed.

J. S. Luscher, Robt. O. Kinkade, and Eugene R. Attkisson, all of Louisville, for appellants. Pendleton Beckley, and Geo. Cary Tabb, both of Louisville, for appellees.

SETTLE, O. J. The question involved in this case is whether the real estate in the city of Louisville owned by the De Molay Commandery No. 12, Knights Templar, the title to which is held by appellants as its trustees, is subject to taxation. The action was brought by appellants to obtain a decision by the court of that question, and an injunction therein sought to prevent appellees from assessing the property for taxation, and also to prevent their collecting any taxes thereon. After the filing of appellees' answer proof was taken on the issues made by the pleadings. On the hearing the court below refused the relief asked by appellants and dismissed their petition. From the judgment entered in conformity to that ruling, the latter have appealed.

The property consists of a lot and three-story stone front building, the lot front 62½ feet on the south side of Broadway, between Second and Third streets, and running back 260 feet to an alley. The entrance hall on the first floor of the building divides the front part of it into two large parlors, a library and committee rooms. The rear is occupied by the drill hall and kitchen. The drill hall is at times rented out, and since the institution of this action a lease was made of it to a Christian Science congregation as a place of worship on Sundays, for

one year, at a rental of \$75 per month. The second floor of the building is used more particularly for the purposes of the commandery, such as the conferring of degrees, conducting the work of the commandery, etc. The third floor contains lockers owned by the members of the commandery, in which they keep their uniforms and any other personal property they may wish to put there. The estimated value of this property is \$47,000.

The sole ground upon which the exemption from taxation is asked by appellants is that De Molay Commandery is an institution of "purely public charity," and by reason thereof, under section 170 of the Constitution of the state, not subject to taxation. The petition does not ask the exemption of a fund, the principal or interest of which is devoted to charitable uses, but only its real estate, already described, which was purchased and is maintained for the use and benefit of the members of De Molay Commandery, or rather, as alleged in the petition, "for a home for the said De Molay Commandery." The provision of the Constitution under which the exemption is here claimed is found in section 170 thereof:

"There shall be exempt from taxation * * * institutions of purely public charity. * * *"

[1] It is well to bear in mind at the outset that exemptions from taxation must be strictly construed, and one claiming an exemption must show it to be clearly within the spirit and intent of the exception. City of Middlesboro v. New South Brewing Co., 108 Ky. 351, 56 S. W. 427, 21 Ky. Law Rep. 1782; City of Newport v. Masonic Temple Ass'n, 108 Ky. 333, 56 S. W. 405, 21 Ky. Law Rep. 1785, 47 L. R. A. 252.

One of the best statements of the rule referred to is thus given in Frederick Elect. Lt. & Power Co. v. Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 180:

"The right of taxation is never presumed to be relinquished, and before any party can rightly claim an exemption from the common burden, it is incumbent upon that party to show affirmatively that the exemption claimed is authorized by law. If there be a * * * doubt upon the subject, that doubt must be resolved in favor of the state, and it is only where the exemption is shown to be granted in terms clear and unequivocal that the right of exemption can be maintained."

[2] Is De Molay Commandery an institution of "purely public charity"? Its property is used and enjoyed only by its own members. No part of its building is given over to the free use of widows or orphans as a home, nor is it even an asylum for the indigent of its own order. The only occupancy of its building by persons outside of the order is confined to the occasional occupancy of its drillroom for such use as it receives compensation. The use made of the building by its members is for the benefit of the association and their individual comfort and social profit. The total income of the De Molay

Commandery for the past year appears to have been \$4,900, \$300 of which it spent in charity, that is, distributed for the relief of the sick or indigent among its own members. It is true the commandery has occasionally made charitable contributions outside of the state, for its books show that in 1889 it donated \$88 to yellow fever sufferers in Florida; in 1901, \$100 to Galveston, Tex., flood sufferers; and in 1907, \$107 to sufferers from the earthquake and fires of San Francisco, Cal. But all of the contributions to charity mentioned, though highly commendable, are not sufficient to demonstrate that the commandery is an institution of purely public charity. It also expends considerable sums each year in furtherance of the fraternal spirit and aims of the order, because such expenditures are found necessary to enlist the interest and obtain the co-operation of the members in its work.

In brief, it appears from the record before us that De Molay Commandery is essentially a fraternal and social organization, and that the charity it dispenses is only an incident to the work it performs. Its charter, made a part of the record, shows it to be a corporation created by an act of the Legislature of Kentucky, with power to acquire and own property, real and personal, to borrow and loan money; but it is nowhere recited therein that it is a charitable organization. We do not mean to be understood as saying that De Molay Commandery is a business corporation, created or maintained for gain or profit. On the contrary, its mission is to benefit mankind, and to that end its work is in large measure charitable. But what we do mean to say is aptly expressed in *Bangor v. Lodge*, 73 Me. 428, 40 Am. Rep. 369, as follows:

"It is apparent that the defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential elements of a public charity. It has other objects than charity. Whatever its ultimate purposes, they are other than charitable. Its funds are derived, not from devises and gifts as in case of a public charity, but from fees and the assessment of its members. The funds so obtained are to be distributed among the poor and needy members, from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution within the meaning of the statute."

In *City of Newport v. Masonic Temple Assoc.*, 108 Ky. 333, 56 S. W. 405, 21 Ky. Law Rep. 1785, 47 L. R. A. 252, it was held that property held exclusively by a Masonic Lodge is not a "purely public charity," the opinion quoting with approval the excerpt from *Bangor v. Lodge*, supra. To the same effect are the following cases decided in other jurisdictions: *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671; *Flietter v. Crawford, Collector*, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191; *Lodge v. Hayslip*, 23 Ohio St. 144; *Babb v. Reed*, 5 Rawle (Pa.) 151, 28 Am. Dec. 650; *State v. McGrath*, 95 Mo. 193, 8 S. W. 425;

State v. Central St. Louis Masonic Hall Ass'n, 14 Mo. App. 597.

The following cases, cited in the brief of appellants' counsel, namely: *Widows' & Orphans' Home v. Commonwealth*, 126 Ky. 388, 103 S. W. 354, 31 Ky. Law Rep. 775, 16 L. R. A. (N. S.) 829; *Commonwealth v. Young Men's Christian Association*, 116 Ky. 711, 76 S. W. 522, 25 Ky. Law Rep. 940, 105 Am. St. Rep. 234; *German Gymnastic Association v. Commonwealth*, 117 Ky. 958, 80 S. W. 201, 25 Ky. Law Rep. 2105, 65 L. R. A. 120, 111 Am. St. Rep. 287; and *Commonwealth v. Board of Education Methodist Episcopal Church*, 166 Ky. 610, 179 S. W. 596—do not support their claim to the exemption here asserted. In the case first mentioned, the *Odd Fellows Widows' & Orphans' Home* at Lexington was held to be exempt from taxation upon the ground that it was a corporation whose sole object was to provide a suitable home and maintenance for the destitute widows and orphans of its bounty, which made the corporation and its work an institution of purely public charity in the meaning of section 170 of the Constitution. In the second case, the *Young Men's Christian Association* was allowed the exemption from taxation claimed, on three grounds: First, that it was a religious institution; second, an educational institution; and, third, that it was a purely public charity. In the opinion it is said:

"We have no hesitancy in declaring that appellees, in the use of their buildings as places actually used for religious worship, are exempted from taxation thereon, as being clearly within the letter and intent of section 170 of the Constitution. * * * Aside from that part of the religious work done by appellees, which may be denominated devotional, they undertake to bring within the religious, moral, and intellectual influences of the institution all young men, and, for that matter, old men, too, for the betterment, improvement, and protection from evil influences and consequences. It is not so much the giving of alms, or in aid of the mendicant. The endeavor is to reach the boys and young men before they need alms, and before they are reduced to beggary, and, by training the minds, and teaching them how to use and preserve their bodies, and how to live useful and honest lives, to save them from the lower grades of misfortune, so familiar in the utter helplessness of abject poverty and disease and want."

In the third case, the *German Gymnastic Association* was relieved from taxation upon the ground that it was an educational institution. In the last case mentioned, an office building owned by the Board of Education of the Methodist Episcopal Church and located in the city of Louisville was held to be exempt from taxation because the entire income therefrom was used in the support and maintenance of a school owned and conducted by the board in Barboursville, Ky., the latter institution being one solely devoted to the purposes of education.

A companion case in principle to the four last considered is *Commonwealth, by, etc., v. Parr's Ex'r et al.*, 167 Ky. 46, 179 S. W. 1048. In that case *Daniel G. Parr, of Louisville, by*

will devised the residuum of his estate to trustees, who were directed to use it in providing and maintaining in the city of Louisville a permanent home for old and destitute women, residents of the state of Kentucky, to be known as "Parr's Rest," "where feeble old women, who have no estate of their own, and who are unable to provide for themselves the necessaries of life, might find shelter and rest in their declining years." It was held that the home known as "Parr's Rest," as well as the money and other personal property devoted to its maintenance, was exempt from taxation, upon the ground that the charity was of a purely public character, which section 170 of the Constitution declares shall not be subject to taxation. In the opinion it is said:

"That Parr's Rest is an institution of purely public charity, within the meaning of section 170 of the Constitution, there can be no question. 6 Cyc. 900; Ford v. Ford, 91 Ky. 575 [18 S. W. 451, 13 Ky. Law Rep. 183]; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89 [17 S. W. 212, 13 Ky. Law Rep. 385] 18 L. R. A. 669; Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky. 487 [36 S. W. 921, 19 Ky. Law Rep. 1091, 1916] 40 L. R. A. 119; Commonwealth v. Thomas Trustee, 119 Ky. 208 [83 S. W. 572, 26 Ky. Law Rep. 1123, 6 L. R. A. (N. S.) 320]; Widows' and Orphans' Home v. Commonwealth, 126 Ky. 356 [103 S. W. 354, 31 Ky. Law Rep. 775] 16 L. R. A. (N. S.) 829; City of Dayton v. Trustees of Speer's Hospital, 165 Ky. 60 [176 S. W. 361]; Neptune Fire Engine & Hose Co. v. Board of Education, 166 Ky. 1, 178 S. W. 1138. In the case last above cited, we said: 'Mr. Justice Gray, when on the Supreme Bench of Massachusetts, defined a charity in its legal sense as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. Jackson v. Phillips, 14 Allen (Mass.) 555. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Jackson v. Phillips, supra. While this last definition is perhaps not as concise as could be desired, it is nevertheless both clear and comprehensive, and is adopted by Perry in his work on Trusts as the most satisfactory definition of a charitable use; and it has lately been approved by the Supreme Court of Pennsylvania in Fire Insurance Patrol v. Boyd, supra [120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745], where the distinction between the motive and the purpose of the gift is pointed out, and the purpose declared to be the true test. Without confining themselves to any one definition, but looking at the subject in its broadest significance, text-writers have generally classified charitable gifts as follows: (1) Gifts for eleemosynary purposes; (2) gifts for educational purposes; (3) gifts for religious purposes; and (4) gifts for public purposes. Bishopman's Principles of Equity, § 120.'"

It is manifest that neither De Molay Commandery nor its building or other property here claimed to be exempt from taxation can be classed as an institution of purely public charity in the meaning of any of the above

definitions of such a charity, or in the meaning of section 170 of the Constitution. On the contrary, like the building of the Masonic Lodge which, in City of Newport v. Masonic Temple Ass'n, supra, was held to be subject to taxation, its building is maintained solely as a home for the commandery, and substantially the only charity it dispenses is what it does not need to expend in maintaining its home. It is not therefore entitled to the exemption claimed; and as the judgment of the circuit court was to this effect, it must be and is hereby affirmed.

KENTUCKY LIVE STOCK INS. CO. v. McWILLIAMS.

(Court of Appeals of Kentucky. Jan. 9, 1917.)

1. INSURANCE — 256(1), 268, 552—FALSE WARRANTIES IN APPLICATION—STATUTES—CONSTRUCTION.

It is the purpose of Ky. St. § 639, providing that all statements or descriptions in an insurance application shall be held representations, and not warranties, nor shall misrepresentations, unless material or fraudulent, prevent recovery on the policy, to prevent loss of indemnity on misrepresentations or warranties not fraudulent or material, either in the application or proof of loss, and to defeat recovery the false statements must be shown to have been material or fraudulent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968, 1018, 1019, 1358; Dec. Dig. —256(1), 268, 552.]

2. INSURANCE — 665(3, 7)—LIVE STOCK INSURANCE — MISREPRESENTATIONS — FRAUD — EVIDENCE.

Evidence held to show that statements in procuring insurance on a horse and making proof of loss, while false, were neither material nor fraudulent, so that the policy was not thereby avoided.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716, 1723, 1724, 1726, 1727; Dec. Dig. —665(3, 7).]

3. INSURANCE — 281—LIVE STOCK INSURANCE—MISREPRESENTATIONS—FRAUD.

No different rule should be applied as to misrepresentations of the price paid for live stock and misrepresentations as to value of any other property insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 597-600; Dec. Dig. —281.]

4. INSURANCE — 281—LIVE STOCK INSURANCE—VALUE OF PROPERTY.

The material question in fixing insurable value of live stock is not the price paid, but its true value, so that, where the statement that the value of a horse was \$1,200 was in no way contradicted, the fact that the owner falsely stated that he paid \$1,100 for it was not material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 597-600; Dec. Dig. —281.]

5. INSURANCE — 668(6)—LIVE STOCK INSURANCE—FRAUDULENT REPRESENTATIONS.

Where the owner of a horse in applying for insurance stated that he had paid \$1,106 for the horse, as he counted it, in cash, cash notes same as cash, and the agent wrote in the application "\$1,105 cash," and said that it did not make any difference, it cannot be said as

a matter of law that the statement was fraudulent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737-1740, 1758-1760; Dec. Dig. § 668(6).]

6. APPEAL AND ERROR § 302(4)—SCOPE—INSTRUCTIONS—PRESERVATION OF EXCEPTIONS. Although all instructions were objected and excepted to, if the giving of one only was assigned as error in the motion and grounds for new trial, that alone is before the court on appeal for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1748; Dec. Dig. § 302(4).]

7. TRIAL § 296(1)—INSTRUCTIONS—FORM.

An instruction need not state all the law on the subject if it properly refers to other instructions which do cover the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707; Dec. Dig. § 296(1).]

8. APPEAL AND ERROR § 1001(1)—SCOPE—QUESTIONS OF FACT.

A verdict supported by some evidence will not be disturbed upon appeal unless it is flagrantly against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. § 1001(1).]

Appeal from Circuit Court, Anderson County.

Action by J. McWilliams against the Kentucky Live Stock Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis, Todd & Bond, of Shelbyville, and J. S. McElroy, Jr., of Louisville, for appellant. Edwards, Ogden & Peak, of Louisville, and Lillard Carter, of Lawrenceburg, for appellee.

CLARKE, J. On August 5, 1914, appellant issued to appellee an insurance policy for \$750, insuring a Percheron stallion named Belmont Boy for one year against death from accident or disease. On October 11, 1914, the horse was burned to death in an accidental fire and, appellee having furnished proof of the destruction of the horse, appellant denied liability therefor and declined to pay the policy. Appellee then instituted this action in the Anderson circuit court, and upon trial before a jury recovered a judgment against appellant for the amount of the policy, with interest and costs. Appellant's motion for a new trial having been overruled, this appeal is prosecuted.

Appellant's defenses were that the policy was avoided by reason of false representations made by appellee in his application upon which the policy issued, and that the right to recover was forfeited by false statements in the proof of loss submitted by appellee to sustain his claim for indemnity under the policy.

The reasons urged here for reversal are: (1) That the court erred in refusing a directed verdict for the appellant; (2) that the court erred in giving and refusing instructions; (3) that the verdict is contrary to and not supported by the evidence.

The statements made by appellee in both the application and the proof of loss, which are alleged to have been false and material, are his answers to the following questions:

"Q. 21. What did you pay the party named in answer to question 19? A. \$1,105. Q. 22. In the purchase of the above animal did you pay cash or trade or both? A. Cash. Q. 23. Has the purchase money been all paid? A. Yes."

The policy contains clauses providing that it should be void in the event that representations made by appellee in the application were false, and that the right to recover anything upon the policy would be forfeited in the event false statements were made in the sworn proof of loss insured was required to furnish the company if a loss occurred.

Section 639 of the Kentucky Statutes provides as follows:

"All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy."

[1] It is the purpose of this section to prevent the insured from losing his indemnity upon either a misrepresentation or warranty that was not fraudulent or material to the risk, as has been held by this court in numerous cases, and the same rule applies with equal force to statements in the proof of loss. *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *Home Ins. Co. v. Koob*, 113 Ky. 360, 68 S. W. 453, 58 L. R. A. 58, 101 Am. St. Rep. 354, 24 Ky. Law Rep. 223; *Prov. Savings Society v. Dees*, 120 Ky. 285, 86 S. W. 522, 27 Ky. Law Rep. 670; *Prov. Savings Society v. Whayne's Adm'r*, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160; *Warren Deposit Bank v. F. & D. Co.*, 116 Ky. 38, 74 S. W. 1111, 25 Ky. Law Rep. 289; *Imperial Fire Ins. Co. v. Klerman*, 83 Ky. 468; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81, 11 Ky. Law Rep. 539; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87, 14 Ky. Law Rep. 800; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434, 19 Ky. Law Rep. 204; *Sun Mut. Ins. Co. v. Crist*, 19 Ky. Law Rep. 305, 39 S. W. 837; *Bank v. American Bonding Co.*, 153 Ky. 579, 156 S. W. 394; *Knights of Maccabees v. Shields*, 156 Ky. 270, 160 S. W. 1043, 49 L. R. A. (N. S.) 853; *U. S. F. & G. Co. v. Foster Bank*, 148 Ky. 776, 147 S. W. 406; *Blenke v. Citizens' Life Ins. Co.*, 145 Ky. 332, 140 S. W. 561; *Masonic Life Ass'n v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505.

It therefore results that, in order to avoid the policy, because of statements in the application, or to defeat a recovery because of statements made in the proof of loss, such statements must be false and either fraudulent or material.

[2] The uncontradicted proof here shows that appellee did not pay \$1,105 in cash for the horse to those from whom he bought it,

as stated in both the application and proof of loss, but that, instead, he paid \$580 in cash, \$40 in accounts that he held against two of the owners of the horse, a \$50 note he gave in part satisfaction of the price for which he bought the interest of one of the joint owners, and 19 shares of the capital stock of the Central Life Insurance Company, which was accepted at \$20 per share in the trade, making the purchase price \$1,050. Appellee testified that to this sum he added the \$55 that he paid as a premium on the policy, because he regarded the premium as a part of what the horse was costing him.

As it is clear that the \$55 he was paying as a premium for the insurance policy was no part of the purchase price, and as the purchase price was not all paid in cash, but a part of same consisted of a note for \$50 and shares of stock, which, it is claimed, were worth much less than \$20 per share, the price at which it was accepted in the trade, it is claimed by appellant that the statements made by appellee, in both the application and proof of loss, that he paid \$1,105 for the horse, and that he paid same in cash, were false, fraudulent, and material and that, upon this proof, it was entitled to a peremptory instruction.

[3] While it is apparent that the statements are inaccurate and, in a sense, false, we are of the opinion that they were neither fraudulent nor material. Counsel for the appellant insist that a different rule is necessary and should apply to representations of the purchase price of live stock in an application for insurance than with reference to other kinds of property, as such companies must depend and do rely almost entirely, in fixing the value of such property, upon the price paid for it by the owner, and that, for that reason, misrepresentations or false statements with reference to the purchase price are always material, but we are unable to see any reason why the rule should be different with reference to such property than with reference to any other property.

In *Providence Sav. L. Assur. Society v. Wayne's Adm'r*, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160, this court said:

"Whether it was material to the contract, as we have seen, depends on whether prudent men of ordinary judgment engaged in the same business would, if it had been disclosed to them, have either raised the price or rejected the risk."

[4] The material question in fixing the insurable value is, therefore, not what the owner paid for the property, but what it is worth. Appellee stated in his application that the horse was worth \$1,200, and this value is fully established and in no wise contradicted by the proof, in which state of case it is apparent that what appellee actually paid for the horse was not material.

[5] Nor can it be said that, upon the proof, the court was authorized to hold as a matter of law that these statements were

fraudulent, because appellee testified that Mr. E. L. Whitehead, secretary of the company, filled out the application for the policy at his dictation, and that he stated to Mr. Whitehead, in answer to the question as to the amount and how he had paid for the horse, that, "as he counted it," the horse cost him \$1,105, which he had paid to the owners in "cash, cash notes same as cash," and that Mr. Whitehead, upon this statement by him, wrote the answers in the application, \$1,105 cash," and said to appellee:

"That is simply to ascertain the value of the horse; that doesn't make any difference."

Mr. Whitehead and his stenographer both deny this conversation and state that the answers, as written in the application, are as given by appellee, and that he made no reference otherwise.

It will therefore be seen that upon this question there was a conflict in the evidence as to whether or not appellee either falsely or fraudulently represented the amount he had paid for the horse or the manner of the payment. Manifestly, if appellee's contention as to how these statements were made is true, appellant cannot rely upon the alleged falsity of the answers to defeat the policy. In *Masonic Life Ass'n of Western New York v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505, it was said:

"And so, if the answers in the medical report were written by a physician employed by the insurance company, who was acting as its agent in making the examination, and the answers so written by the physician and agent were made from his knowledge or were suggested by him or the applicant, while acting in good faith and without any intention to deceive, was induced by the misleading statements or suggestions of the physician to make false answers the company cannot rely on the falsity of the answers to defeat the policy."

It therefore results that the court did not err in overruling the motion for a peremptory instruction.

2. The objections urged to the instructions given are directed solely to the form in which they were given, but the substance is not criticized. In instruction No. 1 the jury were told to find for appellee the reasonable market value of the horse, not exceeding \$750, unless they believed as in instruction No. 2 or No. 4. Instructions Nos. 2 and 4 authorized a finding for appellant if the jury believed that the statements in either the application or proof of loss were false and fraudulently made, and that the policy would not have been issued if the true facts and conditions of the purchase had been disclosed.

[6, 7] While appellant objected and excepted to each of the instructions given, only the giving of instruction No. 1 is assigned as error in the motion and grounds for a new trial, and that instruction alone is before us for review. *Mann Bros. v. City of Henderson*, 154 Ky. 154, 156 S. W. 1063; *Kentucky T. & T. Co. v. Peel*, 160 Ky. 239, 169 S. W. 689; *Acme Mills & Elevator Co. v. Rives*,

141 Ky. 786, 133 S. W. 786. Since that instruction qualified appellee's right to recover, by reference to other instructions which defined appellant's right to defeat such recovery, there is no merit in appellant's contention that the giving of instruction No. 1 was reversible error, as it has been frequently held by this court that the entire law need not be stated in one instruction. *Hobson, etc.*, on Instructions, § 16.

Appellant also complains that the court refused its offered instruction to find for it if the jury believed that the statements in either the application or proof of loss were false, without regard to whether they were material or fraudulently made. This, in effect, is but another way of insisting upon a peremptory instruction, to which, as we have heretofore seen, appellant was not entitled, since, to defeat a recovery, the statements must not only be shown to have been false, but material or fraudulent as well.

[8] 3. As has been stated, there was a conflict in the evidence as to whether appellee's answers to the questions involved were accurately written in the application by the company's secretary, and as to whether or not appellee's answers were in fact false, material, or fraudulent. These questions having been submitted and determined by the jury, we cannot say that the verdict is contrary to or unsupported by appellee's testimony, and a verdict supported by some evidence will not be disturbed upon appeal, unless it is flagrantly against the evidence, a condition which does not obtain in this case. *Miller's Adm'r v. Ewing*, 163 Ky. 401, 174 S. W. 22.

Wherefore the judgment is affirmed.

HAYES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. FALSE PRETENSES §32—INDICTMENT—DESCRIPTION OF PROPERTY.

Cr. Code Prac. § 122, subsec. 2, provides that the indictment shall contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case, and section 137 provides that the words used in an indictment shall be construed according to their usual acceptance in common language. An indictment for obtaining money by false pretenses described the property obtained as "the sum of \$2.50." *Held*, that the dollar mark preceding the numbers stated in figures meant that sum of money in dollars and cents, and that kind of money in use in the state, so that the indictment sufficiently described the property alleged to have been obtained.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42-44; Dec. Dig. §32.]

2. FALSE PRETENSES §11—PROPERTY SUBJECT—LARCENY.

The property alleged to have been obtained in an indictment for obtaining property by false

pretenses must be such as is the subject of larceny.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. §11.]

3. FALSE PRETENSES §32 — INDICTMENT — OWNERSHIP OF PROPERTY.

Under Cr. Code Prac. § 128, providing that, if an offense involves the commission of or attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or as to the owner of the property taken is immaterial, an indictment for obtaining money by false pretenses alleging that the fraud was perpetrated upon a named person, without expressly alleging that she was the owner of the money obtained, was sufficient; as it was immaterial whether she or some other person was the owner.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42-44; Dec. Dig. §32.]

4. CRIMINAL LAW §970(1)—TRIAL—MOTION IN ARREST.

Where the indictment was sufficient and stated a public offense within the jurisdiction of the court, the motion in arrest of judgment after verdict was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445, 2455, 2456, 2460; Dec. Dig. §970(1).]

5. CRIMINAL LAW §1186(4) — APPEAL — HARMLESS ERROR—VARIANCE.

In a prosecution for obtaining money by false pretenses by representing that he was the agent of the "Haucke Motor Company," where the facts showed that the bicycle on which a payment was obtained was sold by the Indian Motorcycle & Bicycle Company, but where it did not appear that defendant was in any way misled by the variance, and where he fully understood what company it was that he was accused of falsely pretending to be the agent of, there was no error in overruling a motion for a directed verdict on the ground of variance, in view of Cr. Code Prac. § 353, forbidding reversal for errors of record where the court is satisfied that the substantial rights of a defendant have not been prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §1186(4).]

Appeal from Circuit Court, Mason County.

Fred Hayes was convicted of obtaining money by false pretenses, his motion for a new trial was overruled, and he appeals. Affirmed.

Allan D. Cole and H. W. Cole, both of Maysville, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

HURT, J. The appellant, Fred Hayes, was indicted by the grand jury of the Mason circuit court and charged with the crime of obtaining money by false pretenses. A trial resulted in his conviction and a judgment by the court that he was guilty of the crime charged. His motion for a new trial was overruled, and upon appeal from the judgment to this court he insists that the judgment ought to be reversed, because, as he contends, the court erred to the prejudice of his substantial rights by overruling his demurrer to the sufficiency of the indict-

ment; by overruling his motion to direct a verdict in his behalf; by misinstructing the jury; and by overruling his motion in arrest of the judgment.

1. The indictment substantially charges that the appellant, in Mason county, and before the finding of the indictment, unlawfully and feloniously, and with the intent to defraud Ida Francis, falsely represented to her that he was the agent of and authorized to collect moneys for the Hauke Motor Company, from which she and her minor son, Bascom Francis, had purchased a bicycle, and for which they owed a part of the purchase price; that unless she made an immediate payment upon the price of the bicycle to him, as agent aforesaid, the company would take the bicycle from her and her son, and that by means of such false statements to her he obtained from her the sum of \$2.50; that appellant knew when he made the representations that they were false and untrue; that he was not, in fact, the agent for the Hauke Motor Company, and was not authorized to collect for it, and made the statements for the fraudulent purpose and intent of deceiving and defrauding Ida Francis; that she believed the false representations made by him to be true, and was deceived and defrauded thereby and induced thereby to pay appellant the sum of \$2.50, which she would not have done but for the fact that she believed his representations to be true.

[1, 2] (a) The first objection made to the indictment is that it is defective, in that it does not describe with sufficient particularity the property alleged to have been obtained by the false pretenses. The property is thus described: "The sum of \$2.50." To make an indictment for obtaining property by false pretenses sufficient upon demurrer, it is necessary to describe the property obtained with the same particularity and certainty as is necessary to describe the property alleged to be stolen in an indictment for larceny. It is likewise true that the property alleged to have been obtained in an indictment for obtaining property by false pretenses must be such as is the subject of larceny. Section 137, Criminal Code, provides as follows:

"The words used in an indictment must be construed according to their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."

When a dollar mark precedes a number stated in figures, it means that sum of money in dollars and cents, as indicated by the figures, and it means the kind of money which is in use in the state of Kentucky. Indeed, we do not know of any other meaning which could be attributed to it or gotten out of it. Such meaning is the usual and only one for a dollar mark and figures following. Section 122, subsec. 2, Criminal Code, provides that the indictment shall contain—

"a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case."

It is impossible to see how a person of common understanding would fail to understand, if it should be indicted for obtaining "the sum of \$2.50," by false pretenses, that he was accused of obtaining \$2.50 in lawful money of this country. By the terms of section 135, Criminal Code, when one is indicted for larceny of money, it is sufficient to charge the larceny of it, "without specifying the coin, number, denomination or kind thereof."

[3] (b) Another objection urged against the indictment is that it does not give the name of the person injured or defrauded. The indictment, however, specifically alleges that Ida Francis was the person upon whom the fraud alleged was perpetrated. It is, however, insisted that the indictment fails to charge that Ida Francis was the owner of the money which was obtained from her by fraudulent pretenses, and for that reason the indictment is insufficient. Truly the indictment does not specifically charge, in words, that she was the owner of the money, but charges that by false pretenses a fraud was consummated by obtaining from her the money. Section 128, Criminal Code, provides that:

"If an offense involve the commission of, or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured, or as to the owner of the property taken or injured or attempted to be injured, is not material."

Under this section of the Code, if an act is sufficiently identified by the indictment, that a party is put upon notice of the accusation against him in such manner as enables him to meet the accusation, and is sufficiently identified by the indictment so that a conviction upon such an indictment would be a bar to a prosecution for the same offense, whether the act affects one person or another, a mistake as to the name of the party injured or from whom the property was taken is immaterial. This section of the Code has been construed by this court in the case of *Hennessey v. Com.*, 88 Ky. 301, 11 S. W. 13, 10 Ky. Law Rep. 823, and *McBride v. Com.*, 13 Bush, 337. It appears that in an indictment for obtaining money under false pretenses by false representations made to the person from whom the money was obtained, and the name of such person is given, it so identifies the act for which the party is indicted that a second conviction could not be sustained for the same act, and it is certainly sufficient to put the party indicted upon notice of the act which he is called upon by the indictment to answer. The indictment in the instant case alleges specifically that the

false representations were made to Ida Francis, and that by reason of her being deceived thereby the money alleged to have been obtained was obtained from her, and the indictment further precludes the inference that it was the money of the appellant. Hence it is immaterial whether Ida Francis was the owner of the money or some other person was the owner. A second conviction could in no event be sustained, if it was alleged in another indictment, that the money was owned by some person other than Ida Francis, when the proof of the accusation would show that it was the same offense of which the appellant is accused in the indictment in the instant case.

[4] 2. The indictment being sufficient, and stating a public offense within the jurisdiction of the court, the motion in arrest of judgment after the verdict was properly overruled. *Ward v. Com.*, 14 Bush, 233; *Walston v. Com.*, 16 B. Mon. 15; *Weatherford v. Com.*, 10 Bush, 196; *Comely v. Com.*, 17 B. Mon. 403; Criminal Code, § 276.

3. There is no error observable in the instructions given, and the only fault found with them is that they follow the indictment.

[5] 4. The motion for a direct verdict of not guilty at the close of the evidence for the commonwealth and at the close of all of the evidence is based upon the contention, as we understand it, but there was a fatal variance between the allegations in the indictment and the proof offered in support of it with relation to the person whom it was alleged that appellant represented that he was the agent of and from whom the bicycle had been purchased, and who was threatening to take it if immediate payment was not made. The indictment charges that the appellant represented to Ida Francis that he was the agent of the Haucke Motor Company, and that same was the company from which the bicycle had been purchased, and to which all the purchase price promised had not yet been paid. The facts, as developed by the evidence, was that Bascom Francis, the minor son of Ida Francis, had purchased a bicycle from the Indian Motorcycle & Bicycle Company; that Frank Haucke is a member of that company and the member of it with whom the transaction was had. There is no other company handling motorcycles and bicycles in the city of Maysville, where the transaction transpired, with which any person named Haucke is associated. The appellant was acquainted with the fact that the Francis boy had obtained the bicycle from the Indian Motorcycle & Bicycle Company, and yet owed it the sum of \$12 upon the price of the bicycle, and had promised the boy, as rent for the use of his bicycle, to pay to that company \$8 of the amount which the boy owed upon the price of the wheel. Frank Haucke testified that the Haucke Motor Company is the Indian Motorcycle & Bicycle Company. The appellant testified that Frank

Haucke had told him that his company was going to take the wheel from the boy during the week because of nonpayment, and that he told Haucke that he would pay \$8 for the wheel. Appellant also testified that he had promised the boy to pay the \$8 for the rent of the wheel to the Indian Motorcycle & Bicycle Company. The appellant conceived the idea, as he says, of getting \$2.50 out of the mother of the boy, and hence, according to the testimony of Ida Francis, the appellant, whom she had never before seen, came to her house and inquired if it was her son who worked at the cotton factory, and when she gave an affirmative answer, the appellant then represented that he was the collecting agent for the Haucke Motor Company and said, "We will give him just until to-night to pay \$2.50 on his wheel, or we will take it from him." She said, "Didn't he pay \$2 Saturday?" and appellant said, "No; he didn't." She gave him the \$2.50, consisting of two \$1 bills and a silver half dollar, and he gave her a receipt for it. Appellant did not pretend in his testimony to have any authority from any one to collect the money, but did not deny receiving it as the agent of the company, which the boy owed for the wheel, but claimed that he had promised the boy to pay the \$8 rent for the wheel to the Indian Motorcycle & Bicycle Company as a payment of what the boy owed for the wheel, and that he was attempting to raise \$4 more and then pay the entire balance of \$12, which the boy owed on the wheel, and thought he would get \$2.50 of it from the mother, though when arrested he claimed that the Francis boy owed him \$2.50, and the only way he had to get it was to get it out of his mother. He never paid anything to the company, as he has promised, and spent the \$2.50 which he had obtained from the boy's mother. While Ida Francis in her cross-examination is led to say that the bicycle company was the Indian Motorcycle & Bicycle Company she says that it was the company which her son owed for the bicycle that appellant represented himself to be the collecting agent for. Hence it does not appear that the appellant was in any wise misled by reason of the indictment alleging that it was the Haucke Motor Company instead of the Indian Motorcycle & Bicycle Company, and that he fully understood what company it was that he was accused of falsely pretending to be the agent of, and Ida Francis testified that appellant called it the Haucke Motor Company when demanding the money from her, and doubtless did from the fact that Frank Haucke was a member of that partnership. It seems that not only the appellant, but Ida Francis, understood that it was the same company, and that both of them called it the Haucke Motor Company. While, technically, there was a variance between the allegations of the indictment and the proof as to the name of the motorcycle and bicycle company, the court's action in

overruling the motion for a direct verdict upon that ground was not prejudicial to the appellant. Upon a consideration of the whole case, it does not appear that the substantial rights of the appellant were in any wise prejudiced by the alleged error. Criminal Code, § 353.

The judgment is therefore affirmed.

BEARD et al. v. BEARD.

(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. TRUSTS § 49—DEED OF TRUST—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

In an action to set aside a deed of trust executed by plaintiff after she had renounced the trust provisions of her husband's will and claimed her dower and distributable share of his estate, the effect of which deed was to relinquish substantially all that the renunciation of the will brought her, and to retain substantially the same rights in the income of her deceased husband's estate as had been given her by his will, evidence held to show that the deed had been procured by undue influence of the trustee in order to avoid any injury to it as a financial institution which might arise from the renunciation of the first trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 70; Dec. Dig. § 49.]

2. CONTRACTS § 96—"UNDUE INFLUENCE."

"Undue influence" is a kind of mental coercion which destroys one's free agency and constrains him to do that which is against his will, and that he would not have done if left to his own judgment and volition, so that his act becomes the act of one exerting the influence rather than his own act, rendering his deed, etc., void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 441, 1155, 1169; Dec. Dig. § 96.]

For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. DEEDS § 72(1)—UNDUE INFLUENCE—PERSUASION AND IMPORTUNITY.

An influence, acquired by modest persuasion, arguments addressed to the understanding and appeals to the affections, not destroying free agency, does not amount to undue influence, but the influence obtained by excessive importunity, superiority of will or mind destroying free agency, etc., avoids the deed, etc., thereby procured.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190, 199; Dec. Dig. § 72(1).]

4. TRUSTS § 58, 59(1)—DEED OF TRUST—REVOCATION.

Where a deed or other instrument creating a trust is not revocable by the maker by its terms, and is entered into understandingly by the parties, and is not procured by undue influence or affected by fraud, it cannot be revoked by the maker without the consent of all the parties to it, nor can its terms be altered by the maker except by the consent of the cestui que trustent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 77, 78, 79; Dec. Dig. § 58, 59(1).]

Appeal from Circuit Court, Breckinridge County.

Action by Sallie M. Beard against B. F. Beard, Jr., and others, to set aside and cancel a deed of trust. Judgment for plaintiff, and the defendants appeal. Affirmed.

Charles Carroll, of Louisville, for appellant Bank of Hardinsburg & Trust Co.

Claude Mercer, of Hardinsburg, guardian ad litem, for other appellants. Henry De Haven Moorman and David R. Murray, both of Hardinsburg, for appellee.

HURT, J. Morris H. Beard died, testate, on the 24th day of October, 1913. His last will and testament was thereafter duly probated. By its terms, he devised his entire estate, real, personal, and mixed, to the Bank of Hardinsburg & Trust Company, in trust for his widow and two infant sons. To his widow, the appellee, Sallie M. Beard, he devised one-half of the net income of his estate during her natural life, with directions to the trustee to pay same to her in such amounts as she might desire. The other one-half of his entire estate, and the remainder interest in the one-half, which was devised to his wife for life, he devised to his two infant sons, B. F. Beard, Jr., and Murray Beard. The trustee was directed to pay the income from the one-half of the estate held in trust for the sons, and the income from the one-half devised to his wife, in the event of her death, to the sons or to their guardians, until they should arrive at the age of 25 years, respectively, when the principal of the estate should be delivered to them. The trustee was authorized to sell and convey the real estate, and to change the identity of any of the property when it was for the benefit of the estate, and for the purposes indicated in the will the trustee was invested with the full possession, control, and management of the estate. The Bank of Hardinsburg & Trust Company was nominated as executor of the will.

The Bank of Hardinsburg & Trust Company was a flourishing financial institution, engaged in a general banking business, and also authorized by law to qualify and act as the personal representative of deceased persons, guardians for infants, and a trustee of trusts. After the probate of the will of Morris H. Beard, the Bank of Hardinsburg & Trust Company accepted the trust created by the will of decedent and qualified as trustee. It was appointed executor of the will and statutory guardian for the infants, B. F. Beard, Jr., and Murray Beard, and qualified as such executor and guardian. The decedent, Morris H. Beard, had for many years been an officer and employé of the Bank & Trust Company, and to his capacity and faithfulness it, in a large measure, owed its success and prosperity. He was the owner of 200 shares of the capital stock of this institution at the time of his death, and in addition thereto his estate was considerable.

Before the expiration of one year from the probate of her husband's will, the appellee determined to renounce the provisions of the will as to her, and to claim the dower and distributable share of the estate to which she would have been entitled if her husband

had died intestate. This she did on the 14th day of September, 1914, as provided by law. Upon the same day she executed and delivered a deed, by which she transferred, set over, and relinquished unto her two infant sons, above named, her entire one-half interest in the personal estate of her late husband, except that she reserved a life estate in the net income of the property transferred, and the right to cast the vote as the owner of 100 shares of the capital stock of the Bank & Trust Company, at such times as the stockholders of the corporation might be privileged to vote as stockholders of the company. To carry out the purposes of the deed, the property affected by the deed was put in trust, and the Hardinsburg Bank & Trust Company was created the trustee of the parties to the deed, and empowered to keep and retain in its control and management the property conveyed, with directions to pay to her the net income from the property during her life. It was further provided by the deed that in the event of her death before her sons should arrive at the age of 25 years, the trust should continue until such time, and Marvin D. Beard was made a trustee for the purpose and with the authority to control the voting power of the capital stock affected by the deed, until her sons should arrive at 25 years of age. The Bank & Trust Company accepted the trust created by the deed, as to it and Marvin D. Beard did likewise as to the trust in his favor.

In January, 1916, this action was instituted by the appellee, Sallie M. Beard, against the appellants, the Bank of Hardinsburg & Trust Company, as trustee and as guardian for the infants, B. F. Beard, Jr., and Murray Beard, and against the two last named, personally, to set aside and to have adjudged void the deed of trust executed by her on September 14, 1914, upon the alleged ground that she procured to execute and deliver the deed by reason of the undue influence exerted upon her by the then president of the Bank & Trust Company, the present president of the company and its attorney, and by reason of certain representations made to her and facts withheld from her, by which she was misled and deceived into executing the deed.

An answer was filed for the appellant Bank & Trust Company as trustee and guardian, by which the averments of the petition are traversed, but the present president of the trustee and guardian, being ruled to verify the answer, he declined to do so, upon the ground that he had given testimony to the effect that the deed was procured by an undue influence, which had been exerted upon the appellee. A guardian ad litem was appointed for the infant beneficiaries of the deed, who adopted the answer, as his answer in the petition, and the issues were thus formed. After the proof was taken, the cause was submitted, and the chancellor adjudged that the appellee was entitled to

the relief sought, and that the deed be set aside and held for naught. From this judgment the Bank of Hardinsburg & Trust Company, as trustee and statutory guardian, and the appellants B. F. Beard, Jr., and Murray Beard, by their guardian ad litem, have appealed.

[1] Without undertaking to set out with particularity the evidence of the circumstances under which the deed sought to be canceled was executed, the following facts seem to have been proven and existed: The appellee was about 37 years of age, and was married to her husband at the age of 18 years. She had never been required to undertake or consider any business matter. She was entirely ignorant of the legal effects of instruments, such as deeds, and, in fact, was entirely without experience in transactions of that character. She was in a feeble state of health, and had been since the death of her husband, and as described by a witness, "weak, nervous, and run down." It had been necessary to carry her to Louisville, Indianapolis, and other places for treatment, and was entirely unable to perform the duties of a housekeeper. She had made up her mind, although reluctant to take any step contrary to the will of her late husband, that it was necessary for her future interest that she renounce the provisions of her husband's will, so far as same related to her. If she did so, it vested the control and power of disposition of one-half of the personal estate of her late husband in her absolutely, and the use and control of one-third of his real estate in her for life. That under the will of her husband she had only the income of one-half of the estate for her life, with no power of disposition of it, except the income when paid to her. She had firmly made up her mind to renounce the will, and then to make a will of her own, by which she would devise the property, which she would receive from her husband's estate, to her children at her death. She had never thought of executing a deed of trust, and probably did not know what such an instrument was. She did not have the benefit of the advice of a lawyer who was acting in her interest, nor the advice of any disinterested person. Her husband's father was the president of the Bank of Hardinsburg & Trust Company, which was her trustee, and which then had in its control and management the entire estate of her deceased husband. It was an institution which had for a part of its business the acting as a trustee of trust funds, and out of which it reaped the profits of such business. She had absolute confidence in the business judgment of her father-in-law and his interest in her welfare. The attorney for the Bank & Trust Company was the same attorney who prepared her husband's will, and had been intimate in a business way and socially with her late husband. The same attorney was the professional counselor and

friend of her father-in-law. She had entire confidence in the attorney. The present president of the trustee was her deceased husband's brother, in whom she had entire confidence. When she announced her intention to renounce the will of her husband, her father-in-law became fearful that the effect of it would be to injure the confidence of the public in the soundness of the trustee as a financial institution, and thus be injurious to its interests. He enlisted his son, the present president of the institution, in the same opinion. Finding she was determined to renounce the will, he conceived the idea of procuring her to execute the deed of trust, and thus place the property irrevocably in the same condition, so far as appellee's right to its use and control, as it was under the terms of the will. He secured the services of the trustee's attorney to persuade her to execute the deed of trust. The attorney visited her four or more times, and argued with her and importuned her to execute the deed of trust. She refused to do so, and announced her purpose to make a will, as above stated. She proposed to seek the advice of her uncle, who was an attorney, then residing at Indianapolis, but the father-in-law advised her that such was useless, as the matter was one which could be attended to by any good attorney. She proposed to take the papers to her uncle for his opinion, but this was not consented to, because it was feared that she might be advised to unconditionally renounce the will and to fail to execute the deed. It was represented to her that if the trust created by her husband's will was removed, the future of the banking institution, in which her husband had such confidence and pride, would be uncertain and precarious, and it would injuriously affect the interests of her and her children. As she says, it was represented to her that the bank was then in a "tottering" condition, and it was feared could not withstand the removal of the trust in the will, unless another was created by a deed. The father-in-law and attorney visited her on several occasions to present these arguments. She sent for her brother-in-law on several occasions to advise with him about it, and he urged her to make the deed, and, as he now says, that he overlooked her interests in his zeal for the interests of the bank. The attorney urged that it was her duty to leave the property as her husband had desired it to be. The deed was prepared, and taken to and read to her, but she declined to sign it, and still insisted that her purpose was to make a will. The attorney returned again and added a fresh argument, to the effect that her father-in-law was old and very much desired her to make the deed, and if she refused to do so, it would probably influence him to her detriment in any provision that he might contemplate making for her in his will. That at this time she finally consented and executed the deed. She claims

and testifies that the attorney represented to her that she could revoke the deed at any time she chose, and that she executed the deed under the belief that she could revoke it, and with the intention to do so, when the bank should become in a stable condition, as it was represented to her that it was necessary for the trust to be continued to allow the bank to get into a safe condition. The attorney denies that he represented to her that she would have the power to revoke the deed in the future, but she was not advised that in order to have such power a clause, reserving to herself the right to make the revocation, should be incorporated in the deed. Whether such representation was or was not made to her, there is no doubt from the proof that she believed, when executing the deed, that she would have the power to revoke it whenever she desired, and instituted this suit shortly after her mind was disabused upon that subject.

While the consideration for the execution of the deed, as expressed in it, was the love and affection which the appellee had for her two sons, and, a further consideration, the wishes and intent of her husband as contained in his will, her desire was to make a will by which she would devise her whole estate to her two sons, and as to the further consideration mentioned, she had upon the same day renounced the "wishes and intent of her husband as contained in his will." While there is some dispute as to what made up the considerations for the deed, the parol proof makes it to satisfactorily appear that the real consideration for the deed was to avoid any injury to the trustee, as a financial institution, which might arise from any distrust which might be caused to arise in the minds of the public from the removal by appellee of the trust for her benefit created by the will of her husband, and this consideration was not expressed in the deed. It is also apparent that the trustee would be benefited by the control and use of appellee's funds as a trustee for her. The contention that she understandingly executed the deed, in order to be upheld, it must be made to appear that upon the same day upon which she renounced the provisions of the will, and thus became the owner of one-half of the personality of her late husband's estate, with the right to use and dispose of it at her pleasure, instead of one-half of the income from it for life, as provided by the will, she, then of her own mind and understandingly, by the deed irrevocably disposed of all that she had acquired by the act of renunciation, except the voting power of the stock, of which she became the owner, in the Bank & Trust Company. The will gave her the income of the property for life. The deed reserved for her only the net income of her property for life. The effect of the deed was to relinquish substantially all that the renunciation of the will brought her. That the appellee did not desire to execute the deed

and, if left to her own will and judgment, would never have done so, there is, from the proof, no doubt.

[2, 3] Undue influence is a kind of mental coercion which destroys the free agency of one and constrains him to do that which is against his will, and what he would not have done if left to his own judgment and volition, so that his act becomes the act of the one exerting the influence, rather than his own act—such act being one to his own injury, or to the injury of some one upon whom he would, if left to his own free will, have bestowed a benefit. While the influence which is acquired by modest persuasion, arguments addressed to the understanding, and mere appeals to the affections, and which does not destroy free agency, have been held not to be an undue influence, but the influence obtained by excessive importunity, superiority of will or mind, or by any other means which destroys one free agency and constrains him to do what he is unable to refuse, when exerted over the act of such a one, in the making of a will or deed, will render the deed or will, made because of such influence, void. *Wise, etc., v. Foote, etc.*, 81 Ky. 10; *Lucas v. Cannon*, 13 Bush, 650; *Barlow v. Waters*, 28 S. W. 785, 16 Ky. Law Rep. 426; *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762, 11 Ky. Law Rep. 708; *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837, 12 Ky. Law Rep. 589; *Overall v. Bland*, 12 S. W. 273, 11 Ky. Law Rep. 371; *Sherley v. Sherley*, 7 Ky. Law Rep. 612; *Fry v. Jones*, 95 Ky. 148, 24 S. W. 5, 15 Ky. Law Rep. 500, 44 Am. St. Rep. 206; *Harrison's Will*, 1 B. Mon. 363; *Elliott's Will*, 2 J. J. Marsh. 343; *Broadus v. Broadus*, 10 Bush, 303; *McGuire v. McGuire*, 11 Bush, 142; 39 Cyc. 88; *Wood v. Rigg*, 152 Ky. 242, 153 S. W. 214.

The facts and circumstances detailed in the evidence, in our opinion, justified the chancellor below in arriving at the conclusion that the execution of the deed of trust was procured by an undue influence exerted over the appellee; that it was not done understandingly by her, and would not have been done by her if left to her own free will and judgment. She desired independent legal advice, which she was persuaded not to seek; she was in a feeble state of health, when it is difficult to resist argument and excessive importunity; she had the advice of no one who had in mind her interests; the parties who procured the execution of the deed were those in whom she had confidence, both in their business judgment and friendship for her, and while it is not intended to say that they intentionally wronged her or were guilty of any fraudulent purpose, they, by their confidential relations with her, had and obtained complete dominion over her will, and caused her to part with the control and use of all her property at the middle of life, and to do the very thing which she hoped to get rid of by the renunciation of the will; she was al-

together inexperienced in business affairs, and did not know the effect of her acts.

[4] It is true that the law pertaining to the creation of trusts in this jurisdiction is that, where the deed or other instrument, which creates the trust, is not revocable by the maker by its terms, is entered into understandingly by the parties, and its execution was not procured by undue influence nor tainted with fraud, it cannot be revoked by the maker of it without the consent of all the parties to it; neither can its terms be altered by the maker, except by the consent of the cestui que trustent. *Coleman v. Fidelity Trust & Safety Vault Co.*, 91 S. W. 716, 28 Ky. Law Rep. 1263; *Anderson v. Kemper*, 116 Ky. 339, 76 S. W. 122, 25 Ky. Law Rep. 538; *Middleton v. Shelby County Trust Co.*, 51 S. W. 156, 21 Ky. Law Rep. 183; *Brannin et al. v. Shirley*, 91 Ky. 450, 16 S. W. 94, 12 Ky. Law Rep. 977. In the case last cited, this court said:

"There can be no doubt but that a voluntary conveyance or gift made by one who is competent to act for himself, and understands what he is doing, where the transaction in the result of his own judgment and will, will be sustained by the chancellor, although there is no power of revocation, but a gift of all of one's estate without any revocation or power of revocation would be of itself a suspicious circumstance, and, aided by even slight proof of mistake, misapprehension, or misunderstanding on the part of the grantor, will be sufficient to set aside the deed."

The judgment is therefore affirmed.

CITY OF HIGHLAND PARK v. REKER.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. EVIDENCE \Leftrightarrow 158(17)—ORDINANCES—PAROL EVIDENCE.

Parol evidence cannot be received to prove the enactment of a city ordinance; the records of the city council being the only competent evidence on that issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 495; Dec. Dig. \Leftrightarrow 158(17).]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 100—ORDINANCES—EVIDENCE.

Where a city council failed to keep a record of its proceedings, showing compliance with Ky. St. § 3664, in striking certain territory from its limits, held that the existence of valid ordinances, striking such territory, necessarily failed of proof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 213-218; Dec. Dig. \Leftrightarrow 100.]

3. MUNICIPAL CORPORATIONS \Leftrightarrow 33(2)—ORDINANCES — STRIKING TERRITORY FROM CITY LIMITS.

Where no advertisement was made of the enactment of an ordinance striking territory from city limits, as required by Ky. St. § 3664, the ordinance is of no effect, notwithstanding the regularity of the council proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 82; Dec. Dig. \Leftrightarrow 33(2).]

4. MUNICIPAL CORPORATIONS \Leftrightarrow 33(2)—ORDINANCES — STRIKING TERRITORY FROM CITY LIMITS.

Under Ky. St. § 3664, before territory can be stricken from the corporate limits of a

city, there must be an ordinance accurately defining the territory to be stricken; such ordinance must be published as required by the statute, and after a proper publication has been made and no remonstrance filed in circuit court, the city council may, by a second ordinance, strike from the city limits the territory described in the first ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 82; Dec. Dig. § 33(2).]

5. MUNICIPAL CORPORATIONS § 33(2)—CORPORATE LIMITS—BOUNDARIES.

Where a city attempted to strike certain territory from its corporate limits by ordinances enacted in 1906 and again in 1913, but such ordinances failed of effect by reason of noncompliance with Ky. St. § 3664, *held*, in a prosecution in 1916, there had been no such acquiescence and recognition by the city and its inhabitants in the boundaries as determined by such ordinances as would exclude the territory stricken from the corporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 82; Dec. Dig. § 33(2).]

6. ESTOPPEL § 62(4)—MUNICIPALITY—DETACHMENT OF TERRITORY.

Where by acts 1890, c. 1537, the boundaries of a city were definitely fixed, and the city by ordinances enacted in 1906 and again in 1913 attempted to strike certain territory from its corporate limits, which ordinances failed of effect by reason of irregularities, the city was not estopped, either by lapse of time or by the attempted enactment of such ordinances, to assert jurisdiction over persons selling intoxicating liquors within the territory attempted to be stricken.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 153; Dec. Dig. § 62(4).]

Appeal from Circuit Court, Jefferson County, Criminal Branch, Criminal Division.

Prosecution by the City of Highland Park against John Reker, for retailing intoxicating liquors without city license. From a judgment of acquittal, the City appeals. Reversed and remanded.

L. F. Speckman, of Louisville, for appellant. L. D. Greene, of Louisville, for appellee.

SAMPSON, J. This is a prosecution in the name of the city of Highland Park against John Reker under an ordinance to recover a fine of defendant, for retailing intoxicating liquors therein without having procured a license from the city to carry on such business. Reker defends upon the grounds that his saloon is not located within the city limits; that part of the corporation having theretofore, as he contends, been stricken therefrom. He was acquitted both in the police court and the Jefferson circuit court, criminal division, and the city appeals.

Highland Park, Jefferson county, Ky., is a city of the sixth class; its boundary was fixed by act of the General Assembly in 1890 (Laws 1890, c. 1537). In 1906 the city council undertook, by the following ordinance, to strike certain territory from the east side of its limits:

"An ordinance fixing the eastern boundary line of the town of Highland Park, Kentucky:

"Whereas some question has arisen as to the correct eastern boundary line of the town of Highland Park: Now therefore to remove any doubt and to fix the said line, the board of trustees of the town of Highland Park, Kentucky, do ordain as follows:

"Section 1. That the limits of the town of Highland Park, Ky. on the entire eastern line thereof be and the same are hereby reduced so that the west side of Ash Bottom road as it now exists, shall be the eastern boundary line of the town of Highland Park.

"Sec. 2. All ordinances in conflict with this ordinance are hereby repealed.

"Sec. 3. This ordinance shall take effect from and after its passage and publication.

"Approved September 15, 1906."

Again on September 15, 1913, by another ordinance, in exactly the same language, it is declared that the same territory on the east side, which was described in the previous ordinance, was stricken. This ordinance fixes the limits of the city on the entire eastern line, at the "west side of Ash Bottom road as it now exists." Early in 1916 a license tax on the sale of intoxicating liquors in the city of Highland Park was fixed by its ordinance at \$300 per annum.

The appellee, defendant below, John Reker, operated a saloon or tavern on the east side of Ash Bottom road, and in the territory which by said ordinance was attempted to be stricken from the corporation. Reker held a license from the county of Jefferson to operate his saloon, but he had procured no license from the city of Highland Park, contending that his place of business was beyond the city boundary, relying upon the two ordinances referred to above, but these are assailed by the city, on the grounds that they were not enacted according to the requirements of section 3664 of the Kentucky Statutes. Therefore the exact question for decision here, is: Did the ordinance of 1906 or the one of 1913, or the two together, meet the requirements of section 3664 of the Kentucky Statutes. If the provisions of this statute were followed, then this territory was stricken from the city, and the defendant, Reker, would not be subjected to pay the license tax claimed by the city, but if this ordinance was invalid for any reason, the territory was not stricken, and the defendant Reker is liable to the city for a license tax on his saloon.

A careful examination of the record kept by the clerk of the council fails to show any advertisement whatever of the ordinance, or that the final enactment of the ordinance was ever passed or entered, as required by section 3664, Ky. Stat. It is contended by appellee, however, that the advertisement was had, and each step regularly taken, but that the clerk in making the orders by oversight or inadvertence failed to incorporate this in the records of the council, but that the city attorney and other city officials who attended the meeting of the council have

testified that the ordinances mentioned were properly introduced and accried into enactment according to the provisions of said section, and that this cures the defect, if any there was, in the records of the proceedings, and renders the ordinance valid.

[1] Can parol evidence be received to prove the steps taken or actions had of such legislative body? This court in numerous opinions involving this question has held:

"A city council can only speak by its records. When its records are read and signed, it is the only evidence of the action taken by the council at that time. If in fact the council agreed to take any action which is not put upon the book, and the book without such action is read, approved, and signed, then there is no ordinance which can affect the rights of third persons." *Town of Mt. Pleasant v. Eversole*, 96 S. W. 478, 29 Ky. Law Rep. 830.

In the case of *Spalding v. City of Lebanon*, 156 Ky. 37, 160 S. W. 751, 49 L. R. A. (N. S.) 387, it is said:

"If it were permitted to enlarge or restrict the record evidence by parol testimony, the entries in the journal would be uncertain and unreliable, and would fail to afford any evidence that could be depended upon to show the actual proceedings of a city council at * * * its meetings."

And, quoting from *Dunn v. City of Cadiz*, 140 Ky. 217, 180 S. W. 1089:

"Appellee's charter provides for the appointment of a city clerk for a term of two years. Ky. Stat. § 3619. It is made the duty of the city clerk to keep a true, full record of all of the proceedings of the city council. Ky. Stat. § 3627. The Legislature, having provided appellee with a clerk and having made it his duty to keep a true record of the proceedings of the general council, we conclude that the city of Cadiz can speak only by its record. Any other rule would be to substitute for the record the uncertain memory of the witnesses."

The city, through its legislative body, in attempting to strike the territory, enacted the ordinance defining the boundary on the east side of the town, and the records kept by its clerk show this, but by section 3664, Ky. Stat., in order for this ordinance to take effect and to exclude this territory from the city, it was necessary that the proposed change in the city boundary—

"be published in at least ten issues of a daily newspaper, in and having the largest circulation in the town, or if there be no daily paper in the town, in at least four issues of a weekly newspaper, published in and having the largest circulation in the town * * * or by posting copies of the ordinance for at least ten days, in four of the most public places in the town."

[2] Since the city council failed to keep a record of its proceedings showing that it carried out the provisions of section 3664, Ky. Stat., with reference to striking territory from its limits, and since the rule has long prevailed in this jurisdiction that parol evidence cannot be received to prove the enactment of an ordinance, and that a city council can speak only through its records, it follows that the existence of such ordinance fails of proof.

[3] But had the clerk's records shown each step taken by the council to be regular, and it should appear, as it does in this case, that

no advertisement was had of the enactment of the ordinance as required by section 3664, Ky. Stat., then the ordinance would equally fail.

[4] As is said in the *City of Bardstown v. Hurst*, 121 Ky. 119, 89 S. W. 147, 724, section 3664, Kentucky Statutes, required three steps to be taken before contiguous territory can be stricken from the corporate boundary of a city:

"First, there must be an enactment of an ordinance defining accurately the territory to be annexed or stricken off; second, there must be a publication of such ordinance four times in a weekly newspaper in the city, if there is no daily paper published therein; third, in not less than thirty days after the enactment of the ordinance defining accurately the territory to be annexed or stricken off, if the publication of same 'in at least four issues' of a weekly newspaper has been made and no petition of remonstrance is filed in the circuit court by one or more resident freeholders of the territory to be annexed or stricken off, within thirty days of the enactment of the first ordinance, the city council may by ordinance annex to or strike from the city limits the territory described in the first ordinance, and it shall upon the enactment of the last ordinance become a part of such city or shall be stricken therefrom."

These provisions not having been fulfilled, the territory in which the defendant Reker's saloon was operated was not stricken from the city, but was at the time of the issuance of the warrant, under the ordinance within the corporate limits and subject to regulation by the city.

Defendant, Reker, further contends that the city, once having attempted to lop off the territory in which his business is conducted, and having for ten years acquiesced therein and held out to the public including the defendant and other residents thereabout, that the west side of "Ash Bottom road" constituted the extreme eastern boundary of the city, and the defendant and other inhabitants of the community having acted thereon, the city is estopped to say that its acts, in attempting to pass the ordinance, and the ordinance itself are void.

[5] In some instances where a great time has elapsed, or where for some reason the boundary is indefinite or uncertain, it has been held that the boundary generally recognized and acquiesced in by the corporation and the inhabitants is the true boundary, but this is not the case here. The time has neither been so long nor were the boundaries indefinite or uncertain. The act of the Legislature fixing the boundary of the city is as follows:

"All the lands embraced within a rectangle one mile wide, by one and three-fourths mile long and whose center is a point on the Louisville & Nashville Railroad right of way, one-eighth of a mile southwardly from the station on said railroad known as Highland Park, the right of way of said railroad dividing said rectangle into two equal parts, the sides of which are parallel to the said railroad right of way."

This makes the boundary easy of ascertainment by any one interested therein. In *Asher v. City of Pineville*, 140 Ky. 670, 131 S. W. 512, the court said:

"The mere fact that during the years mentioned the city authorities were under the impression that appellant's residence was outside of the city limits, and for this reason he was not assessed for tax, cannot deprive the city of the right to retrospectively assess and collect taxes for these years after it ascertained that his residence was within the city limits. * * * We think that there can be no doubt that, when property within the limits of a city for any reason is omitted from assessments, it may, in the proper time and manner be retrospectively assessed."

[8] From this we conclude that the city was not estopped by its act attempting to strike said territory from its limits or by the lapse of time, from asserting its jurisdiction over the territory in question.

The appellant and defendant, John Reker, having been dismissed in the lower court, the judgment is reversed and remanded for a new trial consistent with this opinion.

WALLACE et al. v. LACKEY.

(Court of Appeals of Kentucky. Jan. 10, 1917.)

1. TRESPASS \S 19(1)—TITLE TO SUPPORT ACTION.

In an action for trespass and removal of timber, plaintiffs must recover, if at all, upon the strength of their own title, and not because of want of title in the defendant.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 18, 19, 24, 28; Dec. Dig. \S 19(1).]

2. EXECUTORS AND ADMINISTRATORS \S 473, 474(2)—ACTIONS FOR SETTLEMENT—NOTICE.

One claiming title to property under an execution sale and by adverse possession, who was not a party to a suit by the administrator of the record owner of the land against the heirs and creditors for a settlement of the estate, was not entitled to notice of any proceedings therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 2042; Dec. Dig. \S 473, 474(2).]

3. JUDGMENT \S 501—COLLATERAL ATTACK—JUDGMENT SUBJECT TO.

In an action for trespass and removal of timber, a judgment offered authorizing the execution of a deed in evidence as part of plaintiff's chain of title, could not be objected to because irregular or erroneous, but only on the ground that it is void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 941; Dec. Dig. \S 501.]

4. JUDGMENT \S 501—VALIDITY.

A decree or judgment of a court having jurisdiction is not void, although it may be erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 941; Dec. Dig. \S 501.]

5. JUDGMENT \S 481—COLLATERAL ATTACK—PRESUMPTIONS.

Where a consent judgment is attacked collaterally, it must be conclusively presumed that all the parties to the suit agreed to it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 917; Dec. Dig. \S 481.]

6. JUDGMENT \S 518—COLLATERAL ATTACK—WHAT CONSTITUTES.

In a suit for trespass and removal of timber an attack upon the validity of an order in proceedings by the administrator of the record owner of the land, reinstating the case upon the docket and directing the execution of a deed

to plaintiffs, is a collateral attack, since the relief sought was not a vacation of the order and judgment, but to defeat plaintiff's title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 961, 962; Dec. Dig. \S 518.]

7. JUDGMENT \S 486(1)—COLLATERAL ATTACK—VALIDITY.

A decree or judgment which is not void cannot be attacked except by direct proceedings to vacate the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 919, 920, 921, 923; Dec. Dig. \S 486(1).]

8. JUDGMENT \S 495(1)—COLLATERAL ATTACK—JURISDICTION.

The judgment of a court of general jurisdiction cannot be collaterally attacked, and it will not be held void unless the want of jurisdiction of the court appears upon the record in the action in which the judgment was rendered, as it will be presumed that the court has not proceeded without its jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 549½, 933; Dec. Dig. \S 495(1).]

9. JUDGMENT \S 499—JURISDICTION—EVIDENCE—PRESUMPTION.

In an action for trespass and removal of timber, parol proof of the validity of orders of the court reinstating an action by the administrator of the record owner against the heirs and creditors, and ordering the execution of a deed to plaintiffs, was incompetent, since if the record was silent merely as to a jurisdictional fact, that fact will be presumed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 940; Dec. Dig. \S 499.]

10. TRESPASS \S 19(1)—TITLE TO SUPPORT ACTION.

As the purchaser of land sold at a decretal sale in an administrator's action against heirs and creditors took equitable title to the land upon the confirmation of the sale and payment of the purchase price, a deed subsequently executed related back to the confirmation of the sale, giving purchasers title to support an action for trespass committed before execution of the deed, and the deed was admissible in the trespass suit to establish title.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 18, 19, 24, 28; Dec. Dig. \S 19(1).]

11. TRESPASS \S 67—EVIDENCE—SUFFICIENCY.

In an action for trespass and removal of timber, evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 150; Dec. Dig. \S 67.]

12. APPEAL AND ERROR \S 216(1), 242(4)—PRESENTATION OF LOWER COURT OF GROUNDS FOR REVIEW.

In an action for trespass and removal of timber, where the court was not asked and did not rule upon the competency of evidence offered in support of a defense and the sufficiency of such evidence to support the defense and no instructions were offered or considered relating to the grounds of the defense, such questions will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1421-1423; Dec. Dig. \S 216(1), 242(4); Trial, Cent. Dig. \S 627.]

Appeal from Circuit Court, Lawrence County.

Action by F. T. D. Wallace, Jr., and others against James Q. Lackey. From a judgment for the defendant dismissing the petition,

and from an order overruling a motion for new trial, plaintiffs appeal. Reversed and remanded.

Clyde L. Miller, R. C. McClure, and G. W. Castle, all of Louisa, for appellants. M. S. Burns and W. D. O'Neal, both of Louisa, for appellee.

HURT, J. This is an appeal from a judgment of the Lawrence circuit court, in an action wherein F. T. D. Wallace, Jr., and others, the appellants, were the plaintiffs, and the appellee, James Q. Lackey, was the defendant. The action was to recover from the appellee the value of certain trees, which appellants alleged that he had wrongfully cut and removed from their lands and converted to his own use, and damages done to their lands by cutting underbrush and making roads over them. The defense of the appellee consisted of a denial of the ownership of the trees or lands from which the trees were cut, or upon which the underbrush was cut or the roads made, and a claim of ownership by the appellee of the lands by adverse possession for the statutory period necessary to create title in him under the statute of limitations. At the conclusion of all the evidence, the court sustained a motion to instruct the jury peremptorily to find for the appellee. The jury returned a verdict for appellee in accordance with an instruction to that effect, and the court rendered a judgment, by which the petition was dismissed. The appellant's motion for a new trial being overruled, they have appealed.

While the court below did not assign any reason for peremptorily directing a verdict, an examination of the record demonstrates clearly that it was done upon the ground that the appellants had failed to manifest any title to the lands in controversy, and not because all of the evidence had tended to show title to the lands in the appellee.

[1] The land in controversy is an uninclosed, unimproved tract of woodland, containing 10½ acres, and the familiar rule that the plaintiffs are obliged to recover, if at all, upon the strength of their own title, and not because of want of title in the defendant prevails in this case. The ruling by which the court directed a verdict for appellee was the result of a previous ruling by it, as to the admission of certain evidence for the appellants, which will be hereafter noticed. The facts of the case, as developed by the proof for the appellants, will be adverted to for the purpose of determining whether the court was in error as to its ruling upon the admission of the evidence mentioned.

On November 24, 1853, John Rogers, Jr., sold and conveyed to Thomas Wallace a large tract of land, of which the tract in controversy was a part. On December 10, 1857, Wallace sold and conveyed to John Haws a portion of the land upon the southern end of his tract. The northern end of the portion

sold and conveyed to Haws adjoins the land in controversy. He also sold a portion of the land, which was conveyed to him by Rogers to Wellman and Wilson. This portion adjoined the land in controversy for a short distance on the east side of the disputed land.

Another portion of the Roger's land Wallace sold to John Crabtree. The land sold to Crabtree adjoined the land in controversy upon the northeast and north. After these sales were made, there remained to Wallace of the lands purchased from Rogers the 10½ acres of land in controversy. On April 3, 1865, John Haws sold and conveyed to Thomas Wallace the lands which Wallace had theretofore sold and conveyed to him, and also two other tracts adjoining. Thomas Wallace then moved upon these lands, residing upon one of the tracts until he died, in 1871. The land in controversy adjoined the land purchased by Wallace from Haws upon the northern end. The lands purchased from Haws and the 10½-acre tract in controversy were called the Haws farm to distinguish it from other lands which were owned by Wallace. Shortly after the death of Thomas Wallace, the administrator of his estate instituted a suit against his heirs and creditors for a settlement of the estate. The Haws' farm was ordered to be sold in that action, and was purchased by Eugene Wallace and F. T. D. Wallace, Sr. This sale was made on the 13th day of January, 1876, and the sale reported to the court on May 30, 1876. The report of sale was confirmed during May, 1876, but a deed was not made until the year 1897. Previous to that time Eugene Wallace had died, and F. T. D. Wallace, Sr., who was a joint purchaser of the lands with him, but transferred his interest in the purchase to the heirs of Eugene Wallace, who are the appellants here. In 1897 a deed was ordered to be made for the lands to the heirs of Eugene Wallace, and the commissioner of the court executed to them a deed, which was reported and approved, but, as is insisted by appellants, the commissioner by mistake failed to include in the deed the land in controversy. In 1898 the suit of the administrator of Thomas Wallace against his heirs and creditors was stricken from the docket of the court. After this controversy arose, on May 5, 1910, an order was entered in the Lawrence circuit court, wherein the suit for the settlement of Thomas Wallace's estate had been prosecuted, reinstating the case upon the docket, and the order recites that it was done by consent. Thereafter the court rendered a judgment, which recites the fact of the sale of the Haws farm, the report and confirmation of the sale, and the transfer by F. T. D. Wallace, Sr., to the heirs of Eugene Wallace, and the making of the deed in 1897, and that by mistake all of the land sold at the sale was not included in the deed, and directed the court's commissioner to make and report a deed to the heirs of Eugene

Wallace, which would include the land in controversy, as well as the other lands embraced in the former deed. F. L. Stewart, the commissioner of the court, in obedience to this order, made and reported a deed, by which the title of all the heirs of Thomas Wallace was conveyed to the appellants in the lands in controversy, as well as in the other lands which had been sold by the commissioner, in 1876, to Eugene Wallace and F. T. D. Wallace, Sr. This deed was acknowledged by the commissioner and was, by an order of the court, duly approved and so indorsed by the judge of the court, and ordered to be certified for record.

In 1875, in a suit by the receiver of the estate of Thomas Wallace against John Crabtree, the lands owned by Crabtree and which lie adjoining the lands in controversy, upon the north, were sold by a judgment of the court, when Greenville Lackey became the purchaser, and same were conveyed to him on the 23d day of June, 1883. After the death of Greenville Lackey, the appellee, James Lackey, became the owner of a portion of these lands by inheritance from his father, Greenville Lackey. The boundary of these lands shown in the evidence does not seem to cover or embrace the lands in controversy.

[2] Upon the trial, after appellants had exhibited a chain title to the lands in controversy from the commonwealth of Kentucky down to Thomas Wallace, and then the deed from the commissioner of the court in the suit for the settlement of Thomas Wallace's estate to appellants, which was made in 1897, they then offered in evidence the deed by the commissioner of the court in the same suit, which was made to them in the year 1910, and the order of the court directing the making of such deed. The introduction of this deed in evidence was objected to, and the court sustained the objection, upon the alleged ground that the suit had been redocketed and the deed made without any notice to the appellee, and after the trespasses complained of were committed. While there was no formal avowal of its contents, it shows for itself and the record makes it clear that it embraces the lands in controversy. After the rejection of this deed as evidence, the court, being of the opinion that appellants had failed to show title to the lands, sustained the motion for the direct verdict. The order of the court directing the case to be redocketed and the order directing the deed, which was rejected, to be made, and approving same were exhibited upon the motion to read the deed in evidence. In rejecting the deed as evidence, and hence in directing a verdict against appellants, the court was in error. With this deed as evidence, the appellants would have shown a connected chain of title for the lands from the commonwealth of Kentucky to themselves, and were entitled to recover for the trespasses sued for, if appellee did not show a title from Thomas Wallace, or a vendee of

his, anterior to that of appellants, or a title to the lands by adverse possession, or by reason of the alleged agreement to establish a division line. The appellee was not a party to the suit in which the rejected deed was made, and had no interest in any proceedings in that case, as any step therein could in no way affect any title, which he may have to the land, and for that reason was not entitled to notice of any proceedings therein. The effect of the deed made in 1910 was to vest in appellants such title to the land in controversy as the heirs of Thomas Wallace may have had at the date of the confirmation of the sale to Eugene Wallace and F. T. D. Wallace, Sr., in May, 1876, and no other effect whatsoever. It does not appear that any other persons had any interest in the proceedings in 1910, except the heirs of Thomas Wallace, and if they chose to agree to place the suit again upon the docket and to have a deed made to conform to the sale theretofore made, and to correct any error in a former deed, the court thereby acquired jurisdiction of the parties and the subject-matter.

[3, 4] In an action of this character, when a judicial record or judgment is offered in evidence as a part of the chain of title, the only objection which can be made to it is that it is void. It cannot be objected to because it is irregular, or erroneous. If the court which rendered the judgment or made the decree had jurisdiction, the judgment or decree is not void, though it may be erroneous.

[5] When a court of general jurisdiction makes an order, which recites that it was done by the consent of the parties, when it is collaterally attacked, it must be conclusively presumed that all of the parties to the suit agreed to it, or else it would not have been made. *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378.

[6] For the appellee to attack the validity of the order of the circuit court in the action of Thomas Wallace's Administrator v. Thomas Wallace's Heirs and Creditors, reinstating the case upon the docket, in 1910, and the judgment directing the deed of 1910 to be made, is but a collateral attack upon them, since his purpose and the relief sought by the attack was not to have vacated the order and judgment, but to defeat the title of his adversary. 23 Cyc. 1062.

[7] It is well settled that a decree or judgment, which is not void cannot be attacked, except in a direct proceeding to vacate the judgment. *McIlvoy v. Speed*, 4 Bibb, 85; *Berry v. Foster*, 58 S. W. 709, 22 Ky. Law Rep. 745; *Sorrel v. Samuels*, 49 S. W. 762, 20 Ky. Law Rep. 1498; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378.

[8] It is likewise well settled that a judgment of a court of general jurisdiction, as is a circuit court, in this state, cannot be collaterally attacked, unless the want of jurisdiction of the court appears upon the record

in the action wherein the judgment was rendered, before a judgment of such a court can be held to be void upon a collateral attack, because of want of jurisdiction of the court to render it, the record must show that the court was without jurisdiction.

[9] If the record is merely silent as to some jurisdictional fact, as a want of a summons upon some party to the suit, it will be presumed that the party was duly summoned, or else the judgment would not have been rendered. *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384; *Dennil v. Alves*, 132 Ky. 345, 113 S. W. 483; *Jones v. Edwards, etc.*, 78 Ky. 6; *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222; *Sears v. Sears*, 95 Ky. 173, 25 S. W. 600, 15 Ky. Law Rep. 510, 44 Am. St. Rep. 213; *Wilson v. Teague*, 95 Ky. 47, 23 S. W. 656, 15 Ky. Law Rep. 414; 1 Black on Judgments, § 271; *Fleet on Collateral Attack*, § 855; *Maysville & B. S. R. R. Co. v. Ball*, 108 Ky. 241, 56 S. W. 188, 21 Ky. Law Rep. 1693; *Segal v. Reisert*, 128 Ky. 117, 107 S. W. 747, 32 Ky. Law Rep. 901; *Miller v. Farmers' Bank*, 75 S. W. 218, 25 Ky. Law Rep. 373; *Berry v. Foster*, 58 S. W. 709, 22 Ky. Law Rep. 746; *Northington v. Reed*, 75 S. W. 206, 25 Ky. Law Rep. 354; *Feltner et al. v. Huff et al.*, 118 S. W. 936; *Derr v. Wilson*, 84 Ky. 17; *Myers v. Pedigo*, 72 S. W. 734, 24 Ky. Law Rep. 1923. Hence the parol proof heard by the court below, in the instant case, as to the validity of the orders of the court relating to the reinstatement of the action upon the docket and the making of the deed of September 10, 1910, was all incompetent. The reason for the principle, which denies a litigant the right to collaterally attack a judgment of a domestic court of general jurisdiction for any reason, except that the judgment is void for want of jurisdiction of the court to render it, is not far to seek. If such attacks were permissible, in every action in which it became necessary for a litigant to rely upon a decree or judgment of such a court in another action, it would involve in the action on trial all the facts and proceedings which gave the court jurisdiction, wherein the decree or judgment was rendered. The rule, which confines the evidence for the determination as to the jurisdiction of the court which renders a judgment to the record of the action, is founded upon the reason of the above rule, and the presumption that a court of general jurisdiction has not proceeded without its jurisdiction.

The alleged trespasses complained of in the petition were committed before the corrected deed of 1910 was executed to appellants by the commissioner of the court, and it is contended that at that time the appellants were not the owners of the land in controversy, and for that reason the corrected deed should not be admitted in evidence, although it may have invested appellants with title

upon the date of its execution. However, if the land in controversy was a portion of the lands which were sold at the decretal sale, on January 18, 1876, to Eugene Wallace and F. T. D. Wallace, Sr., and the same confirmed in May, 1876, and the purchase money paid, the purchasers became the owners of the land upon the confirmation of the sale and the payment of the purchase price.

[10] The confirmation of the sale vested in the purchasers the equitable title to the land, and they thereby became the beneficial owners. The execution of the deed only conveyed to them the legal title. Until its execution, the heirs of Thomas Wallace held the legal title, but it was for the benefit of the purchasers of the land, and when the deed was executed it related back and vested in the appellants the legal title as held by the heirs of Thomas Wallace at the confirmation of the sale. *Neal v. Louisville*, 6 Ky. Law Rep. 300; *Dennis Bros. v. Strunk*, 108 S. W. 957, 32 Ky. Law Rep. 1230; *Feltner v. Huff*, 118 S. W. 936.

[11] Hence the court was in error in excluding the corrected commissioner's deed to appellant for the land and the order directing the deed to be made. While the records of the suit, except the order to re-docket and the judgment directing the deed to be made, were not offered in evidence, the recitals in the deed, with these orders, are sufficient, prima facie, to support the validity of the decree and the other matters affecting the validity of the conveyance. With the admission of the deed and order, it seems that the evidence was sufficient to require the submission of appellant's cause to the jury, under proper instructions.

[12] The questions raised in the record and in the briefs as to the competency of the evidence offered by the appellee in support of his defense and the sufficiency of such evidence to support a defense to the action are not decided, since the court below was not asked, at the conclusion of the evidence, to, and did not, rule thereon, and no instructions were offered or considered relating to the grounds of the defense, and such questions are not now before this court for adjudication.

The judgment, for the reasons given, is reversed, and the cause remanded for proceedings consistent with this opinion and other proper proceedings.

SOVEREIGN CAMP OF WOODMEN OF THE WORLD v. VALENTINE.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. INSURANCE — § 819(4) — BENEFIT INSURANCE — EVIDENCE — SUFFICIENCY.

In an action on a fraternal benefit certificate, evidence held insufficient to show that the death of the insured resulted from drinking carbolic acid, or that if he did drink acid it

was intentionally done, or that he was insane at the time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. ¶819(4).]

2. INSURANCE ¶819(4)—BENEFIT INSURANCE—PRIMA FACIE CASE.

In an action on a fraternal benefit certificate, the beneficiary made out a prima facie case by proving that the insured was dead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. ¶819(4).]

3. INSURANCE ¶817(3) — BENEFIT INSURANCE—EVIDENCE—BURDEN OF PROOF.

In an action on a fraternal benefit certificate, the burden was on the defendant to prove that the insured committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1999; Dec. Dig. ¶817(3).]

4. INSURANCE ¶788(1)—BENEFIT INSURANCE—FORFEITURE.

Where a benefit certificate provided that if a member should die by his own hand, sane or insane, the certificate should be void, if an insured voluntarily and intentionally drank carbolic acid with the intention of producing his death at a time when his mind was in sufficiently sound condition that he knew the probable consequences of his act, the certificate was forfeited, but not if the poison was not voluntarily or intentionally taken but by accident or mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. ¶788(1).]

5. INSURANCE ¶788(1)—BENEFIT INSURANCE—FORFEITURE.

Where a benefit certificate provided that if the insured should die by his own hand, whether sane or insane, the certificate should be forfeited, if the insured drank carbolic acid while insane the certificate was forfeited unless it is shown he did not have enough mind to know that his act would probably result in his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. ¶788(1).]

6. INSURANCE ¶825(1)—BENEFIT INSURANCE—QUESTION FOR JURY.

In an action on a fraternal benefit certificate, evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ¶825(1).]

7. INSURANCE ¶826(2)—BENEFIT INSURANCE—INSTRUCTIONS.

In an action on a benefit certificate, an instruction, that if the death of the insured was caused by his voluntarily taking carbolic acid the jury should find for defendant, was properly refused as misleading, in that it did not submit to the jury the question whether the insured had sufficient mental capacity to know the probable result of his act.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2010; Dec. Dig. ¶826(2).]

8. TRIAL ¶260(1) — REVIEW — PREJUDICIAL ERROR.

The refusal of a requested instruction substantially covered by given instructions is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ¶260(1).]

9. APPEAL AND ERROR ¶882(12)—REVIEW—INVITED ERROR.

Where the appellant offered an instruction similar to the one given, he cannot complain that the court erred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8602; Dec. Dig. ¶882(12).]

Appeal from Circuit Court, Fulton County.

Action by Mary B. Valentine against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Herschel T. Smith, of Fulton, for appellant. Ed Thomas, of Fulton, and Gus Thomas, of Frankfort, for appellee.

SAMPSON, J. This action was instituted in the Fulton circuit court by Mary B. Valentine against appellant society to recover on a benefit certificate or policy of insurance for \$1,000 issued by appellant to one T. O. Valentine in 1910, and in which policy the plaintiff, Mary B. Valentine, is the beneficiary. Mary B. Valentine was the wife of T. O. Valentine, who died August 17, 1914. The benefit certificate contained what is commonly called a suicide clause, which reads as follows:

"Section 4. If the member holding this certificate should die * * * by his own hand or act, whether sane or insane; * * * this certificate shall be null and void, and of no effect, and all moneys which shall have been paid, and all rights and benefits which have accrued on account of this certificate shall be absolutely forfeited without notice or service."

The appellant society admits the issuance of the policy, but denies its liability thereon because it charges that T. O. Valentine, the insured, died by his own hand by taking carbolic acid, and that, under the clause of the policy above referred to and some parts of its constitution and by-laws, in such case, it is not liable. To this the plaintiff replied and traversed the allegations that insured took carbolic acid, and affirmatively alleged that, if he did so do, it was by mistake or accident, and not with suicidal intent, and in a third paragraph she further alleged that if the insured did take carbolic acid, not by accident or mistake, then he took it at a time when he was insane to such an extent that he did not know the probable effects thereof, and that therefore she was entitled to recover on the policy.

T. O. Valentine, the insured, was a brick mason by trade and was earning at the time of his death about \$5 per day at a job at which he had been engaged for some weeks at Union City, Tenn.; he came home on Saturday night from work, his partner with him. They had agreed to return to work on Monday morning, but for some slight reason they changed their plans and agreed to return on the afternoon train. They were both about the streets of Fulton on the forenoon of Monday, the day of the death of Valentine. Valentine had another policy of insurance upon which the premiums were paid monthly, and they were due on that day, and the agent approached Valentine and the premium was paid that forenoon. Valentine was in the Owl Drug Store about 11 o'clock, and called for some carbolic acid, stating to

the druggist that he had a horse that had been cut by a barbed wire and he intended to use a solution of carbolic acid in treating the wound, and after some conversation between him and the druggist he procured an ounce of carbolic acid, and likewise an ounce of iodine, which the druggist suggested was also good for such an injury. Mary B. Valentine kept carbolic acid for sanitary purposes in the kitchen. Valentine then left the drug store and went on the outside and had some conversation with the insurance man, and then went away. Shortly after this the druggist on his way to dinner passed Valentine at the railroad crossing in conversation with a colored man, in which conversation Valentine inquired of the man if he had pasture for his horse, and the colored man answered that he did not have such pasture. Valentine had shortly before that owned a horse, but it is not shown that he owned one at this time. Between 12:30 and 1 o'clock, while the plaintiff, Mary B. Valentine, and her two brothers, were sitting at the dining table in the home of the insured, Valentine came in and one of his brothers-in-law said to him, "You are too late for dinner," to which Valentine answered, "No, not much," and sat down at the dinner table, and some other conversation followed. Immediately Valentine arose and went into another room, some of the witnesses thought the kitchen, and while he was out the other three persons left the dining room and went into the sitting room. In a few moments Valentine returned, coming into the sitting room. He exclaimed, "I am gone," and sank to the floor. To those who inquired what was the matter, he made no answer, but directed his brother-in-law to get whisky from the cellar, and his brother-in-law went to the cellar, but, not finding the liquor, came back for further directions, and Valentine told him to look under the tub, and he returned and brought the whisky, and Valentine drank freely, consuming most of the contents of the bottle. Whisky is shown to be an antidote for carbolic acid poison. Dr. Nat Morris was called and attempted to administer to Valentine, but without results, and shortly thereafter he died. What became of the carbolic acid is not shown by the evidence. Whether Valentine drank it is not certain from the evidence, although one or two witnesses testified that they smelt carbolic acid when they were near Valentine about the time he died, and evidence was also given that one corner of the mouth of Valentine was white from the burn caused by carbolic acid, but this was the mere conjecture of the witness. One or two witnesses mentioned seeing a bottle in the hand of Dr. Nat Morris while he was over the deceased, which they thought was perhaps a bottle containing carbolic acid. No one saw Valentine drink carbolic acid or otherwise do violence to himself. Dr. Morris died before the trial of the case and did not

testify. Several witnesses testified that Valentine on the day of his death acted and talked in the usual manner, and there is no evidence that he was despondent or in any trouble.

[1] From the evidence it cannot be said that the insured died by his own hand or act. It certainly cannot be said that he was insane. Neither can it be said from the evidence that his death resulted from drinking carbolic acid, or, if he did drink carbolic acid, it was intentional or only accidental. The jury heard the facts and found for the plaintiff, Mary B. Valentine. It has often been held that the jury is the judge of the facts, and, where there is evidence sufficient to support the verdict, no error appearing in the record, the judgment will be affirmed.

[2] The plaintiff made out a prima facie case when she proved that her husband was dead, because the general clause in the policy is a promise to pay upon the death of the insured, and the exception to this is set out in the subsequent and separate clause, and it devolved upon the appellant to show that it came within the exception. *Ætna Life Ins. Co. v. Rustin*, 151 Ky. 103, 151 S. W. 366; *Vicars v. Ætna Life Ins. Co.*, 158 Ky. 1, 164 S. W. 106.

[3] There is no presumption of law that one has committed suicide, but the presumption is that one will not do so, and the burden of proving that the insured died by his own hand or act, whether sane or insane, was upon the society, and, it having failed to show how insured came to his death, the jury was justified in returning a verdict for the plaintiff on the contract of insurance. In the case of *Ætna Life Ins. Co. v. Rustin*, supra, where the insured was found on his porch shot in the abdomen from which he died, and where a policy of insurance containing a suicide clause was involved, the court said:

"The plaintiff here made out a prima facie case when she showed that her husband had been shot; for the presumption against suicide was strengthened by the proof that no pistol was found about him or about the premises, and the nature of his wound was such that he must have been shot practically where he was when found. * * * As the plaintiff had thus made out her case, it then devolved on the defendant to show that the clause limiting its liability applied. It will be observed that, in the general clause of the policy containing the defendant's promise to pay, there is no qualification or exception, and no reference to the subsequent part of the policy containing the limitations upon its liability."

All this may well be said of the case at bar. It urges that the instructions given are erroneous, but its chief complaint is that the trial court overruled its motion for a directed verdict in its favor upon the ground, as stated in its brief, that there is no proof that insured was insane, or that he took carbolic acid by accident, but that, on the contrary, the proof shows that he was sane, and that

he bought and took the poison with suicidal intent. It further insists, however, that:

"If the case should have gone to the jury at all, instructions H and Y, offered by the defendant, should have been given; but I am not relying upon the refusal of the court to give these instructions, but I am hinging the reversal of this case entirely on the refusal of the court to sustain the defendant's motion for peremptory instruction at the conclusion of all of the testimony."

[4, 5] The instructions complained of and which were given by the court are as follows:

"The court instructs the jury to find for the plaintiff the sum of \$1,000 with interest from December 22, 1914, unless they believe that the decedent, T. O. Valentine, voluntarily committed suicide, while sane as is defined in instruction No. C."

"Instruction O. The court instructs the jury that if they believe from the evidence that the decedent, T. O. Valentine, voluntarily and intentionally drank carbolic acid at a time when his mind was in sufficiently sound condition as that he knew the probable consequences of the taking of the carbolic acid, if he did so do it at all, with the intention of bringing about or producing his death, then in that event the law is for the defendant, and the jury should so find; but, on the contrary, the court says to the jury that although they may believe from the evidence that the decedent, T. O. Valentine, died from the effects of carbolic acid which he had taken, still, if they should further believe from the evidence that said poison was not voluntarily or intentionally taken by him for the purpose of committing suicide, but by accident, or mistake, on his part, then and in this latter event, if the jury so believe, the law is for the plaintiff, and the jury should so find as directed in No. B."

"Instruction No. 2. Although the jury may believe from the evidence that T. O. Valentine was insane at the time he drank the carbolic acid, if he did so, and took his own life, yet the jury should find for the defendant unless they should believe from the evidence that at the time he did so he was insane and did not have enough mind to know the act that he was committing would probably result in his death."

[6] From the facts stated we conclude that the case should have been submitted to the jury, and the instructions given by the court fairly and in plain terms submit the issues raised on the pleadings.

It next complains that instruction Y offered by it should have been given. It is as follows:

"The court instructs the jury that if you believe from the evidence that in this case the death of T. O. Valentine was caused by his voluntarily taking the carbolic acid, a poisonous drug, then you will find for the defendant."

[7] This instruction does not correctly present the law of the case, in that it was calculated to mislead the jury. The insured may have taken carbolic acid voluntarily—that is, swallowed it without solicitation or coercion—and yet not have had sufficient mental capacity to know the probable effects thereof, or that it would kill him. Instruction C, however, given by the court, correctly presents this theory of the case, and it was not error on the part of the trial court to refuse instruction Y.

Appellant then offered instruction H, which is as follows:

"The court instructs the jury that if you believe the death of T. O. Valentine was the result of carbolic acid taken by accident and without intention to so take it, if you believe he did take it, then the law is for the plaintiff, and you will so find; but if you believe he took carbolic acid which resulted in his death knowingly, and the taking thereof caused his death, then the law is for the defendant, and you will so find."

[8] This instruction in a measure covers one issue presented by the facts, but it is not in such apt terms as instruction C given by the court but which is in substance the same upon this point. Since instruction C given by the court presents the issues properly, and fully covers all that is contained in instruction H, it was not error for the court to refuse to give H. It has been repeatedly held by this court that, even where an offered instruction correctly states the law and might properly have been given, it is not prejudicial error to refuse it, if the court gave an instruction covering substantially all that it contained. *Tyler v. First National Bank of Winslow*, 150 Ky. 515, 150 S. W. 685.

[9] And since the appellant offered an instruction similar to the one given by the court, it is in no position to complain that the court erred, even if it did so, which in this case does not appear to be true.

Appellant's motion for a directed verdict having been properly overruled, and the case submitted to the jury upon instructions correctly submitting the issues, it results that the case must be affirmed.

BROADWAY & NEWPORT BRIDGE CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 11, 1917.)

1. COMMERCE — 26 — INTERSTATE BRIDGES — REGULATION OF TOLLS.

If the states of Ohio and Kentucky shall enact by reciprocal legislation laws fixing the rate of toll that may be charged foot passengers on a bridge over the Ohio river, the state of Kentucky will have authority to prosecute the bridge company for charging excessive rates; but, in the absence of such reciprocal action by both states, no penalties can be imposed on such bridge company for a violation of Ky. St. § 845, making it unlawful for a bridge company to charge foot passengers more than five cents for five crossings.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. — 26.]

2. COMMERCE — 26 — INTERSTATE BRIDGE — REGULATION OF CHARGES.

Such reciprocal legislation must be legislation establishing the same tolls for passage from Kentucky to Ohio as from Ohio to Kentucky, and hence its requirements are not met by Ky. St. § 845, making it unlawful for a bridge company to charge for foot passengers more than five cents for five crossings, and Gen. Code, Ohio, § 9312, authorizing toll to be collected for foot passengers on consolidated bridges over the Ohio river in an amount not exceeding five cents for four tickets.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. — 26.]

3. COMMERCE ⚡26—TOLL ON INTERSTATE BRIDGE—STATE POWER TO REGULATE—POLICE POWER.

The state has no authority, under its police power, in the absence of congressional legislation on the subject, to fix the rate of toll on an interstate bridge over the Ohio river.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. ⚡26.]

4. CRIMINAL LAW ⚡1124(1)—APPEAL—PRESENTATION FOR REVIEW.

In a criminal or penal case, the fact that there is no motion or grounds for new trial, and bill of exceptions in the record, will not require dismissal of the appeal, but will merely eliminate from the consideration of the appellate court, questions which might otherwise have been considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2947; Dec. Dig. ⚡1124(1).]

5. CRIMINAL LAW ⚡1090(1)—BILL OF EXCEPTIONS—NECESSITY.

No bill of exceptions is necessary in a criminal case where nothing occurred below to which defendant desired to or did make an objection or save an exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2807; Dec. Dig. ⚡1090(1).]

6. CRIMINAL LAW ⚡1091(1), 1104(3)—“BILL OF EXCEPTIONS”—“TRANSCRIPT OF EVIDENCE.”

“Bill of exceptions” and “transcripts of evidence” are clearly distinguishable. The latter may contain no objection or exception, and nothing other than the evidence introduced on the trial; the former is, strictly speaking, only a record which points out alleged errors committed below in relation to evidence as well as other things.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2776, 2808, 2823-2830, 2886; Dec. Dig. ⚡1091(1), 1104(3).]

For other definitions, see Words and Phrases, First and Second Series, Bill of Exceptions.]

7. CRIMINAL LAW ⚡1144(½)—APPEAL—REVIEW IN ABSENCE OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions in a criminal case, the appellate court will presume that no error was committed below, and that the judgment is correct, providing the pleadings and evidence support it, but a judgment not so supported will be reversed, notwithstanding the absence of any bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3014; Dec. Dig. ⚡1144(½).]

8. CRIMINAL LAW ⚡1090(18)—APPEAL—PRESENTATION BELOW—BILL OF EXCEPTIONS.

All errors occurring below in a criminal case must be properly complained of at the time of their occurrence, and, together with the objections and exceptions thereto, be incorporated in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. ⚡1090(18).]

9. CRIMINAL LAW ⚡1090(1)—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

Where, in a case submitted on an agreed statement of the facts, exception was saved to a judgment finding a bridge company guilty of charging excessive tolls, and an appeal prayed, no bill of exceptions was necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2807; Dec. Dig. ⚡1090(1).]

10. CRIMINAL LAW ⚡905—NEW TRIAL—PURPOSES OF MOTION AND GROUNDS.

The purpose of a motion and grounds for a new trial authorized by Civ. Code Prac. §

340 is to direct the trial court's attention to alleged errors, so that it may review the entire record and trial in the light thereof, and either grant or refuse a new trial as justice requires.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2128, 2183, 2404, 2405; Dec. Dig. ⚡905.]

11. CRIMINAL LAW ⚡1063(4)—PRESENTATION FOR REVIEW—MOTION AND GROUNDS FOR NEW TRIAL.

Where, in the prosecution of a bridge company for charging excessive tolls in violation of Ky. St. § 845, making it unlawful to charge for foot passengers more than five cents for five crossings, the only ground on which a reversal was asked was that the evidence exhibited in the agreed statement of facts was wholly insufficient to support the judgment finding defendant guilty, the filing of any motions and grounds for new trial was unnecessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2673, 2680; Dec. Dig. ⚡1063(4).]

Appeal from Circuit Court, Campbell County.

The Broadway & Newport Bridge Company was convicted of violating Ky. St. § 845, which makes it unlawful for a bridge corporation to charge foot passengers more than five cents for five crossings, and appeals. Reversed, with directions to dismiss indictment.

Nelson & Gallagher, of Newport, for appellant. M. M. Logan, Atty. Gen., D. O. Myatt, Asst. Atty. Gen., and Lawrence J. Diskin, Com. Atty., of Newport, for the Commonwealth.

CARROLL, J. The Broadway & Newport Bridge Company, is a consolidated corporation created under section 843 of the Kentucky Statutes, and is a citizen of the state of Kentucky. It was formed by the consolidation of the Broadway and Newport Bridge Company, an Ohio corporation, and the Newport & Broadway Bridge Company, a Kentucky corporation. It maintains and operates a bridge across the Ohio river, connecting Newport, Ky., and Cincinnati, Ohio, which is used, in connection with other traffic, by foot passengers. Section 845 of the chapter under which this corporation was created provides that it shall be unlawful for it or any other like bridge corporation to demand, charge, or receive for foot passengers more than five cents for five crossings; or, in other words, the limit that the company may charge foot passengers who secure five tickets is five cents, or one cent for each crossing. But, notwithstanding this limitation, it appears that the company sold only four tickets, entitling the purchaser to one crossing each for five cents, and the grand jury of Campbell county returned against it the indictment before us for violating in the manner stated the statute. After a demurrer to the indictment had been overruled, the case was submitted to the court on an agreed state of facts, and the court found the company guilty, and assessed against it a fine of \$500, as prescribed in the statute. From

the judgment thus entered it prosecutes this appeal.

It appears from the agreed facts that the company is now and has been at all times selling only four tickets for five cents, each ticket entitling the purchaser to one crossing. It further appears that section 9312 of the Civil Code of Ohio authorizes toll to be collected on consolidated bridges over the Ohio river, and that this toll shall at no time exceed that collected at the Covington and Cincinnati bridge. It further appears that the rates of toll charged by the Covington & Cincinnati Bridge Company for passage over said bridge are more than five cents for four tickets. It will thus be seen that under the agreed state of facts the Ohio statute authorizes consolidated bridge companies such as the Broadway & Newport Bridge Company to charge and collect more than five cents for four tickets, while the Kentucky statute provides that these consolidated bridge companies shall not charge more than five cents for five tickets. It will further be observed that this company charges more than the Kentucky statute authorizes, but less than the Ohio statute permits. On these facts, the only question in the case involving the merits is, Has the state of Kentucky the power to regulate the rates of toll for foot passengers on this bridge?

In the case of Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky, decided by the Supreme Court of the United States and reported in 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, it appears from the opinion that the bridge company operated a bridge across the Ohio river between Covington, Ky., and Cincinnati, Ohio, and that an indictment was found against the bridge company by the grand jury of Kenton county, Ky., for demanding and collecting tolls in excess of the rate fixed by the Kentucky Statute, and refusing to sell tickets at the rates required by law. It further appears that this bridge company was incorporated under an act of the Legislature of Kentucky, which required the confirmation of the act by the state of Ohio, and that thereafter by an act of the Ohio Legislature the company was made a body corporate in that state. For a violation of the statute of this state fixing the rates of toll that might be charged, the bridge company was fined in the Kenton circuit court, and, the judgment of that court having been affirmed by this court, the case was taken to the Supreme Court of the United States, which court reversed the judgment of this court, and in the course of the opinion, after holding that the bridge was an instrument of interstate commerce, said:

"It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable, not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not

have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and, without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious, there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the [bridge] company to condemn land within its own territory, but in the operation of the bridge their action must be joint, or great confusion is likely to result."

After further pointing out the confusion that might exist by inharmonious or conflicting legislation by the states of Kentucky and Ohio as to the manner in which the bridge should be operated and the rates of toll that should be charged thereon, and saying that "Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions," the court said:

"We do not wish to be understood as saying that, in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. * * * Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may, by reciprocal action, fix upon a tariff which shall be operative upon both sides of the river."

[1] It is agreed by counsel that there is an absence of congressional legislation on the subject of the rates of toll that may be charged for passage over this bridge, and we think the opinion of the Supreme Court authorizes us to rule that if the states of Ohio and Kentucky enacted by reciprocal legislation laws fixing the rates of toll that might be charged foot passengers on this bridge, the state of Kentucky would have authority to maintain a prosecution against the bridge company for charging rates in excess of those fixed by the statute of each state, but that, in the absence of such reciprocal action by the states of Kentucky and Ohio, the courts of Kentucky have no power to impose penalties on the company for a violation of the Kentucky Statutes. Having this view of the matter, it only remains to be determined whether the states of Ohio and Kentucky have joined in the enactment of legislation fixing like rates of toll for passage over this bridge.

[2] The solution of this question is to be determined by the agreed state of facts, and we think it apparent from these facts that there has been no such reciprocal legislation by the two states as would meet the requirements demanding such legislation before either state can enforce its penal statutes against bridge companies for charging excessive rates of toll in violation of the laws of

either of the states. According to the agreed state of facts under the Kentucky statute, the bridge company must sell five tickets for five cents, while under the Ohio statute it may charge five cents for four tickets, or even more than five cents for four tickets. This mere statement is of itself, we think, sufficient to illustrate that there has been no reciprocal legislation on this subject between the two states. A person desiring to go from Newport to Cincinnati could, under the Kentucky law, demand five tickets for five cents, entitling him to passage from Newport to Cincinnati, but if a citizen of Cincinnati desired to go to Newport, Ky., the bridge collector at the Cincinnati end of the bridge could require him to pay five cents, or even more, for four tickets entitling him to passage from Cincinnati to Newport.

We think the reciprocal legislation contemplated by the opinion of the Supreme Court must be such legislation as establishes precisely the same rates of toll for passage over the bridge from Newport to Cincinnati as from Cincinnati to Newport, and that until such a joint rate is adopted by both states, neither state can enforce penalties for violations by the bridge company of the rate of toll it has fixed.

It is, however, further insisted by counsel for the commonwealth that, in the absence of congressional legislation or reciprocal legislation between the two states, the state of Kentucky, by virtue of the police power at its command, may enforce obedience to its laws by this Kentucky corporation, notwithstanding the fact that it is engaged in interstate commerce.

In *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U. S. 537, 35 Sup. Ct. 158, 50 L. Ed. 350, L. R. A. 1915F, 792, the Supreme Court had before it a case involving the power of the city of Covington to enact certain ordinances regulating the operation of street cars between Covington, Ky., and Cincinnati, Ohio. These regulations consisted in limiting the number of passengers that should be permitted to ride in any car; in forbidding passengers to ride on the platforms of the cars unless they were equipped as provided in the ordinance; in requiring the company to clean and ventilate its cars at stated times; keep the temperature of the cars at a designated degree; and operate them in sufficient numbers to accommodate the public. The court, after holding that this street car company was engaged in interstate commerce, said:

"Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution? In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consid-

eration in the *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151 [Ann. Cas. 1916A, 18], and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce."

—and then proceeded to rule that so much of the ordinance as limited the number of passengers that might be carried in any car, and that made it the duty of the company to operate a sufficient number of cars to accommodate the public, was an interference with interstate commerce which it was not within the power of Covington to regulate or control, but that such of the ordinance as referred to passengers riding on the platform, as well as the provision with reference to keeping the cars cleaned, ventilated, and fumigated, might be treated as a police regulation which was within the power of the city of Covington to impose.

[3] To what extent the states may go in the regulation of interstate commerce through the means of what is known as the police power is a question involved in much uncertainty, but we think that under the police power the state of Kentucky has not the authority to fix the rates of toll that this interstate bridge company may charge, in the absence of congressional legislation on the subject. If it did have such power, it could, of course, establish reasonable rates of toll, and, likewise, under the same power the state of Ohio could fix reasonable rates of toll. But unless the rates of toll fixed by the two states were the same, we would have the same condition that now exists, and a person going from Newport to Cincinnati might be charged one rate and a person going from Cincinnati to Newport might be charged another rate. But, aside from the confusion that this conflict in rates would produce, it does not seem to us that a state, by virtue of its police power, has the authority to regulate charges in interstate commerce. To give to the police power of the states this measure of authority would enable the states, each acting for itself, to adopt such rules and regulations as to each might seem desirable, and embarrass interstate commerce with burdens which we do not think it is within the power of the states to impose. In fact, it seems to us quite clear that the right of one state to fix the rate of tolls upon this bridge was expressly denied in the *Cincinnati & Covington Bridge Company Case*, supra, although it should be said that the authority of the state in respect to matters like this under the police power of the state was not considered by the court or referred to in the opinion. See, also, *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders*, 234 U.

S. 317, 34 Sup. Ct. 821, 58 L. Ed. 1380, in which case the ruling in the Covington Bridge Case was approved.

[4] A question of practice is raised in this case that should be disposed of. There is no motion and grounds for a new trial, and no bill of exceptions in the record, and on this state of the record a motion was made by the commonwealth to dismiss the appeal, which motion was passed to be heard with the merits. It may, at the outset, be observed that the mere fact that the record in a common-law case, or in a criminal or penal case, does not contain a motion and grounds for a new trial, or a bill of exceptions, is no ground for dismissing the appeal. The complaining party may, if he chooses, bring his common-law, or his criminal, or his penal case here without either a motion for a new trial or a bill of exceptions. If he chooses to adopt this practice, as he may do, his course of procedure will not work a dismissal of his appeal. It will only result in many questions being eliminated from the consideration of this court that might have been considered if the record were accompanied by a motion and grounds for a new trial and a bill of exceptions. As was said in *Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266:

"The sole purpose and office of a bill of exceptions is to bring before this court a record authenticated by the trial judge of things that transpired in the trial court that do not appear on the record book of the trial court. It is not necessary to put in the bill of exceptions the pleadings, orders of court, or any motion or paper that is mentioned in the orders of court as having been offered or filed as a part of the record, although it may not be copied on the record book, as the fact that it is there mentioned is sufficient evidence of its identification to make it a part of the record for this court when copied by the clerk, accompanied by his certificate."

[5] So that in a common-law case tried by a jury, or in a case in which the law and facts are submitted to the court without the intervention of a jury, if nothing has occurred on the trial to which the complaining party desired to or did make an objection or save an exception, no bill of exceptions is necessary, for the simple reason that the party did not think it proper to object or except to anything that the court did in the progress of the trial, or to anything that happened during the course of the trial, and therefore in such a case all that the complaining party need do, and indeed all that he can do, is to bring to this court a bill of evidence, or what is usually called a transcript of the evidence, properly certified to by the trial judge, in which transcript the instructions given by the court may be inserted, as was held in the *Postal Telegraph-Cable Company Case*, or the instructions may be put in a separate bill of exceptions, properly signed and certified to by the trial judge.

[6] Much of the confusion in respect to

ills of exceptions grows out of the practice or habit of calling the transcript of the evidence a bill of exceptions, or speaking of bills of exceptions and transcripts of evidence interchangeably and as meaning the same thing. But, in truth, they are very different things. The transcript of the evidence may not contain anything except the evidence that was introduced on the trial. It may not have in it any objection or any exception. But a bill of exceptions is, strictly speaking, only a record or transcript that points out alleged errors committed by the trial court in relation to evidence, as well as to other things. Under the modern practice these objections and exceptions usually appear in the transcript of the evidence at the appropriate place, and this practice has contributed to the confusion that comes up in calling the bill of transcript of the evidence a bill of exceptions, because, excepting errors in respect to the instructions, the majority of errors relate to questions of evidence. As illustrating this, we find in *Cook v. Commonwealth*, 13 S. W. 356, 13 Ky. Law Rep. 702, the court saying, when the testimony was not in the record, that:

"There is, however, no bill of exceptions. * * * In the absence of a bill of exceptions, the action of the court in the conduct of the trial will be presumed to have been correct, and the evidence sufficient to support the verdict."

And the judgment was affirmed. In that case the court apparently treated the failure to bring up a transcript of the evidence as the same thing as having no bill of exceptions, when the transcript of the evidence might have been brought up without any bill of exceptions, if, as we have said, counsel did not make any objections or save any exceptions in the introduction of evidence. Also in *Gambrell v. Gambrell*, 130 Ky. 714, 113 S. W. 885, where there was no bill or transcript of evidence in the record, and, this being so, the court said:

"The appeal prosecuted from the judgment, therefore, presents but the single question whether the judgment is authorized, or might be authorized, by the pleadings. For, in the absence of a bill of exceptions and evidence, it will be presumed that the evidence and instructions authorized the verdict rendered, provided the state of pleadings do."

And manifestly this was so, because, in the absence of the evidence, there could be nothing before this court to consider except the sufficiency of the pleadings to support the judgment. To the same effect are *Louisville & Atlantic Coal Co. v. Morris*, 132 Ky. 223, 116 S. W. 330; *Settle v. Gibson*, 147 Ky. 616, 144 S. W. 764; *Daniels v. Compton*, 151 Ky. 714, 152 S. W. 753; *Clark v. Wallace Oil Co.*, 155 Ky. 836, 160 S. W. 506; and *Tyler v. Woerner*, 158 Ky. 710, 166 S. W. 178.

[7] If, in a trial before a jury, the complaining party brings to this court his bill or transcript of evidence, properly signed and certified, and the instructions to the jury, the court will consider the evidence precisely in

the same manner as it would consider the transcript of the evidence if it contained numerous objections and exceptions touching the admission or rejection of evidence that had been made and saved. But in the absence of objections or exceptions, it will, of course, be presumed that the court did not commit any error in the admission or rejection of evidence, and so upon this point the only question before this court would be, was the evidence sufficient to support the verdict, assuming that the pleadings were good and the instructions unobjectionable? Without a bill of exceptions, that is, a bill pointing out alleged errors committed by the trial court, or that occurred during the progress of the trial, this court will presume that no error was committed by the trial court, and that no error happened during the progress of the trial, and therefore we will assume that the judgment appealed from is correct if the pleadings and the evidence support the judgment. If, however, the pleadings do not support the judgment, or there is no evidence to support the judgment, then it will be reversed, notwithstanding there is no bill of exceptions, because no litigant is entitled to have a judgment unless he first states a cause of action and supports his cause of action, if it is put in issue, by evidence.

[8] It is a further rule of practice that all errors occurring during the trial of the case, whether made by the trial judge or brought about in some other way, must be objected or excepted to, as the case may be, at the time they occur so that the attention of the court may be immediately directed to the complaint, and it is the proper practice to set out these alleged errors and the objections and exceptions thereto in a bill of exceptions, so that this court may consider them, and this, we repeat, is the only office of a bill of exceptions. *McAllister v. Connecticut Mutual Life Ins Co.*, 78 Ky. 531.

[9] Applying these general rules to the case we have, it is apparent that no bill of exceptions was necessary, because the case was submitted to the court on an agreed state of facts, and there was nothing that occurred at the trial to which the complaining party could make an objection or save an exception except to the judgment of the court finding the appellant guilty on the facts, and to this judgment there was an exception saved and an appeal prayed.

[10] Considering next, the effect of the failure to file a motion and grounds for a new trial: Section 340 of the Civil Code, after declaring that "a new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court," proceeds to point out the causes for which a new trial may be granted. The purpose of a motion and grounds for a new trial is to direct the attention of the court to alleged errors that occurred during the trial and to

which an objection was made or an exception saved at the time, and also to bring to the attention of the court such other errors relied on which it might be proper to bring to its attention without a previous objection or exception, so that the trial court may have an opportunity to review the entire record and trial in the light of the alleged errors to which its attention is called by the grounds for a new trial, and, after considering them, either grant or refuse the new trial, as may seem right.

[11] But it is not necessary to enable a party to prosecute an appeal that he should file a motion and grounds for a new trial, although if he fails to do so he cannot avail himself on the appeal of any errors that may have been committed during the progress of the trial and that should have been pointed out in the motion and grounds for a new trial. As said in *Roberts Cotton Oil Co. v. Dodds & Johnson*, 163 Ky. 695, 174 S. W. 485:

"In the absence of a motion and grounds for a new trial, nothing is brought to this court for review on appeal except the inquiry as to whether the petition states a cause of action, and whether the evidence presented by the bill of exceptions authorized the judgment. Every other error upon the trial is waived by the failure to call the attention of the trial court to it, by motion and specific grounds assigned."

If, therefore, there is no motion and grounds for a new trial, we will consider on appeal only the question whether the pleadings and evidence authorized the judgment. If the petition did not state a cause of action, or if a demurrer filed should have been sustained to it, or if the evidence is wholly insufficient to support the judgment, we may reverse the case for any of these reasons, although there is no motion and grounds for a new trial. Thus it was said in *Henderson v. Dupree*, 82 Ky. 678:

"In the absence of a motion for a new trial, this court will not consider the evidence in the case as it would if it had been made; but yet it is proper to determine whether there is any testimony whatever to support the verdict or judgment, because, if none, then only a question of law was presented to the judge of the lower court; and a party ought not to be required to call his attention to the fact that the adverse party has no case or defense whatever. * * * If a party presents no reason whatever in his pleadings or by testimony against the claim of his adversary, a rule requiring the attention of the lower court to be called to it would be purely technical, without reason, and founded only upon the presumed utter incompetency of the judge. If, notwithstanding the evidence, it would have been proper in him to have instructed peremptorily against the party that has succeeded, or in effect have sustained a demurrer to the evidence, then only a question of law was presented, which, upon a consideration of the whole case, was decisive of the party's right, and ought to be considered by the appellate tribunal even in the absence of a motion for a new trial."

To the same effect are *Helm v. Coffey*, 80 Ky. 176; *Albin Co. v. Ellinger & Co.*, 103 Ky. 240, 44 S. W. 655.

Applying to the case we have these rules of

practice, it seems manifest that no motion and grounds for a new trial were necessary. The only ground upon which a reversal is asked is that the evidence exhibited in the agreed state of facts was wholly insufficient to support the finding of the court, and if the evidence is not sufficient to support the judgment, we may look into this, in the absence of a motion and grounds for a new trial.

Wherefore the judgment is reversed, with directions to dismiss the indictment.

NETTER v. CALDWELL.

(Court of Appeals of Kentucky. Jan. 12, 1917.)

1. APPEAL AND ERROR \S 242(4)—OBJECTIONS IN LOWER COURT—DEPOSITIONS.

In the absence of showing that plaintiff presented defendant's deposition, taken before trial under Civ. Code Prac. \S 606, subd. 8, to the trial court, or that the court was asked to rule upon the competency of questions which defendant refused to answer, the objections thereto, or the refusal to answer, and where it did not appear that plaintiff ever requested an order requiring defendant to answer the questions, or any of them, or to complete the deposition, plaintiff could not complain that the questions were not answered, or that the deposition was not completed; it having been discontinued by agreement on defendant's refusal to answer, and the proceedings referred to the court for a ruling on the objections, to be presented to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 1421-1423; Dec. Dig. \S 242(4).]

2. APPEAL AND ERROR \S 236(1)—HARMLESS ERROR—REFUSAL TO COMPLETE DEPOSITION.

Where plaintiff undertook to take defendant's deposition before trial, under Civ. Code Prac. \S 606, subd. 8, and defendant refused to answer certain questions, so that the deposition was not completed, but defendant testified on trial, and plaintiff did not ask continuance because of his failure to obtain the deposition, or on the ground of surprise, or that the taking of the deposition was necessary in preparing his defense, plaintiff was not prejudiced by defendant's refusal to answer or complete the deposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1384; Dec. Dig. \S 236(1).]

3. TRIAL \S 108½—QUESTIONS ON VOIR DIRE—RELATIONS OF JURORS TO INSURER—DISCRETION OF COURT.

In an action for personal injuries through defendant's negligent operation of an automobile, where plaintiff made persistent efforts to get before the court and jury the fact that defendant held a policy of indemnity insurance, protecting him against loss in the use of the automobile, in order to prejudice the jurors' minds by impressing them with the fact that, if a judgment were obtained, it would be paid by the foreign insurer, rather than by defendant, a citizen of the city, the ruling of the court in refusing to permit the jurors or their voir dire to be asked whether any of them owned a policy of insurance in the insurer, or whether any of them were stockholders, servants, or employees of it, was within the discretion of the court, since the absence of good faith on plaintiff's part justified the court's ruling.

[Ed. Note.—For other cases, see Trial, Dec. Dig. \S 108½.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Alvin Netter, by, etc., against Junius Caldwell. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

O'Doherty & Yonts and Chas. P. Johnson, all of Louisville, for appellant. Bennett H. Young and Marion W. Ripy, both of Louisville, for appellee.

SETTLE, C. J. In this action, which was instituted by the infant appellant, Alvin Netter, by his father and next friend, against the appellee, Junius Caldwell, a recovery of damages was sought by the infant for injuries alleged to have been sustained by him through the appellee's negligent operation of an automobile. The accident occurred in June, 1913, on Third street, south of York street, in the city of Louisville. It appears from the bill of evidence that as appellee, accompanied by J. T. Gathwright, was riding in his automobile north on Third street, the infant appellant, who was assisting his father in delivering vegetables to his customers, came suddenly from the pavement on the east side of Third street on his way to the west side thereof, carrying some boxes of strawberries to be delivered to a customer. In entering the street from the east side he passed between two wagons that were standing at the curbing on that side of the street, and was looking north at the time. As he moved rapidly out from between the wagons into the street, he collided with or was struck by appellee's automobile, which was proceeding northward. According to the testimony of appellee and Gathwright, it does not appear that the boy was seen by them before he came in contact with the machine. There was little, if any, contrariety of evidence as to the speed of the automobile at the time of the accident, substantially the whole of it being to the effect that its rate of speed did not exceed five miles an hour; and the fact that it did not proceed more than four or five feet after the collision with the boy demonstrates that it was moving slowly. There was some contrariety of evidence as to what part of the machine came in contact with the appellant, the evidence introduced in his behalf conducing to prove that he was struck by the front of the machine, while that of appellee and his witnesses, Gathwright and Sachs, as strongly conducing to prove that he ran into the machine, striking it between the front and back seats. According to the testimony, the collision resulted in no serious or permanent injury to the appellant. His left arm and left side were considerably bruised, but no bones were broken. The trial resulted in a verdict for the appellee; and from the judgment entered thereon this appeal is prosecuted.

Two grounds are urged by appellant's

counsel for a reversal of the judgment: (1) That the trial court erred in refusing to enter, on appellant's motion, an order requiring appellee to give his deposition, "and thereby answer certain questions asked by appellant's counsel"; (2) that the court further erred in refusing to permit appellant's counsel to examine the jurors upon their voir dire as to whether they were stockholders, servants, agents, employes, or interested in the Casualty Insurance Company of America, in which it is claimed appellee held a policy, indemnifying him against any loss that might arise on account of injuries that might be caused others in operating his automobile.

[1] Appellant is not entitled to the reversal asked on the first ground urged by him. While under subsection 8, § 606, Civil Code, he clearly had the right to take the deposition of appellee as if under cross-examination, it is not made to appear from the bill of exceptions that he was deprived of that right by any ruling of the trial court. It does, however, appear from the record that in obedience to a notice that his deposition was desired and a subpoena served upon him, appellee went to the office of appellant's counsel for the purpose of giving his deposition as demanded by the latter: After a few preliminary questions, which had no bearing upon the cause of the accident in which appellant was injured, appellee was asked certain questions by appellant's counsel, intended to elicit information as to whether he had, at the time of the accident, an indemnity policy in the Casualty Company of America, protecting him against loss in case of injury resulting to others from the use by him of his automobile, and whether the counsel making defense for appellee in this case were not the regularly retained counsel of the Casualty Company of America, and employed by it to make such defense. The foregoing questions and each of them were objected to by counsel present representing appellee, and upon the advice of the latter he declined to answer them. The questions objected to and not answered are Nos. 5, 6, 7, 8, 9, 10, 11, and 12, contained in the deposition of appellee, which appears in the record. The notary's certificate to the deposition shows that upon appellee's refusal to answer these questions, the deposition was discontinued by agreement of the parties, and, further, that:

"The proceedings were referred to the court for a ruling upon said objections to be presented to the court."

The record fails to show that the deposition was ever presented by appellant to the trial court, or that the court was asked to rule upon the competency of the questions referred to, the objections thereto, or the refusal of appellee to answer them; nor does it appear from the record that appellant ever requested of the court the entering of an order requiring appellee to answer the questions, or any of them, or to complete the

deposition. And in the absence of such a showing, appellant cannot complain that the questions were not answered, or that the deposition was not completed.

[2] Moreover, appellant could not have been prejudiced by the refusal of appellee to answer the questions or complete the deposition, as the latter testified on the trial, and appellant did not ask a continuance of the case because of his failure to obtain appellee's deposition, or on the ground of surprise, or that the taking of the deposition was necessary in preparing his defense.

In *Owensboro City Ry. Co. v. Rowland*, 152 Ky. 175, 158 S. W. 206, it was complained by the appellant that the trial court had erred in refusing an order requiring appellee to give his deposition. In passing on this contention we said:

"The trial court manifestly erred in refusing the order appellant asked to compel appellee to give his deposition, and thereby answer certain questions asked by appellant's counsel. The right of appellant to take his deposition was conferred by subsection 8, § 606, Civil Code, which provides: 'A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.' It is not meant by this section that in order to take a deposition for use in an action at law, the witness must be of a class named in section 554, Civil Code; but it applies to the taking by either party to the action of the deposition of the adverse party. * * * We do not, however, agree with appellant's counsel that the error of the court in question authorizes a reversal of the judgment appealed from. It is not made to appear that the error was prejudicial. Appellee testified on the trial, and appellant did not ask a continuance of the case on the ground of surprise or because of its failure to obtain appellee's deposition in advance of the trial; nor was it claimed that by reason of such failure it was prevented from preparing or making its defense."

[3] Appellant's second contention possesses little merit. It does appear from the record that his counsel moved to be allowed to ask the jury panel on their voir dire whether they or any of them owned a policy of accident or casualty insurance in the Casualty Company of America, or whether they or any of them were stockholders, servants, or employes of the Casualty Company of America, or were related or connected in any wise with Booker & Kinnard or Owen B. Mann, local agents of the Casualty Company of America in the city of Louisville. It also appears from the record that the motion as to each and all of these questions was overruled by the court, to which appellant excepted. In support of the above motions the affidavits of appellant and his counsel were filed. It is not, however, stated in either of these affidavits that the appellant or his counsel had any information to the effect that any member of the jury was in any manner connected with or interested in the Casualty Company of America. It is only stated therein that "it is possible, or even highly prob-

able," that the panel contained jurors whose relations with the insurance company mentioned, or its agents, friends, lawyers, parties, or stockholders would give cause for appellant's objecting to their serving upon the jury. It was not made to appear by either of the affidavits that appellant's counsel, at least, was not personally acquainted with the members of the jury constituting the panel, or that he did not know the occupation or business of each of them.

In view of the situation presented by the record, we are unprepared to say that the refusal of the trial court to allow the jurors to be interrogated as demanded by appellant was an abuse of discretion, or prejudicial to any of his substantial rights. From the institution of the action down to the conclusion of the trial the repeated and persistent efforts of appellant to get before the court and jury the fact that appellee held a policy of indemnity insurance in the Casualty Company of America upon his automobile, protecting him against loss in the use thereof, are conspicuously shown. The questions asked appellee before the notary show that appellant's only motive in taking his deposition was to prove the existence of the indemnity policy. The same purpose was manifested by his giving both to appellee and the Casualty Company of America notice to produce on the trial the policy it was claimed had been issued to appellee by that company.

We think it fairly evident that these efforts to bring to the attention of the jury the existence of the fact that such a policy was held by appellee was done to prejudice their minds by making upon them the impression that if a judgment were obtained, it would be paid by a New York insurance company rather than by appellee, a citizen of the city of Louisville, although appellant, through his counsel, well knew that he was not entitled to join the former in the suit or to recover against it therein any part of the damages claimed. If the facts and circumstances referred to were sufficient to induce in the mind of the trial court the belief that such was appellant's motive (and we incline to the opinion that they were), it

had good reason to doubt his good faith in endeavoring to inject into the case the insurance matter. And the absence of good faith on the part of appellant justified the ruling of the court in refusing to permit the jurors to be asked on their voir dire the questions, the exclusion of which is complained of.

In *Duncan Coal Co. v. Thompson's Adm'r*, 157 Ky. 304, 162 S. W. 1139, the probability of injustice resulting to the defendant in the state of case suggested is recognized and condemned. In the opinion it is said:

"We have recognized the propriety of such a question where counsel for plaintiff has information that the defendant has indemnity insurance, and that some member of the jury is interested in the insurance company, and the question is asked in good faith. *Dow Wire Works Co. v. Morgan*, 96 S. W. 530; *Owensboro Wagon Co. v. Boling*, 107 S. W. 264. This privilege, however, is not only liable to abuse, but is frequently abused. While the question is asked ostensibly for the purpose of determining the bias or interest of the juror, in a great majority of cases the sole purpose of such a question is to bring to the attention of the jurors the fact that any verdict they may render will impose no liability on the defendant, but will be paid by some one else. No argument is necessary to show how prejudicial it is to the defendant to call the attention of the jury to this fact. A doubtful case may turn on the point that the real defendant will not suffer by the verdict. Cases should be tried on their merits. If plaintiff have a meritorious case, he should win. He should not win merely because some one other than the defendant will have to bear the loss. In view of the constant abuse of the privilege in question, we conclude that the question should never be asked unless asked in good faith, and the good faith of plaintiff's counsel will depend on whether or not he has reasonable grounds to believe that defendant carries indemnity insurance, and that one or more of the jurors are in some way interested in the insurance company. If the question be asked, and the trial court entertains any doubt as to the good faith of plaintiff's counsel in asking the question, the court should, if asked, discharge the panel at plaintiff's cost." *Owens v. Georgia Life Insurance Co.*, 165 Ky. 507, 177 S. W. 294.

As in this matter the court did not abuse its discretion, and the verdict of the jury was the only one authorized by the evidence, no reason is perceived for our holding that appellant was prejudiced by the ruling in question; hence the judgment is affirmed.

LE GOIS v. STATE. (No. 4283.)

(Court of Criminal Appeals of Texas. Nov. 15, 1916. Rehearing Denied Dec. 20, 1916.)

1. INTOXICATING LIQUORS \S 130 — ILLEGAL SALE—ORDINANCES—VALIDITY.

An ordinance of a city prohibiting license to sell liquors in certain territory is not subject to the criticism that it does not prohibit the sale of liquors, since Pen. Code 1911, art. 130, prohibits pursuing occupations taxed by law, without license, and, under Acts 31st Leg. c. 17, § 1, the business of dealer in intoxicating liquors is an occupation taxed by law.

[For other cases, see Intoxicating Liquors, Cent. Dig. §§ 188½, 139; Dec. Dig. \S 180.]

2. MUNICIPAL CORPORATIONS \S 48(1), 58—ADOPTION OF CHARTER—POWERS—DELEGATION BY LEGISLATURE.

Under Const. art. 11, § 5, providing that cities of over 5,000 population may adopt or amend charters, subject to limitations prescribed by the Legislature, and not inconsistent with the Constitution or general laws, the power of the city to adopt a charter or pass an ordinance is not dependent on grant from the Legislature, but is to be governed only by the limitations found in the acts of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 145-147; Dec. Dig. \S 48(1), 58.]

3. INTOXICATING LIQUORS \S 10(3,4)—ILLEGAL SALE—STATUTES—CONSTRUCTION.

Under Acts 33d Leg. c. 147, § 4, authorizing cities to provide for establishment of districts wherein saloons may be located and liquors sold to be drunk on the premises, and to prohibit the sale of such liquors or the location of saloons within such defined district, the city is empowered either to license saloons and wholesale houses in certain districts or to prohibit absolutely the sale of liquor in certain districts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 10, 11; Dec. Dig. \S 10(3, 4).]

4. INTOXICATING LIQUORS \S 10(3)—ILLEGAL SALE—STATUTES—CONSTRUCTION.

Under Acts 33d Leg. c. 147, § 5, providing that the enumeration of powers shall never be construed to preclude a city from local self-government, the city is empowered to prohibit the sale of liquors in certain districts even if the specific power of section 4 of such act did not cover such prohibition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 10; Dec. Dig. \S 10(3).]

5. INTOXICATING LIQUORS \S 12—PROHIBITION OF SALE—ELECTIONS.

Where a city at a special election adopted a charter provision prohibiting sale of liquor in certain districts, such charter provision was not in violation of Const. art. 16, § 20, authorizing the people to adopt prohibition by a vote.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 14; Dec. Dig. \S 12.]

Appeal from District Court, Wichita County; Wm. N. Bonner, Judge.

J. B. Le Gois was convicted of selling intoxicating liquors in the corporate limits of the city outside the territory wherein saloons could be licensed, and he appeals. Affirmed.

W. T. Carlton, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of selling intoxicating liquors in territory in the corporate limits of the city of Wichita Falls outside the territory in which saloons were authorized to be licensed by the charter of said city.

The facts show that appellant was running a retail saloon outside the saloon limits fixed by the charter; that upon adoption of the charter he ceased to run a retail liquor house but thereafter opened, on the advice of counsel (other than the one engaged in the trial of the case), a wholesale liquor house in the prescribed territory, and sold beer by the gallon, not permitting it to be drunk on the premises where sold. He moved to quash the indictment on the ground that this section of the charter is void because in conflict with the federal and state Constitutions, and because the laws of the state nowhere give the city of Wichita Falls, under its charter, the authority to limit the sale of intoxicating liquors within certain bounds of said city. This motion brings into review section 5 of article 11 of the Constitution, adopted in 1912. It provides that:

"Cities having more than 5,000 inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the state, or of the general laws enacted by the Legislature of this state," etc.

After the adoption of this provision of the Constitution it is affirmatively shown and conceded by appellant that the city of Wichita Falls had amended its charter, the agreement reading:

"It is agreed that section 23 of the charter of the city of Wichita Falls was a part of the charter of said city adopted by the city of Wichita Falls at an election held for the adoption of said charter on the 26th day of November, A. D. 1913, the results of said election being duly canvassed and the result declared as shown by ordinance on page 8, Statement of Facts, and it is further agreed that this section 23 of the charter of the city of Wichita Falls was in force at the times of the alleged sales of liquor herein; that said section had never been repealed or amended since the adoption of said charter."

Section 23 provides, among other things:

"No license shall issue for a longer period than one year, and such license shall not be assignable except by permission of the board of aldermen, provided that no person shall be licensed to sell intoxicating liquors except within the following described boundaries in said city."

Here follows the field notes of the territory in which license may be granted to sell intoxicating liquors, but, as appellant admits he made the sales within the corporate limits of the city of Wichita Falls and outside of the territory thus defined, we do not deem it necessary to set forth the boundaries of the territory. Sec. 23 then provides:

"And no person shall be licensed to sell intoxicating liquors in any building fronting on

any alley in said city, and the county judge of Wichita county and the comptroller of the state of Texas are hereby forbidden to issue any license to sell intoxicating liquors in any building in violation of the foregoing provisions and any license so issued shall be void and any license to sell intoxicating liquors in violation of this section shall become void."

[1] One of appellant's contentions is that this section only prohibits the issuance of license to sell, and does not prohibit the sale of, intoxicating liquors. We think such criticism hypercritical, as the laws of this state prohibit a man from engaging in the business of selling intoxicating liquors without first obtaining license to sell, and when you prohibit the issuance of license it necessarily carries with it the prohibition to sell. Article 130 of the Penal Code prohibits the pursuing of any occupation taxed by law without obtaining a license, and the business of wholesale dealer in intoxicating liquors is an occupation taxed by law. Section 1, c. 17, Acts 31st Leg. p. 293, Session Acts. Section 23 of the charter makes it plain, for it says:

"The board of aldermen shall not make any additional regulations of said business than now or hereafter fixed by the laws of this state, except to enforce the provisions as to selling outside of the limits above described"

—thus reserving to the council the right to pass ordinances in aid of the enforcement of the provision prohibiting the sale in territory where no license is allowed to be issued.

[2] The contention that we must look to the laws passed by the Legislature for all power for a city to act cannot be sustained since the adoption of section 5 of article 11 of the Constitution. That was the rule prior to the adoption of this provision of the Constitution—that a city must be able specifically to point out the authority to act in the grant given it by the Legislature; otherwise it was powerless to act. Ex parte Heidleberg, 51 Tex. Cr. R. 583, 103 S. W. 395; McNeill v. State, 29 Tex. App. 48, 14 S. W. 398. It was because of this well-recognized rule of law that article 11, § 5, of the Constitution was adopted in 1912. Our Legislature meets but once in every two years, and, as new evils arose to require the different cities and towns to rush to it and ask and secure a grant of authority and power to suppress the evil, it was regarded as too ineffectual a rule of law, and it was intended by this amendment to give the cities the power to act, without the specific grant of authority from the Legislature, and for the Constitution by its terms to confer this power on the cities and towns, and it did do so, only limiting the power thus granted to such limitation as may be prescribed by the Legislature, and provided that such power should not be so exercised as to be inconsistent with the Constitution of the state or the general laws of the state.

The Legislature of a state has all power to enact laws, except as it may be inhibited by the Constitution of the state or nation. It does not have to look to the Constitution for

a grant of power to enact laws, but only to see if it is inhibited from acting. And a city does not since the adoption of section 5 of article 11 longer have to look to the Legislature for a grant of power to act (this being given by the Constitution), but only look to acts of the Legislature to see if it has placed any limitations on the power to act granted by section 5 of article 11. If the Legislature has placed no limitations on the power of a city to act, and the provision is inconsistent with no provision of the Constitution or the general laws of the state, the power of the city is as general and broad as is the power of the Legislature to act. We no longer must look to the Legislature to grant to a city power to amend its charter or to insert therein any given provision, but we only look to the acts of the Legislature to see if that body by any provision adopted has placed any limitations on the power of a city to act in the matter. If therein we find no limitation placed on the city to amend its charter in any given particular, and such provision is inconsistent with no provision of the Constitution and no general law of the state, the city has the authority to so amend its charter and adopt such provision without any grant of power further than that conferred by section 5 of article 11 of the Constitution. The authority and power is therein granted and conferred on the city by a higher power than the legislative body—the sovereign speaking through its written Constitution.

[3] While not necessary for the Legislature to have passed an enabling act putting in force this provision of the Constitution, as it was self-enacting, and became effective immediately upon its adoption by the people, yet the Legislature did in 1913 pass an enabling act, and the first section thereof is an exact copy of section 5, article 11, of the Constitution, granting all the power to cities conferred by the constitutional amendment, if it was necessary for the Legislature to pass an enabling act. Chapter 147, Sess. Acts 33d Leg. p. 307. In section 4 of this act it is declared: That by the provisions of this act it is contemplated to bestow upon the city adopting the charter or amendment thereunder the full power of local self-government, and among other powers that may be exercised by any such city, the following are enumerated for greater certainty (omitting all except what relate to the question here involved):

"To provide for the establishment of districts within said city wherein saloons may be located or maintained and wherein spirituous, vinous and malt liquors may be sold to be drunk on the premises, and to prohibit the sale of such liquors or the location of such saloons within such defined district."

Appellant's contention is that this section grants authority only to establish districts in which the sale of intoxicating liquors to be drunk on the premises may be prohibited, and does not grant authority for the city in

its charter to establish districts in which the sale of intoxicating liquors may be prohibited when such liquors are not to be drunk on the premises; in other words, a wholesale house selling by the gallon is beyond the power and control of the city. We do not think this the proper construction to be placed on the language of this section; for the clause "to establish limits wherein saloons may be located wherein intoxicating liquors may be sold to be drunk on the premises" is followed by another clause, "and to prohibit the sale of such liquors." "Such liquors" means spirituous, vinous, and malt liquors, as they had been enumerated in the preceding clause, and this second clause provides for the absolute prohibition of the sale of such liquors (in any quantity) in the districts authorized to be established.

[4] But, should we be in error in such construction, section 4 is followed by section 5 in the act passed by the Legislature, and it provides:

"The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government: Provided, * * * such powers shall not be inhibited by the Constitution of the state"

—thus granting and conferring on the cities all power that is not inhibited by the Constitution and general laws of the state, as was done by the constitutional amendment. So, if section 4 did not confer upon the city the power to establish districts in which liquor should be sold, regardless of the quantity, section 5 of the act does specifically grant such authority and power, if it was necessary for the Legislature to give such a grant.

[5] Appellant also contends that this section of the charter of Wichita Falls is violative of section 20 of article 16 of our Constitution, wherein the people are authorized to adopt prohibition by a vote of the people. This provision of the charter was adopted by a vote of the people, at an election authorized by law to be held, and it by its terms prohibited the sale of liquor in territory defined, and authorized the sale in territory defined in the charter. The question that of authorizing a city to adopt and define limits in which the sale of liquor may be permitted, and define limits in the city in which such sales may not be made, is not violative of this provision of the Constitution, has been discussed so frequently by the courts of this state we do not deem it necessary to do so again. In *Cohen v. Rice*, 101 S. W. 1054, the Court of Civil Appeals, Fifth District, says:

"The section of the charter quoted above is not a local option statute prohibiting the sale of intoxicating liquors in the city of Marshall, but a statute regulating its sale within that city, and this the state or the city council of Marshall, acting under power conferred by charter, had a right to do under the police power of the state. The ordinance does not prohibit the sale of intoxicating liquors in the city of Marshall, but regulates the sale of the same in the city

by confining its sale to the business portion of the city.

"The same contention here insisted upon was passed upon by the Court of Criminal Appeals in the case of *Ex parte Levine* [46 Tex. Cr. R. 364] 81 S. W. 1206. In that case the court had under consideration the charter of the city of Corsicana, which defined the saloon limits and made it unlawful to sell or give away intoxicating liquors outside of such saloon limits. Levine had been convicted of selling intoxicating liquors outside of the saloon limits and taken into custody by the constable, whereupon he made application to the Court of Criminal Appeals for a writ of habeas corpus, claiming the ordinance was invalid. The writ was refused. The court held the provision in the charter was an act of regulation, and not affected by the provisions of the state Constitution affecting local option."

See, also, *Garonizk v. State*, 50 Tex. Cr. R. 533, 100 S. W. 374; *Ex parte King*, 52 Tex. Cr. R. 386, 107 S. W. 549; *Ex parte Levine*, 46 Tex. Cr. R. 364, 81 S. W. 1206; *Williams v. State*, 52 Tex. Cr. R. 371, 107 S. W. 1121.

The Legislature, after the adoption in 1912 of the provision of the Constitution hereinbefore recited, at its session in 1913 (Acts 33d Leg. c. 18) passed a law which provides:

"*Selling Outside of Fixed Limits in Cities and Towns.*—If any person shall sell any intoxicating liquor in any city or town, after such city or town shall in any manner have fixed the limits in said city or town in which intoxicating liquors may be lawfully sold, outside of such limits, he shall be punished by confinement in the state penitentiary not less than one nor more than three years. In prosecutions under this law, where it is proven that there is posted up at the place where such intoxicating liquor is sold, United States internal revenue liquor or malt license, to anyone, it shall be prima facie proof that the person to whom such license is issued is engaged in and is pursuing the business and occupation of selling intoxicating liquors within the meaning of this law"

—thus providing a penalty for the sale of liquor in any quantity within limits of a city or town where the city has in any manner fixed the limits in which such sales should not be made. The city followed the mode and method prescribed by law in fixing such limits, and it is made to appear that the limits in which sales can be made are coextensive with the fire limits of said city, showing that the sale of liquor is restricted to the business portions of the city and only prohibited in other portions of the city. Such regulations are reasonable and wise, in our opinion.

While not taking up and discussing in every detail the contention of appellant, the above opinion disposes of every contention made. The charter provision is not void; is not inconsistent with any provision of the state or federal Constitutions, nor any provision of the general laws of this state. It was enacted in accordance with the power conferred on the city by the Constitution of this state by section 5 of article 11; and, as the Legislature has seen proper to place no limitations on the power of the city to amend its charter, this court can place none. The charter is admitted to have been legally adopted, and by fixing the limits in which license may

be issued to sell intoxicating liquors within such city it has acted within the power conferred on it by law. The sales being admitted by appellant to have been outside of the limits so fixed and within the prescribed territory, the judgment should be affirmed.

The judgment is affirmed.

DAVIDSON, J. I do not now express any opinion, but will as soon as I can satisfactorily do so look into the questions and may then write.

BELL v. STATE. (No. 4305.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916. Rehearing Denied Jan. 10, 1917.)

LARCENY \S 55—SUFFICIENCY OF EVIDENCE.

Evidence consisting of testimony of the victim, who was drunk, and with whom defendant had been, and of one who saw him putting his hands in the victim's pockets, *held* sufficient to sustain a conviction of larceny from the person.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 152, 164, 165, 167-169; Dec. Dig. \S 55.]

Appeal from Criminal District Court, Travis County; O. W. Robinson, Special Judge.

Marlon Bell was convicted, and appeals. Affirmed.

T. B. Monroe, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, Judge. Appellant was convicted of theft from the person, his punishment being assessed at two years' confinement in the penitentiary.

The evidence is not of a cogent nature, being a case of circumstantial evidence; yet we are not prepared to say the jury, under the circumstances, was unauthorized to render their verdict. The injured party was in a state of intoxication, and was not very clear in his testimony as to a part of the transaction, and during the latter part of the day seems to have been in such condition that he did not recollect things that actually occurred, but he did recollect that appellant was with him and moving about town and drinking with him, and he recollected the appellant knocking him over or pushing him over, but he did not seem to be clear as to whether appellant got his watch and money or not. There was a woman about 60 years of age who saw this transaction from a nearby residence, and recognized the defendant as the man who either knocked or pushed down the alleged injured party, and saw him put his left hand in the left-hand vest pocket and his right hand in the right-hand vest pocket of the injured party. She saw him take something from the pocket, but did not recognize what it was. The watch taken was in the left-hand pocket and the money was in the right-hand pocket. The watch and money were both gone when the injured party was

arrested and carried to the calaboose for being intoxicated. Later on appellant left the injured party, and was arrested about an hour later in a different part of the city. He, too, was sharply intoxicated. This is the substance of the state's case. Appellant was never seen with the watch, but the officer who arrested him said he had \$4 or \$5 in silver, but the books at the police station only showed he had 70 cents. A stranger pawned the watch within the hour at Mr. Jackson's jewelry establishment. The watch was found there, and Mr. Jackson testified a stranger brought it there, that he had known appellant for a year, and that appellant was not the man who pawned the watch, appellant himself denying having taken the property. This is practically the defendant's case. We are of opinion that the testimony of the injured party, in connection with the testimony of the lady who saw the transaction, was sufficient to authorize the jury to render their verdict.

The judgment is affirmed.

HARPER, J., absent.

MARTINEZ v. STATE. (No. 4815.)

(Court of Criminal Appeals of Texas. Dec. 20, 1916.)

CRIMINAL LAW \S 1090(1)—APPEAL—RECORD.

Where there is neither a statement of facts nor bills of exceptions, there is nothing to review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2653, 2806-2807, 3204; Dec. Dig. \S 1090(1).]

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Vicenta Martinez was convicted of violating the law prohibiting the sale of intoxicating liquors in prohibition territory, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for violating the law prohibiting the sale of intoxicating liquor in prohibition territory, a felony. But there is neither a statement of facts nor bills of exceptions, and hence nothing to review.

The judgment is affirmed.

CARR v. STATE. (No. 4328.)

(Court of Criminal Appeals of Texas. Dec. 27, 1916.)

1. HOMICIDE \S 185(1)—INDICTMENT—MEANS OR INSTRUMENT.

In an indictment for murder by "cutting him with a sharp instrument," the grand jury should have charged the character of the instrument used if they could obtain the information.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 215-217, 219, 221; Dec. Dig. \S 185(1).]

2. HOMICIDE \S 286(1)—TRIAL—INSTRUCTIONS—INTENT.

Upon trial for murder, where there was nothing to indicate that the weapon used was a deadly one, and the fatality of the wound can be accounted for without imputing to appellant the purpose to kill, it could not be legally presumed that appellant intended to kill, and it was error for the court not to so instruct the jury, and not to include in its charge Pen. Code 1911, arts. 1147, 1149, to that effect.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 586; Dec. Dig. \S 286(1).]

3. CRIMINAL LAW \S 368(3)—EVIDENCE—ADMISSIBILITY—ATTENDANT CIRCUMSTANCES—RES GESTÆ.

Evidence that immediately after deceased was cut his brother entered the house and assaulted other occupants and "was drunk and seemed very mad" was a part of the res gestæ, showing the situation, and should have been admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 819, 821; Dec. Dig. \S 368(3).]

Appeal from District Court, Sabine County; A. E. Davis, Judge.

George Carr was convicted of murder, and he appeals. Reversed and remanded.

J. W. Minton, of Hemphill, and Beeman Strong, of Nacogdoches, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, his punishment being assessed at five years' confinement in the penitentiary.

So far as the application of the law to the questions presented for revision is concerned, the facts may be briefly stated: The killing of deceased occurred at the house of Capps, a brother-in-law of appellant. Appellant was visiting Capps and family, Capps' wife being the sister of appellant. There was a social function in vogue. Deceased, Royal Jordan, and his brother, Elbert, were present; both of them were more or less drinking; Elbert considerably intoxicated. In the room where the guests were assembled Elbert Jordan became boisterous. Capps insisted upon better behavior on his part, to which Elbert Jordan did not accede. Capps finally told him he must desist or get out. Some of the gentlemen present took Elbert Jordan from the house out into the yard. Deceased came in from the yard onto the gallery when this occurred. Elbert Jordan also returned to the gallery about the time of the trouble. Deceased was standing on the gallery, where other people were also, some of the testimony showing others were close to the deceased, while some of the testimony tended rather to isolate him a few feet. The witnesses also differ as to whether deceased did or said anything. There is testimony showing that he did not, while there is evidence also to the effect that he threatened to take the lives of one or more of them. The state's evidence is to the effect that appellant started from the door across the gallery, passing near Elbert Jordan, and two of

the witnesses testified they saw him strike with his right hand or arm; at least saw his right arm go out in the direction of deceased, and that he was within arm's reach. None of them saw him with any instrument of any sort in his hand. The evidence shows without question that deceased was struck by a sharp instrument of some character in the right groin, the wound being from two to three inches long and at its greatest depth about one inch. The instrument seems to have severed or punctured an artery from which deceased died from bleeding.

[1] The language in the indictment is this:

"By then and there cutting him with a sharp instrument, a better description of which the grand jury is unable to give, and the name of sharp instrument is unknown to the jurors."

The only description of the instrument on the trial was that the wound was inflicted, or could have been inflicted, by a sharp instrument. There was no attempt, so far as the record shows, to show that the grand jury used any diligence to ascertain the nature or kind of instrument, or that by reason of diligence they could or could not have ascertained the character or kind of instrument used. This is made a question for revision. Under the authorities we are of opinion that the grand jury should have charged the character of instrument used if they could have obtained the information. This being a charge of murder, the character of the instrument is usually necessary to be charged, and especially so if the kind and character used could be obtained. Upon another trial this question should be met by proper evidence, and if the character of the instrument can be ascertained by the grand jury, another indictment should be obtained setting forth and describing it.

[2] Two or three questions are presented with reference to charges given and refused, and omissions in the charge. It is contended that articles 1147 and 1149 of the Revised Penal Code of 1911 should have been given in charge to the jury; and in this connection that the jury should also have been instructed with reference to the presumption arising from the use of a weapon. Under the facts of this case the court erred in omitting charges on these matters, and also in refusing the special requested instructions.

There is nothing to indicate in this record that the instrument was a deadly one, and in fact there is no testimony as to what kind of instrument was used, except it was a sharp one. If the weapon used was not a deadly one, it would not be presumed that appellant intended to kill, unless as under the circumstances stated in those two articles. The wound does not indicate it. From all the testimony, if appellant is the party who inflicted the wound, it was done by throwing out his arm and striking as he passed deceased. He did not stop, but went off the

gallery. It was the only wound on the body, and if appellant struck it, he did it as stated. That the wound proved to be fatal can be accounted for in various ways without imputing to appellant the purpose and intent to kill. If appellant is the party who inflicted the wound, it seems to have been a casual wound, inflicted just in passing deceased, and the fact it happened to strike the artery was more accidental than intentional. It is a well-known rule that wherever facts are shown in submitting the theories of the defendant, a favorable view must be taken by the court in his charges; that is, the facts must be submitted under the charge so as to present favorably for the defendant his side of the case, or any weakness in the testimony that might result by the verdict of the jury in his favor. These questions have been so often decided as well as fixed by the statute it would seem hardly necessary to further discuss them. Articles 1147 and 1149, Penal Code, 1911; *Huddleston v. State*, 70 Tex. Cr. R. 260, 156 S. W. 1168; *Reeves v. State*, 74 Tex. Cr. R. 503, 168 S. W. 860; *Dawson v. State*, 70 Tex. Cr. R. 8, 155 S. W. 266; *Wilson v. State*, 49 Tex. Cr. R. 50, 90 S. W. 312; *Cralger v. State*, 48 Tex. Cr. R. 500, 88 S. W. 206; *Hightower v. State*, 56 Tex. Cr. R. 248, 119 S. W. 691, 133 Am. St. Rep. 966; *Vinson v. State*, 55 Tex. Cr. R. 490, 117 S. W. 846; *Crow v. State*, 55 Tex. Cr. R. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497; *Lee v. State*, 44 Tex. Cr. R. 460, 72 S. W. 195; *Martinez v. State*, 35 Tex. Cr. R. 396, 33 S. W. 970; *Washington v. State*, 53 Tex. Cr. R. 480, 110 S. W. 751, 126 Am. St. Rep. 800; *Danforth v. State*, 44 Tex. Cr. R. 105, 69 S. W. 159; *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361; *Honeywell v. State*, 40 Tex. Cr. R. 199, 49 S. W. 586; *Fitch v. State*, 37 Tex. Cr. R. 500, 36 S. W. 584; *Swink v. State*, 32 Tex. Cr. R. 530, 24 S. W. 896; *Branch's Criminal Law*, § 484. We have discussed these charges and matters in a general way, without going into a specific enumeration of the different charges and questions.

[3] A bill of exceptions recites that while Mrs. Capps was testifying the defendant offered to prove by her—

"that just as Royal Jordan, deceased, was cut, Elbert Jordan, his brother, immediately entered the house, being the home of the sister of defendant, and assaulted, or undertook to assault, some of the occupants of said house, and that said Elbert Jordan was drunk and seemed to be very mad," etc.

This was at the time of the trouble. The parties had barely separated at the time he entered the room. The deceased had just been wounded. This was a part and parcel of the transaction, and was recognized by the court in his charge to the jury on the law of self-defense. He submitted the defensive theory that appellant had the right to defend against both Royal Jordan and Elbert Jordan. The time intervening was so short that

it could hardly be described in time. It was a part of the *res gestæ*, and showed the condition of the situation and what occurred at once. Upon another trial this testimony should be admitted. See *Branch's Criminal Law*, § 339.

There are some other questions in the case, but they seem to be a part of those already decided.

The judgment is reversed, and the cause remanded.

DEISHER v. STATE. (No. 4308.)

(Court of Criminal Appeals of Texas. Dec. 13, 1916. Rehearing Denied Jan. 10, 1917.)

1. CRIMINAL LAW §351(10) — EVIDENCE — SUBSEQUENT ACTS OF DEFENDANT—THREATS AGAINST WITNESSES.

A threat by accused to whip two men whom he knew were important witnesses against him was admissible as a circumstance tending to show that he was trying to prevent them from testifying.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 784; Dec. Dig. §351(10).]

2. WITNESSES §372(2)—CROSS-EXAMINATION —INTEREST.

A witness for accused can properly be cross-examined to show that he was a good friend of accused, liked him, and was doing what he could to help him, and that he was a surety on several of defendant's bonds, and had signed defendant's note to raise money to hire attorneys, to show the interest of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 883, 884; Dec. Dig. §372(2).]

3. WITNESSES §350—CROSS-EXAMINATION—INDICTMENT.

The state can properly ask a witness for the defense whether he had ever been indicted, especially where he answered that he had a good record, had not had any trouble, and did not think the question a fair one.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1140–1149; Dec. Dig. §350.]

4. CRIMINAL LAW §1169(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACT OTHERWISE ESTABLISHED.

In a prosecution for rape of a girl under 15, where the undisputed evidence of prosecutrix and her father and mother was that she was only 13, error, if any, in admitting an entry from the family Bible in evidence, was harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3138; Dec. Dig. §1169(2).]

5. CRIMINAL LAW §1091(4)—BILL OF EXCEPTIONS — ADMISSION OF EVIDENCE — SUFFICIENCY.

A bill of exceptions to the admission of an entry in a family Bible in evidence which does not disclose the date of the birth or the age of prosecutrix as shown by the Bible entry is defective.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2816, 2831, 2832, 2931–2933; Dec. Dig. §1091(4).]

6. CRIMINAL LAW §851(10) — EVIDENCE — SUBSEQUENT ACTS OF ACCUSED—ATTEMPT TO INFLUENCE PROSECUTRIX.

In a prosecution for assault on a girl under 15, where prosecutrix at first denied the act, and it appeared that accused was continuously attempting to induce prosecutrix and her parents

to testify in his behalf, and not against him, evidence that a witness for the state heard accused request prosecutrix's sister to talk to prosecutrix was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 784; Dec. Dig. ¶851(10).]

7. CRIMINAL LAW ¶726—ARGUMENT OF DISTRICT ATTORNEY — RESPONSE TO DEFENDANT'S ARGUMENT.

Argument of district attorney in response to and brought out by the argument of the attorney for the accused cannot be complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. ¶726.]

8. CRIMINAL LAW ¶1037(2)—APPEAL—PRESENTING QUESTIONS BELOW — MISCONDUCT OF PROSECUTOR.

The misconduct of the prosecuting attorney in his argument does not require a reversal, where accused did not request the court to charge the jury not to consider it, though he did object to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. ¶1037(2).]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

John Delsner was convicted of rape of a girl under 15 years of age, and he appeals. Affirmed.

Chandler & Chandler and Pat. L. Pittman, all of Stephenville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the offense of rape upon a girl less than 13 years and 1 month of age, and his punishment assessed at the lowest prescribed by law. The evidence was amply sufficient to sustain the conviction. Appellant in no way by his assignments or brief contends otherwise.

[1] Will Strong and Jim Head were important state's witnesses against appellant, and he knew it. The state had the right, therefore, to prove by Mr. Bennett, the father of the assaulted girl, that appellant, in discussing with him said witnesses in connection with his case, or their testimony in his case, said that he was going to whip them. The effect of his threat would at least tend to show that he was trying to prevent them testifying against him, and thereby suppress their testimony or prevent them testifying the truth against him. This would be a circumstance against him. The court therefore did not err in admitting said testimony which is complained of by two of appellant's bills.

[2] The interest, animus, bias, or prejudice of any witness, whether for the state or the defendant, can always be shown. The court did not err in requiring Mr. Poe, a material witness in his behalf, to testify on cross-examination that he was a good friend of the defendant, liked him, and was doing what he could to help him, that he was a surety on his several bonds in this matter, and that he had also signed appellant's note to raise

money to hire his lawyers to defend him in this cause. *Magruder v. State*, 35 Tex. Cr. R. 219, 33 S. W. 233; 1 Branch's Ann. P. C. pp. 93, 94.

[3] It was not error to permit the state to ask the witness Hubbard on cross-examination if he had ever been indicted (see 6 Michie's Crim. Digest, p. 705, for cases), especially in view of his answer as follows: "I think I have a good record. I have been here seven years, and I have not had a bit of trouble. I don't think that a fair question." *Harding v. State*, 49 Tex. Cr. R. 601, 95 S. W. 528; *Hart v. State*, 57 Tex. Cr. R. 24, 121 S. W. 508; *Warthan v. State*, 41 Tex. Cr. R. 387, 55 S. W. 55; *Baker v. State*, 45 Tex. Cr. R. 396, 77 S. W. 618; *Wofford v. State*, 60 Tex. Cr. R. 625, 132 S. W. 929. It is needless to cite the many other cases to the same effect.

As explained by the court, appellant's bill No. 5, as to his cross-examination of Mrs. Bennett, the assaulted girl's mother, shows no error.

[4] Mrs. Bennett, the mother, Myrtle Bennett, her daughter, the assaulted girl, and Mr. Bennett, her father, all swore that she was just-past 13 years of age less than a month before the alleged assault was committed. There was no testimony at all showing or tending to show that she was 15 years of age or older. In other words, there was no dispute of the fact that the assaulted girl was just past 13 years of age. Hence, even if the torn leaf from the Bennetts' Bible, whether the original entry or a copy of it, was erroneously admitted in evidence over appellant's objection, it was immaterial, and its admission, even though erroneous, presents no reversible error. *Haywood v. State*, 61 Tex. Cr. R. 92, 134 S. W. 218; *Lott v. State*, 66 Tex. Cr. R. 152, 146 S. W. 544; *Boyd v. State*, 72 Tex. Cr. R. 521, 163 S. W. 67; *Henkel v. State*, 27 Tex. App. 510, 11 S. W. 671; *Holliday v. State*, 35 Tex. Cr. R. 183, 32 S. W. 538; *Nelson v. State*, 35 Tex. Cr. R. 205, 32 S. W. 900; *Tracy v. State*, 44 Tex. R. 9; *Height v. State*, 68 Tex. Cr. R. 273, 150 S. W. 908; *Veal v. State*, 8 Tex. App. 477; *Gaston v. State*, 11 Tex. App. 143.

[5] Besides this, the bill attempting to present the matter is wholly defective, in that it does not disclose the date of the birth of said Myrtle nor her age in said purported Bible entry. And we cannot tell therefrom what the date of her birth nor age was.

[6] Myrtle Bennett, said assaulted girl, among other things, testified positively to the act of intercourse appellant had with her as alleged in the indictment. On his cross-examination of her she admitted that at first, just after the act, and on more than one occasion, she had denied that he had had said act with her. The state's witness Head testified that after appellant had an examining trial and was bound over he saw him with

Leah Bennett, Myrtle's sister, at the depot in Alexander, and that appellant said to her that he wanted her to talk to Myrtle, and she replied: "We are talking to her all the time." The court therefore did not err in permitting Myrtle to testify that her sister Leah talked with her and tried to get her not to tell anything on appellant. It is clear from the record that appellant was doing all he could practically continuously from the time it first became known that he was charged with said assault to induce all of the Bennetts, Myrtle and her father and mother, to testify in his behalf, and not against him. Under the circumstances said testimony of Myrtle complained of by him was properly admitted.

[7] Appellant has three bills complaining of the argument of the prosecuting attorneys. In one it is clearly shown that the argument of the district attorney was in response to, and brought about by, his attorney's argument. The other two instances complained of present no error. The district attorney had the right to make the argument complained of. *Edwards v. State*, 75 Tex. Cr. R. 647, 172 S. W. 230, 231, and the many authorities there cited; *Harding v. State*, 49 Tex. Cr. R. 604, 95 S. W. 528; *Mooney v. State*, 176 S. W. 57, and cases there cited and rules established; *Bass v. State*, 16 Tex. App. 69; *Pierson v. State*, 18 Tex. App. 524; *Tweedle v. State*, 29 Tex. App. 586, 16 S. W. 544; *House v. State*, 19 Tex. App. 227; and a great many other cases.

[8] While appellant's bills show he objected to said arguments, he in no way requested the court to charge the jury not to consider them, even if they had been improper. *Mooney v. State*, 176 S. W. 58, and cases there cited. In no event do appellant's bills as to the said argument present any reversible error.

Appellant has three several bills claiming that the court committed an error in not sustaining his challenge to three jurors respectively. Each bill, however, as qualified by the court, shows that each of said jurors was a qualified and competent juror. Neither of appellant's bills shows that he had exhausted his challenges, and they all show that neither of these jurors sat upon the jury. Neither of his bills shows that any incompetent or improper juror was forced upon him. He merely complains generally that he took jurors to whom he would have objected if the court had sustained his objections. It is so well established that neither of appellant's bills presents any error that it is needless to cite the authorities. They are numerous and uniform to the effect that no error is presented by either of said bills.

The judgment is affirmed.

HARPER, J., absent.

CARTER v. STATE. (No. 4908.)

(Court of Criminal Appeals of Texas. Dec. 6, 1916. Rehearing Denied Jan. 10, 1917.)

CRIMINAL LAW—§1092(7), 1099(6)—APPEAL AND ERROR—STATEMENT—BILLS OF EXCEPTION.

Where the trial court inadvertently or erroneously allowed accused 90 days after adjournment to file a statement of fact and bills of exception, the order for any additional time after 90 days from sentence was void, and a statement and bills of exception, filed 112 days from sentence, will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2850, 2852-2854, 2877; Dec. Dig. §1092(7), 1099(6).]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Bill Carter was convicted of murder, and appeals. Affirmed.

S. W. Bishop and J. B. McEntire, both of Gorman, and J. R. Stubblefield, of Eastland, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder, and his punishment assessed at ten years in the penitentiary.

This is the third appeal in this cause; the others are reported in 75 Tex. Cr. R. 110, 170 S. W. 739, and 188 S. W. 881, respectively.

The court in which he was convicted, by law, could continue more than eight weeks, and as a fact, the term at which he was convicted, did continue longer than eight weeks. It convened April 17th and adjourned July 8, 1916. He was convicted and judgment rendered May 11, 1916. His motion for a new trial was overruled on June 6th, at which time he was duly sentenced, and gave notice of appeal to this court, all of which was then and there duly entered in the minutes of the court. At this time, the court, inadvertently or erroneously allowed appellant 90 days after adjournment to prepare and file a statement of facts and bills of exceptions, when under the statute and all the decisions of this court thereunder plainly and without doubt he could allow only 90 days from the date of sentence. His order, therefore, for any additional time after 90 days from sentence was without power, ineffectual, and void. The decisions of this court so holding are so numerous, certain, and uniform it is unnecessary, and a useless task, to collate and cite them. On this point there has been "no variableness, neither shadow of turning," by this court or its decisions.

The statement of facts and all bills of exceptions were filed September 26, 1916, which was 112 days after sentence, and 21 days too late. Therefore, the Assistant Attorney General's motion to strike them out and not

consider them must be, and is, sustained, and they cannot be considered. There is nothing we can review without them.

The judgment must therefore be affirmed; and it is so ordered.

HARPER, J., absent.

BELL et al. v. STATE. (No. 4319.)

(Court of Criminal Appeals of Texas. Dec. 27, 1916.)

1. CRIMINAL LAW §747 — WITNESSES — CREDIBILITY—QUESTIONS FOR JURY.

Under conflicting evidence, credibility of the witnesses is a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. §747.]

2. CRIMINAL LAW §792(2)—PRINCIPALS—INSTRUCTIONS.

Where the state's evidence tended to show that one defendant held the deceased while the other defendant shot him, it is proper to charge the law of principals as to the first defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. §792(2).]

3. CRIMINAL LAW §1153(2) — WITNESSES — COMPETENCY.

Under Vernon's Ann. Code Cr. Proc. 1916, art. 788, providing that all persons are competent to testify in criminal actions except insane, and children who, after examination, appear not to possess sufficient intellect or do not understand the obligation of an oath, the court will not revise the judge's order permitting deceased's seven-year old son to testify as to the facts of the homicide in the absence of showing that the discretion of the court was abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8062; Dec. Dig. §1153(2).]

4. CRIMINAL LAW §700—TRIAL—STATEMENT OF CASE.

Vernon's Ann. Code Cr. Proc. 1916, art. 717, subdiv. 3, requiring the prosecuting attorney to state to the jury the nature of the accusation and the facts expected to be proved, is directory, not mandatory, and in the absence of injury because of omission of such statement, there was no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1658, 1659; Dec. Dig. §700.]

5. HOMICIDE §169(1)—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder defended on the ground of self-defense, it was proper to exclude testimony that deceased on the morning of the homicide passed near the witness' house, did not speak to her, and appeared to be in a solemn mood.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 841; Dec. Dig. §169(1).]

6. CRIMINAL LAW §1137(3) — APPEAL — INVITED ERROR.

Accused persons cannot complain of instructions literally following the special charge requested by them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. §1137(3).]

7. CRIMINAL LAW §822(1)—INSTRUCTIONS—CONSTRUCTION.

When any part of the charge is attacked, the whole charge must be looked to, and if no inju-

ry is shown on the perusal of the whole charge, there is no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 8158; Dec. Dig. §822(1).]

8. CRIMINAL LAW §1172(1)—INSTRUCTIONS—PREJUDICE.

Where accused objected to the charge on principals, and the court then stated that he would give the charge requested by accused and withdraw his own charge, but through error withdrew only a part thereof, but his attention was not called to it until the motion for new trial, accused was not prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8128, 8154; Dec. Dig. §1172(1).]

9. CRIMINAL LAW §1144(6)—APPEAL—PRESUMPTIONS.

Where the record showed a motion for change of venue, which was contested, but failed to show what testimony was heard, the legal presumption is that the court's action was right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2740, 2757, 2901, 3021; Dec. Dig. §1144(6).]

Appeal from District Court, Houston County; John S. Prince, Judge.

John F. and Jim Bell were convicted of murder, and they appeal. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellants were convicted of murder, and their punishment assessed at life imprisonment.

[1, 2] J. T. Dawes was the man whom they are alleged to have killed by shooting with a pistol and striking him with a stick and file. The undisputed testimony by many witnesses shows that the body of deceased was most brutally and horribly shot up, and beaten up from the crown of his head nearly to the soles of his feet, at least to the tops of his shoes. The state's testimony, which was ample, and evidently believed by the jury and lower court, by an eyewitness and through corroborating testimony, showed that appellant John F. Bell held deceased while Jim Bell shot him three times after he had beaten him up. The testimony of defendants—both testified—raised the issue of self-defense. The state's testimony disputed this and was amply sufficient to show that the killing was not in self-defense. The issue was fully presented in the court's charge, to which there was no complaint. It was proper also for the court to charge the law of principals as to John F. Bell, which he did. There was some testimony tending to impeach the testimony of some of the material witnesses on both sides, but all this was a matter for the jury, and proper charges were given on the subject. It is unnecessary to detail the testimony. All issues raised can be passed upon without that.

[3] One of the state's main witnesses was the son of deceased, who was an eyewitness to the beating and killing. He was some two or three months over seven years of age.

The appellants objected to his testifying, claiming that he was incompetent. The trial judge, after an examination of him, held he was competent, stating that he regarded him as having more than ordinary intelligence for his age, and refers to his entire testimony as bearing on his competency. The court has all the time held under the statute (Vernon's Ann. Code Cr. Proc. 1916, art. 758, subdiv. 2) that the competency of a witness of tender years is determinable by an examination by the trial judge, and the action of the trial court thereon will not be revised on appeal in the absence of a showing that its discretion holding the witness competent was abused, and unless abuse of such discretion is apparent. This proposition is plainly laid down and a great many decisions of this court cited by both Judge White in his An. C. C. P. § 951 et seq., and 2 Branch's An. P. C. § 1771. Under the authorities, we think it is clear the trial judge did not abuse his discretion, and we would not be authorized to so hold, and we hold that the witness was competent.

[4] It has all the time been held by this court that subdivision 3, art. 717, Vernon's Ann. Code Cr. Proc. 1916, to the effect that the prosecuting attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved before introducing his testimony, is directory and not mandatory, and that no error is shown when the trial court does not require the prosecuting officer to make such statement, unless injury because thereof is shown. In this case we think no injury is shown because the prosecuting officer did not make such statement, and hence no error is presented in the court's refusal to require him to do so. *Holsey v. State*, 24 Tex. Cr. R. 35, 5 S. W. 523; *Essary v. State*, 53 Tex. Cr. R. 596, 111 S. W. 927; *House v. State*, 75 Tex. Cr. R. 341, 171 S. W. 206.

[5] The court committed no error in not permitting Mrs. Beard to testify that the deceased, in passing her house the morning before he was killed, passed along near her house, and did not speak to her or raise his head, and was looking down toward the ground, and appeared to be in rather a solemn mood. This testimony had no bearing whatever upon the case, and had no connection with the killing.

[8, 7] In preliminarily stating the case to the jury, the court in one sentence told the jury:

"In this case the defendants being jointly indicted, both may be convicted of murder, or one may be convicted and the other acquitted."

This sentence literally followed a special charge which appellants requested. Besides, it could have caused no injury to appellants, or either of them, in view of the whole charge of the court, which of course must be looked to when any given sentence or paragraph is attacked.

[8] The testimony called for a charge on the law of principals. The judge, in preparing his original main charge, embodied a charge on that subject. After preparing it, he gave it to appellants' attorneys for examination, etc., under the statute. They thereupon objected to his whole charge on that subject, and in lieu and instead of the court's charge they asked a charge on the subject. The court then told them that he would take out of his charge what he had given on the subject and give their charge literally, as asked by them, instead, and he undertook to do this. He did give their charge in full just as asked. By some mishap, in undertaking to take out his charge on the subject, only a portion of it was taken out. The portion not taken out was general as to who were principals under the law of principals. Appellants in no way called his attention at the time to the fact that only a portion of his charge had been taken out, and his attention was not called thereto until the appellants made their motion for a new trial. All this is made clear by appellants' bill and the court's explanation and qualification thereof, as shown in the record. This presents no reversible error under the circumstances stated. We cannot see how it would or did injure the defendants, or either of them.

[9] Appellants made a motion for a change of venue. It was properly contested by the state. Evidently the court must have heard testimony on it, but what testimony he heard is in no way disclosed by this record. The legal presumption is that the court's action on this point was clearly right.

No other question is presented for review. The judgment is affirmed.

JENNINGS v. STATE. (No. 4312.)

(Court of Criminal Appeals of Texas. Dec. 20, 1916.)

1. CRIMINAL LAW §200(7) — FORMER JEOPARDY—STATUTE.

Pen. Code 1911, art. 1317, provides that if a house be burglarized and the person guilty of such burglary shall, after so entering, commit any offense, he shall be punished for burglary, and also for whatever other offense is committed, and article 1318, providing that if the burglary was effected to commit one felony and the person guilty thereof while in the house committed another felony, he shall be punishable for any felony so committed as well as the burglary. Defendant, in a prosecution for an assault with intent to commit rape, pleaded former jeopardy, alleging that he had formerly been indicted for burglary with intent to ravish the named woman in the house at the time, and had been acquitted. *Held*, that the sustaining of a demurrer to the plea and the exclusion of all testimony in support of it was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 403; Dec. Dig. §200(7).]

2. CRIMINAL LAW — 363 — RAPE — 48(1) — EVIDENCE—RES GESTÆ.

In a prosecution for an assault with intent to rape, the statements of the assaulted party testified to by certain witnesses and by such party herself, and her statement soon afterwards to others complaining of the injury inflicted by defendant, and their testimony as to the conditions of her clothes and person and bed and room, where it is alleged the assault occurred, were *res gestæ*, and admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. 363; Rape, Cent. Dig. § 67; Dec. Dig. 48(1).]

3. RAPE — 40(3)—EVIDENCE—CHARACTER OF PROSECUTRIX.

Evidence that the prosecutrix had theretofore lived with another man at her house, and had had an illegitimate child, and had been compelled to leave her home on account of her immoral relations with men, was inadmissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 57; Dec. Dig. 40(3).]

4. RAPE — 59(1) — TRIAL — SUBMISSION OF DEFENSES.

Where defendant's testimony made an issue as to self-defense, or as to his going to see prosecutrix that night at her invitation and having sexual intercourse with her as testified by him, the failure to submit such defenses was reversible error.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 88; Dec. Dig. 59(1).]

Appeal from District Court, Titus County; J. A. Ward, Judge.

Raphael Jennings was convicted of an assault with intent to rape, and he appeals. Reversed, and cause remanded.

I. N. Williams, of Mt. Pleasant, and Seb F. Caldwell, of Austin, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of an assault with intent to rape, and assessed the lowest punishment.

[1] He pleaded former jeopardy. His plea alleged that he had formerly been indicted for burglary with intent to ravish Tina Carter, a woman, in said house at the time, and that on the trial thereof he was acquitted. The court properly sustained a demurrer to this plea and excluded all proffered testimony to prove it. The court's action was in accordance with the statute and the many decisions thereunder. Articles 1317, 1318, P. C., and decisions thereunder.

[2] The statements of the alleged assaulted woman made to, and testified by, Gus Rutherford and his wife, and by her also, were clearly *res gestæ*, and admissible, and so were her statements soon thereafter made to others complaining of the injuries which she claimed were inflicted upon her at the time by appellant, and their testimony as to the conditions of her clothes and person and bed and room, where it is alleged the assault occurred.

[3] The court did not err in refusing to permit Mollie Crosby to testify in substance that the alleged assaulted woman had theretofore lived with another man at her house,

and that she had had an illegitimate child, and that she had been compelled to have her leave her home on account of her immoral relations with men. *Wood v. State*, 189 S. W. 474, recently decided, but not yet officially reported, and authorities therein cited.

[4] Without reciting all of it, the testimony of the alleged assaulted woman was to the effect: That appellant came to her house where she was living alone between 1 and 2 o'clock at night when she was asleep. That his coming into her room must have awakened her, for the first she saw of him was when he was standing at her bed with a lighted match. She asked who it was, and he told her. She asked what he wanted, and he told her that he had come to see her to have sexual intercourse with her. That she refused to do this, ordered him away, and that thereupon he violently assaulted, choked, and beat her in an attempt to have intercourse with her.

Appellant testified: That prior to this time he had been with her many times and had repeatedly previously thereto had sexual intercourse with her with her full consent. That on the evening this assault occurred at night she met him on the streets in town and specially invited him to come down to see her that night and have sexual intercourse with her, and that he went at her invitation at the time she says he was there. That when he reached there he knocked on the door. She responded, asking who it was, when he told her, and that she got up and let him in. That he thereupon, with her full consent, went to bed with her, stayed with her some two hours, and during the time had two acts of sexual intercourse with her with her full consent. That just after this last act, she wanted him to pay her \$1 for his pleasure with her. That he told her he had no money and did not pay her. That it was solely because of his failure and refusal to pay her the dollar at the time that she got mad at him, assaulted him, and that his assault of her thereupon followed and was wholly in self-defense from his testimony and standpoint. He introduced more or less testimony tending to show his prior previous relations with the woman as he testified he had had and of meeting her in the town the evening before and having said engagement with her to go out and stay with her that night.

The court in his charge did not submit either of his claimed defenses, that of self-defense or his going to see her that night at her invitation and having sexual intercourse with her as testified by him, and that he in no way assaulted her for the purpose or with the intention of having sexual intercourse with her. Appellant objected to the court's charge for failure to submit his claimed self-defense, and asked a charge on the subject himself, which the court refused. He also asked a charge on his

other defense, as stated, which the court refused. In our opinion, the court's action in both of these particulars was material error against appellant. It is unnecessary to discuss these questions. The mere statement of them shows material error against appellant, for which the judgment must be reversed.

While appellant assigns error in the refusal of other special charges requested by him, none of them present any error.

For the errors pointed out, the judgment is reversed, and the cause remanded.

ROBERTSON et al. v. HAYNES et al.
(No. 8450.)

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 28, 1918. Rehearing Denied
Dec. 16, 1918.)

1. PLEADING —214(1)—DEMURRER—ADMISSION.

Allegations of the petition must be taken as true as against general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529; Dec. Dig. —214(1).]

2. ELECTIONS —271—CONTEST—GROUNDS.

Property owners of a common school district could have successfully contested the election determining whether a special tax should be levied and collected upon property in the district by proving that two qualified voters cast their votes against the tax, but the votes were wrongfully and illegally thrown out and not counted by the judges, and that a qualified voter was denied the privilege of casting his ballot, though he offered to make the statutory oath as to his legal qualifications; the result of the election having been in favor of levying the tax by a vote of 24 to 22.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. —271.]

3. ELECTIONS —269—STATUTORY REMEDY FOR IRREGULARITIES—EXCLUSIVE CHARACTER.

The remedy given by the statutes of the state relative to election contests for irregularities in elections, such as the illegal throwing out of votes or denying to qualified voters the right to vote, is exclusive of all others, so that the validity of an election as to whether a special school tax should be levied and collected upon property in a common school district could not be attacked by suit to enjoin its levy and collection.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. —269.]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by S. H. Robertson and another against J. B. Haynes and others. From a judgment sustaining a general demurrer to the petition and dismissing the cause of action, plaintiffs appeal. Judgment affirmed.

W. H. Spinks, of Alvarado, for appellants.
W. E. Myers, of Cleburne, for appellees.

DUNKLIN, J. Pursuant to an order of the commissioners' court of Johnson county, an election was held in common school district No. 27 of that county, for the purpose of determining whether or not a special tax of 15 cents on the \$100 should be levied and

collected upon property in that district. The returns made to the court by the judges of that election showed that 24 votes were cast in favor of the levy of such a tax and 22 votes cast against it. After canvassing said returns, the commissioners' court, by an order duly made, declared the election in favor of said tax carried, levied the special tax against the property situated in that district, and directed the assessment and collection of the same. This suit was instituted by S. H. Robertson and S. J. Howeth against the county commissioners, the county judge, the trustees of the school district, the county superintendent of public schools, and the county assessor and county tax collector, to enjoin the levy and assessment of said special tax, and, from a judgment sustaining a general demurrer to the petition and dismissing the cause of action, the plaintiffs have appealed.

[1] The allegations contained in the petition must, as against the general demurrer, be taken as true as a matter of course. The facts recited above were alleged in the petition, and in addition thereto it was alleged that D. C. Jackson and George James, who resided in said school district, were qualified voters in said election, and who owned property situated in said district subject to such special tax, cast their votes at said election against the school tax, but the votes were wrongfully and illegally thrown out, and not counted by the judges of said election; that, had said votes been counted, the returns made upon said election would have shown 24 votes against the school tax and 24 votes for the school tax, and, in the event of such a tie, the special school tax could not and would not have been levied. According to further allegations in the petition, the votes cast by said Jackson and James were not challenged by the judges, or any one else, and, had they been challenged, those voters would have made the necessary statutory oath to entitle them to vote, and they did not know that their votes would not be counted by the judges until after the returns of the election had been made.

According to further allegations in the petition, R. D. McFadden, who was also a qualified voter under the laws of the state, residing in said school district and owning property situated therein subject to such tax, attempted to cast his ballot in said election, but was denied the privilege of so doing by the judges of said election, notwithstanding the fact that he offered to make the statutory oath to said judges of his legal qualifications to vote, which offer was declined by the judges, and had he been permitted to vote he would have cast his ballot against said school tax. Had his vote been received and had the votes of Jackson and James been counted, the returns of the election would then have shown 24 votes cast for the school

tax and 25 against it, thus defeating the special tax levied.

Appellants invoke subdivision 1 of article 4643, Vernon's Sayles' Texas Civil Statutes, which provides that the judges of the district and county courts may hear and determine all applications for writs of injunction, and grant such writs "where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant." And such decisions of our courts as *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, and *Holbein v. De La Garza*, 59 Tex. Civ. App. 125, 126 S. W. 42, are cited to support the contention that the court had jurisdiction to hear and determine the cause of action alleged in their petition, independent of the further questions whether or not plaintiffs had an adequate remedy at law, and whether or not such relief could be given by a court of equity under the rules of equity jurisprudence.

[2, 3] It cannot be doubted that plaintiffs could have successfully contested the election by proving the facts alleged in their petition referred to already, and it is well settled by the decisions of this state that the remedy so given by the statutes for such irregularities in elections is exclusive of all others. See *Davis v. Parks*, 157 S. W. 449; *El Paso v. Ruckman*, 92 Tex. 86, 46 S. W. 25; *Parker v. Drainage District*, 148 S. W. 351; *Wharton County Drainage District v. Higbee*, 149 S. W. 381; *Boesch v. Byrom*, 37 Tex. Civ. App. 35, 83 S. W. 18; *Coffman v. Goree Independent School District*, 141 S. W. 132; *Troutmen v. McClesky*, 7 Tex. Civ. App. 561, 27 S. W. 173; *Wilbern v. Cone*, 148 S. W. 818; *Crabb v. Celeste Independent School District*, 132 S. W. 890; *City of Carthage v. Burton*, 51 Tex. Civ. App. 195, 111 S. W. 440.

The only opinion which we have found which might possibly be construed as contrary to that line of decisions is *Cochran v. Kennon*, 161 S. W. 67, by the Court of Civil Appeals for the First District; but, as shown by the opinion itself, a distinction is drawn between that case and the cases cited above, by reason of the fact that in that case the sole attack upon the tax levy was based upon the fact that the statutory notices necessary to an election for the purpose of determining whether or not a special school tax should be levied were not given, and the conclusion of the Court of Civil Appeals was that such an attack would not be available in a contest of the election, and that injunctive relief to restrain the levy of the tax was the only remedy open to the taxpayer.

Upon the face of the returns the levy of the tax was proper. The facts alleged in the petition as a basis for the attack made upon the election consisted of irregularities which

could be invoked only by a contest of the election. To hold otherwise would be to say that every taxpayer in the district could prosecute a suit of the same kind and on the same grounds with probably varying results, thus leading to a multiplicity of suits, and interminable confusion and uncertainty, which the statutes giving the right to such persons to contest the election evidently were intended to avoid.

Hence we are of the opinion that the court did not err in sustaining the general demurrer to plaintiff's petition, and that the judgment should be affirmed.

WIGGINS v. WAGLEY et al. (No. 8485.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 2, 1916.)

1. VENDOR AND PURCHASER \Leftrightarrow 267—VENDOR'S LIEN — SUBSEQUENT SALES — LIABILITY OF PARCELS.

When the vendor of a tract has notice that the purchaser has subsequently sold it in parcels, the right to foreclose the vendor's lien against the whole tract or any parcel is subject to the right of the parcel owners to have the parcels subjected to the payment of the lien in the inverse order of their alienation, and if the vendor releases any parcel from the lien, owners whose purchases preceded that of the parcel released are relieved from the lien to the extent of the value of the land released.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 751-758; Dec. Dig. \Leftrightarrow 267.]

2. JUDGMENT \Leftrightarrow 707—CONCLUSIVENESS—PARTIES CONCLUDED.

A junior incumbrancer or lienholder, of whose rights the senior lienholder had notice when he sued to foreclose, and who was not joined as a party, is not bound by the judgment of foreclosure in so far as it affects his equities.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. \Leftrightarrow 707.]

3. VENDOR AND PURCHASER \Leftrightarrow 267—VENDOR'S LIEN—RELEASE OF PART—EFFECT.

The release from a vendor's lien of a part of a tract of land whose value was sufficient to pay the amount then due discharges parcels previously sold from the lien, though before foreclosure suit the amount of the lien has been increased to more than the value of the property released.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 751-758; Dec. Dig. \Leftrightarrow 267.]

Appeal from District Court, Callahan County; Thomas L. Blanton, Judge.

Trespass to try title by J. H. Wiggins against H. Wagley and others. From separate judgments awarding plaintiff a lien upon the land for a part only of the amount claimed by him, and determining the liability of the several defendants among themselves, the plaintiff appeals and defendants Wagley and others assign cross-errors. Judgment reversed in so far as it subjected the land to plaintiff's claim, cross-assignments sustained, and judgment rendered for defendants.

Russell & Surles and F. S. Bell, all of Baird, for appellant. J. Rupert Jackson, of Baird, J. J. Butts, of Cisco, and W. B. Ely, of Baird, for appellees.

BUCK, J. On April 27, 1915, in the district court of Callahan county, appellant sued appellees, H. Wagley and W. P. Ledbetter, in trespass to try title to recover a tract of 409.8 acres of land in Callahan county. Appellees L. F. Threet, R. B. Bishop, John H. Garner, C. H. Daniels, and J. J. Ray were by Wagley and Ledbetter made parties defendant. Plaintiff appeals from a judgment (1) in favor of defendant L. F. Threet as to the 80 acres of land owned by him; (2) in favor of plaintiff against defendants Ledbetter, Wagley, and Ray, respectively, subjecting their lands, in the order named, to the payment of a judgment for \$821.63, rendered in the district court of Rusk county, in a certain suit wherein plaintiff in the instant case was plaintiff, and W. F. Turner was defendant, less a credit of \$800, the agreed value of the 80 acres of land held by Threet, and released May 31, 1909, by Wiggins to A. L. Cole; (3) in favor of defendant Bishop; (4) in favor of Ledbetter, as against his immediate vendor, Daniels, for any amount the former might be forced to pay by reason of this judgment; (5) in favor of Wagley against his predecessor in title, Garner, for any amount the said Wagley should be forced to pay by reason of said judgment.

The following state of facts is supported by the court's findings and the statement of facts, to wit:

(1) June 6, 1903, J. H. Wiggins by deed conveyed to W. F. Turner the 409.8-acre tract mentioned, retaining a vendor's lien to secure the payment of five vendor's lien notes of even date, each in the principal sum of \$350, bearing 8 per cent. interest from date, and due November 1, 1904, 1905, 1906, 1907, and 1908, respectively, said deed being duly filed for record January 6, 1904.

(2) January 1, 1904, Turner, by deed, conveyed to R. L. Ray 123 acres out of said 409.8-acre tract, and Ray assumed to pay, and thereafter did pay, notes 1, 3, 4, and 5 of the original series. Said deed was recorded January 18, 1907. December 2, 1905, R. L. Ray conveyed this 123-acre tract to J. J. Ray, one of the defendants, the deed being recorded June 1, 1914.

(3) February 8, 1906, Turner conveyed by deed to J. W. Newton 125 acres out of the 409.8-acre survey, and by mesne conveyances the title thereto became vested in H. Wagley, one of the defendants herein, by deed from J. O. Cook, dated September 7, 1907, recorded December 30, 1907.

(4) April 13, 1906, Turner conveyed to J. C. Whisenant 160 acres out of the said original tract, apparently intended to be all of the remainder left after the conveyance to Newton, and by mesne conveyances the title thereto was vested by deed dated July 8,

1906, and recorded December 14, 1906, in A. L. Cole.

(5) At this stage in the transfers, the remaining 160 acres was divided, Cole conveying the west one-half to J. W. Watson, October 28, 1907, the deed being recorded January 6, 1909; then by mesne conveyances the title thereto became vested October 2, 1909, in W. P. Ledbetter, one of the defendants.

(6) By deed dated March 12, 1909, Cole conveyed the east one-half of the 160-acre tract to O. H. Brown, and by mesne conveyances, on October 1, 1913, the title thereto became vested in L. F. Threet, one of the defendants.

(7) January 18, 1909, Wiggins executed a release of the vendor's lien retained, as to notes 1, 3, 4, and 5, said release being filed for record March 25, 1909.

(8) March 31, 1909, Wiggins executed a release in favor of A. L. Cole, discharging the east one-half of the 160-acre tract from the vendor's lien to secure the payment of purchase-money note No. 2, executed by Turner.

(9) This 80-acre tract, being the east one-half of the 160-acre tract, was at the time of said release to Cole, and at the time of the trial, of the reasonable value of \$800.

(10) January 6, 1914, Wiggins recovered against Turner in the district court of Rusk county a judgment for \$821.63, presumably the amount of note No. 2, with interest and attorney's fees, with a foreclosure of the vendor's lien. None of the defendants in the instant case were parties to this suit, Turner being the only defendant, though the trial court found that at the time of the said suit and judgment Wiggins had notice of the alienation of parcels of the original 409.8-acre tract, which had then been made.

(11) Under the order of sale issued by virtue of the aforesaid judgment, the sheriff of Callahan county levied upon and sold the 409.8-acre tract, except the 80 acres owned by Threet, and theretofore released by Wiggins, and the 123 acres owned by J. J. Ray. The latter secured a writ, enjoining the sale as to his 123 acres. Wiggins purchased the land under this sale for \$885, and received a sheriff's deed, and, after satisfying the costs, the judgment recovered in Rusk county was credited with the \$844.47. It was agreed that the sheriff's return on the order of sale showed that he had complied with the requirements of law in advertising and selling said land, and that the recitals in the sheriff's deed show such compliance.

The appellees Wagley and Ledbetter, by proper pleas, in the trial court urged their right to have the land subjected to the payment of the debt secured by the vendor's lien in the inverse order of alienation, and that the 80 acres owned by Threet at the time of the trial, being the last alienated, should have been resorted to first to satisfy plaintiff's debt, and that said 80 acres owned by Threet was, at the time of said release and

ever since then, of a reasonable value in excess of the balance of the purchase price due said plaintiff, as evidenced by the said note No. 2, and therefore said defendants Ledbetter and Wagley were acquitted and discharged of any further indebtedness or liability by reason of said vendor's lien retained.

Appellant, Wiggins, by several assignments urges error in the trial court's action: (1) In overruling plaintiff's general demurrer; (2) in overruling plaintiff's motion for new trial; (3) in rendering judgment to the effect that the Rusk county judgment was not binding upon appellees. But there is, in our opinion, presented in these assignments only one question, to wit, Is the Rusk county judgment *res adjudicata*, and, therefore, conclusive, against defendants as to their right to have the several parcels out of the original 409.8-acre tract subjected to the payment of the purchase-money debt in the inverse order of the alienation of said several parcels?

[1] We will first consider the question of the rights of appellees herein had they been made parties to the Rusk county suit. If the vendor in an executory contract to sell land elects to rely on his right of foreclosure, where parcels of the land covered by the vendor's lien have been separately sold, with notice to the vendor, the equities affect him to such an extent that he cannot deal with the whole premises, or with any parcel thereof, or with the owner of any parcel by release or agreement, so as to disturb the equities subsisting among the various owners, or to destroy the rights of precedence in the order of liability, or to defeat the rights of ratable contribution, or of complete or partial exoneration. *Burson v. Blackley et al.*, 67 Tex. 5, 11, 2 S. W. 668, 671. The following statement of the principles applying are quoted with approval by our Supreme Court in the cited case, to wit:

"The release of one parcel or share would release all the other parcels from the same proportionate amount of their respective original liabilities which the value of the part released bears to the total value of the mortgaged premises; one owner being released, all the others are entitled to a pro rata abatement. When the equities of the various owners are unequal, so that their respective parcels are liable in the inverse order of alienation, if the mortgagee, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases all those parcels which are subsequently liable, in the order of their several liabilities, from an amount of the mortgage debt equal to the value of the parcel released. If the value of the parcel released equals the mortgage debt, then all the subsequent parcels are wholly relieved from liability; if the value is less than the mortgage debt, the subsequent parcels can at most be liable in their order only for the excess of the debt over such value."

As held in this case, the rule with reference to mortgagors and mortgagees applies to vendors and vendees. See *Lattimore v. Provine et al.*, 29 Tex. Civ. App. 111, 69 S. W. 222 (writ denied). When the vendor of a large tract of land has notice that a pur-

chaser has subsequently sold parcels thereof, his right of foreclosure against the whole tract, or against any parcel or parcels thereof, is subject to the right of such parcel owners to have the parcels subjected to the payment of the purchase-money debt in the inverse order of their alienation, and if such vendor, with such notice, shall release any parcel from the vendor's lien, such parcel owners whose purchases preceded that of a parcel owner whose land is so released are relieved from the payment of the original purchase debt to the extent of the value of the land so released. *Vansickle v. Watson*, 108 Tex. 87, 123 S. W. 112. A lienholder cannot release part of the land subject to his lien, to the damage of one who purchased or secured an incumbrance on another part of the land prior to the release. *First State Bank of Teague v. Cox*, 139 S. W. 1. Hence, we conclude that had the appellees herein been made parties to the original suit, they could have required that the parcel of land primarily chargeable with and liable for the debt, to wit, the tract owned by Threet, being the last in order of alienation, should first be subjected to the payment of the debt, and that if its value was in excess of such debt at the time of said release, appellees would have been released from any liability.

[2] That a subsequent incumbrancer or junior lienholder, of whose status and rights the holder of the senior lien had notice at the time of the institution of a suit for foreclosure, and who was not made a party to the original suit, is not bound by said judgment in so far as his right to have his equities adjudicated is concerned is well established by the authorities. *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821; *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870; *Ballard v. Carter*, 71 Tex. 161, 9 S. W. 92; *Gamble v. Martin*, 151 S. W. 327 (writ denied). We, therefore, conclude that appellant's three assignments, improperly numbered 1, 6, and 12, must be overruled; and it is so ordered.

[3] We now come to the consideration of appellees' cross-assignment, to the effect that the court erred in holding and adjudging that the lands owned by appellees Ledbetter and Wagley, in the order named, were liable for and chargeable with the payment of the balance due on the Rusk county judgment of \$821.63, less the value of the 80 acres owned by and released to L. F. Threet, on the ground that the evidence shows, and the court so finds, that, at the date of said release, to wit, March 31, 1909, said 80 acres was of the value of \$800, and that at said time the balance due the plaintiff was less than said amount, and that the liability of defendants Ledbetter and Wagley, at said time, was fixed by and limited to the amount then so due plaintiff. We are of the opinion that the contention made in the cross-assignment is well taken. The amount due

on note No. 2, March 31, 1909, even including attorney's fees, was less than \$600. At this time note No. 2 was long past due, and, had suit been brought thereon by plaintiff at said time, it is apparent that he could have satisfied his debt out of that parcel of the land primarily liable therefor, and we do not think that because at said time he failed to enforce his right of payment, but elected to wait until such time as such debt, including accrued interest, attorney's fees, and costs, should exceed the value of the Threest tract, he ought to be permitted to subject the land of defendants to the payment of such excess.

We, therefore, sustain appellees' cross-assignment, and reverse the judgment of the court below, in so far as it made appellees' land liable for the excess, and hereby render judgment, discharging and releasing the lands of appellees from the payment of any part of appellant's judgment or lien, and from the decree of foreclosure rendered in the district court of Rusk county in the case of Wiggins v. Turner; appellees to recover all costs as against appellant.

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GULF, C. & S. F. RY. CO. v. SULLIVAN et al.
(No. 8456.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 4, 1916.)

1. ABATEMENT AND REVIVAL ⇨54—ACTIONS FOR PERSONAL INJURIES—INJURIES RESULTING IN DEATH.

Though under the common law, actions for personal injuries abated on the death of the injured person, yet by specific provision of Rev. St. 1911, art. 5686, the action of an injured person whose injuries do not result in death survives for the benefit of his heirs or legal representatives.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-258, 261-270; Dec. Dig. ⇨54.]

2. ABATEMENT AND REVIVAL ⇨75(1)—CAUSE OF DEATH—ACTIONS ON INJURIES—QUESTIONS FOR JURY.

In an action by a pedestrian who died before trial, for injuries when struck by railway cars, evidence held to raise a jury question whether his injuries resulted in death or whether his death was from other causes, so as to permit revival under Rev. St. 1911, art. 5686, providing for revival of actions in the personal representatives of persons whose deaths do not result from injuries received.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 441, 445-465, 467-473; Dec. Dig. ⇨75(1).]

3. APPEAL AND ERROR ⇨1048(2)—PREJUDICIAL ERROR—OPINION EVIDENCE.

It was prejudicial to permit plaintiff's brother, who was not a physician, to testify that after the accident plaintiff recovered and was in perfect health, such testimony being competent only from an expert witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4140; Dec. Dig. ⇨1048(2).]

4. ABATEMENT AND REVIVAL ⇨75(1)—INJURIES RESULTING IN DEATH—QUESTION FOR JURY.

On death of plaintiff suing for personal injuries, and petition of his parents to continue

the action, it was defendant's right to have the jury instructed that, on the issue whether death resulted from the injuries, proximate cause is not necessarily that nearest in time to the result, and that although deceased after partial recovery fell and further injured himself, if the efficient cause of his death was the injury by the cars, there could be no recovery.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 441, 445-465, 467-473; Dec. Dig. ⇨75(1).]

5. RAILROADS ⇨350(7)—CROSSING ACCIDENTS—QUESTION FOR JURY.

Evidence held to present a jury question whether one injured by railway cars received due warning of their approach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1161; Dec. Dig. ⇨350(7).]

6. RAILROADS ⇨350(13)—INJURIES TO PERSON—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence held to present a question for the jury whether a pedestrian injured by railway cars was negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. ⇨350(13).]

7. NEGLIGENCE ⇨141(3)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Defendant has the right, on request, to have an affirmative presentation of facts well pleaded, and relied on by him in support of plea of contributory negligence, if the evidence fairly supports an inference of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 384; Dec. Dig. ⇨141(3).]

8. TRIAL ⇨191(8)—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

In a pedestrian's action for injuries when struck by railway cars, instruction, assuming that as a matter of law, if he attempted to cross the tracks without looking or listening and after warning, he was negligent, was properly refused, when he testified that he did look.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 430; Dec. Dig. ⇨191(8).]

9. RAILROADS ⇨351(9)—CROSSING ACCIDENTS—INSTRUCTIONS.

In a pedestrian's action for injuries when struck by railway cars, a charge that if the railway had no watchman on the cars and gave no signal by bell or whistle it was liable, even though it had exercised ordinary care in other respects, and even though the plaintiff adequately warned of the danger in crossing the track, was erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1201½; Dec. Dig. ⇨351(9).]

10. WITNESSES ⇨394—IMPEACHMENT—CORROBORATION—EVIDENCE—ADMISSIBILITY.

Where on the third trial of a case one party impeached the witness by showing that on a former trial he had testified to facts in conflict with his testimony on the third trial, it was error to permit, in corroboration, a showing that on another former trial he testified as he did on the third trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1258, 1259; Dec. Dig. ⇨394.]

Appeal from District Court, Denton County; C. F. Spencer, Judge.

Action by Lloyd Sullivan, by his next friend, against the Gulf, Colorado & Santa Fé Railway Company. On plaintiff's death, on the petition of G. W. Sullivan and wife, his parents, they were permitted to continue the suit. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Lee, Lomax & Smith, of Ft. Worth, and R. H. Hopkins, of Denton, for appellant. Owsley & Owsley, of Denton, and J. W. Koons, of Sanger, for appellees.

CONNER, C. J. This case has been before us on two former appeals. See G., C. & S. F. Ry. Co. v. Sullivan, 168 S. W. 473, and G., C. & S. F. Ry. Co. v. Sullivan, 178 S. W. 615. The suit was originally brought by Lloyd Sullivan, through a next friend, to recover of appellant damages for personal injuries sustained by him at Sanger, Tex., on May 19, 1913, as a result of being run over by a car attached to one of defendant's engines engaged in switching at that place. After the reversal of the judgment in the second appeal, to wit, on December 23, 1914, Lloyd Sullivan died, and the present appellees, G. W. and Lillie Sullivan, parents of the deceased, filed an amended petition, setting up the circumstances of the injury, alleging negligence, and further specifically charging that the injuries so received by their son did not result in his death, and that the cause of action in Lloyd Sullivan's favor, therefore, survived to them. Upon the trial on this amended petition, on September 9, 1915, a verdict was returned and a judgment entered in favor of appellees for the sum of \$6,500, from which judgment this appeal has been prosecuted.

The deceased, Lloyd Sullivan, was injured, as alleged, while going along a pathway over which numerous citizens of the town of Sanger passed to and fro across a switch track of appellant's, by a backing train on May 19, 1913. On the first trial the cause was submitted upon the sole issue then presented of injury to the deceased after his perilous position had been discovered by the operatives of the train. On the appeal from the judgment which followed the cause was reversed and remanded, on the ground that the evidence failed to sustain the verdict and judgment on the issue of discovered peril, as will be more fully shown by a reference to our opinion on that appeal. See 168 S. W. 473. On the second trial, as well also as upon the last, the cause was submitted upon allegations of negligence on the part of the operatives of the train in failing to give warning of its approach, and of contributory negligence on the part of the deceased, which was alleged by the appellant company. On the second appeal the verdict and judgment was again reversed for a number of errors particularly specified in our opinion, and we now have, as stated, an appeal from the judgment in favor of the present appellees.

A reference to our former opinions will disclose fully the circumstances of the case. But we should, perhaps, here restate the circumstances for the sake of clearness. The injury to Lloyd Sullivan was inflicted in the town of Sanger in Denton county. Appellant's railway extends through the town in the direction of north and south. Its depot

is on the west side of its main track; on the west side of the depot is what is termed a house track, which extends in a northerly direction some 250 or 300 feet where it curves to the left or west and continues to a mill and some elevators. Immediately north of the depot is a public road or street. North of the depot and between the main line and house track, approximately 150 or 175 feet, is situated a pumphouse, to which people from the northwestern part of the city frequently and constantly resorted over and across said house track for the purpose of getting water. A few feet north and a little west of the pumphouse, say some 10 or 15 feet, is situated a coal bin. This coal bin is some 6 feet from the east line of the house track. Immediately opposite the coal bin and across the house track is situated a gate leading into appellant's stock pens. The south line of the stock pens, if extended across the switch track to the coal bin, would bisect the coal bin. The passage of citizens to the pumphouse, as stated, resulted in a well-defined, frequently traveled path or roadway leading from the pumphouse in a northwesterly direction. This pathway passed the northeast corner of the coal bin, and, extending in a northwesterly direction, entered upon the house track about midway of the stock pens, this point, as we estimate, being some 50 or 60 feet north of the south line of the stock pens and some 25 or 30 feet from northeast corner of the coal bin, and some 250 or 260 feet north of the depot. This pathway, after entering upon the house track, continues in its northwesterly direction on and by the northeast corner of the stock pens. On the day in question it was shown that a person by the name of June Teacle had some mules in the stock pens for shipment, and that a freight car had been spotted in front of the stock pens for the purpose, of receiving them; that Lloyd Sullivan left appellant's depot from a door in its east side, and from thence, as he testified, traveled north until he came to the road mentioned. He then found, as he stated, that a train of cars on the switch track blocked the roadway, and he therefore continued his walk until he arrived at the coal bin where he stopped and leaned up against its west wall about 6 feet south of its northwest corner. At this point Lloyd Sullivan must have been within 6 feet of the house track. As he testified, he then looked to the south along the house track, and saw the train or the engine, but the evidence leaves it somewhat uncertain which, down about the depot. After looking south, according to his testimony, he then turned in the direction of the pathway, and proceeded to and along it just north of the standing stock car until he arrived at the center of the track, at which point June Teacle, who, together with a colored helper by the name of Joe Warren, was standing upon the stockyards plat-

form, holloed to him to go back; that he attempted to do so, but was caught by the car before he could get away and his right leg run over and crushed. Other circumstances will be stated from time to time as we may deem necessary in illustration of our rulings.

The appellees alleged the facts we have stated, and charged that appellant's servants, operatives of the switch train, were negligent in suddenly approaching without blowing a whistle or ringing the bell, or otherwise giving warning. These allegations the defendant denied, and alleged in turn that Lloyd Sullivan was guilty of contributory negligence in attempting to cross the switch track at the time and under the circumstances he did. Appellant further alleged that one of its switchmen, named J. C. McGuire, was, at the time of the accident, at or about the pumphouse for the purpose of giving signals to the operatives of the locomotive backing the train, and that he observed Lloyd Sullivan approaching the track and holloed to him, warning him against doing so, at the same time running towards Lloyd Sullivan in the effort to catch and stop him, which, as McGuire testified, he almost, but not quite, succeeded in doing. The verdict of the jury upon all issues was in appellees' favor.

Addressing ourselves to the questions and related questions in the order of importance, rather than in the order of presentation, we will first notice the questions presented under appellant's seventh assignment of error.

[1] Under the common law, actions for personal injuries abated upon the death of the injured person, but we have a statute which so alters the rule as that such action, not resulting in death, survives the death of the injured party for the benefit of his heirs or legal representatives. See Revised Statutes 1911, art. 5686. It was under the operation of this article alone that appellees could have hope of a recovery, for it is undisputed that Lloyd Sullivan was an afflicted dependent, because of which the father and mother were without right of recovery on account of loss in wages or other contribution. It is also undisputed that Lloyd Sullivan died as a result of abscesses which formed upon the bone of the injured leg, the leg having been amputated soon after the injury by the car. But the controverted issue was whether the bone abscesses were caused by the injury inflicted by the railway company in May, 1913, or by a fall from a wheel chair in May, 1914. On the second trial in September, 1914, while the suit was being prosecuted in the name of Lloyd Sullivan, the plaintiff's petition contained the following allegation:

"That by reason of the injuries so inflicted upon the plaintiff by the carelessness and negligence of the defendant, its agents, servants, and employees aforesaid, the plaintiff was confined to his bed for a period of two months, and had to have his leg amputated three times, and the plaintiff was thereby rendered a hopeless and helpless cripple for life, and the stump of his

leg has never healed, and he is still suffering therefrom, and has been compelled to have several surgical operations performed thereon, and has ever since, by reason thereof, suffered intense pain and mental anguish."

This petition was sworn to by the appellee, G. W. Sullivan, and his testimony upon that trial, as also the testimony of the other appellee Mrs. Lillie Sullivan and of the attending physician, who was a relative, Dr. Rice, all supported the allegations so quoted. That trial resulted in a verdict and judgment in favor of Lloyd Sullivan for \$6,500. After Lloyd Sullivan's death, appellees presented an amended petition, upon which the last trial proceeded, and in which, after describing the injuries to Lloyd Sullivan, etc., it was further charged:

"That the injury so inflicted upon the said Lloyd Sullivan as aforesaid, was one not resulting in death, and he died from another cause. * * * That the plaintiff George W. Sullivan is the father of the said Lloyd Sullivan, deceased, and that the plaintiff Lillie Sullivan is his mother, and the said Lloyd Sullivan died without issue, and the plaintiffs are his sole heirs at law."

The testimony of appellees and of Dr. Rice on the last trial also supported the amended allegations, and appellant insists under one of its assignments that the verdict and judgment, supported by sources so discredited and upon witnesses who in giving their testimony are so manifestly influenced and controlled by what the immediate necessities of the case demand, should not be permitted to stand. On the last trial it was shown by a number of witnesses that in May, 1914, Lloyd Sullivan had a fall from a wheel chair, with which he had been provided, and which at the time and later seemed to cause him very much pain, and which, as indicated by the testimony of Dr. Rice and also by Dr. Sullivan, might have caused the abscesses from which Lloyd Sullivan died. On said second trial appellee Mrs. Lillie Sullivan, in answer to a question, testified:

"Yes; we had a rolling chair for him, and then his limb began to pain him and rise, and he got so he couldn't go in it any longer. Q. When was it that the limb began to pain him and rise? A. In February the first time. Q. Of this year (meaning 1914)? A. Of this year; yes, sir. Q. Now, how has he been since that? A. Well, from February to May he didn't suffer continuously, but just maybe a few days and at night, and maybe a few nights at a time, but after about the 20th of May of this year he hasn't seen a well minute; he has suffered constantly ever since the 20th of May."

On the last trial she thus explains the testimony just quoted:

"Will say I made that statement that the trouble began in February, but I never had been on the witness stand before, and I was nervous and confused and worried and grieved and told Mr. _____ (one of her counsel) after I got off the stand that I had made a mistake. Yes; I made those answers, but I told Mr. _____ right away after I went off the stand, and I told him about it, and he said it would not be necessary for me to go back on the stand again, that it was not material. As to my condition at the time I told you that I had made a mistake and wanted to correct it, will say I am naturally nervous, and when anything is mentioned about

my poor boy it is almost more than I can stand—we tried so hard to save him. Yes; I am nervous and broken down now."

We do not find that this explanation was corroborated by the testimony of her counsel. Appellee G. W. Sullivan, on the last trial, testified, among other things:

"After I fixed that rolling chair for him he was improving and seemed to be in good health. As to whether or not his leg had recovered, will say it was all healed up, and we used no bandages nor nothing on it at all. It healed all right. To look all right; it looked to be sound and well. No; he did not suffer any from it then. * * * Yes; there was something happened to him after that. He turned his chair over; that was some time in May, 1914, that he turned his chair over. * * * When I got there they had the wagon off of him and he was sitting down on the ground there with both hands around his leg like this (indicating, holding leg with both hands), gripping his leg, and I asked him if he was hurt, and he said that he was. * * * I don't believe he was ever out on his chair any more after that."

This witness manifested considerable hesitation in identifying his signature to the verified petition upon which the second trial proceeded. He testified:

"As to whether I made affidavit to that petition which contains the following allegations (the allegations from the petition upon which the second trial proceeded and hereinbefore quoted), will say I don't remember. As to whether I did not make affidavit in the petition that this case was tried on and appealed, that the stump of Lloyd Sullivan's leg had never healed, will say I don't remember. Yes; I remember swearing to the petition. Yes; I remember holding up my right hand and solemnly swearing the allegations in that petition were true. As to whether I swore to it without knowing that was alleged, will say I signed it because they asked me to, and I thought it was all right. As to whether I signed it and swore to it without knowing what was in the petition, or whether the allegations in it were true, or not, will say, of course, I didn't know it all. As to whether I didn't know about those allegations, will say I don't remember about it. No. I don't know anything about that. I know I never read the petition. * * * Certainly, the petition which you say contains 10 pages, 21 paragraphs, was not written by me; it was written by my lawyers."

He further testified that the petition had been signed at the instance of his attorneys, and that he signed it to the best of his "knowledge and belief," and that he was "not a lawyer." He further testified that this was his first lawsuit, and he depended upon his counsel; that they told him to "swear to it, and he swore to it."

Dr. Rice's testimony upon the last trial is too lengthy to set out. It is perhaps susceptible, however, of the construction that when he testified upon the second trial he had not had his attention definitely called to the second injury of Lloyd Sullivan's injured limb in May, 1914. He testified to the effect that in the absence of a history of such injury, he would yet be inclined to the opinion that Lloyd Sullivan's death was caused by the original injury, and that in testifying, if he did so, upon the second trial, to the effect that the abscesses then shown were a proba-

ble result of the original injury, he meant that the original injury was indirectly so.

It cannot be said that this change of base on the part of appellees is calculated to create a favorable impression; and, if the verdict and judgment rested alone upon the testimony of appellees, we might feel inclined to support appellant's contention relating to the subject. For on the second trial the evidence that Lloyd Sullivan's injury continued to inflict pain was undoubtedly material on the issue of the amount of damages to be awarded, but otherwise than as material in the way of augmenting damages, the question was immaterial, and the jury may have thought that the particular issue upon which the case was made to turn upon the last trial was only incidentally in mind of the witnesses, and not emphasized by counsel, and therefore may have credited the explanations given by appellees. Moreover, upon the last trial Dr. Sullivan for the first time testified. While it seems that he was distantly related to one of the appellees, G. W. Sullivan, who was the doctor's great-uncle, we find nothing to cast suspicion upon his testimony, and he testified to the effect that he had seen and observed Lloyd Sullivan after he had been first discharged by Dr. Rice, about a month and a half after the original injury, and that he had then apparently recovered from the effects of the wounds caused by the car "as far as a man could that had his leg off." He further testified that:

"The condition of his health was good as far as I could see after he recovered as I say."

He also testified that in June, 1914, he had been called in to see Lloyd Sullivan, and that:

"My diagnosis of it was that he had an abscess, and it was my opinion at that time that he had bruised it in some way—bruised the stump—* * * Lloyd Sullivan is dead; he died along about Christmas, I believe the 23d of December, 1914. I believe his death was caused by septic troubles—septicæmia or absorption from that abscess. In my opinion the abscesses were caused by a bruise received at some time subsequent to the accident."

He further testified that:

"If the railroad injury had left septic poisoning, or an injury to the bone that would have produced it, in my opinion it would not have taken this length of time to develop. I think it would have come in a very short while. When I first formed my opinion that some injury had intervened and caused it, I did not have any history about the subsequent injury at all. Nobody had told me that he had received an injury or bruise when I examined him—I hadn't been told that at all."

A Mrs. Smith, sister of appellee Mrs. Lillie Sullivan, for the first time also testified, to the effect that:

After Lloyd Sullivan had returned home from the sanitarium (about a month after the original injury), "he appeared to be perfectly well after he got out. I examined his limb after he got out. It appeared to be well. I do not think he suffered any after he got out after he went to going around in his wheel chair. He never

complained. After he got to going around in his chair, his general appearance and health seemed to me to be better. * * * He was never able to be out any more after he fell and hurt that limb."

A Mr. T. S. Wheeler testified to the effect:

That he had been living at Sanger since 1887 and knew the deceased in his lifetime, and remembered the occasion of his being hurt on the railroad in May, 1913; that he knew "that he recovered and got out after receiving that injury; I seen him in town after that with his chair, riding over town. Sometimes I would see him maybe for three or four days straight along—I would be in town, and he would be down there at the store, come down by himself."

The witness then testified to Lloyd Sullivan's subsequent injury in May, 1914, in the overturning of his chair which he, Wheeler, witnessed, and further testified that he never thereafter saw Lloyd Sullivan out on his chair.

Gordon Sullivan, 20 years old and a brother of the deceased, Lloyd Sullivan, also for the first time testified upon the last trial. He said:

"After he, Lloyd Sullivan, came back from Gainesville he recovered from the effects of that injury in about a month. He got out and went to going around. He had a rolling chair fixed up for him to get around. * * * He was in perfect health after he got out and went to riding in that chair. I know that Lloyd received another injury after he got his health, and went around, when he turned over he bruised that limb again. * * * It hurt him a great deal. After that the limb began to rise, and we called in Dr. Sullivan and Dr. Rice, and they kept lancing it, and it kept rising, and it never healed any more."

[2] On the whole, therefore, we think the subject was properly submitted as an issue for the jury's determination, and this was done by the court in the following language:

"If you find and believe from the evidence that the death of the original plaintiff herein, Lloyd Sullivan, was proximately caused by the injuries he received when he was struck by the car at Sanger, about which evidence has been introduced before you, then these plaintiffs cannot recover anything, and you will find in favor of defendant."

The contradictory statements of appellees and of Dr. Rice, if any, were before the jury, together with the explanations given by these witnesses, as also the evidence of other witnesses, and we cannot say that the verdict of the jury thereon must be set aside on the grounds urged by appellant as stated in the beginning of this discussion.

[3] In this connection, however, we desire to call attention to an objection made to the testimony of Gordon Sullivan. By referring back to his testimony as already quoted, it will be seen that, among other things, he testified that after Lloyd Sullivan returned from the sanitarium and got to riding in his wheel chair "he was in perfect health." To this statement appellant objected upon the ground that it was the expression of an opinion and conclusion of a nonexpert, and irrelevant and incompetent. The court, however, overruled the objection. Without determining whether or not of itself the error

was sufficient to cause a reversal, we think the ruling was wrong, and perhaps prejudicial under the circumstances of this particular case. The testimony of the physicians tended to show that the abscesses causing the septic poison which resulted in Lloyd Sullivan's death were induced by a diseased or injured condition of the bone in Lloyd Sullivan's injured leg, and whether the original or the subsequent injury caused the abscesses was the closely contested issue, and it was going beyond the province of a nonexpert witness to state that Lloyd Sullivan had, soon after the first injury, regained "perfect health," which, in view of the issue, comprehended the idea that the bone of the leg had entirely healed long prior to Lloyd Sullivan's injury in the fall from his rolling chair. Such an opinion, we think, was admissible only on the part of an expert. Gordon Sullivan was a nonexpert, and as such could only properly testify, as did several other witnesses to whose testimony no objection was urged, as to Lloyd Sullivan's apparent general health, absence of complaint, and to other circumstances within the range of common observation, which, together with expert testimony, if any, would be proper for the consideration of a jury in determining whether Lloyd Sullivan's death was in fact the proximate result of the first or of the second injury. See Jones' Blue Book of Evidence, vol. 2, § 359, and 11 R. C. L. p. 590, where the subject is discussed.

In this connection also we are inclined to the view that the following special instruction, requested by the defendant and refused by the court, should have been given:

"You are instructed in this case that by proximate cause is not necessarily meant the cause or condition which is nearest in time or space to the result which follows; and, even though you may believe in this case that after the injury sustained by Lloyd Sullivan in having his leg cut off he thereafter fell and injured the stump of such limb, still, if you further believe that the effect, if any, of the injury received by the said Lloyd Sullivan at the time he fell, if he did so, after the original injury was inflicted, was slight only, and that the active and efficient and procuring cause of the said Lloyd Sullivan's death was the injury received at the time he was run over by the defendant's cars, you will find for the defendant without reference to any other issue in the case, and so say by your verdict."

[4] As it seems to us, it was the right of the defendant to have placed before the jury in an affirmative form the law arising from the specific circumstances recited.

Under another assignment appellant insists that the court erred in refusing to give a peremptory instruction on the ground that it conclusively appears from the testimony that Lloyd Sullivan was guilty of contributory negligence in entering upon appellant's track at the time and under the circumstances of his injury. Under substantially the same evidence appellant on its second appeal presented under its seventeenth assignment of error the same proposition, and it

was then overruled. At that time we did not discuss the testimony, but contented ourselves with stating that we did not think the evidence "on either of the issues of defendant's liability or of plaintiff's contributory negligence" such as to require the peremptory instruction to find in appellant's favor, as was requested. Under such circumstances, it would be rare indeed that an appellate tribunal would feel called upon to declare a ruling of the court erroneous which, on appeal, had been approved and which later the trial judge followed, and we probably would be entirely justified in disposing of the assignment under consideration without further reference, except for the earnestness with which the contention is presented, and the fact that the discussion will probably illustrate conclusions hereinafter announced. We will therefore briefly present our view upon the state of the evidence relating to the issue of contributory negligence.

[5] Appellant's contention is to the effect that Lloyd Sullivan either did not look for the train before he started from the coal bin to cross the house track, as he testified, or that if he did so, he voluntarily and heedlessly approached and attempted to cross the track immediately in front of the approaching train. While appellant's witnesses testified to a state of facts tending to show that Lloyd Sullivan received warning of the approaching train, both from the switchman, McGuire, and by the ringing of the bell and blowing of the whistle, yet this testimony was either directly or inferentially refuted by witnesses in behalf of the plaintiffs, and the conflict was clearly for the jury's determination. Assuming, therefore, as in aid of the verdict we should do, that no warning was given, and that Lloyd Sullivan did look for the location of the switch train before leaving the coal bin, it cannot be said as a matter of law that a jury might not reasonably infer that at the particular time Lloyd Sullivan turned toward the pathway leading from the pumphouse in the direction of his home, the engine and train were standing still, as one construction of Lloyd Sullivan's testimony perhaps indicates, and that, therefore, in the absence of any warning Lloyd Sullivan might, in the exercise of ordinary care, have concluded that he could safely cross the track, which at most was but 15 or 20 feet away. It is true, as appellant contends, if the testimony be so construed, it is, apparently at least, altogether improbable that the train from below the depot could have traversed the intervening 253 feet, as shown by the testimony, in time to have run over Lloyd Sullivan had he continued his journey with reasonable care and diligence, but, as stated in the beginning of this opinion, it is not very clear from Lloyd Sullivan's testimony that it was not the engine that Lloyd Sullivan saw down about the depot. If it was the engine instead of the cars to which he referred, then there was some seven or eight cars

attached to the engine that extended north from the depot along the switch track, which would bring the train much closer to the car, which had been spotted in front of the stock pens, and which ran over Lloyd Sullivan. But even in that phase of the testimony, if the train in fact was standing, as is, perhaps, not an unreasonable inference from Lloyd Sullivan's testimony, which was reproduced upon the last trial, and there was no warning given, it would still be for the jury, we think, to say whether Lloyd Sullivan was guilty of contributory negligence in not again looking to see whether or not the train was approaching, for the evidence tends to show that in turning towards the pathway across the house track, he necessarily left the depot and the train, whether standing or in motion, to his left and a little behind, and the proof shows that he was afflicted in his limbs so as to deprive him of the free and rapid motion; his walk, as some of the testimony indicates, was slow and somewhat difficult; there was a slight curve also from the depot to the path crossing, and the engine could not be seen from where Lloyd Sullivan entered upon the track.

[6] Then, too, it is not impossible that after his entrance upon the track, his forward progress was arrested by the exclamation of June Teacle to "go back; go back!" This exclamation and the resultant effort on the part of Lloyd Sullivan to retrace his steps may possibly have been the immediate cause of his being run over. These were all, as it seems to us, theories presented by the evidence, and we think it was for the jury rather than the court to determine the issue of whether or not Lloyd Sullivan was guilty of contributory negligence under all of the circumstances at the time. It is a rule established by many of our authorities that, in order to authorize the court to withdraw the case from the jury by a peremptory instruction, the evidence tending to establish contributory negligence, must, in the absence of a statutory violation, be of such character as that there is no room for ordinary minds to differ in the conclusion to be drawn therefrom. See *Hancock v. G., C. & S. F. Ry. Co.*, 99 Tex. 613, 92 S. W. 456, and cases therein cited. It has also been held that the mere failure to look and listen for the approach of a train is not negligence per se, and cannot be treated as such by the court, though it may be so declared by a jury under the circumstances of the case. See *El Paso Electric Co. v. Kendall*, 78 S. W. 1081; *S. A. & A. P. Ry. Co. v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499. We are of opinion, therefore, that the court did not commit reversible error in submitting the issue of contributory negligence.

[7] In this connection we should mention the fact that the court submitted the issue of Lloyd Sullivan's contributory negligence in general terms only, and that appellant requested a special instruction, attempting to

apply the law of contributory negligence to the facts as pleaded by it. It is too late to now question the right of a defendant upon request to have an affirmative presentation of the facts well pleaded and relied upon by him in support of a plea of contributory negligence, if the evidence tends to show a state of facts as so alleged, which fairly supports an inference of negligence. See *Wells Fargo Express Co. v. Benjamin*, 179 S. W. 513; *F. W. & D. C. Ry. Co. v. McCrummen*, 133 S. W. 900, and cases therein cited.

[8] The court, however, is not required to give a charge that is inaccurate, and an examination of the special charge, to the refusal of which error has been assigned in this case, shows, as we think, that it was objectionable in that it assumed, in the first instance, that Lloyd Sullivan did not look and listen for the train that approached, as he testified that he did. It further assumes, in effect, that if Lloyd Sullivan attempted to cross the track under the circumstances pleaded and recited in the charge, it would constitute negligence, whereas this was for the jury to determine from all of the evidence before it. The special charge further assumed that, if Lloyd Sullivan approached the track and was run over under the circumstances recited, the result was the proximate cause of his negligence; whereas this also was for the jury; particularly in view of the testimony hereinbefore referred to, possibly indicating that Lloyd Sullivan's progress was interrupted by the sudden exclamation of June Teacle, and that this act on the part of Teacle, co-operating with the negligence of the operatives of the train in failing to give warning of its approach, may possibly have been the proximate cause.

A further special instruction on the issue of contributory negligence was requested by appellant, which embodied circumstances included in the special charge just disposed of, and also included a reference to the alleged warning given by the brakeman, McGuire, but this charge also, as we think, was likewise objectionable, in that it assumed that Lloyd Sullivan, at the time he started towards and across defendant's track, did not look and listen, nor did the charge require a finding on the part of the jury that the circumstances recited did constitute negligence, but assumed, in effect, that if Lloyd Sullivan did attempt to cross the track under the circumstances recited, that it would constitute negligence as a matter of law. The charge was therefore properly rejected.

[9] Error has been assigned to the following portion of the court's charge:

"Now, if you find and believe from the evidence that at the time alleged in plaintiffs' petition, that the deceased, Lloyd Sullivan, was passing over the defendant's track at the place where people generally passed over the same in going to and from the water plant, as mentioned in paragraph 6, if you find that the people did so pass over said track as so explained therein, and you further find that in so passing over the same that he was struck by a car be-

ing backed or moved by the train which was being switched at such place of Sanger, and you further find that defendant company did not have a watchman on said backing cars to discover any person or persons who might be on said track at the place passing across the same, or if you find that said employees operating said train failed to give any signal of the backing of said train, such as ringing the bell, or blowing the whistle, just prior to the accident, and you further find that deceased, Lloyd Sullivan, was not guilty of contributory negligence, as explained in section 8 hereof, or section 6 above, and you further find that either the failure to keep a watchman on said cars so being backed, if they did so fail, or failure to give some signal of the approach of the train, such as ringing the bell or blowing the whistle, if they did so fail, was negligence on the part of the operatives of said train, and you further find that such negligence, if any, was the proximate cause of the deceased Lloyd Sullivan's injuries, and you further find that said injuries, viz. having his leg run over by said train, did not proximately cause his death, then you will find in favor of the plaintiffs, unless you further find for the defendant under other sections of this charge."

We think this charge is erroneous, in that its effect was to inform the jury that, if the defendants had no watchman on the cars or gave no signal by bell or whistle, the defendant would be liable under other conditions there stated, even though the defendant had exercised ordinary care in other respects, and even though Lloyd Sullivan may have had sufficient warning through other sources. It was undisputed that there was no watchman upon the backing train, and it may be true that the operatives of the train failed to give any signal of its backing, such as ringing the bell or blowing the whistle, just prior to the accident, yet if in fact the brakeman, McGuire, as he testified, warned the deceased as he started towards the track and deceased heard him in time to have availed himself of the warning, all of which was for the jury to determine, then the fact that there was no watchman on the car, and that no warning signal had been given by bell or whistle, would not necessarily be material. The defendant had the right to have the jury determine from all of the facts whether the defendant exercised ordinary care to give warning, in any way in which it might be done, of the approach of the cars, and the charge objected to is affirmatively erroneous in excluding the effect that might have been given to the warning, if any, given by the brakeman, McGuire.

We are of the opinion that there was error also in permitting the introduction of a part of the testimony of appellees' witness Joe Warren. On the trial, Joe Warren, the negro helper of June Teacle, standing upon the platform of the stock pens, testified that he, as well as June Teacle, hollered to Lloyd Sullivan. He further testified that he did not hear the brakeman McGuire halloo to Lloyd Sullivan; that he never heard the brakeman say a word, and that he had not theretofore so testified. On cross-examination, and for

the purpose of impeachment, the defendant offered the following portion of the testimony of Joe Warren, given upon the first trial of the case in 1913:

"Q. How did you tell him to go back? A. I said 'The train is going to back up here; you had better look out.' Q. Did you halloo at him? A. No, sir; not in a distressing way, because I thought that he could get out of the way. Q. Didn't you see the brakeman there at that time? A. The brakeman was on the same side he was on. Q. On the same side Lloyd Sullivan was on? A. Yes, sir. Q. Did he run towards Lloyd Sullivan? A. He did after the train had very near caught him; he run toward him. Q. You saw him run toward him before he was struck? A. Yes, sir. Q. Did you hear the brakeman halloo at him? A. Yes, the brakeman said you are going to get hurt, or something like that. Q. Was he running? A. Yes, sir; he was running then. Q. He told him he was going to get hurt if he didn't look out? A. Yes, sir. Q. Could you see the brakeman standing out close to the coal bin just when Lloyd Sullivan started? A. Yes, sir. Q. Did you see the brakeman give the stop signal then? A. No, sir. Q. Were you looking at him? A. No, I wasn't watching him; I was watching Lloyd Sullivan. Q. You don't know whether he gave the stop signal then or not—the only stop signal you saw him give was after the train had struck him? A. It was just before it struck him. Q. You saw the brakeman give the stop signal just before the train struck him? A. Yes, sir."

Thereafter the plaintiffs, in corroboration of the witness, offered, over the appellant's objection, the following portion of the testimony of Joe Warren, given on the second trial of this case in September, 1914:

"I always try to remember things. Yes; I tried on the last trial to remember. No; there is no reason that I should remember any more now than I did then. I don't undertake to say whether I did or didn't make that answer on the last trial. As to whether I was asked this and made the following answer: 'Did you hear the brakeman holler at him? A. Yes; the brakeman said, 'You are going to get hurt,' or something like that; will say that was Mr. Teacle. If I made that answer, I was trying to repeat what Mr. Teacle said; not the brakeman, but Mr. Teacle. You got that wrong there; not the brakeman—Mr. Teacle, I meant to say."

[10] To the testimony so given in corroboration the defendant objected, to the effect that it was irrelevant and incompetent, and as indicated, we think the objection should have been sustained. It is said in 40 Cyc. 2787, that:

"As a general rule, a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony, and the rule is the same whether the previous statements were made verbally or in writing, and applies equally to statements under oath and unsworn statements."

On the same subject our Supreme Court in the case of Insurance Co. v. Eastman, 95 Tex. 34, 64 S. W. 863, said:

"Upon the subject of admitting the testimony of the former declarations of a witness in sup-

port of his testimony given upon the trial, there is a great contrariety of opinion as to the circumstances which render such admission proper. But two rules are reasonably well established: (1) That in the absence of evidence impeaching the credibility of a witness, such testimony is never admissible. *Moody v. Gardner*, 42 Tex. 414. (2) That whenever a witness is sought to be impeached by showing that he has made declarations inconsistent with the testimony given by him upon the trial, and the tendency of such impeaching evidence is to show that the testimony of the witness is, by reason of some motive existing at the time of the trial or of some influence then operating upon him, fabricated, it is proper to admit evidence of his former declarations which corroborate his testimony, provided such declarations were made at a time when no such motive or influence existed."

As it seems to us, it is quite clear that the corroborating evidence offered is not brought within the exception indicated in the quotation we have just made, and which is supported by numerous authorities, that is to say, Joe Warren, having been impeached by the introduction of contradictory statements given by the witness on the first trial, could not corroborate the testimony given by him upon the last trial to the contrary by proving that upon the second trial he had testified in harmony with his evidence upon the last trial; it not appearing in any way that the motive, if any, which induced the witness to testify falsely upon the last trial, if he did so, did not exist with like force at the time of his testimony upon the second trial when the corroborating evidence was given. It further appears in the evidence that Joe Warren was an employé of the appellee G. W. Sullivan at the time of the accident to Lloyd Sullivan, having temporarily been loaned to June Teacle for the purpose of loading the mules. What other or later connection, if any, between the witness and appellee G. W. Sullivan does not appear, but we think the testimony of the witness upon the last trial, together with the impeaching testimony, and such explanation, if any, as the witness could make at the time of impeachment, should all be left to the jury, without the supporting aid of the fact improperly proven that he gave a consistent explanation a year before. See *Vicars v. G. C. & S. F. Ry. Co.*, 37 Tex. Civ. App. 500, 84 S. W. 286; *F. W. & D. C. Ry. Co. v. Stone*, 25 S. W. 808.

Appellant urges a number of assignments presenting other questions, but they have no such applicability to the case, nor such importance, as makes it necessary in our opinion to discuss them. All assignments, except as hereinabove indicated, are therefore overruled. But for the errors noted the judgment will be reversed, and the cause remanded.

Reversed and remanded.

COKER v. MOTT et al. (No. 5743.)

(Court of Civil Appeals of Texas. San Antonio.
Nov. 29, 1916. Rehearing Denied
Jan. 8, 1917.)

1. APPEAL AND ERROR \S 1011(1)—REVIEW—FINDINGS OF FACT.

The trial judge's findings as to the facts have the same effect as findings of a jury, and if the evidence is conflicting, a mere preponderance against the finding is not cause for reversal.

[For other cases, see Appeal and Error, Cent. Dig. \S 3983-3988; Dec. Dig. \S 1011(1).]

2. APPEAL AND ERROR \S 856(1)—REVIEW—PRESUMPTIONS FAVORING JUDGMENT.

When the judgment of the court can be supported by any reasonable theory as to the evidence and there are no conclusions of fact and law, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3408; Dec. Dig. \S 856(1).]

3. APPEAL AND ERROR \S 1011(1)—REVIEW—FINDINGS OF FACT—WEIGHT OF EVIDENCE.

The fact that the trial judge accepted testimony of defendant alone, as against that of plaintiff and his witnesses, is not ground for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3983-3988; Dec. Dig. \S 1011(1).]

Appeal from Nueces County Court; Walter F. Timon, Judge.

Suit by J. C. Coker against W. O. Mott and another, to recover on a note and foreclose a chattel mortgage given as security therefor. From a judgment against the maker for the amount of the note, but denying foreclosure, plaintiff appeals. Affirmed.

Suttle & Todd, of Corpus Christi, for appellant. Pope & Sutherland, of Corpus Christi, for appellees.

FLY, O. J. Appellant sued W. C. Mott on a promissory note for \$194.40 and to foreclose a mortgage on a certain automobile, executed by Mott to appellant. W. E. Womack was made a party to the suit on the ground that he was in possession of the automobile and claiming the same. The cause was tried without a jury, and judgment rendered in favor of appellant as against Mott for the amount of the note, but in favor of W. E. Womack for the automobile.

Womack swore that he was the owner of the Star Theater, and that on March 27, 1913, Mott, as his agent, sold the same to Tyler & Co., taking the automobile in part payment, that he (Womack) took possession of the automobile, and always retained possession as the owner of the same, and that Mott had no interest whatever in the automobile. Appellant showed that on March 27, 1913, Mott sold the Star Theater, and gave a written transfer in his own name, and received a bill of sale from Tyler & Co. to him for the automobile; that, on April 2, 1913, Mott gave him the note for \$194 and a mortgage on the automobile. The transfer of the Star Theater was not filed for record until April 10, 1916, and the bill of

sale to the automobile was not acknowledged or recorded. Appellant swore that Mott told him that he traded the theater to Tyler & Co. and that he had taken the automobile as part pay for the theater; that he saw the automobile a number of times in the possession of Mott, and that Mott had represented that he was the owner of the automobile, and had tried a number of times to sell the same to appellant. Two witnesses swore that the Star Theater had been listed with them for sale by Mott.

The evidence showed that Mott left Corpus Christi after the sale of the theater, probably immediately after giving the note and mortgage. He could not have had possession of the automobile more than six days before he gave the note and mortgage, and yet appellant swore that he, during that time, saw Mott in possession of the automobile a number of times and that he "tried numbers of times to sell same to plaintiff." Womack flatly contradicted appellant as to Mott ever having possession of the automobile. No one else testified that Mott was ever in possession of the automobile. Womack did nothing to cause appellant to think Mott owned the automobile. Appellant did not state that he saw the bill of sale before the note and mortgage were executed.

[1, 2] When a cause is tried by the judge, his findings as to facts have the same force and effect as the findings of a jury. If the evidence is conflicting, a mere preponderance in favor of the losing party is not cause for a reversal. *Mann v. Wallis*, 75 Tex. 615, 12 S. W. 1123. The trial judge was in a much better position to pass upon the credibility of the witnesses and the weight to be given their testimony than this court could be. The bills of sale were given and received by Mott without the connivance of Womack, and the court may have deemed them a part of Mott's scheme to get money from appellant. Womack's positive testimony was not shaken by the words and acts of a man who got money from another and then fled from the community. Whenever the judgment of the court can be supported by any reasonable theory as to the evidence, it must be affirmed, where there are no conclusions of fact and law. *Tinsley v. Penniman*, 8 Tex. Civ. App. 495, 29 S. W. 175.

[3] Because the trial judge preferred to believe Womack as to his ownership and possession of the property, rather than the testimony of appellant and his witnesses, can form no ground for a reversal of the judgment, and none of the decisions cited by appellant sustains any such contention. We can readily conceive of a case in which a judge could properly and wisely reject the testimony of 20 witnesses and take that of one witness, even though the evidence of the 20 be supported by written testimony for which the one witness was not responsible.

No effort was made by appellant to show by Tyler that he really bought the theater from Mott or really sold him the automobile. Womack swore the theater was his, and that Mott acted as his agent in selling it and taking the automobile as part payment, and the bills of sale did not destroy that evidence.

The judgment is affirmed.

GORDON v. TEXAS & PACIFIC MERCANTILE & MFG. CO. (No. 8449.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 21, 1916. Rehearing Denied Nov. 25, 1916.)

1. MASTER AND SERVANT §302(2)—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER.

The owner of an automobile who was not present at the infliction of the injury cannot be held liable except it be shown that the person in charge was not only the agent of the owner, but was at the time engaged in the business of his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. §302(2).]

2. MASTER AND SERVANT §302(2)—INJURIES TO THIRD PERSONS—AUTHORITY OF SERVANT.

While authority to use an automobile in exceptional ways might be implied by circumstances which would warrant the inference that the employer knew of such uses, the commitment of a car to the custody and control of an employé for the special purpose of delivering merchandise would not alone authorize the conclusion that the employé was at liberty to use the car for other purposes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. §302(2).]

3. MASTER AND SERVANT §332(4)—INJURIES TO THIRD PERSONS—TRIAL—INSTRUCTIONS.

In an action for injuries caused by an automobile driven by defendant's servant, where it appeared that the automobile was in the general control of the servant for commercial use during the daytime, and that the accident happened at night, while the servant, after his employment had finished, was taking persons having no control over him to a fire, the court properly refused a requested instruction that, if the machine was defective and dangerous to use upon the road at night, and that the defects and danger were within the knowledge, actual or constructive, of the defendant, and the driver was one of its employés, defendant would be liable for the consequences, even though the driver was not using the car in the business of his master or with his knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1277; Dec. Dig. §332(4).]

4. TRIAL §252(8)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

In an action for injuries caused by defendant's automobile driven by its employé, where there was no evidence of incompetency or recklessness of the driver or knowledge on the part of the defendant of such incompetency, an instruction that, if defendant owned the automobile and the driver had been employed regularly and was incompetent or reckless, and the incompetency or recklessness was known to defendant, and the driver was thereafter given control of the car, the retention of the driver under

such circumstances constituted negligence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 608; Dec. Dig. §252(8).]

5. EVIDENCE §106(5)—INTOXICATION—ADMISSIBILITY.

In an action for damages caused by defendant's automobile, driven by its servant, where there was no evidence tending to show that the servant was habitually intoxicated or defendant ever knew or heard of his being in an intoxicated condition, testimony that the driver on one occasion had appeared intoxicated when he came to deliver merchandise to the witness was incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 187; Dec. Dig. §106(5).]

6. MASTER AND SERVANT §330(3)—INJURIES TO THIRD PERSON—EVIDENCE—SUFFICIENCY.

In an action for damages caused by defendant's automobile while driven by its servant, evidence that the servant was acting outside the scope of his employment held sufficient to justify a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. §330(3).]

7. MASTER AND SERVANT §330(1)—INJURIES TO THIRD PERSON—EVIDENCE—BURDEN OF PROOF.

In an action for damages caused by an automobile driven by defendant's servant, although proof that an automobile is being driven by a servant will support a finding of fact that he was employed in the business of his master, in the absence of countervailing proof, the burden of proof as a matter of law remains upon the plaintiff to establish the material allegations upon which recovery must rest, since while the weight of the evidence may, from time to time, shift, the burden of proof as to the essential elements of the plaintiff's cause of action does not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1270; Dec. Dig. §330(1).]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Suit by Mrs. R. N. Gordon against the Texas & Pacific Mercantile & Manufacturing Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

Alexander, Baldwin & Ridgway, of Ft. Worth, for appellant. John W. Wray, of Ft. Worth, for appellee.

CONNER, C. J. Mrs. R. N. Gordon brought this suit in the district court of Palo Pinto county against the Texas & Pacific Mercantile & Manufacturing Company on February 15, 1915, for \$25,000 damages because of personal injuries received by her on the night of March 24, 1914, in an automobile collision. She alleged that the defendant company was a corporation engaged in a general mercantile business at Thurber, Tex., and owned and operated an automobile truck that it used in and about its business and between the towns of Thurber and Minus in hauling merchandise and transporting men between said towns and in protecting and looking after its property. She further alleged that on the night mentioned she, with her children and brother, was driving a one-

horse buggy along the public road from Mingus to Thurber, when she met the defendant's automobile truck, driven by one of its agents and servants, and that without fault on her part, and through the negligence of said servant, the automobile ran into the buggy, threw her out upon the ground, and seriously injured her, the particulars of which we need not here specify. It was alleged that the automobile truck at the time was defective in particulars set out in the petition, and "was, at the time of the accident, being used for defendant's business." It was alleged that the defendant was negligent in permitting said automobile to be used upon the public road at night with the defects specified, and that the machine in its condition was a dangerous one, which the defendant knew, or could have known by the exercise of ordinary care. As a further ground of negligence it was alleged that the defendant employed and permitted said car to be operated by a careless, incompetent, and reckless driver. The defendant answered by general demurrer, general denial, and plea of contributory negligence. Upon the trial, which was on October 12, 1915, the case was submitted to a jury upon special issues, in answer to which the jury returned the following verdict:

"We, the jury, find that Charley De Witt (the driver of the automobile at the time in question) was not engaged in the defendant's business at the time of the accident, and was not acting within the scope, nor apparent scope, of his employment."

The jury had been instructed that in event they so answered that issue, other issues need not be considered by them, and thereupon the court entered judgment in favor of the mercantile company, from which the plaintiff has duly prosecuted an appeal.

Error is assigned to the refusal of the court to give the following special instruction:

"Gentlemen of the jury: You are instructed that though you may believe from the evidence that at the time of the accident in question the auto truck causing the accident was not being used for any business of the defendant, yet, if you believe from the preponderance of evidence that said car was owned by defendant, and that it was being driven by an employé of the defendant, and that said car was in a bad state of repair and defective, and that such defects or bad state of repair, if any, rendered said car a dangerous machine to use on the public road in the nighttime, and that defendant, or those of its agents or employées who had control and management of said car, knew, or by the exercise of ordinary care could have known, of such defective condition, if any, and knew of the danger to the traveling public incident to the operation of said car upon the public road in its defective condition, and that such use and operation of the car in such condition at said time and place was negligence, and that plaintiff was injured, and that such negligence of defendant, if any, was the proximate cause of her injuries, if any, then you will find for plaintiff."

It seems evident that the requested charge authorizes a recovery without a finding that the appellee company, through some authorized agent or source, knew, or by the use of

due care should have known, that the driver of the car was using it for the purpose shown in the evidence. The charge proceeds upon the assumption, and appellant so urges, that if the machine was defective, as alleged, and as there was evidence to show, and that it was dangerous to use it upon the road at night, as was being done, and that said defects and danger were within the knowledge, actual or constructive, of the appellee company, and that the driver was one of its employées, then appellee would be liable in damages for the consequences, even though at the time in controversy the driver was not using the car in the business of his master, but for purposes of his own, or of others with him without any knowledge on the part of the master that it was at the time being so used.

The evidence substantially shows that De Witt, the driver, had for a number of years served the defendant company in the capacity of a driver of the automobile in question; that the automobile was used in the delivery of merchandise in and about the town of Thurber and on monthly trips to the town of Mingus, on the railroad a few miles away; that ordinarily deliveries of merchandise were made in the daytime, although there was evidence that occasional deliveries were made as late as 8 or 10 o'clock at night. De Witt had been furnished and kept a key to the garage in which the automobile was kept at night. The evidence is silent as to whether or not any other person had such a key. On the night in question De Witt completed his deliveries about 6:30 o'clock, housed his automobile, and thus completed his labors for the day. Some time later, between 8 and 9 o'clock, it was discovered that a fire was raging in the town of Mingus, at which point there is evidence tending to show that the defendant company owned some property, although its location and character seems not to be specified in the evidence. Upon the discovery of the fire several persons, including the chief of the fire department at Thurber, a cashier of the defendant company employed in its mercantile establishment, and perhaps one or more other employées of the defendant company induced De Witt, the driver, to go to the garage, bring out his automobile, and take a company of men, some 20 or 25, to Mingus to aid in putting out the fire. The auto was defective; it had poor lights, and possibly some defect in its steering gear, and on the journey the collision occurred of which the plaintiff complains, and the evidence leaves no doubt of her serious injury. The evidence was to the effect that Mr. Williams, one of defendant's vice presidents, and Mr. W. K. Gordon, its general manager, were the agents of the defendant company having authority and control over De Witt. It does not appear, however, that either of these agents knew on the night in question that De Witt had, or intended to take, the automobile out of the gar-

rage and make the trip to Mingus, nor is there any evidence tending to show that either of these officers ever knew of De Witt's so using the automobile in the nighttime for any like purpose. Nor does the evidence show that the chief of the fire department, or the defendant company's cashier, or physician, or other employé, that went to Mingus on the night in question, had any authority or control over De Witt whatever. Nor does the evidence show that it was within the scope of the duties of the driver named, or of any one of defendant's employés, who went to Mingus, to go there even in the protection of property belonging to the company. Under the evidence they certainly were not so directed on the night in question; or rather there is no evidence that they were so directed. The evidence further showed, however, that the defendant company owned the automobile truck, kept it in repair, and furnished the gasoline, oil, and all equipment for its use; and the evidence fails to show that any other of defendant's employés had been given custody or control over the automobile at either day or night. But Mr. Gordon, the general manager, testified without contradiction that:

"As driver, it was part of De Witt's duty to put the truck up at nights the same as it is the duty of the teamster to put his teams up at night and take them out in the morning. De Witt owed the company absolutely no duty after his day's work was over; after the day's work is done he is free as far as the company is concerned."

[1] Appellant's contention, in substance, is that the mere fact that the automobile was defective and dangerous for driving at night, and known to be so by the defendant, and that at the time it was being driven by one of defendant's servants, having been given power to take it from the garage, creates a liability on defendant's part for the consequences. We cannot approve so broad a ground of liability on the part of automobile owners. The authorities seem uniform to the effect that the owner of a car who was not present at the infliction of the injury cannot be held liable, except it be shown that the person in charge, not only was the agent or servant of the owner, but also was engaged at the time in the business of his master. See *Hill v. Staats*, 187 S. W. 1039, 189 S. W. 85 (No. 8416), by this court not yet officially reported; *Christensen v. Christiansen*, 155 S. W. 995; *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 526, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 183, 5 L. R. A. (N. S.) 599; *Evans v. Automobile Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Howe v. Leighton*, 75 N. H. 601, 75 Atl. 102; *Jones v. Hoge*, 47 Wash.

663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338.

[2] If it be conceded that the automobile under consideration was defective, and that it was dangerous to drive it upon the public roads at night, as the evidence tends to show, yet something more is required in order to create liability than a mere showing that the automobile was owned and furnished by the defendant and had been placed in the general control of the driver for a special purpose. There is nothing in this case to show that the driver's control was general in the sense that he had the right or authority to take or use the car for any purpose other than for the delivery of merchandise, or to go to Mingus once a month with guards to get the money with which to pay the defendant's employés. The commitment of the car to the custody and control of De Witt for these purposes will not alone authorize the conclusion that he was at liberty to use the car in visiting fires or places of amusement in a neighboring village. Of course authority to so use the car might be shown by direct evidence, or might be implied even by proof that De Witt had used the car for such purposes with such frequency as to warrant the inference that some agent of the defendant corporation having control knew, or by the exercise of ordinary care could have known of, and consented to, such exceptional uses of the car by De Witt. But the record discloses no such proof, direct or circumstantial. The evidence, indeed, negatives any such state of affairs. Gordon, the general manager of defendant corporation, testified that he never knew De Witt to use the car later than 8 o'clock at night. One or more witnesses testified that they had seen De Witt driving the car to Mingus, visiting picture shows, etc., but the number of times, or the time of day or night that such uses occurred is not made to appear. Nor has it been made to appear that any officer of the defendant corporation having control over De Witt over the car in question knew of any such use.

[3] There is also testimony that when De Witt was urged to take the car out on the night in question, he replied that he was not authorized to do so without the consent of Williams, the vice president, or a Mr. Creighton, but nevertheless finally went to the garage and took the car out, and we find no evidence that either Williams, Creighton, Gordon, or other agent of the defendant company having any right of control over De Witt, or over the car, either knew of or consented to De Witt's taking, and to the consequent use of, the car on the night in question; and, while there is evidence that the defendant company owned the property in Mingus, the evidence fails to show with any degree of certainty that it was in danger, or that it was any part of the duty of De Witt, the driver of the car, or of any one of defend-

ant's employes who accompanied him, to go to the fire in question in an effort to save property of the defendant corporation. Indeed, the vital issue, as submitted by the court, and the answer thereto as given by the jury, seems broad enough to preclude all reasonable inferences arising from the evidence upon which a judgment in appellant's favor could be predicated. We, accordingly, find that the court properly refused the special charge requested.

[4] Error is also assigned to the rejection of a special charge, to the effect that if the defendant owned the automobile in question and De Witt had been employed as a regular driver, and that De Witt was an incompetent or reckless driver, and that such incompetency or recklessness was known to the defendant, and De Witt thereafter given the management and control of the car and to drive the same, and that the retention of the driver under such circumstances constituted negligence, they would find for the plaintiff. We find but little, if any, evidence of substantial weight tending to show incompetency or recklessness on the part of the driver, De Witt, or that, if any such incompetency there was, such incompetency was known to any agent of the defendant corporation having authority to act. For these reasons, and for reasons above given in disposing of the first assignment, the second assignment, complaining of the action noted, will be overruled.

[5] Complaint is also made of the exclusion of the testimony of Henry Bernard, to the effect that one night about 11 o'clock about one month before the accident in question, De Witt came to his, the witness' house, to deliver some feed stuff, and that he appeared to be intoxicated at the time. The testimony was offered on the issue presented in the pleadings of De Witt's incompetency, but we find no error in the court's ruling in this respect. We do not understand that an isolated condition of the kind indicated is competent proof to establish incompetency, and there is no evidence tending to show that De Witt was habitually intoxicated, or that the defendant, through any authorized agent, ever knew or heard of his being in an intoxicated condition.

[6] The remaining assignments complain that the verdict and judgment are not supported by the evidence, and that the court erred in placing the burden of proof upon the plaintiff on the issue, among others, of whether or not the driver, De Witt, acted with authority in driving the car. What we have already stated of the evidence we think sufficiently disposes of the contention that the evidence is insufficient to support the verdict and judgment, and several authorities

have been cited to the effect that when it is shown that when an injury has been negligently inflicted by a servant of the owner of the car, it will be presumed, in the absence of countervailing proof, that the servant was at the time employed in the business of his master. See *Studebaker v. Kitts*, 152 S. W. 464; *Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; *Kahn v. Home Telephone & Telegraph Co.*, 78 Or. 308, 152 Pac. 240.

[7] We think, however, that the inference arising from the facts stated are, properly speaking, inferences of fact, and not of law. That is, it may be true that upon proof that the car of an owner is being driven by one of his servants is sufficient as a matter of evidence, in the absence of explanation that the driver at the time was engaged in the master's business, and would support a finding to that effect. The inference, however, we think is one of fact. The burden of proof as a matter of law, as we understand the rule, yet remains upon the plaintiff to establish upon the whole case the material allegations upon which his right of recovery must rest. While the weight of the evidence may, from time to time, shift, the burden of proof as to the essential elements of the plaintiff's cause of action does not do so. See *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Railway Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563. We are therefore of opinion that the court's charge was correct. A contrary charge, indeed, would, under the circumstances of this case, have been misleading, and the evidence to the effect that, when the car was housed for the night, De Witt's duties were ended seems undisputed. His ordinary hours of employment in the business of the master began in the morning, and, with the exception of a few instances shown, ended in the evening. On the night in question it is undisputed that his duties for the day had ended. His car had been housed, and the use thereafter made was in the night and exceptional, and, as it seems to us, one of the vital propositions of the plaintiff's case was to show that at the time of the accident in question De Witt was engaged in the business of his master, or at least acting within the apparent scope of authority given him by the master. The plaintiff so alleged, and, as we conclude, the burden was upon her to support the allegation. But even if mistaken in this view of the law, we consider the evidence on the issue so preponderating in appellee's favor as to render the error of the court, if any, without probable prejudice.

On the whole, we conclude that all assignments of error must be overruled, and the judgment affirmed.

RYAN v. LOFTON et ux. (No. 8447.)

(Court of Civil Appeals of Texas, Ft. Worth.
Oct. 21, 1916. On Motion for Re-
hearing, Nov. 25, 1916.)

1. FRAUDS, STATUTE OF §129(7)—ORAL CONTRACT—IMPROVEMENTS.

Improvements, consisting of piping a house for gas, the value not shown, and the purchasing of wall paper amounting to \$2.10, not paid at the time of trial, were so insignificant as not to take the conveyance as to which an oral contract was sought to be enforced, out of the statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4); the property being worth \$700, with a rental value of \$10 per month.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 322; Dec. Dig. §129(7).]

2. FRAUDS, STATUTE OF §129(9)—ORAL CONTRACT—IMPROVEMENTS.

Where, to enforce oral contract to convey, reliance is had upon the claimant's possession and improvement of the premises, the value of the improvements must be shown to be such proportion of the value of the property and made in such reliance upon the contract as to give the claimant equitable rights.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 322; Dec. Dig. §129(9).]

On Motion for Rehearing.**3. TRESPASS TO TRY TITLE §41(1)—ACTION—EVIDENCE.**

In suit for trespass to try title, the defense being equitable rights under an oral contract to convey, evidence held to show that plaintiff's grantor, an aged man, promised when title was taken in his own name to convey the property to defendants in consideration of support until his death, which was given him.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 62; Dec. Dig. §41(1).]

4. TRESPASS TO TRY TITLE §35(1) — DEFENSES.

In trespass to try title, defendants are entitled to give in evidence any lawful defense to the action, except the defense of limitation, without any special pleading as a predicate therefor.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 50, 52; Dec. Dig. §35(1).]

5. TRUSTS §17, 18(5)—ORAL AGREEMENT TO CONVEY.

Where legal title is taken in the name of the purchaser with the understanding that in fact the equitable title shall vest in persons promising to support the purchaser until his death, such parol agreement, when executed, constitutes a valid enforceable trust, authorizing a decree of the purchaser's interest to such persons as against a purchaser of the legal title with notice, notwithstanding statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4).

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 20; Dec. Dig. §17, 18(5).]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by William C. Ryan against R. L. Lofton and wife. From judgment for defendants, plaintiff appeals. Affirmed.

R. W. Haynie, of Abilene, for appellant. Ben L. Cox, of Abilene, for appellees.

BUCK, J. This is an action arising in trespass to try title, William C. Ryan, appellant, claiming title to the property in controversy by legal transfers, and R. L. Lofton and wife claiming title to the property by virtue of a parol gift from M. P. Moore. By agreement between all parties W. E. Dennis and wife were agreed upon as the common source of title; said Dennis and wife being the immediate grantors in the conveyance to M. P. Moore. From a judgment in favor of the defendants, plaintiff appeals.

In August, 1913, R. L. Lofton and his wife, Mrs. Eula Lofton, lived in Abilene, Tex. M. P. Moore purchased from Dennis the premises in controversy, and the Loftons and he moved thereon, and all occupied the house until the day before Moore's death, which occurred in May, 1914. Moore was quite old, and had lived with the Loftons for some years in Cisco prior to their removal to Abilene, Moore furnishing the house rent free, and the Loftons nursing, caring for, and boarding Moore. During a goodly portion of the time they lived together in Abilene Mr. Moore was sick and bedfast and required considerable attention. The day before he died he was moved from the Lofton residence, at the instance of the appellant herein, and apparently over the protest of the Loftons. A few days before his death Moore executed a deed to the property in question in favor of the Right Reverend Joseph Patrick Lynch, D. D., bishop of the Catholic diocese of Dallas, Tex., and his successors and assigns, reciting a consideration of \$750. Subsequent to Moore's death, on, to wit, July 21, 1914, Rev. Lynch deeded the property to William C. Ryan, appellant, the consideration recited being "ten dollars and other valuable consideration."

On August 11, 1915, appellant filed suit in form of trespass to try title. Defendants answered by a plea of not guilty, and further alleged that they had acquired the title from M. P. Moore under the following circumstances, to wit: That, while the title was taken by said M. P. Moore in his own name, the same was taken for the use and benefit of the defendants and with an equitable title in these defendants; that the said M. P. Moore had been for several years prior to the date of said deed an old and decrepit man, without a family and without relatives upon whom to rely for support and maintenance; that for five years prior to the date of said deed the defendants had taken care of said Moore and had boarded him and had permitted him to room with them and had cared for him during sickness, with no remuneration therefor save and except the promise of said Moore at his death to remunerate them by leaving them what property he owned at said time; that at the time of the purchase of the property by Moore from Dennis said Moore placed defendants in possession there-

of, and agreed with and promised them that at his death the title to said premises should vest in the defendants, and the property should become theirs without any incumbrance or other charge thereon, with the sole condition that defendants would take care of, support, maintain, and nurse said Moore from said date of the deed during the rest of his natural life, it being understood that said premises were to become the property of the defendants at the death of said Moore in consideration of and in payment for the services of defendants in taking care of said Moore for the five years prior to the date of said deed and for the time intervening from the date of said deed to the death of said Moore; that defendants faithfully carried out their part of said agreement and did take care of and support and nurse the said Moore during the rest of his natural life and until his death in May, 1914.

Defendants alleged in another count that the value of said property was \$700, and that the value of their services to the said Moore during the time they nursed and cared for him, alleged to have covered a period of some five years previous to the date of said deed and the time subsequent thereto, was of the reasonable value of \$75 per month. They further alleged that while relying upon the contract and agreement alleged to have been had with said Moore prior to his death, and while in possession and control of said premises, they made valuable improvements thereon.

The court having sustained plaintiff's exception to that portion of defendants' answer setting up the promise and agreement of M.

P. Moore to give the defendants the property in controversy at his death, defendants amended their answer and alleged that the agreement of said Moore and the understanding of said defendants were that the property in fact vested in said defendants at the time of the execution of the deed from Dennis to Moore, and further pleaded fulfillment of the agreement on the part of the defendants to nurse and care for said Moore, and the making of valuable and permanent improvements, etc.

The issues were sharply drawn by the evidence: First, as to the nature of the agreement or contract, if any, between Moore and the Loftons; second, as to whether any permanent or valuable improvements had been made; third, as to whether defendants had complied with the terms of the alleged contract with Moore in taking care of him during his last days.

The cause was submitted to the jury on the following special issue, to wit:

"Q. 1. At the time M. P. Moore purchased the property in controversy from W. E. Dennis and the defendant Mrs. Lofton began occupying the same did the late M. P. Moore then give such property to the said Mrs. Lofton, or did he merely promise to give the same to her at his death, or did he let Mrs. Lofton enter such property upon

the understanding that she should take care of him for the rent of such property?"

To this the jury answered as follows:

"We find that the property was given to the defendant Mrs. Lofton by M. P. Moore the day M. P. Moore bought the property."

Upon this verdict the court entered a judgment in favor of the defendants on their plea of not guilty, and further decreed that all the right, title, claim, and interest of William C. Ryan in said property should be divested out of him and vested in the defendants, and that the cloud cast upon the title by virtue of the execution, delivery, and recording of the deed from Moore to Rev. Lynch, and the deed from Lynch to plaintiff, be removed, and that defendants be in all respects quieted in their title. From this judgment the plaintiff has appealed.

The trial court in sustaining plaintiff's special exception to that part of defendants' answer pleading an agreement and promise on the part of the deceased M. P. Moore to give, at his death, the property in controversy to defendants as a remuneration for their taking care of him during his lifetime, seems to have concluded that such an agreement is not sustainable, but that in order to make the parol agreement of transfer of title to real estate valid there must be: First, a promise on the part of the grantor to convey to the grantee in present; and, second, the entering into possession by the grantee under said promise; and, third, the making of valuable and permanent improvements on the part of the grantee and in the reliance on the grantor's promise. While a parol sale or gift of land may be sustained in equity when it is followed by the possession of the grantee or donee who makes valuable improvements thereon in good faith (*Wootters v. Hale*, 83 Tex. 563, 19 S. W. 134), yet it does not follow that the validity of such sale or gift may not be sustained in the absence of valuable and permanent improvements.

"A contract to devise land, though looked upon with some disfavor as a nontestamentary method of disposition of property at death, and consequently not subject to the statute of wills, will yet be in effect enforced by equity when the contract is clear, definite, and without doubt. It is obvious that equity cannot compel direct specific performance of the contract to devise land by ordering the promisor to make the devise before his death, as performance is not due until the time of death. But equity will do what is equivalent to giving specific performance, by fastening a trust upon the land in the heir or devisee, and enforcing conveyance by the representative holding the legal title in favor of the purchaser under the contract to devise. Before the death of the promisor equity will enjoin any attempted conveyance of the land to a third party as a fraud upon the promise of the contract to devise; or, if it has been conveyed to a grantee with notice or without consideration, equity will compel the land either to be held in trust for the devisee purchaser or to be reconveyed to the grantor." 6 Pomeroy, Eq. Jur. § 746.

See, also, *Davies et al. v. Cheadle et al.*, 31 Wash. 168, 71 Pac. 728; *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042; *Burns v.*

Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; Bryson v. McShane, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527; note under Krell v. Codman (Mass.), 14 L. R. A. 860; Grindling v. Rehyll, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466; Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802; Clancy v. Flusky, 187 Ill. 605, 58 N. E. 594, 52 L. R. A. 277; Burdine v. Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Updike v. Ten Broeck, 82 N. J. Law, 105; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Masterson v. Harris, 174 S. W. 570; Clark v. West, 96 Tex. 437, 73 S. W. 797; Jordan v. Abney, 97 Tex. 296, 78 S. W. 486. All of these cases are authority to the effect that a valid contract binding one of the parties to leave, at his death, property to another, is enforceable where the other party has fulfilled the terms of his agreement.

[1, 2] While we are of the opinion that the judgment rendered cannot be sustained on the basis of valuable and permanent improvements made prior to M. P. Moore's death, yet we think the evidence is sufficient to enforce specific performance on the part of appellant, who is shown to be the holder of the legal title and to have received the same with notice of defendants' claim and without valuable consideration. The only improvements shown to have been made by the defendants was the piping for gas, the value thereof not shown, and the purchase of wall paper amounting to \$2.10, not paid for at the time of the trial. It is agreed the property in controversy is of the value of \$700, and that the rental value of the same was \$10 per month. At most, these items would be insignificant in value, and not such as to take the conveyance out of the statute of frauds. Wallis v. Turner, 95 S. W. 61; Hutcheson v. Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434; Eason v. Eason, 61 Tex. 225; Ann Berta Lodge v. Leverton, 42 Tex. 18. As stated in the last-cited case:

"Nor can it be maintained that any character of improvements or repairs made on the premises, of however little value, will entitle the purchaser to have the contract enforced."

As reliance is placed on the grantor's putting the grantee into possession of the premises and the making of improvements, the value of such improvements must be shown to be in such amount in proportion to the value of the property, and made in reliance upon the promise to convey, as would vest in the claimant-grantee equitable rights, to deprive him of which would constitute a fraud, the perpetration of which the statutes of frauds were enacted to prevent. But whether the parol gift of conveyance be intended to take place at the time the donee or grantee is placed in possession, or to take place at the death of the donor or grantor, is immaterial. If the donee or grantee has, at the death of the donor or grantor, performed the services which constituted the

consideration for the conveyance, equity will enforce such conveyance. As is said in Jordan v. Abney, supra:

"That a contract between two persons upon valuable consideration that one will, at his death, leave property to the other, is enforceable, where no statute is contravened, is held by an almost unbroken current of authority, English and American. Such contracts, when sufficiently certain, have been held valid and enforceable, in equity as well as at law, whether they provide for the payment of money, or the leaving of specific property, or of all or a moiety of that which the obligor should leave at his death. They have usually been put in the form of agreements to bequeath by will, but this has not been regarded as an essential feature; agreements to leave the property, or that the obligee should have it at the death of the obligor, being held sufficient."

We think the evidence sufficient to support the contention of defendants: (1) That M. P. Moore at the time he purchased the premises in controversy intended either to give them to the defendants at that time or that the defendants should receive them at his death; (2) that the consideration for this agreement was the care and nursing and boarding of the deceased by the defendants; (3) that defendants complied with their agreement to take care of the deceased during the remainder of his natural life. Upon the first and second propositions Mrs. Lofton testified as follows:

"He [Mr. Moore] told me that he would buy a home for me to take care of him, that he was alone, and that he could not stay down there by himself. I agreed to that. Mr. Dudley [the real estate agent] was taking us to look at a place down here on Oak street and we passed by this place, and Mr. Dudley told me there was a place he had for sale, and he said, 'We will look at it.' He told Mr. Moore that. I was with him at the time. We were all together in the buggy. Mr. Dudley was taking us to look at the place, and we all got out and went in. We could not get in the house. The lady was gone, and we looked around all we could, you know, and he [Mr. Moore] told me that the place suited him if it did me. He said I was the one to be satisfied; it was for me that he was buying it for, and I was the one to be pleased about it. And so we didn't go any further. We decided we would take that place. * * * In consideration of Mr. Moore giving me this place, I agreed to take care of him as long as he lived. There was no other consideration. I had taken care of him some prior to that time. We had lived with him at Cisco, prior to the time he came down here and bought this place. He told me that he was giving me this place for my kindness to him at Cisco and for in the future taking care of him. During all the time that he lived with us, and I took care of him, he did not pay me board. He did not pay me anything. * * * He told me that he had bought the place for me. He did not say anything about the place being his until he died. He told me that the place was mine when he bought it. He just says, 'It is yours, the place is yours,' when he bought the place, and he set out shade trees there and everything, and told me he was putting them out for me, they were mine, and to watch them, and he didn't claim to own them. He gave me the property at the time he bought it. He told me when he bought it that it was mine."

Mr. Miller testified for the defendants in part as follows:

"During the summer of 1913 I had a conversation with him [Moore] about buying some property in Abilene. At the time referred to Mr. Lofton was renting property from me, and I didn't know anything about Mr. Moore at the time. But Mr. Moore told me that he wanted to buy some property and he wanted to see some property, and I asked him, 'What kind of property?' and he said, 'Some residence property,' and I carried him and Mrs. Lofton, and I believe it was a little child, in the buggy or carriage around and looked at some property, and the old gentleman was almost helpless at the time, and we went down there and looked at two or three pieces of property. He says, 'I want to buy a residence for Mrs. Lofton.' He says, 'I am not able to take care of myself, and she has been caring for me, and I want to buy her a home.' * * * I didn't show her this place that afterwards he bought, but he remarked that 'I want to buy Mrs. Lofton a home'; that 'she has cared for me, and I am almost helpless.'"

C. W. Dudley testified in part:

"I am the agent that sold the property in controversy in this case. They lived across the street from me, and I saw the old gentleman there, and I got to talking with him one day, and he said he was in the market to buy a home in Abilene. * * * I showed him that particular property—him and Mrs. Lofton. So they looked through the house. I carried them down there, and there was not any one at home, and we couldn't get inside; so the next day or two I showed them this property. We went through it. We was out in the yard looking around in the yard, and he asked Mrs. Lofton how she liked the property, and she said, 'All right,' and he says, 'I want you to be pleased; I am buying this property for you.'"

W. M. Robinson testified in part:

"I knew Mr. Moore that lived with the Loftons. I talked to him just before the Loftons moved into that house. It must have been a week or two before they moved in, and I was cutting off some gas, and I says, 'Mr. Moore, let me wire the house.' 'No,' he says, 'I am not able right now.' He says, 'You should be as good as I was; I bought the property and gave it to Bob's wife,' and he says, 'You ought to be as good as I was.'"

As to the compliance on the part of the Loftons with the agreement to take care of Mr. Moore, Mrs. Lofton testified in part as follows:

"During all the time that he lived with us I took care of him, and he did not pay me board. He did not pay me anything. During the last few months that he lived here in Abilene he was down in bed all the time. He was helpless. I certainly did wait on him. It took most all of my time and attention for him. He was a big care. I had Dr. Haynes with him. I carried out my agreement with him and kept him there the rest of his life. * * * I took care of Mr. Moore at Cisco about six years. We went there in 1901, and stayed there six years. I never did make Mr. Moore any charge for taking care of him in Cisco. I never did charge him anything for my services. * * * I stated that I took good care of Mr. Moore. I certainly did. I sure did, as well as I could. It is a fact that during the last two months of his life his health was failing, and during that time he was confined to his room the larger part of the time. He was not able to be moved. He would not let me move him. He could not be moved. His side hurt him so bad and it was so painful that he would not let me move him. It is not a fact that the last month of his illness that the room in which he was left was very dirty. I kept it just as clean as I could under the circumstances. * * * The evening before Grandpa [meaning Mr. Moore] died, Mr.

Ryan [appellant] came and taken him away when I asked him not to. I told him, I said, 'Don't take Grandpa away.' I said, 'He has been with me so long.' I said, 'I would rather he would be here, and while I am not able to wait on him, but I will do my best; I have always done so, and I will continue to do so as long as he lives.'"

R. L. Lofton testified also to the care taken of the deceased during the time they occupied the house jointly.

For the reasons hereinabove given we conclude that appellant's assignments attacking the action of the court in rendering judgment upon the answer to the question submitted to the jury in this cause, and also to the action of the court in refusing to give plaintiff's peremptory instruction, should be overruled. For the reasons shown and under the authorities cited, we conclude that it was immaterial whether M. P. Moore made the gift or grant of the property to Mrs. Lofton take effect at the time she entered into possession thereof, or whether he agreed to give it to her; the gift to take effect at his death. In either event, the consideration, to wit, the care and support of the deceased during his lifetime, was fulfilled by defendants, and plaintiff and his grantor, Rev. Lynch, who were shown to be purchasers with notice and without valuable consideration, are in no position to complain of the enforcement of the equitable rights vested in defendants. While we have not attempted to discuss each assignment presented by appellant, we have carefully examined the same, and have concluded that all should be overruled, and the judgment of the trial court in all things affirmed; and it is so ordered.

Affirmed.

On Motion for Rehearing.

Appellant in his motion cites us to a number of Texas decisions, many of them by our Supreme Court, which he urgently insists sustain his contention that, in order to take a parol gift or parol sale out of the statute of frauds (article 3965, § 4, Vernon's Sayles' Texas Civil Statutes), possession alone, with payment, in case of a sale, of purchase price, in part or in whole, by the vendee, will not suffice, but there must also be shown valuable improvements made by the latter with the knowledge and consent of the former. Hence it is urged that we were in error in sustaining the conveyance in this case, since we found that no such improvements had been made as would of themselves take the conveyance out of the operation of the statute.

On reconsideration we have carefully examined, not only every Texas authority cited by appellant, but also many others, and have concluded that at least some of the Supreme Court decisions fail to support our heretofore expressed views. While in many, if not most, of the states having the same or similar statutory adoption of the English statute of frauds, enacted in 1676 (29 Car. II, c. 3,

§ 1), courts of equity have been very liberal in construing such statutes and in giving relief, yet our own courts have seemingly been loath to depart from the somewhat rigorous terms of the statute. This conservative sentiment was voiced in the opinions of Chief Justice Hemphill and Associate Justice Lipscomb in one of the leading cases on this question, *Garner v. Stubblefield*, reported in 5 Tex. 552. Early in our judicial history, however, the Supreme Court of Texas modified the statutory inhibition, by enforcing specific performance of a parol contract to convey land where valuable improvements had been made by the vendee or donee, with the knowledge and consent of the vendor or donor. This departure from the strict rule of the statute is justified upon the ground that to follow the statute enacted to prevent frauds would in such a case induce and encourage the evils sought to be prevented by the statute. While it may be questioned whether in case of the payment of all, or a large part, of the purchase price, especially where the insolvency of the parol vendor is shown, there is not presented a more cogent appeal to the equity powers of the courts than in the case of valuable improvements made, yet the decisions have established the distinction beyond question, and it has become *stare decisis*. Equity might permit the removal of improvements, where possible, made by the vendee who is denied specific performance, but it could hardly give substantial value to a moneyed judgment recovered against a hopeless bankrupt.

In many cases language has been used indicating that the court did not intend to hold, or wish to be understood as holding, that the making of valuable improvements was the only equitable ground upon which specific performance should be granted. In *Wood v. Jones*, 35 Tex. 66, and *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538, it is stated in so many words that *either* valuable improvements made in good faith by the vendee, with the consent of the vendor, *or* (italics ours) delivery of possession by a vendor, will take the transaction out of the statute. In *Neatherly v. Ripley*, 21 Tex. 434, it is said that, the purchase money having been paid, possession alone is sufficient to raise an equity to prevent the contract from being treated as a nullity. In *Dugan v. Colville*, 8 Tex. 126, Justice Lipscomb says:

"I apprehend that the true principle is that, if there has not been such a change of circumstances produced or growing out of the parol contract that it would be difficult to place the vendee in the same position that he was in before making the contract, there would not be a sufficient equity raised to justify a decree for a conveyance of the title. If, however, the vendor, by a parol contract, should permit the vendee to go into the possession and bestow much labor and expense in improving the land, in the confidence that the vendor would make the title in conformity with his parol promise, such circumstances would raise an equity in favor of

the vendee against his vendor, aside from and uncontrolled by the statute of frauds."

But the opinion does not say that the state of facts used as an illustration is the only one that would avoid the statute, and reasonably implies the contrary. In *Robinson v. Davenport*, 40 Tex. 334, there were shown valuable improvements to sustain the conveyance, but in discussing the questions involved the court says:

"The doctrine that courts of equity will decree specific performance of parol contracts for the sale of lands under certain circumstances against the inhibitions of the statute of frauds requiring the agreement or some memorandum to be in writing has been too long established to be seriously questioned. The inquiry therefore is not whether relief will be granted in any case, but whether the case comes within certain defined rules which have been held to establish exceptions to the statute. The decisions proceed upon the idea that the equities which will be enforced are in aid of the statute which was to prevent fraud, and independent of it."

In *Jones v. Carver*, 59 Tex. 293, 296, the court uses the following language:

"* * * To entitle the plaintiffs to its specific performance, it is not enough, under the decisions of this court, to show that such a contract was made, and that the greater part, or even all, of the purchase money has been paid. *Some other equitable matter* [italics ours] must be shown to entitle a party to the specific performance of such a contract."

In the case of *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 989, by the Court of Appeals for the Fourth District, a very full discussion of this question is presented, and the writer of the opinion, Justice Fly, uses this language:

"A person claiming real estate under a parol sale or gift obtains no assistance from the law, because it declares such a sale or gift invalid, and in order to enforce such parol agreement he must present proof of possession and the making of valuable improvements of a permanent character, *or other facts* [italics ours] showing that the transaction is a fraud on the purchaser or donee, it not enforced."

There are expressions in other decisions of our Supreme Court and the Courts of Civil Appeals indicating the judicial purpose to limit the exception to the statute to the case of valuable improvements exclusively. For instance, in *Woolbridge et al. v. Hancock et al.*, 70 Tex. 18, 6 S. W. 818, our Supreme Court, speaking through Justice Maltbie, uses the following language:

"But it is necessary to the validity of a parol sale or gift of land in Texas, however the rule may be elsewhere, that possession be delivered and substantial and valuable improvements made, with the consent or knowledge of the vendor, upon the faith of such gift or sale, and that the mere taking possession or making improvements of insignificant value is not sufficient, especially where the value of the rents exceeds that of the improvements."

But the force of this enunciation as a general statement of the law, rather than as an application of the law to the particular facts disclosed in that case, is somewhat impaired by the subsequent language in that opinion, to wit:

"It follows that every case of this class must stand on its special facts, and when it would be

inequitable and fraudulent, as against the person in possession, and especially when he cannot be restored to his former condition, the vendor or donor will not be permitted to repudiate the contract; but the inclination of courts is against extending the rule dispensing with writings in the transfer of lands beyond its present limit, whatever hardships its enforcement may cause in particular cases; the policy of ever having dispensed with it in any case being doubted."

[3] Though we fully appreciate the importance of the main question involved in this case, yet, in spite of a seeming conflict of authorities, we are still of the opinion that defendant in this case presented proof entitling her to the protection of the beneficent equitable power residing in the courts. The evidence justifies the conclusion that M. P. Moore, by parol, conveyed the property in question to the defendants in consideration of years of faithful service and tender care and a like service and care to be rendered during his remaining years. Neither party to the contract knew for what length of time such service would continue. Though an old man, it might reasonably be presumed that Moore would live for many years. The Loftons accepted the contract tendered, and undertook to fulfill, and the evidence is sufficient to sustain the conclusion that they did fulfill to its utmost, their part of the contract. It is difficult to measure in dollars and cents the value of such service. The care of the sick, and especially of the aged, is oftentimes exceedingly trying on the patience and nerves of the attendants. As was said in the case of *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527:

"There are some cases that cannot be compensated for by mere money damages. There are some services that are incapable of valuation in money. As to these the law permits individuals to make their own contracts. Old age is naturally repulsive. The hair grows gray, the eyes sunken, the skin wrinkled and drawn, the will feeble, the habits careless, needing all the care and attention of childhood, without its purity, loveliness, and affection as a compensation."

[4, 5] Since plaintiff's suit was in form of trespass to try title, defendants were entitled to give in evidence any lawful defense to the action except the defense of limitation, without any special pleading as a predicate therefor. We are of the opinion that under the evidence plaintiff was entitled in equity to a conveyance on the theory that, while at the time of the purchase of the premises in question the legal title thereto was taken in the name of M. P. Moore, yet in fact the equitable title was at all times thereafter in the defendants. Mrs. Lofton testified that said Moore told her that it was for her that he was buying the place, and other evidence set out in the original opinion sustains the theory that it was the understanding of both Mr. Moore and the defendants that at the time of the conveyance to Moore of the property in question, though the paper title was placed in him, the equitable title was

vested in the defendant Mrs. Lofton. A conveyance to Moore of the premises, if he at the time of the conveyance agreed by parol to hold the same for the defendants, would vest the equitable title in them, and such parol agreement would constitute a valid enforceable trust, and would authorize a court of equity to decree the transfer of his interest in the property to the defendants. *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Long v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32; *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172; *Houser v. Jordan*, 28 Tex. Civ. App. 398, 63 S. W. 1049. In such a case the statute would not apply.

Hence we conclude that appellant's motion for rehearing should be overruled; and it is so ordered.

GALLAHAR v. WHITLEY. (No. 8446.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 21, 1916. On Motion for Rehearing, Nov. 25, 1916.)

1. EMINENT DOMAIN §2(11)—PUBLIC IMPROVEMENTS—REASSESSMENT—VALIDITY—TAKING PROPERTY.

A reassessment for paying which might have been legally made under the charter, but which, through a mistake in the owner's name in the notice to property owners of the improvement and the hearing thereon, was invalid, made by the city of Mineral Wells, expressly authorized thereto by its charter, adopted August 19, 1913, according to Acts 33d Leg. c. 147, and in view of the further right of the owner under the charter to institute suit within ten days to set the assessment aside for any legal reason, was not a taking of his property in violation of Const. art. 1, § 17, prohibiting the taking of private property without adequate compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 9-12; Dec. Dig. §2(11).]

2. MUNICIPAL CORPORATIONS §455—PUBLIC IMPROVEMENTS—NOTICE—VALIDITY.

An assessment of property for a street improvement can in no case be made without proper notice of the contemplated assessment to the owner and an opportunity given him to resist it for any legal cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084-1093; Dec. Dig. §455.]

3. INTEREST §34—RATE—PUBLIC IMPROVEMENTS—ASSESSMENT CERTIFICATE—VALIDITY OF AGREEMENTS.

Under the charter of the city of Mineral Wells adopted August 19, 1913, in accordance with Acts 33d Leg. c. 147, § 8, assignable certificates issued by the city covering the cost of special improvements and fixing the rate of interest not to exceed 8 per cent. might be enforced, notwithstanding the general statute relating to the subject of interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 71-74; Dec. Dig. §34.]

4. MUNICIPAL CORPORATIONS §524—PUBLIC IMPROVEMENTS—ASSESSMENT CERTIFICATE—ATTORNEY'S FEE.

Under such provision, and in the absence of any power given to the city to impose a penalty of any kind for failure to promptly pay the as-

assessment, no attorney's fee could be added to the amount of the assessment with interest.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1237; Dec. Dig. ¶ 524.]

5. MUNICIPAL CORPORATIONS ¶530—PUBLIC IMPROVEMENTS—ASSESSMENT CERTIFICATE—ACTION.

That suit on an improvement certificate to foreclose an improvement lien declared by a city against a lot owned by defendant and abutting on a street which had been paved was brought before the expiration of ten days, in which, under a provision of the charter, defendant might have instituted suit in the district court to set the assessment aside, was immaterial, where it did not appear in what way the suit on the certificate prevented the institution of such suit by defendant, or that defendant could have successfully maintained such suit.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ¶530.]

On Motion for Rehearing.

6. MUNICIPAL CORPORATIONS ¶524—PUBLIC IMPROVEMENTS—IMPROVEMENT CERTIFICATE—ATTORNEY'S FEES—STATUTES.

Acts 33d Leg. c. 147, § 6, of the law authorizing certain cities to adopt and amend charters, providing that all powers heretofore granted any city by general law or special charter are preserved to them, and such power is granted to such cities when embraced in and made a part of their charters, and Rev. St. 1911, art. 1011, part of the general law relating to the creation of municipal corporations, providing that a city may assess the whole cost of constructing sidewalks or curbs not to exceed three-fourths of the cost of any other improvement against the owner's property abutting on such improvement and their abutting property benefited thereby, and provide for the time and terms of payment and for interest payable upon deferred payments not to exceed 8 per cent., and fix a lien and issue assignable certificates, do not apply to an improvement assessment made by city under its charter pursuant to Acts 33d Leg. c. 147, and hence do not authorize the city to impose an attorney's fees.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1237; Dec. Dig. ¶ 524.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Suit by Frank Whitley against A. W. Gallahar. Judgment for plaintiff, and defendant appeals. Reformed as to attorney's fees, and otherwise affirmed.

W. H. Penix, of Mineral Wells, and P. C. Sanders, of Palo Pinto, for appellant. Ritchie & Cousins, of Mineral Wells, for appellee.

CONNER, C. J. Frank Whitley instituted this suit against A. W. Gallahar in the district court of Palo Pinto county upon an improvement certificate issued by the city commission of the city of Mineral Wells to recover the sum of \$122.08, and to foreclose an improvement lien declared by said city commission against a lot owned by the defendant and abutting on Hubbard street, in said city. The trial resulted in a judgment for the plaintiff, and the defendant has appealed.

The trial was before the court without a

jury, and the judge filed conclusions of fact and law, which are before us. The findings of fact are substantially unassailed, and they are accordingly approved and adopted by us. Omitting facts deemed unnecessary to an understanding of our conclusion, it appears that the city of Mineral Wells is a municipal corporation situated in Palo Pinto county, Tex., duly incorporated and acting under and by virtue of a charter adopted on August 19, 1913, in accordance with section 5, art. 11, of the Constitution of Texas, as amended on November 5, 1912, and in accordance with an act of the Thirty-Third Legislature (Acts 33d Leg. c. 147); that the charter so adopted provides that the board of commissioners of the city shall have the right, by taking prescribed steps and following certain procedures, to order the improvement of any street, or streets, in the city by filling, grading, raising, or paving the same with any permanent and durable material, and to proceed to contract for the making of such improvements after advertisement for bids. The board of commissioners are given the right to charge not exceeding two-thirds of the cost of such improvements against the owners of such property as shall abut upon the streets improved, provided that such sum to be paid by the owners of such property shall not be in excess of the actual benefit of enhanced value resulting to each piece of property from such improvement. It is further provided that to secure the payment of the sum so contemplated to be paid by the individual owners the board of commissioners may create a lien against such abutting property, and fix the sum to be paid as a personal liability against the owners thereof; that upon the completion and acceptance of the work contracted to be done upon each street, the board of commissioners are given authority to issue to the contractor, upon his request, a certificate evidencing the indebtedness of each owner to the said contractor, setting forth due dates, rate of interest, and other particulars in connection with the indebtedness, and stating that a lien had been created upon the property to secure the payment of the indebtedness described in the certificate. The charter also provides that:

"The lien or personal liability fixed by said assessment shall be enforced, together with costs of collection and reasonable attorney's fees if incurred thereon, by suit in any court having jurisdiction."

It further appears that the city of Mineral Wells, after having taken the steps prescribed in its charter, made and entered into a contract with the plaintiff, Whitley, to pave Hubbard street in front of the lot upon which it is sought to foreclose the lien herein and owned by the defendant. Due notice of the determination to pave the street was issued on November 11, 1914, and a date set for the hearing of the owners of the property on said street, stating the amount of the

assessment contemplated to be made against each owner, and giving such owners opportunity to be heard touching any matter connected with the improvement. Said notice was published in the newspapers, as the charter directs, and the defendant's property was included in the list. However, such list gave the owner of the property involved in this suit as D. L. Gallahar, the defendant's name; A. W. Gallahar nowhere appearing in the list of property owners. Thereafter, on November 23, 1914, an assessment was made against D. L. Gallahar, and a lien attempted to be created against the property in controversy to pay part of the costs of such improvement. The improvement of the street was completed by the contractor and in all things accepted and approved February 26, 1915, but it was discovered that a mistake had been made in giving the name of the owner of the lot in question, and on the 29th day of July, 1915, the board of commissioners, deeming it advisable to reassess the cost of paving against the defendant and his said property, determined to reassess such costs against said owner and his property, and gave notice, as the charter required in the first instance, to the defendant that a hearing would be had at the mayor's office in said city designating the time for such hearing, and, further, that "at such time all said owners, their agents or attorneys, or persons interested in said property, are notified to appear and be heard, at which hearing said owners or other persons may appear in person, or by counsel, and may offer evidence" as to the amount assessed against the property of such person, the benefits to said property, or any other matter or thing connected therewith. This notice was properly given to the defendant and his property properly described; the amount of \$122.08 being specified as the amount contemplated to be reassessed against him and his property. The defendant did not appear, either in person or by attorney, and made and filed no opposition to any feature of this second assessment, and on August 17, 1915, the amount stated was reassessed against defendant, and his said property charged with a lien in favor of the plaintiff to secure the payment of the assessment. It was specifically found by the board of commissioners that such sum was not in excess of the special benefits to such property accruing to it by reason of enhancement in the value thereof due to the construction of the pavement. After the reassessment mentioned the city commission issued to the plaintiff in this cause an assignable certificate evidencing the indebtedness of the defendant in the said sum of money, and reciting that it was given in part payment for the cost of paving Hubbard street, and it is upon this second assessment and certificate that the plaintiff sued in this case. In the proceedings resulting in the second assess-

ment the city board relied upon the following provisions of the charter of the city, viz.:

"Whenever any error or mistake shall occur in any proceeding under this charter, it shall be the duty of the board of commissioners to correct the same, and whenever for any reason it shall appear that any assessment or claim or personal liability fixed or attempted to be fixed against any property or its owner hereunder is not enforceable on account of any error or invalidity in any of said proceedings, or the assessment of any property has been by error omitted, the board of commissioners shall have the power, and it shall be its duty at any time, to reassess against said property and its then owner the amount determined to be properly payable by said owner, after notice to and hearing of said owner in the manner hereinbefore provided. But no reassessment shall be made against any property in an amount in excess of special benefits thereto in enhanced value thereof by means of the improvement."

The trial court concluded as a matter of law that the reassessment was authorized, and entered up a judgment in favor of the plaintiff for said sum of \$122.08, together with interest thereon at the rate of 8 per cent. per annum, and the further sum of \$25 attorney's fees, which the court found to be reasonable, and which, it seems, was authorized in terms both by the charter and by the certificate issued to the plaintiff. Judgment was rendered accordingly foreclosing the lien upon the defendant's lot to secure the payment of the judgment, and the defendant has appealed.

The contention of appellant most urgently presented is that the trial court erred in concluding that the reassessment against appellant was authorized—

"for the reason that said reassessment was made long after the paving had been completed, and that there was nothing done thereafter to enhance the value of defendant's property, and did not create any lien whatever against defendant's property, nor a personal obligation to pay money against the defendant, and for the further reason that the charter does not provide for a reassessment after the work has been done on the street by the contractor."

While the precise point seems not to have arisen before in our state, the weight of the authorities elsewhere, so far as we have been able to examine them, seems to be uniform in upholding the right of a municipality, when authorized by a statute, to make reassessments for beneficial improvements where for any reason a prior assessment, which might have been legally made, is invalid. Thus it is said in *McQuillin on Municipal Corporations*, vol. 5, § 2128:

"Statutes or charters generally provide that the municipal authorities may levy a new special assessment where the original assessment is declared void, and such laws have been adjudged to be constitutional. The evident purpose of laws authorizing reassessments is to provide for making reasonable assessments only where a valid assessment might have been made in the first place," etc.

Authorities from a number of states in support of the text are cited. See, also, 28 Cyc. 1191, par. 22; *Sudberry v. Graves & Stephens*, 83 Ark. 344, 108 S. W. 728; 1 Page & Jones on Taxation by Assessment, § 414;

Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232.

[1, 2] As stated in the beginning, the city of Mineral Wells was duly incorporated under an act of the Legislature approved April 7, 1913. See General Laws 1913, p. 307. This act, in defining the powers that may be exercised by municipalities incorporated thereunder, among other things, specially provides that:

They may have "exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards and public grounds of such city, and to provide for the improvement of any public streets, alleys, highways, avenues or boulevards, by paving, raising, grading, filling or otherwise improving the same, and to charge the costs of making such improvement against the abutting property by filing a lien against the same, and a personal charge against the owner thereof, according to an assessment specially levied therefor in an amount not to exceed the special benefit that such property receives in enhanced value by reason of making any such improvement, and to provide for the issue of assignable certificates covering the payment of said costs," etc.

The findings show that these provisions relating to power were embodied in the charter of the city of Mineral Wells, and the regularity of the proceedings in the first instance for the improvement of Hubbard street, upon which appellant's lot abuts, is not questioned in any way, save that it appears that in the notice of the improvement and the contemplated assessment required by the charter a mistake was made in giving the initials. The notice required *D. L. Gallahar*, instead of *A. W. Gallahar*, as it should have been, to be and appear before the city commission. The property affected, however, was properly described, and it may be conceded, and is conceded, that the first assessment was invalid for the want of a proper notice; for it is well settled in this state, as well as elsewhere, that an assessment of the kind can in no case be made without proper notice of the contemplated assessment to the owner, and an opportunity given to him to resist it for any legal cause. *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884. The power to correct mistakes of the character noted was expressly embodied in the charter, and the proceeding under consideration wherein the mistake was sought to be corrected is not complained of in any respect as being irregular. Appellant was notified to be and appear before the city commission and afforded a full opportunity, either in person or by counsel, to show, if he could, that the improvement involved did not benefit his property, or that for some other reason no assessment should be made against him. The essence of the law seems to have been thus complied with. He had his day in court, and we cannot assume that, had any legal reason been shown why the assessment could not, or ought not, to have been legally made, the board of commissioners of the city would have imposed the assessment. The record affirmatively shows that appellant

made no effort to contest the reassessment proposed. The charter also provides that within ten days after an assessment of the kind had been made an abutting owner might institute suit in the district court to set it aside for any legal reason. The record fails to show that appellant instituted any such suit. On the contrary, it affirmatively appears that he did not do so, and on the present trial it does not appear that any effort was made on appellant's part to show that his property was not in fact benefited by the improvement to the full extent of the assessment made by the board of commissioners. So that in no legal sense do we think it can be said, as appellant urges, that there has been a taking of his property in violation of section 17, art. 1, of our state Constitution.

[3, 4] Objection is also urged to the findings and to the judgment because of the imposition of interest and attorney's fees. We have concluded that the objection to the interest is not maintainable, for the reason that in section 8 of the General Laws, hereinbefore cited, and under which the city of Mineral Wells was organized, in further defining the powers that may be exercised by the city, it is further provided that for special assessments of the kind under consideration the city may issue assignable certificates, if deemed advisable, covering the costs of such improvement, and may "fix the rate of interest not to exceed eight per cent.," etc. This special provision having been made and having been included in the charter, we are of opinion that it may be enforced, notwithstanding the general statute relating to the subject of interest. We find, however, no such provision authorizing the city to impose an attorney's fee. Nor have we found where the Legislature has given the city power to impose a penalty of any kind, other than the imposition of interest for the failure of one against whom an assessment is made to promptly pay it. Appellee, in support of the judgment for attorney's fees, cites the case of *Insurance Co. v. Chowning*, 86 Tex. 654, 26 S. W. 983, 24 L. R. A. 504, and other cases to the effect that statutes of the kind are constitutional, but in this case it is not pretended that appellee is entitled to the recovery of attorney's fees by virtue of any statute, or by virtue of any authority other than a provision to that effect in the city charter, and the law by virtue of which the city owes its legal existence, as will be seen from quotations already made from it, expressly limit the power of the city to make assessments of the kind to the benefits conferred by the improvements plus interest, as already indicated. The assessment and payment involved, being involuntary on appellant's part, must find express warrant in the law. We are therefore of the opinion that the court erred in imposing the attorney's fees.

[5] Appellant also complains of the institution of this suit before the expiration of the ten days in which, under a provision of the

city charter, he might have instituted suit in the district court to set the assessment aside, but we regard this objection as of no materiality, in view of the fact that it is not made to appear in what way the institution of this suit by the appellee prevented the institution of the suit against the city in the district court. Moreover, there has not been made to appear in the record before us any ground upon which appellee could have successfully maintained an action of the character mentioned.

We conclude that the judgment should be affirmed in all things except as to attorney's fees, and the judgment will be so reformed as to exclude them, with the costs of appeal taxed against appellee.

On Motion for Rehearing.

[8] Appellee, in whose behalf we affirmed the judgment on a former day, insists with much vigor that, by virtue of section 6 of the act of the Thirty-Third Legislature, the power given cities to include attorney's fees as specified in Revised Statutes, art. 1011, is available here, notwithstanding the silence of the act of the Thirty-Third Legislature referred to on that subject. Section 6 invoked reads:

"All powers heretofore granted any city by general law or special charter are hereby preserved to each of said cities, respectively, and the power so conferred upon such cities, either by special or general law, is hereby granted to such cities when embraced in and made a part of the charter adopted by such city; and provided, that, until the charter of such city as the same now exists is amended and adopted, it shall be and remain in full force and effect."

The article of the Revised Statutes referred to is as follows:

"Subject to the terms hereof, the governing body of any city shall have power, by ordinance, to assess the whole cost of constructing sidewalks or curbs, and not to exceed three-fourths of the cost of any other improvement, against the owners of property abutting on such improvement and against their abutting property benefited thereby, and to provide for the time and terms of payment of such assessments and the rate of interest payable upon deferred payments thereon, which rate of interest shall not exceed eight per centum per annum, and to fix a lien upon the property and declare such assessments to be a personal liability of the owners of such abutting property; and such governing body shall have power to cause to be issued in the name of the city assignable certificates, declaring the liability of such owners and their property for the payment of such assessments, and to fix the terms and conditions of such certificate."

"If any such certificate shall recite that the proceedings with reference to making such improvements have been regularly had in compliance with law, and that all prerequisites to the fixing of the assessment lien against the property described in said certificate, and the personal liability, shall be prima facie evidence of the facts so recited, and no further proof thereof shall be required in any court."

"The ordinance making such assessments shall provide for the collection thereof, with costs and reasonable attorney's fees, if incurred. Such assessments shall be secured by, and constitute

a lien on, said property, which shall be the first enforceable claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes."

The article of the statute is not found in the law of 1913 under which the city of Mineral Wells was incorporated, but is a provision relating to the creation of municipal corporations under the general law. By a careful reading of the article it will be seen that it applies to cases where the cost of sidewalks or curbs is assessed, and authorizes assessments "not to exceed $\frac{3}{4}$ of the costs of any other improvement."

It seems clear that the assessment involved in this case was not made by virtue of that article, for there is no finding, nor contention even, that the assessment under consideration constituted three-fourths or any other aliquot part of the cost of the improvement. On the contrary, the specific finding is that the assessment does "not exceed the special benefit conferred" by the improvement; thus demonstrating that the assessment was made under the act of the Thirty-Third Legislature specially applying, as noted in our original opinion. The special assessment under the act of 1913 to the extent of the benefits conferred was authorized, even though in excess of three-fourths of the cost of improvement, although such excess would be invalid under article 1011. For aught that appears to the contrary in the record, the assessment in this case did exceed the limit fixed by article 1011. It is easily conceivable that the Legislature would be willing to add reasonable attorney's fees where the assessment was limited to three-fourths of the cost of the improvement, and not to be so willing where the full cost, to the extent of the benefits conferred, was authorized. We therefore conclude, as announced in our original opinion, that the Law of 1913 applies, and that its limitations must be observed. That act not having authorized the city to impose attorney's fees, as originally pointed out, we feel that we must adhere to our former ruling, and consequently appellee's motion for rehearing is overruled.

ATCHISON, T. & S. F. RY. CO. v. SMITH
et al. (No. 8417.)

(Court of Civil Appeals of Texas. Ft. Worth.
Oct. 28, 1916. On Motion for Rehearing, Dec. 23, 1916.)

1. JUDGMENT \S 256(1)—VERDICT—ON TRIAL—SUPPORT BY EVIDENCE.

Judgment must follow the verdict, and an assignment questioning the authority of the court to enter a judgment contrary to the verdict simply because the verdict is unsupported by the evidence cannot be sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 446, 464; Dec. Dig. \S 256(1).]

2. NEW TRIAL \hookrightarrow 10—**PRECLUSION FROM MOVING FOR ON GROUND OF INSUFFICIENCY OF EVIDENCE—MOTION FOR JUDGMENT CONTRARY TO VERDICT.**

After judgment is rendered in accordance with the verdict, the losing party is not precluded from moving for new trial on the ground of the insufficiency of the evidence to support the verdict because previous to the rendition of the verdict he made an unsuccessful attempt to have a judgment rendered contrary to it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 13, 115, 131; Dec. Dig. \hookrightarrow 10.]

3. TRIAL \hookrightarrow 274—**OBJECTION TO CHARGES—SUBMISSION TO OPPOSING COUNSEL—STATUTE.**

Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, providing for the submission to opposing counsel as well as the court of requested instructions, does not require the submission to opposing counsel of objections made to the charges given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 687; Dec. Dig. \hookrightarrow 274.]

4. APPEAL AND ERROR \hookrightarrow 544(1)—**RESERVATION OF GROUNDS OF REVIEW—EXCEPTION TO CHARGE.**

It is not necessary to take a bill of exception to a charge given by the court as a prerequisite to the right to complain of such instruction on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. \hookrightarrow 544(1).]

5. APPEAL AND ERROR \hookrightarrow 927(6)—**PRESUMPTIONS FAVORING COURT BELOW—SUBMISSION OF MOTION FOR PEREMPTORY CHARGE TO OPPOSING COUNSEL—STATUTE.**

Without a showing to the contrary, it must be presumed that the trial judge would not have passed upon a motion for a peremptory instruction without requiring its submission to opposing counsel in compliance with Vernon's Sayles' Ann. Civ. St. 1914, art. 1971.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. \hookrightarrow 927(6).]

6. RELEASE \hookrightarrow 57(2)—**INCAPACITY AND FRAUD—SUFFICIENCY OF EVIDENCE.**

In a railroad employe's action for injuries, evidence held insufficient to support the jury's findings that he was mentally incompetent to make a valid contract of settlement, and that he was induced to make it by misrepresentations by the claim agent of the railway and by undue influence exercised upon him.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 108; Dec. Dig. \hookrightarrow 57(2).]

7. RELEASE \hookrightarrow 17(2)—**VALIDITY—DISPARAGING REMARKS AS TO INJURED PERSON'S ATTORNEY.**

Misrepresentations by a railroad's claim agent to its injured employe concerning the services to be rendered by some of his attorneys did not of themselves constitute a sufficient basis for rescission of the contract of settlement, where the testimony introduced in support of rescission on the ground of the employe's incompetency and the claim agent's fraud was insufficient.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. \hookrightarrow 17(2).]

8. RELEASE \hookrightarrow 17(2), 19—**VALIDITY—FRAUD OR UNDUE INFLUENCE.**

Arguments made to its injured employe by a railroad's claim agent, to induce him to settle, relative to the delays and uncertainties of bringing action, were not, under the circumstances, the employe having fully understood conditions, fraudulent, and did not amount to undue influence.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 32, 33; Dec. Dig. \hookrightarrow 17(2), 19.]

9. RELEASE \hookrightarrow 18—**VALIDITY—FINANCIAL DISTRESS.**

The distressed financial circumstances of a railroad's employe when he settled his claim did not, standing alone, furnish sufficient basis for rescission of the settlement.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 33; Dec. Dig. \hookrightarrow 18.]

10. RELEASE \hookrightarrow 12(3)—**INADEQUACY OF CONSIDERATION.**

Where a railway company was liable for injuries sustained by its employe for \$8,000 reasonable damages, but the issue of liability was doubtful and by settlement the delay and annoyance of litigation was avoided, while in his suit after settlement the employe was awarded only \$1,850 in addition to the \$3,750 he had received in the settlement, there was no such gross inadequacy of price paid for the settlement as of itself to constitute a badge of fraud practiced upon the employe.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 20; Dec. Dig. \hookrightarrow 12(3).]

11. MASTER AND SERVANT \hookrightarrow 276(9)—**INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In a railroad employe's action for injuries, evidence held sufficient to support the jury's findings that another employe of the road was guilty of negligence which was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959, 976; Dec. Dig. \hookrightarrow 276(9).]

12. NEGLIGENCE \hookrightarrow 121(5)—**PROXIMATE CAUSE—BURDEN OF PROOF.**

When one seeks to recover damages of another caused by his negligence, it is incumbent on him to establish by competent proof not only the negligence alleged, but also that it caused the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 228; Dec. Dig. \hookrightarrow 121(5).]

13. MASTER AND SERVANT \hookrightarrow 287(5)—**INJURIES TO SERVANT—QUESTION FOR JURY.**

In a railroad servant's action for injuries, the decision of the issues of fact whether another railroad employe pulled the stake that released the timbers that fell, and whether the timbers fell in fact as a result of the act, held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1061; Dec. Dig. \hookrightarrow 287(5).]

14. TRIAL \hookrightarrow 105(1)—**RECEPTION OF EVIDENCE—FAILURE TO OBJECT—INCOMPETENT TESTIMONY.**

A verdict cannot be sustained by incompetent testimony, even though admitted without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260, 261, 266; Dec. Dig. \hookrightarrow 105(1).]

15. EVIDENCE \hookrightarrow 75—**FAILURE TO PRODUCE—PRESUMPTION.**

The failure to produce evidence peculiarly within the knowledge of a party will raise a presumption against him, and every reasonable intendment will be in favor of his opponent upon that issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. \hookrightarrow 75.]

On Motion for Rehearing.

16. APPEAL AND ERROR \hookrightarrow 1173(1)—**REVERSAL IN FAVOR OF ONE PARTY—EFFECT.**

Where the recovery awarded attorneys suing a railroad and its injured employe was conditioned upon the liability of the road for the damages in excess of the amount already paid the employe in settlement, a reversal in favor

of the road operated as a reversal of the entire judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4567, 4569, 4656; Dec. Dig. § 1173(1).]

17. APPEAL AND ERROR § 1173(1)—DETERMINATION—REVERSAL IN PART—CODEFENDANTS.

A railroad's injured employé assigned to his attorneys three-tenths of his cause of action, stipulating that in case compromise was made before suit the attorneys should receive 15 per cent. of the amount agreed on. The employé compromised his claim before suit and the attorneys sued the railroad and their assignor. The latter cross-complained, alleging invalidity of the settlement. There was judgment canceling the settlement, for damages on the cross-complaint and for plaintiffs for three-tenths of the award. *Held* that, on the reversal of the judgment against the railway company, the court should merely modify the judgment for plaintiffs, as against their assignor, by allowing them 15 per cent. of the sum received by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4567, 4569, 4656; Dec. Dig. § 1173(1).]

Error from District Court, Tarrant County; R. B. Young, Judge.

Suit by Mike E. Smith, Leonard M. Levy, and G. W. Dunaway against the Atchison, Topeka & Santa Fé Railway Company, Pecos & North Texas Railway Company, First National Bank of Sweetwater, and L. M. Dunaway, wherein L. M. Dunaway filed an answer to the petition, and also a cross-bill against the railway companies. Plaintiffs and L. M. Dunaway dismissed their respective suits against the Pecos & North Texas Railway Company, and plaintiffs also dismissed as to the First National Bank of Sweetwater. To review a judgment for plaintiffs against the Atchison, Topeka & Santa Fé Railway and L. M. Dunaway, and in favor of L. M. Dunaway against the railway, the railway brings error. Reversed as to defendant railway company, and modified as to defendant Dunaway.

Terry, Cavin & Mills, of Galveston, for plaintiff in error. O. W. Gillespie, G. W. Dunaway, Walter Nelson, and Stanley Boykin, all of Ft. Worth, for defendant in error L. M. Dunaway. Mike E. Smith and G. W. Dunaway, both of Ft. Worth, for defendant in error Mike E. Smith and others.

DUNKLIN, J. On September 28, 1912, L. M. Dunaway was in the employment of the Atchison, Topeka & Santa Fé Railway Company as a bridge carpenter in New Mexico, and while unloading bridge timbers from a freight car, in the performance of the duties of his employment, some of the timbers fell upon him and seriously injured him. The timbers had been loaded upon the car to a height of the aggregate thickness of about 20 pieces, and in order to hold the timbers in place, upright stakes extending above the top of the pile of timbers had been placed in sockets in the outer edges of the sides of the

car. George Bridwell, another employé, was engaged in assisting Dunaway in unloading the car. Other employés were also engaged in the work of unloading, but they were unloading from one side of the car while Dunaway and Bridwell undertook to unload from the other side. The plan adopted by Dunaway and Bridwell for their work was to remove the upright stakes, then to throw off the bridge timbers to the ground. In pursuance of that plan, they first pulled the stakes from the ends of that side of the car, but were unable to pull another intervening stake midway between the two ends by reason of the fact that the same was fast in its socket. Dunaway then left Bridwell on top of the timbers for the purpose of loosening the stake by driving it from its lower end. In order to accomplish this he procured a piece of iron used on the engine called a "shaker bar." With this bar he struck the stake a few blows, and as it came out of its socket several pieces of the bridge timbers tumbled to the ground, and in falling struck Dunaway, breaking an arm, both shoulders, one of his legs, and also his jaw. On account of these injuries he was taken to the railway company's hospital at Topeka, Kan., where he remained until August of the following year. Before leaving the hospital some of the agents of the railway company stationed there proposed a settlement of any claim he might have for damages against the railway company for his injuries. Dunaway indicated a willingness to settle, but no settlement was consummated by reason of the fact that no agreement could be reached with respect to the amount of money he should receive. On September 27, 1913, about one month after leaving the hospital, Dunaway addressed a letter to Hamilton, a claim agent of the railway company at Topeka, Kan., suggesting that if a settlement of the claim was desired Hamilton should meet him either at Sweetwater or Ft. Worth, Tex., and requesting an immediate answer as to the time and place the claim agent would agree to meet him. That letter was referred to Bowman Jarrott, the company's claim agent located at Amarillo, Tex., who, in response thereto, wrote Dunaway that he would meet him at McCauley, Tex., where Dunaway was then located, and on November 11, 1913, the day of that meeting, a contract of settlement in full of Dunaway's claim was consummated between Dunaway and the company acting through Jarrott, as its claim agent, Dunaway signing a receipt in full of all claims growing out of the injuries so sustained by him, and receiving from the company in consideration of such contract the sum of \$3,750.

On December 5, 1913, this suit was instituted by Mike E. Smith, Leonard M. Levy, and G. W. Dunaway, practicing attorneys at Ft. Worth, Tex., against the Atchison,

Topeka & Santa Fé Railway Company, Pecos & North Texas Railway Company, First National Bank of Sweetwater, and L. M. Dunaway. In their original petition, plaintiffs set out the accident to L. M. Dunaway, alleging that it was caused through the negligence of the agents of the defendant companies, which was the proximate cause of L. M. Dunaway's injuries, and by reason thereof he had sustained damages in the sum of \$50,000. It was further alleged that Dunaway had settled his claim for damages with said company for the sum of \$3,750, but that prior to such settlement he had employed the plaintiffs as his attorneys to institute and prosecute a suit to recover damages for said injuries, and in consideration of such services Dunaway had transferred and assigned to the plaintiffs an undivided three-tenths interest in and to his cause of action against said companies for said injuries. It was further alleged that the companies had notice of such assignment at the time the settlement was made. In their petition plaintiffs prayed for judgment against the companies for three-tenths of the actual damages so sustained by L. M. Dunaway, and in the alternative prayed for a judgment against the railway companies and Dunaway for three-tenths of \$3,750, the amount for which Dunaway had settled his claim. Judgment was also sought against the defendant bank, upon the ground that the money collected by Dunaway had been there deposited to his credit.

L. M. Dunaway filed an answer to the plaintiffs' petition, and also a cross-bill against the railway companies, in which he alleged that the contract of settlement was invalid by reason of the fact that he was mentally incapacitated at the time to enter into a legally binding contract; that the amount received by him was wholly inadequate as a consideration for the injuries he sustained in said accident; that at the time of the settlement he was in distressed financial circumstances and was induced to make the settlement by reason of certain false representations to him by the agent, the character of which misrepresentations will be hereinafter noticed. He further alleged that the railway companies were liable to him for the injuries sustained, by reason of the fact that the same were proximately caused through the negligence of their agents, and he asked for judgment in the sum of \$50,000 damages therefor, less the amount, \$3,750, he had received from the Atchison, Topeka & Santa Fé Railway Company.

The plaintiffs also filed an amended petition, containing, substantially, the same allegations relative to the settlement as were contained in Dunaway's cross-bill. The truth of all such allegations was put in issue by appropriate pleading on the part of the defendant railway companies.

Upon the trial of the case the plaintiffs and L. M. Dunaway dismissed their respective

suits against the Pecos & North Texas Railway Company, and the plaintiffs also dismissed their suit against the First National Bank of Sweetwater. The trial was before a jury, and upon the verdict in answer to special issues a judgment was rendered canceling the contract of settlement made by Dunaway, and in favor of plaintiffs against the railway company and L. M. Dunaway for the sum of \$2,400, and in favor of L. M. Dunaway against the railway company for \$1,850, or an aggregate of \$4,250, which was \$8,000, less the \$3,750 already paid to Dunaway. The amounts of such recoveries were based upon the finding of the jury that Dunaway had sustained damages in the sum of \$8,000. From that judgment the Atchison, Topeka & Santa Fé Railway Company has prosecuted this writ of error.

Defendants in error have objected to a consideration of practically all assignments of error contained in the railway company's brief.

We find in the record that the railway company made a motion for a judgment to be entered in its favor, notwithstanding the verdict of the jury on special findings, and the contention is made that as the judgment must follow the verdict, and as no other judgment could have been rendered upon the verdict than the one that was rendered, the railway company is precluded from complaining, as is done in nearly all of the assignments, that the verdict upon the controlling issues is unsupported by the evidence. In support of that contention such decisions as *Blackwell v. Vaughn*, 176 S. W. 912, *Ripley v. Wenzel*, 139 S. W. 897, and *Weinstein v. Acme Laundry*, 166 S. W. 126, are cited. In the case of *Blackwell v. Vaughn*, 176 S. W. 912, this court, speaking through Chief Justice Conner, used the following language:

"In the case of *Scott v. F. & M. Nat. Bank*, 66 S. W. 485, by the Court of Civil Appeals for the Third District, it was held, upon reasoning and authorities which we approve, that, where a party on appeal fails to assign error to the action of the court in refusing to set aside a special verdict, he cannot complain of the judgment on the ground that the findings are unsupported by the evidence."

The other decisions cited above are to the same effect.

Those decisions have no application here since the railway company presented a motion for a new trial in the trial court containing numerous grounds, to the effect that the evidence was insufficient to sustain a verdict against it upon the several issues submitted; that by reason of that fact the court erred in submitting those issues to the jury as controverted issues of fact; that the findings of the jury upon those issues could not be sustained; and further that for lack of sufficient evidence to sustain the issues the court erred in refusing the railway company's request for a peremptory instruction to return a ver-

dict in its favor against the suits, both of plaintiffs and L. M. Dunaway.

[1] It is well settled by the decisions of this state that the judgment must follow the verdict, and an assignment questioning the authority of the court to enter a judgment contrary to the verdict simply because the verdict is unsupported by the evidence cannot be sustained. *Waller v. Liles*, 96 Tex. 21, 70 S. W. 17; *H. & T. C. R. Co. v. Smallwood*, 171 S. W. 292.

[2] But we know of no decision holding that after judgment is rendered in accordance with the verdict, the losing party is precluded from moving for a new trial on the ground of the insufficiency of the evidence to support the verdict, by reason of the fact that previously to the rendition of the verdict he had made an unsuccessful attempt to have a judgment rendered contrary to the verdict.

It is further insisted that the bills of exception taken by the railway company to the action of the trial court in submitting to the jury the special issues do not show that the company's objections made to those instructions at the trial were submitted to opposing counsel for consideration before such instructions were given to the jury.

[3, 4] This contention is overruled for two reasons: First, article 1971, Vernon's Sayles' Texas Civil Statutes, and upon which the contention is predicated, provides for the submission to opposing counsel, as well as the court, of requested instructions, but does not require the submission to opposing counsel of objections made to the charges given; and, second, it is now settled by the decision of the Supreme Court that it is not necessary to take a bill of exception to a charge given by the court as a prerequisite to the right to complain of such instruction on appeal. *G. T. & W. Ry. Co. v. Dickey*, 187 S. W. 184.

The record shows that before the trial judge decided to submit the case to the jury on special issues, the railway company moved for a peremptory instruction in its favor with respect to the demands asserted against it both by the plaintiffs and by L. M. Dunaway, on the ground that the evidence was insufficient to support a recovery against it by either of those parties; the insufficiency of the evidence on several of the material issues being specially pointed out. Objection is made to the consideration of assignments of error to the refusal of that motion upon the ground that the bill of exception to the action of the court in refusing the motion does not show that the requested instruction was submitted to opposing counsel, as well as to the court before the court's action thereon.

[5] In the absence of any showing to the contrary, it must be presumed that the trial judge would not have passed upon the motion without requiring a submission of the same to opposing counsel in compliance with

the terms of the statute. Furthermore, the same questions presented by the motion for an instructed verdict are raised in other assignments to the action of the court in submitting, as controverted, the controlling issues in the case to the jury, for lack of evidence to support findings thereon adverse to the railway company; and as settled by our Supreme Court in *Railway v. Dickey*, supra, the railway company was not required to take bills of exception to those instructions as a predicate for its right to complain of the same here.

We find no merit in the further objections to the assignments on the ground that there has been an improper grouping of the same, and that the propositions thereunder are not followed by proper statements of the evidence.

As grounds for setting aside the contract of settlement made by Dunaway for his injuries, it was alleged that Dunaway was not mentally competent to realize and understand the effect and consequences of the consummation of such a contract, and that he was induced to make the same by false representations made to him and undue influence exercised upon him by the claim agents of the railway company; and that \$3,750, the amount paid to Dunaway by the company, was wholly inadequate as compensation for the injuries he sustained. Those issues were submitted to the jury, and the manner of submitting the same, together with the findings of the jury thereon, are as follows:

Fifth Special Issue: "Was the amount of \$3,750 received by said Dunaway for signing said release adequate compensation for his injuries?" Answer: "No."

"You are instructed that the burden is on said L. M. Dunaway to establish to your satisfaction, by a preponderance of the evidence, that the execution of said release was not his free and voluntary act, and that he was not mentally competent to execute said release and to realize the effect and consequence of same."

Sixth Special Issue: "If in answer to the above question, you say that said sum of \$3,750 was adequate compensation for the injuries of said L. M. Dunaway, then it will not be necessary for you to answer any of the following questions; but, on the other hand, if your answer should be that said sum was not an adequate compensation for said injuries, then you will answer the following questions:

"At the time he signed said release, was said L. M. Dunaway mentally competent to transact important business and to enter into and carry to consummation a settlement of his claim for damages against the said railway company with the claim agent, Bowman Jarrott?" Answer: "No."

Seventh Special Issue: "Did any claim agent or claim agents of the defendant railway company, prior to and at the time of the execution of the release by L. M. Dunaway, knowingly make any false representations to the said L. M. Dunaway and upon which the said L. M. Dunaway relied and which caused and induced the said L. M. Dunaway to execute this release that he would not otherwise have executed?" Answer: "Yes."

Eighth Special Issue: "If you should find that L. M. Dunaway at the time he signed said release was not mentally competent to transact important business and to make a settlement

of his claim for damages with claim agent Bowman Jarrott, then was he induced to sign said release through undue influence exerted on him by said Bowman Jarrott, the claim agent of defendant railway company; that is, did the said Bowman Jarrott take advantage of said Dunaway's impecunious and mental condition or either of them, if either or both existed, or did he make such allusions to, or representations of, the impecunious condition of said Dunaway, if same existed, or employ any persuasions or artifices as alleged in said Dunaway's pleadings, and in evidence before you, if any are in evidence, to such an extent as that the said L. M. Dunaway was imposed upon and overcome by same, and was thereby deprived of the free use and exercise of his free will in the execution of said release, and but for which he would not have executed the same?" Answer: "Yes."

[6] By appropriate assignments of error, it is insisted that the evidence was insufficient to support the findings of the jury that Dunaway was mentally incapacitated to make a valid contract of settlement, and that he was induced to make the same by misrepresentations on the part of the claim agent of the railway company, and by undue influence exercised by them upon him. After a careful consideration of all the evidence bearing upon those issues, we are of the opinion that those assignments should be sustained.

Four witnesses were introduced to sustain the allegation of mental incapacity, namely, Dr. W. F. Britton, W. I. Agnew, Mrs. L. M. Dunaway, wife of defendant in error Dunaway, and J. E. Dunaway, his father. Dr. Britton had known L. M. Dunaway for some 22 or 23 years, and had practiced medicine in his family. After Dunaway left the hospital at Topeka, he came to Texas and called upon Dr. Britton, who lived in Putnam, for further treatment of his injuries. Dr. Britton testified that in the summer of 1913 he treated Dunaway for his injuries. Witness had been Dunaway's father's family physician at Dothan, Tex., and had treated L. M. Dunaway himself while a boy, but had not seen him since his boyhood. During Dunaway's first visit to the office of witness in Putnam in the summer of 1913, he said to witness:

"You see I used to live at Dothan here; you see I was raised here, and father lives there."

This statement was made after Dunaway had talked with the witness for an hour and there had been no previous reference to the fact that he knew witness. Based on that statement by Dunaway, under the circumstances referred to, in connection with the fact that during one of his visits he repeated what he had told on a former visit, to the effect that he had been engaged in railroad work, had been hurt and had been in a hospital, and the further fact that Dunaway's appearance had changed since witness last saw him, witness gave it as his opinion that at the time of the settlement with the railway company, Dunaway was mentally incapacitated to make such a settlement. However, he further testified on cross-examination that such opinion was formed at the time

of his treatment of Dunaway, and that notwithstanding such opinion he then advised Dunaway to settle his claim for damages with the railway company without the aid of lawyers, as witness was satisfied the company would treat him fairly.

Mrs. L. M. Dunaway testified that after his injuries there was a change in the mental condition of her husband; that his mind seemed more like that of a child; that he would forget things and seemed unable to realize how to do things; that he would start to work, would forget what he had started to do, and would not know how to begin. To illustrate, she said that on one occasion his little boy turned over to him a cotton planter which the boy had been operating, and her husband ran the planter for half a day without any seed in it; that in feeding his stock he would sometimes give a double portion to a horse, and on one occasion he directed a hired man to do certain work and later was under the impression that he had assigned work of a different character; she further testified that he loaned out some of the money he received in the settlement without taking notes for it, one of said loans being \$150 to a half-brother of Mrs. Dunaway, over her protest to her husband at the time, but that she did not make known to the borrower her objections. Witness also said that her husband would sometimes drink to excess when he went to McCauley, and sometimes he would bring whisky home with him and place it in the house or barn; that witness had seen him intoxicated but that he was not in that condition when he ran the cotton planter without seed. She further testified that before the settlement she told the father of L. M. Dunaway her opinion of the latter's mental condition, but that she did not mention it to his brother George, although she stayed at his house. No testimony was introduced to show that this witness made any objections to the settlement between the date of its consummation and the date her husband decided to repudiate it.

J. E. Dunaway testified:

"His mental condition, I call it pretty weak, the way I looked at it."

When questioned to give the basis of that opinion, he answered:

"Well, from his general conversation, and he did not seem to have any self-will about him or any self-resistance, and little things that way that he did—that he would do—he could not depend on himself; seemed like he wanted to depend on himself; * * * " that in conversation, his son would start on one subject and then drift to some other, somewhat after the manner of a child, and perhaps in a little while repeat what he had said already.

He further testified that his son loaned some of the money paid him by the railway company to some of his friends without taking any notes or security therefor; one of said loans being in the sum of \$50 to one of his brothers. This witness was present on the

occasion of the settlement, having gone to McCauley for that purpose at his son's request. He testified that there was quite a lengthy discussion between Jarrott and his son, L. M. Dunaway, relative to the matter; that Jarrott offered him \$3,750, but that his son declined to accept that offer at first, and to the best recollection of the witness his son demanded \$8,000; that his son and Jarrott then separated, Jarrott still offering \$3,750, and his son still declining that offer; that later L. M. Dunaway and Jarrott had another meeting when the witness was not present, after which L. M. Dunaway reported to the witness that he and Jarrott had agreed on the settlement for \$3,750, and that he signed the contract of settlement as a witness. But nowhere did he testify that he ever made any objection to the settlement, either to Jarrott, or to his son, on the ground that his son was not mentally capacitated to make a legally binding contract of settlement.

W. I. Agnew, a farmer, knew L. M. Dunaway about 20 years, during which time they were neighbors in the vicinity of Dothan. Witness met him in Cisco, Tex., after the accident and during the summer of 1913. He was then badly crippled. He said to witness:

"You ought to remember me; I used to be an old settler out in that country around Dothan."

From that and other queer remarks in connection with the fact that he would start a conversation and leave it unfinished and seemed more like a child than like a man, witness reached the conclusion that there was "something wrong with his mind."

At best, such testimony would not support any stronger conclusion than that L. M. Dunaway was perhaps mentally weak, and frequently suffered from lapse of memory and absent-mindedness.

Opposed to such a conclusion was the testimony of L. M. Dunaway, himself, given upon the witness stand. His testimony was at great length, covering more than 100 pages in the statement of facts before us. That testimony was clear and distinct, showing no apparent lapse of memory with regard to the facts of his entire case including the negotiations with different agents of the company relative to a settlement of his claim for damages, while he was in the hospital at Topeka, as well as those with Jarrott which culminated in the execution of the contract by him, and the receipt by him of the \$3,750. Nor does he claim that he did not understand the contract, or the legal effects thereof. He details the conversation between himself and Jarrott at McCauley, Tex., at the time of the settlement practically the same as did his father on the witness stand. In very clear terms he gives his reasons for accepting Jarrott's proposition of settlement, and his testimony shows clearly that he thoroughly understood it and the legal consequences thereof. Furthermore,

it is shown by uncontroverted proof that after the settlement, and with a part of the money he received as a consideration therefor, he purchased a farm upon which he made a home for his family; that such purchase was in accordance with his plans previously discussed with his father; that no complaint was made by him that the settlement was not binding upon him until after his brother, George W. Dunaway, had by letters to him shown in the statement of facts repeatedly insisted that he pay his attorneys their proportion of the amount received as their fee according to his contract of employment of them, which demand he had refused; and after a suggestion made in later letters from G. W. Dunaway that he stand by the attorneys in the suit which they proposed to institute against the railway company to recover from the company upon that portion of the original cause of action which L. M. Dunaway assigned to them, and after L. M. Dunaway, on January 27, 1914, more than 2 months after the settlement, had given to the railway company an affidavit to the effect that the written contract of assignment made with his attorneys had been delivered to his brother, G. W. Dunaway, with the distinct understanding that the latter should hold it in escrow, and it should not be delivered or become effective "until it should become apparent that suit must be brought against said railway company upon said cause of action," and with the further understanding and agreement with said G. W. Dunaway that affiant "should go ahead and undertake to adjust his claim with said railway company without suit, and that if affiant did succeed in settling said claim with said railway company without suit, no part of same should go to said attorneys, and said attorneys would not be entitled to and were not to receive any part of the proceeds of said settlement." The affidavit contained the further statement that affiant and Bowman Jarrott, a claim agent of the railway company, had already "agreed upon a full and final settlement of said claim satisfactorily alike to affiant and said agent. * * * Affiant further states that he feels that he has in this matter pursued a just, fair, and conscientious course, and by settling said claim amicably between both parties he has avoided unnecessary and probably long drawn out litigation, and all the worry, suspense, and expense usually attending such litigation, and that he did so at his own expense and of his own free will, and that in doing so he but followed out the letter and spirit of the understanding and agreement had with the said G. W. Dunaway, and that by the very terms of said agreement, the said contract with the said G. W. Dunaway never became effective for any purpose whatever." It further appears that in addition to giving the railway company that affidavit, L. M. Dunaway turned

over to the company the letters he had received from G. W. Dunaway referred to above, and that his original answer and cross-bill in the present suit was not filed until July 15, 1914. Upon the witness stand no contention was made by him that he did not understand the full import of that affidavit.

His testimony, especially when viewed in connection with the facts just enumerated, conclusively establishes the fact that if he was weak-minded, such mental condition was not such as to preclude him from a thorough understanding of the terms of the contract and of the legal consequences of executing it. Relative to the alleged misrepresentations and undue influence which caused L. M. Dunaway to agree to the settlement he, after testifying that before he left the hospital at Topeka, Mr. Hemus, an agent of the railway company, offered him \$1,500 in settlement of his claim, which offer was refused, further testified to the negotiations between him and Jarrott at their meeting in McCauley on the occasion of the settlement:

"I believe it was on Monday that Mr. Jarrott was at McCauley. He came around to the blacksmith, inquiring about me. It was Mr. Hendon's blacksmith shop. McCauley is a small place; it had three or four stores. I had been there but a short time when Mr. Jarrott came. My father was with me. I did not know that Mr. Jarrott was in town until he walked into the blacksmith shop. He introduced himself to me. He asked me to come and go over to the hotel and we would talk our business over. There was nothing else said while we were at the blacksmith shop, that I remember. He had told me who he was. Mr. Jarrott and I went over to the hotel. I think my father came over later. The hotel was just across the road like from the blacksmith shop. We talked about the claim. Mr. Jarrott had the parlor for his room; we went in there to talk. It was about 9 or 10 o'clock. We talked about Hemus and what he said to me. I don't know as I can give you just his exact words; we had a general conversation about it. He said Hemus never offered me enough for my settlement, and he was willing to offer me more.

"Q. Now, how much had Mr. Hemus offered you at that time? A. He had offered me \$1,500. Q. Had you ever been offered more than \$1,500 at that time by any one of the agents? A. Why, no, sir; I don't believe I had. We would talk about the settlement for a while and then branch off on other subjects. We talked about farming and buying land. He said a man could get a little farm if he had a little money, and do better than he could railroading. He told me his experience; how he had made money farming and had educated himself. He said he made a good wheat crop and got the money and went to school; that he liked farming better than anything. He had not made me an offer; only told me he would do better than Hemus. He had made an offer two or three times during the day. I don't think I made him any offer. I believe his first offer was \$2,500. I remember he told me it could be proved that the company was not liable for my accident, but he wanted to treat me right about it; that I had been a good man amongst them and had always treated them right, and they wanted to treat me all right. I told him that the company was liable and that I had got up statements that the company was liable, that I had statements from some of the witnesses, and he wanted to know who they were. I told him George Bridwell, and I told

him what Bridwell had stated, and he showed me a statement from Bridwell that was different, and he said, 'Now, of course, that would throw his evidence out; we would not have his evidence at all, if he had given you one statement and made another here; we cannot use him at all.' I did not have Bridwell's statement with me, but told him what was in it. He showed me the statement he had from Bridwell and read it over to me. He also had a statement from me taken pretty soon after I went to the hospital. He showed it to me and said that I had stated in it that I did not blame the company, nor any of the employees. I made that statement while I was at Topeka; my signature was to it. I don't remember just how long it was after I went to the hospital, possibly 30 days; I was in bed; one of the claim agents got the statement from me. I don't know his name. Mr. Jarrott told me he was dead. I was in the sick ward when that statement was made. I was in bed, and was suffering very much; was in bad condition. When Mr. Jarrott showed me the statement in Bridwell's handwriting, he said it would be a case of testing in court whether I would get anything or not, and it would be a long time in court and maybe not get anything, and it was best to settle these things and not take a chance like that. That he wanted to treat me right and would do all he could to help me out. I believe it was at the hotel we were talking. We were talking about lawyers, and I was telling him I had lawyers for my case and had evidence—these statements that I was telling him about when he showed me these other statements, and asked me who my lawyers was—I told him it was Dunaway and Mike Smith and Levy, and I thought that Turner & Odell was in the bunch; they were in the office with Mike Smith."

He further testified that Jarrott then made some statements in disparagement of the efficiency of service which some of his attorneys would render him in the event of a suit on his claim for damages—and which statements, if any, are not supported by the record in this case, but limiting those statements to some of the attorneys only, and in connection therewith, saying, in substance, that they did not apply to another of Dunaway's attorneys whose name was mentioned. The witness further testified:

"During the conversation with Mr. Jarrott we mentioned my family; I don't remember just what was said. I told him the condition I was in; that I was down there without any money and had to go to Mexico to make proof on our land. I think I made him an offer; the lowest offer I made him was \$4,000. That was the last offer. I had been holding out with Topeka for \$8,000. I told Mr. Jarrott that I was holding out for this amount—that I offered. That was after we got to the hotel; I don't remember how long after. It was soon as the subject of settlement was raised. He told me they would not give that at all, but they would give me more than Hemus offered. I do not remember just how long we had been at the hotel before my father came. It was not very long afterwards. I signed the release about 4 o'clock; we had gone down to the depot and were waiting for the train—the train was a little late. My father was with us part of the time; he was out and in. Mr. Jarrott said they had as good lawyers as there was in the country; I cannot tell all was said about; I do not know. He said the railway company was always prepared for suits, and had plenty of lawyers to fight these suits, and was plenty able to go through with a suit, but they did not like to go into a suit because they wanted to keep out of

these suits and get by and treat the people right and get on without suits. In our conversation, we discussed the hospital doctors and both of us bragged on them being such fine physicians. He told me he would almost fight a man if he heard him say anything about Dr. Freeman as a physician. I believe he asked me if Dr. Freeman did not think I would get along all right, and I told him that he did. My wife spent about two months at the hospital; she went up with me when I was hurt; and she came back about Christmas; I believe Christmas Day. She stayed with me until I was dismissed from the hospital—supposed to have been well. I think it was in February or March. When we got to Clovis, my leg was taken awful bad again. The doctor at Clovis told me the best thing for me to do was to go back to the hospital as soon as I could; she was not with me any more until in July, I guess it was; her and the children came up there. I do not remember whether Jarrott mentioned my wife that day at the hotel or not. We talked about my ability to make money or to accumulate anything railroading. I had been railroading for a long while and had not accumulated anything, and probably would not accumulate if I continued to work for them. I told him I was out of money and transportation, and had to be in Mexico to make proof on my land, and he said he would send me transportation for myself and family to Mexico and return, and to the hospital as long as I would want it. He said my making a settlement would not have anything to do with my not going back to the hospital.

"In our discussion of my future employment I do not think my working for the railroad was considered; I do not remember that it was. I don't remember that he told me any jokes; I had them told to me, but I don't know that he told them. He told me about some other people that had been hurt and who wanted more than they got—the history of other lawsuits. I don't know that I can remember; that I can tell any of them. He told me of one person that the company had offered to make a settlement with and she refused to take it, but went to law about it, and the jury gave the judgment for the same amount, and after the lawyers' fees was paid she never got nothing like what the company had offered her. Her brother would not let her settle, and wanted her to carry it on and they lost out; they had been enemies ever since. We talked some about the Knights of Pythias. I don't know just how it came up; we found that we were both K. P.'s, and I told him I had rather make a settlement with a man of the same order with me as any other man because I felt like he was; would treat me right more than the other man would. I cannot say exactly how long it was after we left the hotel before we made the settlement. The train was late, and I should think it was not more than an hour after we left the hotel before we came to an agreement. He said he had to leave that evening, because he had some other business to see about; I think he said it was getting up some evidence somewhere. Mr. Jarrott and me went down to the depot together; father came later on, just before the train left. We had made the settlement before he came. Mr. Jarrott told me if he was to give me 50 cents more, he would have to give it out of his own pocket. I think there was something said about his seeing me again, but I don't just remember. I was very much disturbed over my condition. Winter was coming on, and I was not able to work, and me and my family was tied up; we were just on the tramp. My boy was nine years old, and the girl was five. You asked that if the statements he made about the lawyers—if I believed it? I think I did. I did not know but what it might be that way; I had not been around these lawyers any and had never had any dealings with lawyers; in

fact, I had not been around my brother except only just to see him every three or four years. I believed the statement of Mr. Jarrott, that the Santa Fe had good lawyers, and I knew they would not have any but good lawyers. Q. At the time you talked to Mr. Jarrott and he was making the statement to you that the Santa Fe wanted to be fair, etc., state whether you believed the statement. A. Why, I don't remember whether I believed that statement. Q. Yes. A. Why, yes, I believed that Mr. Jarrott was giving me all that he was allowed to give me, while I did not think that he was— Q. Well, Luther, state when you signed that receipt or release for \$3,750; state whether you relied and believed these statements told you by Mr. Jarrott during the conversation that day. A. Yes, sir. I cannot recall every word that passed between me and Mr. Jarrott at the time I signed the release. The last word he said was, that if he gave me 50 cents more he would have to give it out of his own pocket. While we were at the hotel I think he offered me \$3,500. The offer of \$3,750 was made after we went to the depot. I had come down to \$4,000. After we went to the depot, in talking about the settlement, he spoke of buying a farm, and said that \$500, or even \$1,000, would not have much to do with making a good trade now on a farm, and I don't remember all he said, but something was said about \$250 or \$500, or \$750 in a good deal in a farm, would not have much effect on it, because five years from now—might not get the money for five years from now, and might not get it then, and might run in court for five years, and the place would be worth much more and a man would take a chance on getting this money any way. He paid the money to me in a check; it was a check on the Atchison, Topeka & Santa Fe Company, and he said I could get it cashed most anywhere in the banks. He told me not to keep it any longer than I could get somewhere and deposit it, and would get that in right away—cash it in right away. I deposited it the next morning at Sweetwater. * * *

"At no time while I was in the hospital did the nurses or physicians talk settlement with me. I talked with Mr. Hemus of the claim department about the settlement. When Mr. McPillomey took my statement, I do not remember that he discussed the settlement with me. I saw other claim agents about the hospital, but I don't think they ever did talk about settlement with me. They would pass the time of day; say something cheerful; that was all. I think I saw Mr. Hamilton, the general claim attorney, but never talked settlement with him; my understanding was that Mr. Hemus was handling the matter for Mr. Hamilton. I don't know that the physicians and nurses, attendants, and claim agents about the hospital continually reminded me that the defendants were not legally liable to me for the injuries and were not obligated to treat me; I have no recollection of any such thing. As I have testified to this jury, all Mr. Hemus said about the company being liable was that it was not shown that it was liable. Nothing was ever said at the time I was in the hospital, or at any other time, that the railroad company was treating me as a matter of charity; this was not a charity case; the hospital association deducted a certain amount every month from my wages and that entitled me to treatment, and no one has ever questioned my right to treatment that I know of; it was not questioned either by Mr. Jarrott, when we made the settlement at McCauley, or at any other time; my right to the hospital treatment has never been questioned to my knowledge.

"When I left there in August they told me to come back, and I suppose I could have done so; I was always treated kindly at the hospital, and have no complaints to make. As well as I remember, the first time I left the hospital was in

February. They always gave me transportation for myself and family whenever I asked for it. When I left the hospital for the last time, Mr. Hemus said that the doctors had given me a release and he was not supposed to give me transportation, unless we made a settlement; that was the only time there was any question about giving me transportation. The first time I ever met Hemus was when I went to him in February to get my transportation. I think that was the time that he offered to settle for \$1,500. At that time they had given me a discharge from the hospital, but I was not well. I still had the cast on my leg, and had to go on crutches. I believe my jaw was worse than it is now. I think it was swelled more. My arm was about as it is now; it was about well; there is still a metal cap on it, on the inside, I suppose, and covered up by flesh. I use the arm. When I left the hospital in February, Dr. Freeman told me I was all right, only needed to get out, but I knew I was not well then. I did say in answer to Mr. Gillespie's question: 'When I went to see Mr. Hemus in February, I told him that I was not satisfied that I was all right, and I did not want to make him any offer of settlement, but I would hear his offer—we had a right smart talk about it, and he finally offered me \$1,500, and I told him I would not consider it at all, and he said I was dismissed from the hospital and was not supposed to have transportation without making a settlement, and I told him I would manage to get home some way, and he finally said they would give me transportation for myself and wife down there and give me transportation back, and that I could remain away 30 days.' I told him I was not ready to talk settlement; that I was not well yet."

J. E. Dunaway, witness for plaintiffs, and L. M. Dunaway, testified to the following conversation between himself and L. M. Dunaway immediately after the terms of settlement had been agreed to and before the contract had been signed:

"Luther came out meeting me as I walked up and he says—'Well,' he says, 'I have settled it,' and I says 'How much did you get?' And he says, 'I just got what they offered me, \$3,750,' and I says to him, I says, 'How come you to settle? You told me you would not settle that way.' 'Well,' he says, 'my land in Mexico, I had to make proof on it and I did not have the money; it would cost me \$40 or \$50 to make the trip and to go out there, and I did not have the money to do that, and I was going to lose that,' and he says, 'My family is here on the bum, and I have been off 12 months, and winter time is coming on and I have no shelter and no clothing, and nothing, and I am not able to work,' and he says, 'I don't see how I could do without that 8 or 4 years or wait on that in the condition I am in, my financial condition is in such condition that I cannot wait for 5 years to get that.' We were within a few steps of the depot when Luther met me. Mr. Jarrott was around the depot somewhere. The next thing they went in and Luther signed the release and Mr. Jarrott gave him the check. I witnessed the release. Mr. Jarrott had told Luther during this conversation there at the hotel, he told Luther that if he made this settlement and taken this money, why he would not be having to live around on his kinfolks, and probably they were getting tired of him, during that conversation, by taking that money he would not have to live around on the bum among his kinfolks and them probably getting tired of him or probably would get tired of him."

[7] Jarrott denied emphatically that he made disparaging statements concerning any of defendant L. M. Dunaway's attorneys and further denied that L. M. Dunaway told him

that he had employed attorneys, but even if he did make the alleged misrepresentations concerning the services to be rendered by some of those attorneys, the same could not of themselves constitute a sufficient basis for rescission of the contract of settlement in view of all the testimony introduced to establish such a claim. Jarrott and L. M. Dunaway were dealing at arm's length. Jarrott did not sustain any fiduciary relation to Dunaway.

[8, 9] The arguments made by him as testified to by L. M. Dunaway and his father could not, under all the circumstances, be condemned as fraudulent or as amounting to undue influence, nor could the distressed financial circumstances of L. M. Dunaway, standing alone, furnish a sufficient basis for such a rescission. In *Beeville v. Jones*, 74 Tex. 148, 11 S. W. 1128, a deed to land was canceled by the trial court on the ground of mental weakness of the grantor and undue influence exercised upon her, and in that case our Supreme Court used the following language:

"If it be conceded that there was evidence authorizing the submission of the issue of imbecility or mental weakness upon the part of plaintiff of such character as would avoid the deed, there was no 'evidence of imposition or undue influence' accompanying it, and the charge was in this respect misleading. It is also otherwise defective. The utmost concession in behalf of plaintiff which the proof authorized was that she was 'naturally a weak-minded woman, but her mind was as good in the fall of 1879 as it ever was.' It cannot be legitimately inferred from the facts that her 'imbecility was of that character which rendered her incapable of understanding the deed,' as stated in the charge, and this was therefore unsupported by proof. The instruction was calculated to impress the jury with the belief that 'mere mental weakness accompanied by evidence of imposition and undue influence' would be sufficient to vacate the deed whether the evidence established these facts or not. 'Mere mental weakness' alone would not have that effect, and in this case there was no evidence whatever of imposition or undue influence. The mere fact of plaintiff's weakness of mind or old age would not incapacitate her from conveying her property. *Stone v. Wilbern*, 83 Ill. 107. In order to avoid a deed on the ground of undue influence it must be shown that the influence existed and was exercised for an undue and disadvantageous purpose. That the influence existed may be inferred from the relative or actual position of the parties. In the case of a gift from the child to the parent undue influence may be inferred from the relation itself, but never when the gift is from the parent to the child, and no suspicion whatever attaches to the latter. But there is no doubt that upon proof of the actual exercise of undue influence it may be set aside. The existence of undue influence and its exercise must concur to produce the effect of avoidance. *Millican v. Millican*, 24 Tex. 445. These elements were not developed by the proof, and the charge we think was error. That the plaintiff's advanced age and her weak understanding at the time of the execution of the conveyance may be considered in estimating the fairness of the transaction where there is evidence of imposition, overreaching, or fraud, we think there is no doubt. *Millican v. Millican*, supra. Such is not the case before us."

Defendants in error have cited several authorities, including *Wells v. Houston*, 23 Tex.

Civ. App. 629, 57 S. W. 584; Varner v. Carson, 59 Tex. 306; Pomeroy's Equity Jurisprudence, §§ 943, 944, 948, discussing the general principles governing the right of rescission of contracts, by reason of fraud in their procurement, but none of them, in our opinion, lead to a conclusion adverse to that reached by us and stated above. Each case of that character must be determined by its own peculiar facts, and, ordinarily, authorities upon that issue are pertinent to the extent only that they announce general principles of equity which control.

[10] Furthermore, assuming that the railway company was liable for the injuries sustained by Dunaway, and that \$8,000, the amount of damages assessed therefor, was reasonable, yet in view of the fact that the issue of liability was doubtful, that by the settlement the delay and annoyance of perhaps protracted litigation was avoided, and the further fact that by the judgment rendered Dunaway was awarded only \$1,850 in addition to the sum he had received in the settlement, there was no proof of such gross inadequacy of price paid for the settlement as of itself to constitute a badge of fraud practiced upon Dunaway.

In his cross-bill against the railway company L. M. Dunaway alleged that Bridwell negligently pulled the stake from its socket and negligently braced his feet against said load of timbers in such manner as to push the same in an outward direction, and that such acts of negligence, concurring with the unstable and top-heavy condition of said timbers which rendered them likely to fall when the stake was removed, caused them to fall, and that such negligence of Bridwell was the proximate cause of the injuries sustained by L. M. Dunaway. Substantially the same allegations were made by plaintiffs. The pleadings contained other allegations of negligence as the proximate cause of the injury, but as the same were not submitted to the jury and as no contention is made in appellee's briefs that there was sufficient evidence to support a verdict thereon in their favor, they will not be stated in this opinion.

Following are special issues submitted with the findings of the jury thereon, to wit:

"Ninth Special Issue: Did George Bridwell pull the stake holding the timbers on the car out of its socket at the time of the injury as alleged in said Dunaway's pleadings? A. Yes.

"Tenth Special Issue: If you have answered 'Yes' to the preceding question, then was the said Bridwell guilty of negligence in so pulling said stake? A. Yes.

"Eleventh Special Issue: If you have answered 'Yes' to each of the foregoing questions, then was the pulling out of said stake by said Bridwell the proximate cause of the injuries to the said Dunaway as alleged by him? A. Yes."

The issue of negligence of Bridwell so shown was the only issue of negligence submitted by the trial court to the jury, and the only one upon which the judgment against the railway company for \$8,000 was predicated.

By appropriate assignments of error, it is insisted that the evidence was insufficient to support the jury's findings that Bridwell was guilty of negligence which was the proximate cause of L. M. Dunaway's injuries, that hence no case of liability for those injuries was established, and that for that reason alone the trial court should have instructed a verdict in favor of the railway company, as to all demands against it asserted by both Dunaway and the plaintiffs in the suit, as requested by the railway company.

[11] We are of opinion that those assignments should be sustained. The only evidence relied on to support the findings of the jury adversely to the railway company upon those issues was the testimony of L. M. Dunaway, himself, which was as follows:

"At the time I received my injury I was working in bridge gang as bridge carpenter; had been for about 2 or 3 months. I have worked for the Santa Fé for 8 or 9 years; have been section foreman and extra gang foreman. Mr. Allen was foreman of gang at time I was hurt. Claude Trimm, McCabe, Gay, and Bridwell were working in the gang at the time. It was 9:30 a. m. when I got hurt. I was unloading a flat car loaded with bridge material; the car had been brought from Avalon, New Mexico, that morning; about 4 or 5 miles from the place where I was hurt. Car was loaded with ties and other timber 3x10, and 18 feet long; they had been crosscut; I think there were about 40 pieces of this timber. They were stacked along the edge of the car in two stacks about 20 planks high, as well as I remember; the ties were over behind the timber and in between them; fixed on the side of the car with stakes drove down in them. There was a hand car on top of the timbers. * * * In unloading the car, Bridwell and me was working together, Trimm and McCabe. The heavy timbers was piled up on my and Bridwell's side of the car. We proceeded to throw off the ties, and I think we had tie plates also and material like that. When we got down to the timbers we pulled all the stakes out but one, and I told him I would loosen it up a little, and then I would get back and for him to pull the stake out, and then we would just roll these timbers off, just push them off. I told him not to touch the stake until I loosened it up and got back out of the way, and he says all right, and I took a shaker bar and hit the stake a lick or two to loosen it up and he—I seen him do it—seen him falling as he went back while I was looking at * * * I seen the stake go up in his hand, and he went right back with the stake in his hand and the timbers came right over on me. I think I had hit the stake two or three licks, I don't think more than two; I had loosened it just a little bit—just begun to slip a little bit; it was tight and I could see it slipping; see where it would give a little out of the pocket. A shaker bar is a little flat iron bar about an inch and a half wide, and a half an inch thick, with a socket on the end of it to put through the shaker to throw the grate—to shake the grate on an engine, the fire grate. It is about 18 inches or 2 feet long, and I should think it would weigh about 5 or 6 pounds; not more than that. We could not pull the stake out of the pocket; it was drove in too tight; both Mr. Bridwell and myself tried to pull it out. As well as I remember, there were 20 of those pieces of 3x10x18 in a stack, and there were two stacks. * * * As well as I remember they extended about breast high above the lumber. * * * I did not use the shaker bar until I got to the

last stake; the others we pulled out. I don't remember whether there were three or four stakes we had gotten out; we had gotten all of them out except one about the center of the lumber. Bridwell and I tried to pull that one out; it was not touching the lumber anywhere. We stood up on top and tried to pull it out. I went and got the shaker bar myself, and stood on the ground to drive this stake out. * * * I told Bridwell not to touch the stake because I knew when it was pulled out his force would kick that timbers off with him on top; he would have fell backwards. The lumber would have rolled off, and he would have fallen backwards, with the lumber rolling down there. He was standing on top of the stacks, and if they had of gone down he would have gone with them; he would go back; I wanted him to leave the stake alone until I could get out of the way, and he said he would; I did not watch him."

He further testified that he did not see Bridwell pull the stake; that after hearing the warning, "Look out!" he looked up and saw him falling backwards on the timbers with the stake in his hand. He further testified that while in the hospital at Topeka, he gave a written statement to the effect that he did not see Bridwell pull the stake, but supposed he pulled it, and in which statement he further said:

"Bridwell told me he was not pulling on the stake, but he must have been or the timbers would not have rolled off as they did. The timbers that fell on me were piled straight up and down, and there was no carelessness in with these stringers,"

—and that that statement was correct. In that statement he further said he did not blame the company or the men for the accident, but on the witness stand he explained his meaning as follows:

"When I said in the statement that I did not blame the company or the men, I meant that the men did not do anything intentionally; that they were my friends and I did not blame them; that it was an accident and I did not feel sore at them."

Defendant introduced depositions of George Bridwell, who was working with Dunaway at the time of the accident, and who was the only witness to the accident, except Dunaway; the depositions having been taken in answer to direct interrogatories propounded by plaintiffs and cross-interrogatories by the Atchison, Topeka & Santa Fé Railway Company. He testified as follows:

"Q. Please state how said accident, if any, happened. A. Dunaway knocked the side stakes out of the pockets on the flat car, and as the timbers started to fall he started to run but could not get out of the cut where we were unloading. Fourteen pieces fell on Dunaway, and an arm, both shoulders, and his jaw was broken, and knocked some teeth out, also broke his leg. Q. At the time of said accident, if any, where was the foreman under whose direction said work was being done, with reference to you and the said Dunaway? A. The foreman was on the east side of the car, and me and Dunaway was on the west side. There was a plan between Dunaway and myself concerning the manner in which the work we were doing was—should be done. I was going to throw the timbers over the top of the stakes which held the timbers on the car, but Dunaway said to knock them out; he had a sledge hammer which he got from the engineer; I was to hold the stake

when Dunaway knocked it out from the bottom. Q. If you have answered that there was a stake fastened on the side of the car for the purpose of holding bridge timbers on said car, which it was your duty to remove, please say exactly what you were to do in removing said stake from the side of said car, also where you were to be and where the said Dunaway was to be when said stake was to be removed. A. I was to be on top of the timbers, and Dunaway was on the ground by the side of the car. Q. Was you pulling on said stake when it came out of its socket? A. No, I was not pulling, I only had a hold of it. Q. If you said that the said Dunaway was under the car of timbers where their falling would probably injure him, please say whether or not you gave him any warning that you were pulling on said stake, in time for him to get out of the way of the falling timbers. A. I never gave him any warning, as I only had a hold of the stake and it came loose too quickly for me to warn him. Q. If you have answered that said timbers rolled off of said car and injured the said Dunaway, did you still have the stake in your hand after the timbers had fallen? A. No, sir; I did not. I was on the timbers that fell; I fell back across the car as I felt the timbers moving. Q. Is it not a fact that Dunaway knew, at the time, that as soon as said brace, stake, or standard was removed from the pocket in which it rested that there was great danger of the bridge timbers falling on him? A. I told him not to knock them out, as it was dangerous. Yes, sir; it is a fact that the bridge timbers that we were preparing to unload from the car were loaded all right, and so far as I know or could judge from the appearance of same there was no defect in the loading of the timbers of the car. At the time Dunaway was knocking the stake or standard out of the pocket of the car I was not pulling on the stake, but simply holding it, and the blow of the hammer knocked it clean out of my hands, as well as the stake was knocked out of the pocket, the timbers falling. I was not pulling on the stake as Dunaway aimed to loosen the stake, and I was not to pull it out. Ed Allen (foreman), Berry Gay, L. M. Dunaway, and myself, and I believe Bill Koonse, were present assisting in unloading the car of bridge timbers at the time of the accident. There were five in the gang. There were no specific instructions as to how we were to unload the car, other than that two were to work on each side of the car. Nobody told Dunaway to get a hammer, or me to get on top of the car. Ed Allen was foreman, and his only orders were to unload the timbers; but he did not say exactly how we was to do. Q. What, if any, understanding was had between you and Mr. Dunaway as to what he should do in the unloading of said car of bridge timbers, and what were you to do and how were you to do or perform the work assigned to you if any was assigned you therein? A. There was no specific plan which we was to follow in unloading the car. Dunaway suggested that he would knock the stake loose, and I stayed on top of the car and he got down and got a sledge hammer from the engineer and said that I would take the stakes out of the pockets when he loosened them; that we could do it easier than to throw the timbers over the side stakes."

[12] When one seeks to recover damages of another caused by his negligence, it is incumbent upon him to establish by competent proof not only the negligence alleged, but also that such negligence caused the injury. In *T. & P. Ry. v. Shoemaker*, 98 Tex. 456, 84 S. W. 1082, our Supreme Court said:

"This fact of causal connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or

omission itself. *Missouri Pac. Ry. Co. v. Porter*, 73 Tex. 307, 11 S. W. 324; *Texas & N. O. Ry. v. Crowder*, 63 Tex. 505."

And in *F. W. B. Ry. v. Jones*, 106 Tex. 345, 166 S. W. 1130, our Supreme Court quoted with approval the following statement of a familiar rule:

"No inference of fact should be drawn from premises which are uncertain. Facts upon which an inference may legitimately rest must be established by direct evidence as if they were the facts in issue; one presumption cannot be based upon another presumption."

See, also, *Mo. Pac. Ry. v. Porter*, 73 Tex. 304, 11 S. W. 324; *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *G. C. & S. F. Ry. Co. v. Davis*, 161 S. W. 982.

The causal connection between the alleged act of Bridwell in pulling the stake and the accident was alleged in the pleadings of Dunaway as follows:

"That at the same time that said Bridwell gave said sudden pull or jerk that he carelessly and negligently braced his feet against said load of timbers in such manner as to push the same forward, and this action concurring with the unstable and top-heavy condition of said timbers as so loaded, and the sudden pulling out of said stake as aforesaid, caused said timbers to fall off said car and onto petitioner. * * *"

And it was further alleged:

"That on account of the manner in which said timbers were so loaded upon said car, it would be an easy matter for them to get top-heavy and fall off said car if said standards were removed."

Plaintiffs' pleadings contained substantially the same allegations.

[13, 14] As conclusively shown by the testimony of Dunaway quoted above, he did not see Bridwell pull the stake; his testimony being merely his conclusion or opinion that he did pull it, and that as a result of that act the timbers fell from the car. The decision of those issues was the exclusive province of the jury, and if that objection had been urged to the testimony, doubtless it would have been sustained. But it is well settled that a verdict cannot be sustained by incompetent testimony, even though it is admitted without objection. *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.

It will be noted that Bridwell had testified by deposition, directly and repeatedly, that he did not pull the stake, but that Dunaway knocked it from its socket. Whether or not he did knock out the stake was within Dunaway's knowledge, and if he did not do so he could have so testified, but he did not so testify, unless his testimony that the timbers could not have fallen if Bridwell had not pulled the stake from its socket should be construed as equivalent to a direct statement that he (Dunaway) did not knock it from its socket.

[15] It is a familiar rule that a failure to produce evidence peculiarly within the knowledge of a party will raise a presumption against him, and every reasonable intention will be in favor of his opponent upon

that issue. *Mitchell v. Napier*, 22 Tex. 120; *Bailey v. Hicks*, 16 Tex. 222; *G. H. & S. A. Ry. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 993; 16 Cyc. 1064. See, also, *Skov v. Coffin*, 137 S. W. 450; 16 Cyc. 1062. Without attempting to decide whether or not under that rule, the presumption could be indulged under the facts stated, that Dunaway did knock out the stake, as testified to by Bridwell, and construing his testimony that the timbers would not have fallen if Bridwell had not pulled the stake, as equivalent to a direct statement that he (Dunaway) did not knock it out, nevertheless the statement as made involves an inference that Bridwell pulled it, when Dunaway says himself he did not see him pull it, and based upon that inference the statement involves the further inference that in pulling it, Bridwell exerted an outward pressure upon the timbers with his feet, and the further inference that as a result of such pressure, and not their top-heavy condition, the timbers fell; Dunaway testifying further that the timbers were not touching the stake. Such proof was not legally sufficient to support the findings of the jury that the injury was the proximate result of Bridwell's alleged negligence, and the same was the only proof offered to sustain such findings.

From the foregoing conclusions upon the assignments of error discussed, it follows that the judgment in favor of plaintiffs and L. M. Dunaway against the railway company, rescinding the contract of settlement and allowing them the recoveries mentioned, must be reversed and judgment must be here rendered in favor of the plaintiff in error, the Atchison, Topeka & Santa Fé Railway Company, as to all of said demands; and it is so ordered. And in view of that disposition of the case it becomes unnecessary to notice other assignments presented in the brief of the railway company.

Reversed and rendered.

On Motion for Rehearing.

In our consideration of the case on original hearing we assumed as true the testimony of L. M. Dunaway, to the effect that at the time of the settlement of his claim with the railway company through its claim agent, Bowman Jarrott, said Jarrott made to Dunaway the disparaging statements relative to some of Dunaway's attorneys. We also assumed as a fact that those statements were false and intended to state in our original opinion that even the record upon the trial showed their falsity. And at the earnest insistence of counsel for appellees, we make the foregoing as a part of our original opinion.

Counsel for appellees have pointed out some inaccuracies in the recital of facts which are of no material importance, such as that Dr. W. F. Britton at the time he was called on to treat Dunaway in Putnam had

not seen the latter since his boyhood, citing evidence to show that he had in fact seen him much more recently than that. We shall not attempt to correct such minor errors, as to do so would lengthen the opinion, which perhaps has been extended unnecessarily already.

Plaintiffs in the court below also insist that the judgment rendered in their favor against L. M. Dunaway, as well as against the railway company, for \$2,400, should have been left undisturbed since Dunaway has presented no complaint or contention, either in the trial court, or in this court, that such judgment should be reversed as to him also, if reversed as to the railway company.

It is apparent from the entire record that the judgment in favor of plaintiffs was for \$2,400 of the amount awarded as compensation to Dunaway for his injuries over and above the amount he had already received, such excess being \$4,250, or the difference between \$3,750, the amount he had received, and \$8,000, awarded by the jury as the total amount of damages sustained by him by reason of his injuries; and that the judgment in favor of plaintiffs against Dunaway, as well as against the railway company, was merely to preclude Dunaway from making any claim to that portion of such additional damages.

[16] In other words, it is apparent from the record that the recovery awarded to plaintiffs was conditioned upon the liability of the railway company at all for damages in excess of the amount already paid to Dunaway. Under such circumstances, a reversal in favor of the railway company operated as a reversal of the entire judgment. *Acklin v. Paschal*, 48 Tex. 147; *Washington v. Johnson*, 34 S. W. 1041; *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548, and decisions therein cited; *Thompson v. Kelley*, 100 Tex. 536, 101 S. W. 1074.

[17] Furthermore, the fact that Dunaway has filed no reply to plaintiffs' contention that the judgment against him for \$2,400 should be undisturbed, or that they should now have a judgment for at least a part of the \$3,750 received by Dunaway, in addition to other circumstances shown in the record, indicates that, in reality, probably they are not hostile to each other upon those issues.

Plaintiffs insist further that, even though the judgment be reversed in its entirety and here rendered in favor of the railway company, still, at all events, we should further render judgment in their favor against Dunaway for three-tenths of \$3,750, the amount received by him in the compromise settlement with the railway company, under the undisputed contract they had with Dunaway. The contract of employment of plaintiffs by Dunaway was in writing and did assign to plaintiff three-tenths of the cause of action against the railway company, but following the lan-

guage evidencing such assignment it stipulates:

"It is further agreed and understood that in case a compromise is made of the said claim before any suit is filed thereon, then my said attorneys are to receive an interest equivalent to 15 per cent. of the amount agreed on as compromise, instead of the three-tenths interest above mentioned."

It is also undisputed that the compromise settlement was made prior to the filing of any suit on the claim for damages.

Under those circumstances, we will now here render judgment in favor of plaintiffs against defendant L. M. Dunaway for \$562.50, same being 15 per cent. of \$3,750, with interest thereon at the rate of 6 per cent. per annum from November 11, 1913, the date of the settlement.

Accordingly, the judgment heretofore rendered by us is so reformed as to give plaintiffs a judgment against Dunaway to that extent, but in all other respects it is undisturbed.

Subject to the foregoing, the motions for rehearing filed by plaintiffs and by defendant L. M. Dunaway are overruled.

BEALL et al. v. OLACK. (No. 8479.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 25, 1916.)

1. JOINT TENANCY §8—RIGHTS OF JOINT TENANT.

A joint tenant or co-owner has the right to the use and enjoyment of the whole property to the extent of his interest only.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. §§ 5-11; Dec. Dig. §8.]

2. JOINT TENANCY §8—RIGHT TO DISPOSE OF INTEREST OF CO-OWNER.

One joint owner in possession of a secured note payable to the order of the co-owner has no authority to dispose of the co-owner's interest in the note or convert it to its own use.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. §§ 5-11; Dec. Dig. §8.]

3. CORPORATIONS §423—LIABILITY FOR ACTS OF OFFICERS—JOINT OWNERSHIP OF NOTE.

Where a corporation and plaintiff jointly owned a secured note payable to plaintiff's order, if the president of the corporation in its behalf assumed authority to dispose of plaintiff's interest, the corporation would be liable in damages to plaintiff for any loss sustained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695, 1903, 1906; Dec. Dig. §423.]

4. JOINT TENANCY §10—JOINT OWNERSHIP—ACTION—MEASURE OF DAMAGES.

If one joint owner of a secured note assumed authority to deal with the interest of the co-owner, and loss ensued, the measure of damages would be the value of the co-owner's interest.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 13; Dec. Dig. §10.]

5. PRINCIPAL AND AGENT §159(1)—LIABILITY FOR TORTS OF AGENT—CONVERSION OF INTEREST OF PRINCIPAL'S CO-OWNER.

Where attorneys wrongfully collected and appropriated in behalf of a corporation proceeds of a secured note jointly owned by the corporation and plaintiff, and payable to plain-

tiff's order, the attorneys and the corporation were joint tort-feasors, and were jointly and severally liable to plaintiff, since the fact that a wrong was done at the direction of the principal does not relieve the agent of personal liability.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599-606; Dec. Dig. § 159(1).]

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Suit by E. E. Clack against J. H. Beall and others. From a judgment of the county court for plaintiff on appeal from the justice court, defendants Beall, Smith, and Spencer bring error. Affirmed.

Eugene De Bogory, of Abilene, for plaintiffs in error. Sayles, Sayles & Sayles, of Abilene, for defendant in error.

BUCK, J. On June 1, 1913, J. C. Ham, president of, and acting for, the Ham Lumber Company, a corporation located at Merkel, Tex., employed E. E. Clack, an attorney residing at Sweetwater, to collect or adjust a judgment in favor of the lumber company against one R. P. Arnold, and agreed to give Clack a one-half interest in said judgment for his services in collecting it. By said agreement Clack was invested with full power to collect or adjust said judgment upon such terms as he might deem proper, and to release the same, and his services were to continue until the collection had been effected. In settlement of said judgment Clack secured a note from Arnold in the principal sum of \$553.14, of date June 14, 1913, payable to Clack six months after date, bearing interest at 10 per cent. from date, and containing the usual stipulation as to attorney's fees. This note was secured by deed of trust on certain described land. Later J. C. Ham, acting for the lumber company, employed the law firm of Beall, Smith & Spencer to collect the judgment. In the meantime Clack had moved from Sweetwater to Dallas, and in April, 1914, employed the firm of Scarborough & Hickman, of Abilene, to collect said note. The court found that he never authorized or employed Beall, Smith & Spencer to collect, or to act for him in any way in the collection of, said note. Beall, Smith & Spencer, acting for J. C. Ham and the Ham Lumber Company, compromised and collected said note by allowing said Arnold's assignee to offset one-half of the face value of said note, principal, interest, and attorney's fees due thereon, by a claim in favor of Arnold which the said Arnold's assignee had and held against the said J. C. Ham, and collected in money the other one-half of the face value of said note, principal, interest, and attorney's fees. After paying the court costs, amounting to \$27.60, and reserving their fees for collection, they paid the balance so collected as follows: \$104.27, to E. E. Clack, and \$104.27 to J. C. Ham, representing the Ham Lumber Company. The court found

that at the time of said collection, and the distribution of the proceeds therefrom by Beall, Smith & Spencer, Clack and the Ham Lumber Company were joint owners of the note, and that Beall, Smith & Spencer had notice of Clack's one-half interest in the same.

On August 8, 1914, Clack sued Beall, Smith & Spencer, and other parties not necessary here to mention, in the justice court of Taylor county for \$179, alleged to be the amount collected by Beall, Smith & Spencer out of plaintiff's one-half interest in said note, for which payment or remittance had not been made. In his petition plaintiff charged that, acting without any authority whatever, Beall, Smith & Spencer had collected said amount and misappropriated the same and converted it to their own use and benefit.

Defendants Beall, Smith & Spencer denied their liability in the amount claimed or in any other amount, and alleged that in the negotiations leading up to and including the collection of said claim and note they were the agents of, and acting for, J. C. Ham; that they had no notice of any interest that plaintiff had in said claim; that plaintiff's interest at best was only a contingent one, dependent upon final payment of the claim and judgment; and that said defendant was entitled to only one-half of said amount collected.

After dismissing other parties defendant, the court gave judgment for plaintiff against Beall, Smith & Spencer in the sum of \$118.07, with interest thereon at 6 per cent. per annum from November 7, 1914, and costs of court. From this judgment the defendants named have prosecuted this writ of error.

Plaintiffs in error present only one specification of error, improperly termed, "appellants' third assignment of error," which is as follows:

"The judgment of the court is contrary to the evidence, because the compromise settlement made in the case of R. P. Arnold v. E. E. Clack, was [with the] full acquiescence and consent of J. C. Ham, the real owner of said obligation, and the real defendant in said suit, and without knowledge that the said E. E. Clack had any interest in the subject-matter in said suit, except a share of the money really realized therefrom, less any expense of collection."

In several propositions under this assignment, plaintiffs in error urge: (1) Either co-owner of joint property has right of possession and control of the same; (2) that plaintiff and Ham Lumber Company were the joint and co-owners of the two notes aggregating \$553.14, and that, as such co-owner, the Ham Lumber Company, as it had power to do, authorized plaintiffs in error to make the settlement that was made; (3) that the plaintiffs in error paid over all money so collected to the client who employed them, and who was entitled to the possession of such money; (4) that, if such compromise settlement was improperly made, the co-owner, and not the attorney, would be responsible

to his joint owner, if the joint owner was injured as a result of such settlement.

From the court's findings of fact, which are not assailed, it is established that plaintiffs in error were the agents of the Ham Lumber Company, and were not the agents of defendant in error, and that they knew of defendant in error's interest in this note and claim at the time the settlement was made.

[1] A joint tenant or a co-owner has the right to the use and enjoyment of the whole property to the extent of his interest, but no further. In the case of *Collier v. Cameron Co.*, 55 Tex. Civ. App. 153, 117 S. W. 915, it was held that, where one tenant in common, without authority, sells all the timber on land, his cotenant is entitled to recover from him, and from purchasers with notice of his cotenancy, his share of the value of the timber taken.

[2-4] In *Sloane v. Gilmore*, 167 S. W. 1089, authorities are cited to sustain the proposition that the presumption that possession of a negotiable instrument is prima facie evidence of title is applicable only to such instruments as pass by delivery, and does not apply to instruments payable to order. Hence we hold that neither J. C. Ham nor the Ham Lumber Company had authority to dispose of defendant in error's interest in said note, or any part thereof, and that, if said J. C. Ham, acting for the lumber company, assumed such authority, said lumber company would be liable in damages to plaintiff for any loss sustained, and that the measure of damages would be the value of defendant in error's interest in the claim, evidenced by the note against R. P. Arnold. Since the settlement made by plaintiffs in error, acting for the Ham Lumber Company, provided for an allowance to the extent of one-half of said note, interest, etc., in payment of a claim held by Arnold's assignee against J. C. Ham, balance in cash, it may be reasonably presumed that the note was of the full value claimed, and that plaintiff's damages would be in the sum of one-half of said note, interest and attorney's fees, less costs of collection, and the amount already received from plaintiffs in error, to wit, \$104.27.

Since the principal, the Ham Lumber Company, was not authorized to collect and appropriate to its own use and benefit any part of defendant in error's interest in said note, it follows that its agent or agents were not authorized so to do. In 1 *Mechem on Agency*, § 1456, p. 1077, the author uses the following language:

"It does not relieve the agent that the wrong was committed with the knowledge of the principal, or by his consent or express direction, because no one can lawfully authorize or direct the commission of a wrong. A fortiori it is no defense that the agent in committing the wrong violated his instructions from his principal. Neither is it material that the agent derives no

personal advantage from the wrong done. The fact that the agent acted in good faith, supposing the principal had a legal right to have done what was done, is no defense. He who intermeddles with property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer."

Section 1457, Id.:

"In accordance with the principles of the preceding section, it is generally held that an agent who, for his principal, takes, sells, or otherwise disposes of, the goods or chattels of another, without legal justification, is personally liable, even though he acted in good faith, supposing the goods to be his principal's, and although he may have delivered the goods taken to his principal or to some other person for and on account of his principal."

In section 1442, Id., it is said:

"As will be seen in another place, the agent will not ordinarily be protected, even though he acts in good faith, where the act is one which the principal could not lawfully authorize. Thus an agent who in good faith receives from his principal and sells by his direction property which did not belong to the principal is ordinarily held liable to the true owner, even though he may have paid over the proceeds to his principal before he was notified of the true owner's claim."

[5] As to this act, amounting to a conversion in law, but not in morals, Ham Lumber Company and plaintiffs in error were joint tort-feasors, and were jointly and separately liable to defendant in error. *Baker v. Wasson*, 53 Tex. 150; *Eastin v. Railway Co.*, 99 Tex. 654, 92 S. W. 838; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452.

Hence we conclude that plaintiffs in error's only assignment should be overruled, and the judgment of the trial court affirmed, and it is so ordered.

SOUTHWESTERN PORTLAND CEMENT CO. v. PRESBITERO et ux. (No. 635.)

(Court of Civil Appeals of Texas. El Paso.
Dec. 7, 1916. Rehearing Denied
Jan. 5, 1917.)

1. TRIAL \S 350(3)—INJURIES TO SERVANT— SPECIAL ISSUES.

In an action for death of plaintiffs' minor intestate employed by defendant, evidence that the deceased occupied the position of night miller at defendant's plant and had full charge of the building justified the submission of a special issue as to whether the deceased, at the time of his death, was acting in the course of his employment as miller in the defendant's building.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 831; Dec. Dig. \S 850(3).]

2. TRIAL \S 350(6)—INJURIES TO SERVANT— ISSUES.

In an action for death of plaintiffs' minor intestate employed by defendant, where the explanatory portion of the charge defined negligence, proximate cause and ordinary care, submission of the question, "Do you find that it was negligence to permit said collar to be in such condition?" was not error, as failing to

present the question of ordinary care in the use of the collar.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. ¶255(6).]

3. TRIAL ¶256(10)—INJURIES TO SERVANT—INSTRUCTIONS—NECESSITY OF REQUESTS.

A charge, defining negligence, proximate cause, and ordinary care, without affirmatively charging what degree of care the defendant was, by law, required to exercise in providing for the safety of its employes, was sufficient to reveal the degree of care required, in the absence of a request for a special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. ¶256(10).]

4. DEATH ¶72—EVIDENCE—ADMISSIBILITY—PECUNIARY CONDITION OF PLAINTIFF.

In an action for the death of plaintiffs' minor intestate employed by defendant, evidence as to the amount of plaintiffs' property was admissible to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 91; Dec. Dig. ¶72.]

5. TRIAL ¶255(4)—INSTRUCTIONS—REQUESTS—PURPOSE OF EVIDENCE.

If the defendant desired the court to limit evidence as to the amount of plaintiffs' property to the purpose for which it was admissible, it should have presented a special charge to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. ¶255(4).]

6. TRIAL ¶127—CONDUCT OF COUNSEL—EVIDENCE—LIABILITY INSURANCE.

In an action for death of plaintiffs' minor intestate employed by defendant, where plaintiff alleged that defendant was not insured in the Employers' Liability Insurance Association, which would have relieved it from actions for injuries to its employes, a question as to whether defendant had notices posted around its plant that it carried insurance in accordance with the Employers' Liability Act (Acts 33d Leg. c. 179, pt. 1, § 3), elicited to prove that the defendant was not insured, was not subject to the objection that it was an attempt to inject into the case the question whether the company is insured, and impress upon the jury that an insurance company, and not defendant, would be called upon to pay the damages assessed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 276; Dec. Dig. ¶127.]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by Barney Presbitero and wife against the Southwestern Portland Cement Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Burges & Burges and S. P. Weisiger, all of El Paso, for appellant. Jones, Jones & Hardie, of El Paso, for appellees.

HARPER, C. J. Appellees, Presbitero and wife, brought this suit against appellant for damages for the death of their minor son, alleged to have been caused by the negligence of the defendant company. They allege, among other things, that the deceased contributed to their support, etc. The defendant answered by general denial; that it had furnished a safe place for deceased to work; that if there were any dangers connected with the operation of the ma-

chinery, the deceased knew of them and assumed the risk; deny that they were guilty of negligence in any of the ways charged, but that deceased left the safe passageway provided for employes without cause, and unnecessarily came in contact with the revolving shaft supposed to have caused his death, and thereby was guilty of negligence against which it could not protect; therefore in no wise responsible. The cause was submitted to a jury upon special issues, and resulted in a verdict and judgment for \$3,830, from which this appeal is perfected.

[1] The first ground of error is that the court erred in submitting to the jury the following special issue:

"Do you find from a preponderance of the evidence that at the time of his death John Presbitero was acting in the course of his employment, as miller, in the raw grinding building of defendant?"

—for the reason that it submitted an issue not supported by any evidence. There is evidence that he occupied the position of night miller at the plant; had full charge of the building; his duties were to look out for the whole building to see that everything was running, etc., and there is positive evidence that he went to work the night of the accident. True, there is evidence that some time before the accident he announced that "he was going to get some sleep," but if he did so, he evidently returned to his place of duty, and the circumstances, as revealed by this record, are sufficient to justify the charge. This disposes of the second, which complains of the refusal of the court to instruct a verdict for defendant upon the same grounds.

The third charges error in submitting the following issue:

"Do you find . . . that it was negligence . . . to permit the said collar to be in such condition?"

—because the question to be submitted was:

"Had the defendant, in permitting its use in the manner and form of its use and the place of its use, failed to exercise ordinary care?"

[2] The explanatory portion of the charge having defined negligence, proximate cause, and ordinary care, it was not error to submit the question complained of.

[3] Whilst the charge nowhere affirmatively charges the jury what degree of care the defendant is by law required to exercise in providing for the safety of its employes, in the absence of a special charge requested by it, we think the charge, submitted as a whole, sufficient to reveal to the jury the degree of care required.

[4, 5] The fourth: The question, "Have you any property to live upon?" asked of the plaintiff, was a proper subject of inquiry to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages. I. & G. N. R. Co. v. Kindred, 57 Tex. 491; Gulf, C. & S. F. Ry. Co. v. Young-

er, 90 Tex. 387, 38 S. W. 1121. If the defendant desired the court to limit the evidence to the purpose for which it was admissible, it should have presented a special charge to that effect.

The fifth complains of the following question propounded to a witness:

"You have no notices posted around the plant out there that your company carries insurance in accordance with the Employers' Liability Act of Texas?"

[8] It is well settled that questions which tend to impress upon the jury that an insurance company, and not the defendant, would be called upon to respond for such damages as the jury might assess constitutes reversible error, but this assignment presents a very different question, for this testimony was elicited to prove that the company was not insured, as provided by the acts of the Texas Legislature, of 1913 (Acts 33d Leg. c. 179, pt. 1, § 3); therefore was not subject to the objection given; i. e.:

"Because it is an attempt to inject into the case the question whether or not the company is insured, to create in the minds of the jurors a prejudice against the defendant company and make them believe that the company was insured with an insurance company," etc.

The act above cited provides that employees of a subscriber to the Employers' Liability Insurance Association has no cause of action against such employer for personal injuries, but must look to the insurance association for compensation. Consolidated Kansas City Smelting & Refining Co. v. Dean, 189 S. W. 747 (opinion rendered at this term). The plaintiff pleaded that the defendant had not taken out a policy, which was not excluded upon exception. Therefore it is not likely that this question and answer had any influence whatever upon the jury.

For the reasons given, the assignments are overruled, and cause affirmed.

LANE et al. v. HERRING, Co. Atty.
(No. 7637.)

(Court of Civil Appeals of Texas. Dallas.
Nov. 25, 1916. Rehearing Denied
Jan. 6, 1917.)

1. WITNESSES \S 380(5)—IMPEACHMENT—PARTY'S OWN WITNESS.

A party cannot impeach a witness called by him by showing statements made by the witness contrary to his testimony where there is no claim that the witness misled or deceived the party, though such statements may be called to the attention of the witness to refresh his memory and to give him an opportunity to explain or correct apparent contradictions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219; Dec. Dig. \S 380(5).]

2. APPEAL AND ERROR \S 1010(1)—REVIEW—FINDINGS—VERDICT.

Findings by the court or the jury that persons were property tax payers in a school district, when supported by the evidence, cannot and will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. \S 1010(1).]

3. ELECTIONS \S 81 — BOND ELECTIONS — QUALIFICATION OF VOTERS—"PROPERTY TAX PAYER."

In view of Const. art. 8, § 1, declaring every character of property within the jurisdiction of the state subject to taxation except that specifically exempted, a person who owned any property subject to taxation, though only a hog or a watch, was a property tax payer within Vernon's Sayles' Ann. Civ. St. 1914, art. 2831, prescribing the qualifications of voters at an election on the issuance of school bonds; it not being necessary that he own a substantial amount of property.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 75; Dec. Dig. \S 81.]

For other definitions, see Words and Phrases, First and Second Series, Property Tax Payer.]

4. ELECTIONS \S 81—BOND ELECTION—QUALIFICATION OF VOTERS—TAXABLE PROPERTY.

A thing without value is not subject to taxation, and therefore its ownership does not make the owner a property tax payer qualified to vote at a school bond election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 75; Dec. Dig. \S 81.]

Appeal from District Court, Limestone County; C. S. Bradley, Special Judge.

Proceedings by J. D. Lane and others against M. Herring, County Attorney, to contest the validity of a bond election in a school district. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. T. Jackson, of Groesbeck, for appellants.

RASBURY, J. This is a proceeding contesting the validity of an election held in common school district No. 40 of Limestone county for the purpose of determining whether the district should issue bonds in the amount of \$3,500 to be expended in the erection of a schoolhouse. It was alleged by appellants, who were plaintiffs below, that 44 votes were cast at said election, 23 being in favor of issuing the bonds and 21 against; and that the commissioners' court had entered an order declaring the bond issue had carried. It was further alleged that the bond issue had not in fact carried for the reason that three illegal votes had been cast in favor of the bond issue, to wit, the votes of John Burleson, Vernon Burleson, and Ed Stevens, neither of whom owned property in the district, and hence were not entitled to vote because not property tax payers in the district, and the elimination of whose votes would result in a majority against the bonds. The petition prayed for injunction restraining the issuance and sale of the bonds.

[1] The first assignment complains of the action of the trial judge in excluding certain testimony. By the bill of exceptions supporting the assignment it appears that appellants called as a witness John Burleson, who it was claimed cast one of the illegal votes for the bond issue and proved by him that he voted at the election in favor of the bonds, and that he was a qualified voter because he was on January 1st, preceding the election, the

owner of two hogs of the value of \$5 which he had purchased from Ed Lauderdale. After opposing counsel had cross-examined the witness counsel for appellants subjected the witness to further questioning for the purpose of showing that the witness did not own the hogs on January 1st, but had acquired them subsequent thereto, all of which the witness denied. Thereupon counsel for appellants inquired of the witness if he did not on January 1, 1915, at J. M. Jones' residence, tell Jones that he did not as matter of fact buy Lauderdale's hogs. This the witness denied. Subsequently appellant called J. M. Jones as a witness by whom he sought to prove that Burleson did make the statements which he denied. Upon objection the witness was not permitted to so testify on the ground that appellant could not in such manner impeach his own witness. If permitted he would have testified that Burleson on February 1, 1915, told him at his residence that he did not purchase the hogs from Lauderdale in December prior, but subsequent, to January preceding the election. To the action of the court so outlined appellee excepted. Without attempting a discussion of the merits of the rule so widely and generally discussed in the past we think it clear that the testimony was correctly excluded. The general and settled rule is that a party will not be permitted to show by other witnesses or by direct or redirect examination that the former has made contradictory statements on prior occasions, etc. The rule has its origin in the principle that one who presents a witness to the court in support of his case represents him as worthy of belief, and may not impeach him by evidence to the contrary. The rule is, however, subject to the qualification that the witness' memory may be refreshed by reference to prior contradictory statements; the object being to enable the witness to explain and correct apparent contradictions, and subject to the further qualification that when a party has in good faith introduced a witness in the belief that he is friendly, but it develops that he is in fact hostile and has misled and deceived the party, the party so deceived and misled is allowed a wider range and will be permitted to show contradictory statements. *Chamberlayne*, Mod. Law Ev. vol. 5, §§ 3743, 3744; *Jones on Evidence* (2d Ed.) §§ 858, 854. The trial court followed the rule precisely. The bill of exceptions shows that counsel was permitted to call the attention of the witness to the alleged prior contradictory statements in order to permit the witness to explain or correct the apparent conflict. But the witness adhered to his original statement. No claim is made that the witness misled or deceived appellant, and hence the other qualification of the general rule is without application. Accordingly, it is our duty to overrule the first assignment of error. In such connection the second and third assignments present the

same character of issue, and hence it will not be necessary to discuss same.

[2] The fourth assignment of error is that the evidence is insufficient to sustain the finding that John Burleson and Ed Stevens were property tax payers in common school district No. 40. There is in the record evidence which will sustain the findings of the trial court that both owned property on January before the election subject to taxation. Such question is for the jury, or when jury is waived for the trial judge, and when supported by the evidence cannot and will not be disturbed by the appellate courts.

[3] The fifth assignment asserts that the charge of the court defining property tax payer is erroneous. The court instructed the jury that a property tax payer, within the meaning of article 2831, Vernon's Sayles' Statutes, defining the qualifications of voters in elections to issue bonds—

"is a person who owned property subject to taxation on the 1st day of January, 1915. The ownership of hogs or any interest in hogs; the ownership of a watch; or the ownership of property."

It is also urged that the court erred in refusing to instruct the jury as requested by appellants that:

"A property tax payer, as meant in this case, is a person who pays taxes on a substantial amount of property; a person owning a very insignificant amount of property, say under \$10, would not be a property tax payer under the meaning of the law."

The general rule is that every character of property within the jurisdiction of the state is subject to its taxing power, save that which is specifically exempted from taxation. It is so declared by article 8, § 1, of our Constitution, which was held to be broad enough to "embrace every kind and class of property within the limits of the state." *Hall v. Miller*, 110 S. W. 165; *Id.*, 102 Tex. 289, 115 S. W. 1168. As a consequence the personal property mentioned in the court's charge, not being by other provisions of our laws exempt from taxation, was with all other property subject to taxation, and being so constituted its owner a property tax payer within the meaning of article 2831, Vernon's Sayles' Stats., and entitled, other qualifications being shown, to participate in the school election. For the reasons we have stated the court should not have given the charge requested by appellants. To say that only those who pay taxes upon a "substantial" amount of property would be to adopt a very uncertain and unreliable rule. What one person might regard as a "substantial" amount of property another might consider insignificant, and what one might consider insignificant, another might with much reason regard as substantial. Accordingly, the right to vote at such elections would be stripped of all fixed and certain rights, and in every contest that arose that right would finally depend upon what the judge or the

jury considered was a substantial amount of property.

[4] Of course a thing without value cannot be taxed, and hence is not subject to taxation, because without any basis upon which to fix the amount of tax. But as to whether property has a value or not is another question which may be certainly determined under rules of evidence long established. While the amount of the property of those whose votes were challenged was inconsiderable, it was none the less property and under the sweeping provisions of the Constitution subject to taxation, and being so constituted the owners property tax payers within the meaning of the statute referred to.

Finding no error in the record, the judgment is affirmed.

PHOENIX CONST. CO. v. WITT & SAUNDERS. (No. 5688.)

(Court of Civil Appeals of Texas. Austin.
Nov. 29, 1916. Rehearing Denied
Dec. 28, 1916.)

PLEADING \S 127(2) — ADMISSIONS — PLEA OF SETTLEMENT.

In an action for damages wherein the defendant's answer averred facts which, if true entitled it to the benefits of the Employers' Liability Act (Acts 38d Leg. c. 179) the fact that defendant pleaded a settlement with plaintiff did not excuse interveners seeking to recover on an assignment of part of the cause of action from pleading and proving that plaintiff had a cause of action against defendant; the plea of settlement not amounting to an admission of such cause of action.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. \S 127(2).]

Appeal from District Court, McLennan County; E. J. Clark, Judge.

Suit by J. Jeter against the Phoenix Construction Company, in which Witt & Saunders intervene, seeking a recovery from the defendant on a part of the cause of action conveyed to them. Judgment that plaintiff take nothing, and for the interveners against the defendant, and defendant appeals. Reversed and remanded.

Homer R. Mitchell, of Dallas, and Scott & Ross, of Waco, for appellant. W. R. Saunders, Edgar & Chas. Witt, and Chas. B. Braun, all of Waco, for appellees.

KEY, C. J. J. Jeter brought suit for damages sounding in tort against the Phoenix Construction Company. Witt & Saunders, a firm of lawyers, intervened, alleging that Jeter had conveyed to them a portion of his cause of action, and they sought to recover from the defendant the portion so conveyed. The defendant in its answer averred facts which, if true, showed that it was entitled to the benefits of the Employers' Liability Act, a law enacted by the Thirty-Third Legislature (Acts 33d Leg. c. 179). The case was tried in the court below after this court

had decided the case of *Middleton v. Texas Power & Light Co.*, 178 S. W. 956, and before the Supreme Court had disposed of that case. In that case the constitutionality and validity of the act of the Legislature referred to was involved. In this case the trial court sustained exceptions to the defendant's plea of nonliability because of the act of the Legislature referred to; and, upon proof being made that appellant, with knowledge of appellee's claim, had made a settlement with the plaintiff, Jeter, and paid him \$216, and the interveners had put in evidence the assignment from Jeter to them, judgment was rendered to the effect that the plaintiff take nothing, and that the interveners recover from the defendant the sum of \$72 and costs, and the defendant has prosecuted this appeal.

In passing upon the validity of the Employers' Liability Act, the Supreme Court of this state held that it was valid and free from constitutional objection. *Middleton v. Texas Power & Light Co.*, 185 S. W. 556. Because of that decision we sustain appellant's first assignment of error, and hold that the trial court committed reversible error when it sustained appellee's exceptions to that portion of appellant's answer which asserted its nonliability because of that act.

We overrule appellant's contention that the written assignment offered in evidence was not admissible because it did not convey any portion of the plaintiff's cause of action. Considering all the terms of that document, we think it should be construed as conveying to interveners a portion of the plaintiff's cause of action, and not merely a portion of whatever sum he might receive from appellant.

We also overrule appellees' contention that appellant, by its answer pleading a settlement with plaintiff, admitted that the plaintiff had a cause of action against it. The plea referred to does not constitute such an admission; and therefore, in order for interveners to recover, it was necessary for them to plead and prove that the plaintiff had a cause of action against the defendant. No such proof was made. Intervenors rested their case upon proof showing that the plaintiff had assigned to them a portion of his cause of action, and that the defendant, with knowledge of that fact, had made a settlement with the plaintiff and paid him \$216. Proof that a defendant has paid a sum of money as a compromise and settlement of an existing suit for damages does not constitute an admission in favor of a third person, though claiming under the plaintiff, that a cause of action ever existed against the defendant.

For the error pointed out, the judgment of the trial court is reversed, and the cause remanded; and if upon another trial the proof sustains appellant's plea under the Em-

employers' Liability Act, then judgment should be rendered for appellant.

Reversed and remanded.

SPEED v. SADBERRY et al. (No. 8463.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 11, 1916.)

1. TRESPASS TO TRY TITLE — TITLE OF PLAINTIFF.

Plaintiff, in trespass to try title, to be entitled to judgment, must show in himself title superior to that under which defendant claims.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 5-7, 9, 15, 16; Dec. Dig. —6(1).]

2. TRESPASS TO TRY TITLE — PRESUMPTION FROM POSSESSION.

Where defendant in trespass to try title is in possession, there is a presumption of title in him, authorizing recovery against persons failing to make affirmative showing of title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. —38(3).]

3. TRESPASS TO TRY TITLE — FORFEITURE OF PUBLIC LANDS—BURDEN OF PROOF—STATUTE.

In trespass to try title by plaintiff claiming that the land was forfeited and awarded to him by the general land office, plaintiff must show, not only that an award was made, but that the requirements of Vernon's Sayles' Ann. Civ. St. 1914, art. 5428, as to forfeiture, had been substantially complied with by the general land office prior to the award.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 58; Dec. Dig. —38(1).]

4. PUBLIC LANDS — FORFEITURE — STATUTE.

By Vernon's Sayles' Ann. Civ. St. 1914, art. 5428, prescribing the requirements of a forfeiture of public lands by the general land office, unless entry of forfeiture is made, both on the application of the grantee and in the account kept with the purchaser, no legal forfeiture results.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 541; Dec. Dig. —172(8).]

5. EVIDENCE — OPINION OR CONCLUSION—CERTIFICATE OF FORFEITURE.

In trespass to try title by plaintiff claiming under a forfeiture and award of lands to him by the general land office, the certificate of the acting commissioner of the office, stating that the records showed that the lands "were forfeited," was inadmissible, as not tending to establish the fact that the necessary entries had been made in the commissioner's office, but rather the conclusion or opinion of the maker.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2171; Dec. Dig. —471(26); *Witnesses*, Cent. Dig. § 834.]

6. APPEAL AND ERROR — REVIEW — REASONS ASSIGNED BY TRIAL COURT.

Where the cause was tried by a jury, and the judgment is sustained by the pleadings and proof, it should be affirmed by the appellate court, though the trial court gave erroneous reasons therefor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3408-3410; Dec. Dig. —854(2).]

7. TRIAL — OBJECTIONS TO EVIDENCE — FAILURE—PROBATIVE FORCE OF HEARSAY.

In trespass to try title by party to whom general land office awarded forfeited lands,

where no objection was urged, on the ground that it was hearsay, to defendant's testimony that, while he had personally never tendered any money to the land office, he knew that his lawyer had tendered it by what the latter told him, the court properly considered such testimony as tending to show application by defendant to have his rights in the forfeited land reinstated, and a tender of the interest due, since hearsay admitted without objection, is not without probative force.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 262; Dec. Dig. —105(2).]

Appeal from District Court, Young County; J. W. Akin, Judge.

Action by Arthur Speed against John SADBERRY and another. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Arnold & Taylor, of Henrietta, and Fred T. Arnold, of Graham, for appellant. C. W. Johnson, of Graham, for appellees.

BUCK, J. September 27, 1901, survey 74, grantee B. R. I. R., containing 160 acres and located in Young county, was awarded by the land commissioner to J. F. Gilmore under the act approved April 16, 1895 (Acts 24th Leg. c. 48), and on October 7, 1902, survey 73, same original grantee and same acreage, and in the same county, was awarded to said Gilmore. Gilmore and wife, on February 1, 1907, conveyed by deed said tracts to T. E. Mills. On December 3, 1909, said Mills and wife conveyed the same land to A. N. Gordon, and on December 3, 1912, said Gordon and wife conveyed to F. P. Burch said two quarter sections. The interest to the state from November 1, 1912, to November 1, 1913, and due on the latter date, remained unpaid up to August 7, 1914, on which latter date there was filed in the office of the county clerk of Young county an instrument signed by the commissioner of the general land office and providing that these two quarter sections were subject to forfeiture for nonpayment of interest due November 1, 1913, and announcing that if said interest was not paid, said two tracts would be on the market for sale August 9, 1914. In said instrument the land mentioned was classified as agricultural, instead of grazing, as in the award to Gilmore, and the price placed at \$4 minimum, instead of \$1 and \$1.50, respectively. On October 2, 1914, there was filed in the office of the county clerk of Young county an award, dated 9/25/14, of these two quarter sections, signed by the land commissioner. By this instrument the two tracts in question were awarded to Arthur Speed at \$6.55 an acre, date of sale being August 10, 1914. The original award to Speed was made September 24, 1914. On October 27, 1914, said Speed sent to the general land office his money order for the interest, to wit, \$11.65, and on November 2d following, the commissioner of the general land office accepted said remit-

tance. On January 11, 1915, appellant filed his petition in the district court of Young county in form of trespass to try title against John Sadberry and Frank Burch. He alleged that the rental value of said land was \$5 per annum, and that the defendants had torn fences, sheds, and houses off said land, since they had unlawfully entered upon the same, of the reasonable value of \$400, and he prayed for judgment for the land, rents, and damages. In the defendants' answer, Sadberry disclaimed any interest in or title to the land except as the tenant of Burch. Burch answered by general and special demurrers, and specially pleaded the 5 and 10 years' statutes of limitation, valuable improvements made in good faith, and further pleaded title through purchase from the state. He further specially pleaded that it had been represented to him, and he so believed, that he had until November 1, 1914, to pay the interest due the state on said land, and that he was informed, and so understood, that the interest due November 1, 1913, had been paid by his immediate grantor, and that he still believed that the payment for same had been made according to the contract between the defendant and his grantor. It was further alleged that, if any pretended forfeiture had been made by the general land office and its officials for a pretended nonpayment of interest, the same was done without any notice to defendant, and that if he had received such notice, he would have paid such interest. He further pleaded that it had been the immemorial custom of the general land office to issue to the owners of school land notice of arrears of interest that forfeitures might be avoided and the purchaser protected from loss, and, further, that as soon as he learned that interest was due and claimed by the general land office, he did, on August 5, 1914, tender to the general land office all interest due, but that said tender had been refused by the commissioner, on claim that the land had been forfeited, reclassified, and sold, and said commissioner declined to reinstate the defendant in his rights as a purchaser. Defendant, in his pleadings, tendered in court the interest, and also the part of the purchase money due on the original sale, together with patent fee, etc., and prayed that said money be transmitted to the treasurer of the state of Texas. Upon a hearing before the court, judgment was rendered that plaintiff take nothing by reason of his suit, and from this judgment plaintiff appeals.

Appellant presents only two assignments of error, which are as follows:

"(1) The court erred in holding that the defendant F. P. Burch had 90 days after said land was declared delinquent by the commissioner of the general land office within which to be reinstated. (2) The court erred in holding that the defendant had the right to be reinstated in the general land office for the following reasons: The evidence clearly shows that the land in question became delinquent for interest payment on November 1, 1913, and subject to for-

feiture then; that the same was forfeited by the commissioner of the general land office on August 4, 1914, and sold to plaintiff on September 24, 1914, and that no effort was made by the defendants to be reinstated in said purchase until after the land in question was sold by the commissioner of the general land office to plaintiff in September, 1914."

There are contained in the record no findings of fact and conclusions of law by the court, and therefore it does not affirmatively appear that the judgment of the court rested upon the basis asserted in the first assignment. The court qualifies plaintiff's bill of exception upon which this assignment is predicated as follows:

"There was no specific evidence of a default in payment of interest, the defendant showing that, while he did not pay the interest, he had relied on the promise of his vendor and supposed it paid, until the trouble arose. There was no evidence of forfeiture, except that contained in the certificate of the acting commissioner of the general land office, which was admitted by the court, over objections of defendant, after the trial, 'forfeited August 4, 1914.' The defendant testified that between the 1st and 15th of August he made application to the general land office to have his rights reinstated, but the defendant could not be certain as to the exact date. That he tendered the necessary amount of money to pay the interest in default, if any, which action was made through his attorney at Austin, having made the arrangements by wire, and that the said attorney so employed reported that the commissioner had denied the application to be reinstated. The law authorized reinstatement, on payment of defaulted interest any time prior to the intervention of rights of plaintiff, which was September 24, 1914. The burden was on the plaintiff to show his rights intervened before the application for reinstatement was made by the defendant, which application for reinstatement was made not later than August 15, 1914. This, in the court's opinion, was not done."

[1, 2] In order for plaintiff to be entitled to judgment, it was necessary that he show in himself title superior to that under which defendant claimed, and, defendant being in possession, there was a presumption of title in him, authorizing a recovery, in this character of a suit, against persons failing to make an affirmative showing of title. *Bogges v. Allen*, 56 S. W. 195, affirmed in *Allen v. Bogges*, 94 Tex. 83, 58 S. W. 833; *Kirby v. Boaz*, 41 Tex. Civ. App. 282, 91 S. W. 642; *Allen v. Long*, 80 Tex. 261, 16 S. W. 43, 28 Am. St. Rep. 735; *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 848. Appellant cites us to article 5423, 3 *Vernon's Sayles' Texas Civil Statutes*, which article provides for reinstatement of purchasers' rights, where the rights of no third person have intervened, and urges that the defendant has not shown himself entitled to reinstatement under the terms of this article.

[3] In order for plaintiff to prevail in this suit, it was incumbent on him to show, not only that an award of the land had been made by the general land office to him, but that the statutory requirements as to a forfeiture had been complied with by the gen-

eral land office prior to said award. Article 5423, supra, reads in part, as follows:

"If upon the 1st day of November of any year any portion of the interest due on any obligation remains unpaid, the commissioner of the general land office shall indorse on such obligation, 'Land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser; and thereupon said land shall thereby be forfeited to the state without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter or any future law."

To establish a forfeiture it was necessary to show at least a substantial compliance with the requirements of the statute concerning forfeitures, and a failure to establish any matter, act, or condition, required or provided would fall short of the necessary proof.

[4] The statute, requiring an entry of forfeiture to be made, both on the obligation of the grantee and in the account kept with the purchaser, if proof should fail to show that either of these entries had been made, under the present law, no legal forfeiture would follow. *Comanche County v. Brightman*, 62 S. W. 978; *Brightman v. Comanche County*, 94 Tex. 599, 68 S. W. 857; *Davis v. Yates* (writ denied) 133 S. W. 281; *Anderson v. Neighbors*, 94 Tex. 269, 59 S. W. 543; *Chambers v. Robison*, 179 S. W. 123. In the last-cited case, the Supreme Court, in an opinion by Chief Justice Phillips, holds the affirmative of the proposition just enunciated, and further states that:

"A usage in the land office, long pursued, of declaring forfeitures for nonpayment of interest by simply making an indorsement on the purchaser's obligation, to which our attention has been directed by the respondents, would be persuasive if the construction of the statute were doubtful. But we regard its provisions as plain."

We will now direct our attention to the state of the evidence with reference to the forfeiture claimed by plaintiff. After both parties had rested, the plaintiff offered, over the objection of defendant, the following certificate from the general land office:

"General Land Office, State of Texas.

"Austin, September 28, 1915.

"I, J. H. Walker, chief clerk and acting commissioner of the general land office of the state of Texas, do hereby certify that the papers, documents and records of said office show: That survey 74, containing 160 acres, B. R. I. R., purchased from the state October 6, 1901, by J. G. Gilmore, and survey 73, B. R. I. R., containing 160 acres purchased from the state by John F. Gilmore, October 10th, 1902, each situated in Young county, Texas, were forfeited August 4, 1914. * * *

"In testimony whereof, I hereunto set my hand and affix the impress of the seal of said office on the day and date first above written. "[Seal.] J. H. Walker, Acting Commissioner."

[5] To the admission of this evidence the defendant objected and preserved a bill of exception thereto, shown in the record. But he does not include in his brief any formal cross-assignment leveled at such action of the court, but contents himself with dis-

cussing such action under what he terms "fourth original proposition" of appellee. While we are not prepared to hold that appellee has presented his exception in such a form as would justify our consideration thereof as against a judgment adverse to him, yet we are of the opinion that the objection urged, to wit, that the certificate offered did not tend to establish the fact of necessary entries having been made in the land commissioners' office, but rather the conclusion or opinion of the chief clerk in the land office that the necessary legal steps to effect a forfeiture had been followed, is well taken, and that the evidence was improperly admitted. The court in his qualification of appellant's bill of exception No. 1, set out above, states:

"There was no evidence of forfeiture except that contained in the certificate of the acting commissioner of the general land office, which was admitted by the court over objection of defendant after the trial."

As it does not affirmatively appear that the court, in rendering judgment, did consider this certificate as establishing the forfeiture claimed, in support of the judgment we can presume that he did not do so. While in this qualification, the court states that the evidence shows that later than August 15, 1914, defendant made application to the general land office for reinstatement, and tendered the interest in arrears, and that said date was prior to the intervention of any rights held by plaintiff.

[6] The evidence showed that the award to plaintiff was made on September 24, 1914, yet, in determining the correctness vel non of the judgment, we are not limited to the reasons assigned by the trial court. Where the judgment is sustained by the pleadings and proof, the judgment (if the cause is tried by a jury) should be affirmed by an appellate court, even though the trial court gave erroneous reasons therefor. 4 C. J. § 2557, says:

"Where a judgment of the court is correct, it will not be reversed on appeal because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reasons therefor. And when it does not affirmatively appear on what grounds the decision was made, it is the duty of the appellate court to sustain the court below, if there was any ground disclosed by the record on which the order could properly have been made. So a decision based on several grounds, one or more of which sustain it, will not be reversed, although some of the grounds are erroneous, at least unless in cases where the ground of decision can be seen to have misled a party to his injury. The ground on which the court below proceeded, it has been held, is not a subject of inquiry in the appellate court. It is the ruling itself, and not the reason therefor, with which the reviewing court is concerned."

See *Railway Co. v. Fowler*, 57 Tex. Civ. App. 556, 122 S. W. 593, and other authorities cited in text from which the above quotation is taken.

[7] In thus holding we do not wish to be understood as concluding that the ground given in support of the judgment, in the

court's qualification of appellant's bill of exception is not supported by the evidence. The defendant Burch did testify as stated, in substance, by the court, that through his attorney at Austin, some time between the 1st and 15th of August, 1914, and prior to September 24th, he did tender to the general land office the money for the interest, and that this tender was refused by said office on the ground that the land had already been forfeited. While the defendant admitted on cross-examination that he personally had never tendered any money to the land office, and only knew that his lawyer had tendered the same by what his lawyer informed him, yet no objection was urged to the testimony because hearsay, nor any motion made to exclude it. Hearsay admitted without objections is not without probative force. *W. U. Tel. Co. v. Hirsch*, 84 S. W. 394; *Thompson v. F. W. & D. C. Ry. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29. In the condition of the record disclosed, we think the court properly considered said testimony as at least tending to show an application by defendant Burch to have his rights reinstated, and a tender of the interest due, but the judgment rendered may be sustained, not only upon this ground, but also because of failure of proof that forfeiture had in fact ever been legally effected.

From what we have said it follows that both assignments must be overruled, and the judgment affirmed.

LANG v. COLLINS. (No. 7851.)

(Court of Civil Appeals of Texas. Dallas. Dec. 9, 1916.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS §302—PROOF OF CLAIMS—SUFFICIENCY.

As regards sufficiency of a creditors' statement of claim and supporting affidavit filed with assignee for benefit of creditors, substantial compliance with the statute is enough.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 888; Dec. Dig. §302.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS §302—PROOF OF CLAIMS—"DISTINCT" STATEMENT.

The requirement of Vernon's Sayles' Ann. Civ. St. 1914, art. 98, for filing with assignee for benefit of creditors by a creditor of a "distinct" statement of claim, means plain, positive, unmistakable, and intelligible, and is satisfied by one that the creditor claims against assignor a certain amount for legal services.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 888; Dec. Dig. §302.]

For other definitions, see Words and Phrases, First and Second Series, Distinct.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS §302—PROOF OF CLAIMS—STATEMENT—"PARTICULAR NATURE" OF CLAIMS.

Within Vernon's Sayles' Ann. Civ. St. 1914, art. 98, requiring filing with assignee for benefit of creditors by a creditor of a distinct statement of the "particular nature" and amount of his claim, "particular" means special, not gen-

eral, and does not require an itemized statement, and "nature" has reference to the kind, quality, sort or species of claim; and it is enough to disclose that it is for legal services.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 888; Dec. Dig. §302.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS §302—PROOF OF CLAIMS—AFFIDAVIT—"OFFSETS"—"CREDITS."

Vernon's Sayles' Ann. Civ. St. 1914, art. 98, requiring a creditors' statement of claims filed with the assignee for benefit of creditors to be supported by affidavit "that there are no credits or offsets that should be allowed against the claim, except as shown by the statement," is satisfied by statement that "all just offsets have been allowed," "offsets" including "credits," which term means payments. "offset" meaning literally to counteract, balance, cancel by contrary claim or sum, and there being no peculiar legal meaning to be attached to the term "offset" as used in the statute.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 888; Dec. Dig. §302.]

For other definitions, see Words and Phrases, First and Second Series, Credits; Offset.]

Appeal from Hill County Court; J. D. Stephenson, Judge.

Action by Walter Collins against W. R. Lang. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Vaughan and J. D. Abney, both of Hillsboro, for appellant. Wear & Frazier, of Hillsboro, for appellee.

RASBURY, J. Appellee in the court below sued appellant, who is assignee of James W. Moore, under a general assignment for the benefit of all accepting creditors, to recover \$350, the amount of his claim against the assignor, Moore, which had been rejected and payment refused by appellant, assignee. Appellant's defense was that the claim was not in compliance with the provisions of article 98, Vernon's Sayles' Civ. Stats., by reason of which appellant was without authority to allow and pay same. Trial was before the court, who rendered judgment for appellee for \$148.60, which was the apportionment to which appellee would have been entitled had his claim been allowed. From such judgment, this appeal is taken.

Appellee's claim and the verification attached thereto is as follows:

"February 15, 1915. James W. Moore, W. R. Lang, Assignee, to Walter Collins, Dr. To amount of account for legal services rendered James W. Moore in district court, and in reference to other matters, up to and including January 16, 1915, \$350.00. * * * I, Walter Collins, being duly sworn, state upon my oath that the above and foregoing account is just, true, and correct, and that all just offsets have been allowed."

The affidavit was followed by the signature of Collins, which was in turn followed by the jurat, signature, and official seal of the officer administering the oath.

[1] The appellant contends that both the statement of the account and the affidavit thereto are wanting in some of the essential

requirements of the statutes. The rule generally and justly applied in the construction of statutes similar to the one involved here is that substantial compliance therewith is sufficient. *Crosby v. McWillie*, 11 Tex. 94; *Walters v. Prestidge*, 30 Tex. 66; *Hughes v. Potts*, 39 Tex. Civ. App. 179, 87 S. W. 708; *First State Bank, Teague, v. Hadden*, 158 S. W. 1168.

[2] The first contention is that the claim is insufficient because it is not, in the language of the statute, "a distinct statement of the particular nature and amount of" the claim. The statute does provide for such a statement. The substance of the statement or claim under discussion is that the assignor, James W. Moore, is due appellee \$350 for legal services rendered in the district court, and in reference to other matters. Is the information so disclosed a "distinct statement of the particular nature and amount" of the claim? We think so. "Distinct" is defined as that which is "plain, positive, unmistakable, intelligible." Statement is defined as "a formal embodiment in language of facts or opinions; a narrative; a recital." The claim, to repeat, is a statement by appellee that he claims against the assignor, James W. Moore, \$350 for legal services. Thus it is plain, positive, unmistakable, and intelligible that appellee claims \$350 for legal services. No more is meant by the ordinary import of the words used. Accordingly we conclude that the statement of the claim was in such respect sufficient.

[3] The next inquiry is: What is meant by "particular nature" of the claim? Particular, as used, means special, not general, etc. "Nature," as used, obviously has reference to the kind, quality, sort, or species of claim, whether for legal services or a claim arising on contract, or a promissory note, etc. Our Supreme Court, in construing the meaning of "the nature of plaintiff's demand" as contained in what is now article 1853, Vernon's Sayles' Civ. Stats., and which regulates what notice shall be given in the citation served upon defendants, held the provision had reference to the "character or controlling characteristics" of the demand. *Pipkin et al. v. Kaufman & Runge*, 62 Tex. 545. Thus, when the claim in this proceeding set out that it was for services it was a general statement thereof, but when it went further and disclosed that it was for legal services, it was, within the meaning of the statute, particularized, and hence became a particular statement. It may be argued that by particular statement was intended an itemized statement. But we think the better conclusion is that, had the Legislature so intended, it would have voiced such intention in words more apt than those used. The obvious purpose of the statute is to require claimants to furnish the assignee notice of the amount and nature of the creditors' claim, in order that he may independently

or with the assistance of his assignor determine its justness, etc.

[4] The second contention is that the claim is insufficient for the reason that the affidavit thereto fails to recite "that there are no credits or offsets that should be allowed against the claim, except as shown by the statement." The statute does provide for the quoted language. In lieu thereof the affidavit in the instant case recites "that all just offsets have been allowed." The precise question then is: Does the omission of the term "credits," the other omitted words being clearly immaterial, render the affidavit fatally defective? In *Walters v. Prestidge*, supra, an early case, which was based upon the still earlier case of *Crosby v. McWillie*, 11 Tex. 94, it was ruled, in effect, that since words are used to express ideas, any language which conveys the meaning of those used in the statute will be sufficient. In that case the term "credit" was used in the affidavit, while the statute also required the use of the term "offset." Incidentally the identical words are required by the statute we are discussing. The court said that the term "credits" "in its most comprehensive signification" did not include offset, and hence the affidavit was defective. The analogy is that, had the term used comprehended as much as the one omitted, the statute would have been satisfied. Then does the term "offsets," in its most comprehensive signification, embrace credits? If it does, the affidavit under discussion is sufficient. "Credits," in its narrow or bookkeeping sense, is opposed to "debts," and may be said to be a payment on account as shown by the creditors' books. In the larger sense, as sometimes used in tax laws, etc., it includes, by some authority at least, things incorporeal, such as the right to demand and recover a sum of money or other thing in possession. 11 Cyc. 1189. "Offset" means literally "to counteract, balance, cancel by contrary claim or sum." Century Dictionary. Then, when appellee stated in his affidavit that all just offsets had been allowed, the effect was to say under oath that every claim held against him by appellant which would counteract, balance, or cancel appellee's claim had been allowed, and conveyed not only the same idea that would have been conveyed by the use of the term credits, but a great deal more, because "credits," as employed in the statutes, as said in *Walters v. Prestidge*, supra, means payment, which is surely comprehended within the definition of "offset." There is no peculiar legal meaning to be attached to the term "offset" as used in the statute, as might be argued in reference to the remedy of offset provided for in our practice acts, in case that remedy and its application to a given state of facts was an issue.

Believing that the affidavit was in substantial compliance with the statute, the judgment is affirmed.

LEONARD v. KENDALL et al. (No. 7639.)

(Court of Civil Appeals of Texas, Dallas, Dec. 2, 1916. Rehearing Denied Jan. 6, 1917.)

1. APPEAL AND ERROR — 179(3) — ASSIGNMENTS OF ERROR—DIRECTIONS OF VERDICT.

A peremptory instruction for plaintiff, where the defenses were limitations and fraud, serves as basis for assignments of error raising those issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1187; Dec. Dig. — 179(3).]

2. CONTRACTS — 313(2) — ANTICIPATORY BREACH—ADOPTION OF RENUNCIATION.

There is not an anticipatory breach of contract by one of the parties renouncing it before time for performance, but only on the other party adopting such renunciation and treating the contract as at an end except for purpose of action for damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. — 313(2).]

3. CONTRACTS — 313(2) — ANTICIPATORY BREACH—RENUNCIATION.

For the person holding a deed for delivery to state to the vendee, before the time for performance, that under instructions from the vendor he refused to deliver, is not such an unconditional declaration as to amount to a renunciation of the contract, and so serve as a basis for an anticipatory breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. — 313(2).]

4. CONTRACTS — 171(2)—ENTIRE OR SEVERABLE.

Defendant's contract to convey land to K., and on completion of the sale to pay plaintiff a commission for it, is divisible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 756; Dec. Dig. — 171(2).]

5. BROKERS — 63(1)—RIGHT TO COMMISSIONS — CONTRACT.

Under contract of defendant to convey land to K. and on completion of sale to pay plaintiffs a commission for negotiating it, right to commission is not necessarily dependent on a conveyance; a broker being entitled to commissions if he secured a customer ready, able, and willing to purchase on the authorized terms, which cannot be defeated by refusal of the principal to convey or by failure of his title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. — 63(1).]

6. BROKERS — 63(1)—CONTRACT FOR COMMISSIONS — ANTICIPATORY BREACH — RENUNCIATION.

As regards anticipatory breach of vendor's contract to pay brokers their commission contained in contract to convey land to the purchaser, it is not a renunciation thereof for the vendor to refuse to convey to the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. — 63(1).]

7. BROKERS — 63(1) — CONTRACT — ANTICIPATORY BREACH—ACCEPTANCE OF RENUNCIATION.

Any renunciation by vendor of contract to convey is not accepted, so as to result in an anticipatory breach, entitling broker to sue vendor for commissions which were payable when conveyance was made, by purchaser bringing suit for specific performance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. — 63(1).]

8. LIMITATION OF ACTIONS — 46(7)—ACCRUAL — ANTICIPATORY BREACH OF CONTRACT.

There never having been acceptance of any renunciation by vendor of contract to convey and pay commissions, limitations do not, on the theory of anticipatory breach, commence to run against action for commissions till time fixed in contract for payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 246; Dec. Dig. — 46(7).]

9. BROKERS — 86(7) — ACTION FOR COMMISSIONS—FRAUD—EVIDENCE.

Mere statement of vendor that the property was worth more than the contract price is insufficient for submission of the defense to action for commissions of fraud of the broker in inducing her to sell at less than its value.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116, 117; Dec. Dig. — 86(7).]

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by J. S. Kendall, Jr., and others against Mrs. M. L. Leonard. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. H. Atwell, of Dallas, for appellant. Dabney & Townsend, of Dallas, for appellees.

RASBURY, J. Appellees in the court below sued appellant for \$2,500, alleged to be due appellees for services rendered appellant in the sale of certain real estate. Appellant's defense, necessary to detail, was that the action was barred by the four-year statute of limitation, and that appellees were not entitled to recover because of fraud, in that the appellee Kendall, in whom she reposed confidence, deceived her into believing that her property was of the value of \$100,000, while in truth its value was \$150,000, thereby enabling said Kendall to buy same himself while pretending to represent another and also collect for his said firm a commission. There was trial, and at conclusion of the evidence the court directed peremptory verdict for appellees, which was returned; and upon which judgment was rendered accordingly for said sum, with accrued interest. From such order this appeal is taken.

The substance of the facts essential to a disposition of the appeal are these: On November 12, 1909, appellant owned an improved lot in the city of Dallas. On that day appellant and appellee J. S. Kendall, Jr., agreed in writing that appellant would sell and said appellee would purchase the property described for \$100,000, of which sum \$1,000 was paid when the contract was executed. The sale was for part cash and part on credit, the cash payment to be \$25,000, and the contract set out in detail the amount of cash and the notes to be given in evidence of the unpaid part and how same was to be secured. The contract also contained recitations with reference to the title and what the abstract delineating same should disclose, and provided that deeds, etc., consum-

inating the sale should be executed within 30 days, except that in event the abstract to be furnished by appellant should fail to disclose good title appellant was entitled to an additional 30 days in which to perfect same, failing in which the contract was to be void and the \$1,000 paid by appellee Kendall to be repaid him. The contract was executed in duplicate, one copy being retained by Kendall and the other by appellant, the \$1,000 being delivered to J. W. Thompson, appellant's attorney. The contract also provided that upon completion of the sale appellant would pay Hann & Kendall \$2,500 commissions for their services in negotiating the sale. On the day of the execution of the contract Kendall transferred same to S. W. King, Jr., in consideration of \$1,000; Kendall acknowledging receipt of the money and King accepting the transfer by written addenda upon the contract. On the following day, or November 13, 1909, appellant and S. W. King, Jr., to whom appellee Kendall had transferred the contract, addressed and jointly signed a letter to American Exchange National Bank, inclosing a deed from appellant to King for the lot which we have described, also check for \$24,000, the balance on the agreed cash payment, six notes representing the deferred payments and a deed of trust, all in conformity with the preliminary contract, all being properly signed and acknowledged and accompanied by the explanation that it was agreed between appellant and King that the bank should hold all in escrow under the provisions of the preliminary contract with Kendall until examination and approval of the title, at which time the deed was to be delivered to King, \$24,000 and the notes and deed of trust to appellant, and the other provisions of the contract assigned to King to be observed. Upon the letter was an addenda signed by appellant directing the bank to pay Hann & Kendall \$2,500 commissions out of the cash deposited with it upon the consummation of the transaction. By successive agreements, taking the form of joint letters addressed to the bank signed by appellant and King and transmitted to the bank through the agency of Hann & Kendall, it was agreed that appellant should have 30 days from January 12, 1910, or until February 12, 1910, in which to perfect her title to the property so sold. The bank assumed the obligation contained in the several agreements. Mr. H. H. Smith, assistant cashier of the American National Exchange Bank, had charge of the transactions we have detailed for the bank. He testified that appellant, subsequent to the transactions we have detailed, notified the bank not to deliver the deed, etc. Also that King and his attorney on February 2, 1910, demanded possession of the deed, which was refused, and that he had then been notified by appellant not to deliver them, and that while his memory for dates was poor he fixed February 2, 1910, as

the day King called by the date of a letter from the bank's attorney whom it had consulted concerning the duty of the bank, although he says the date could have been as late as February 9, 1910. However, it does appear from other evidence that King sued appellant for specific performance of the contract to convey on February 3, 1910. After the termination of the suit for specific performance (*Leonard v. King et al.*, 164 S. W. 1110), which sustained King's right to a conveyance of the property, the witness Smith, who in the meanwhile had been in said proceeding appointed receiver of the property, delivered the deed to King and the money, notes, and deed of trust to appellant. He did not pay Hann & Kendall the \$2,500 commissions. It appears from the testimony of Townsend, who was King's attorney, that when he and King called upon Smith for the papers he did inform them that appellant had instructed him not to deliver same, but that Smith did not advise them that appellant intended to repudiate her agreement to convey. Townsend also testified that his purpose in filing suit on February 3, 1910, was to have it pending when the contract expired on February 12, 1910. The instant suit was commenced February 9, 1914.

Appellant testified that appellee Kendall made her successive offers for her property, beginning with an initial offer of \$50,000 and ending with a final offer of \$100,000 which she accepted, after conferring with her attorney, J. W. Thompson, and being advised by him to do so, and thereafter signed the contract which we have detailed. She further testified when it was proposed to make the contract of sale run in favor of Kendall she inquired why and the explanation was made that the purchaser King was out of town and that it could in no event make any difference to her as long as she received the \$100,000. She acquiesced and the contract was signed. She also testified that she would not have signed the contract or agreed to pay Hann & Kendall \$2,500 commission had she known she was selling to Kendall, as she believed all the time that the sale was to be to King. No evidence, however, was introduced relating to the actual value of the property at the time it was sold. Appellant's testimony as to when she refused to "go ahead," as she puts it, with the contract was substantially the same as that of the witness Smith.

[1] Appellant's brief presents six assignments of error accompanied by various propositions. To any consideration of the assignments appellee objects on the ground that each fails to comply with the rules. There are in the final analysis of the case but two issues presented by the record, one being whether the right to recover the commissions agreed to be paid appellee was barred by the four-year statute of limitation, the other whether the case should have been

submitted to the jury on the issue of fraud in procuring appellant to sell her property for an amount less than its value. We think the action of the court in peremptorily instructing verdict for appellee could serve as a basis for raising both issues, and that there is among the assignments those which present those issues with reasonable certainty under the rules. We accordingly overrule the objections.

[2] We then come to a discussion of the first question. Appellees' cause of action was for debt and clearly one "evidenced by or founded upon" a contract in writing, and hence was not barred until four years after the cause of action had accrued. Article 5688, Vernon's Sayles' Civ. Stats. As disclosed by the facts we have recited the contract for the sale of appellant's land was to be performed on February 12, 1910, at least each party could await that day for performance, and neither could enforce an earlier involuntary performance. As a consequence appellees could maintain a suit thereon for their commissions at any time within four years thereafter or until February 12, 1914. Appellant, in effect, concedes the rule to be as we have stated it, but asserts that appellant renounced the contract to convey the land on February 2, 1910, at which time appellees' cause of action for commissions accrued and the statute was set in motion. The rule invoked is a well-settled one and is controlling in cases where applicable. The inquiry then is: What is the rule of renunciation in such cases, and what application has it in this proceeding in view of the facts related? The contract being an executory one, and the time for performance not having arrived, when it is claimed appellant renounced the contract, the precise issue presented is that of an anticipatory breach thereof as distinguished from one during performance or one when performance was due. The controlling American rule in such cases is said to be the English rule, which is:

"That a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it. * * * The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation." Elliott, Contracts, vol. 3, §§ 2027, 2028.

The rule is similarly declared in 9 Cyc. 635, 636, 637, as well as in 6 R. O. L. §§ 384, 385. It is also the rule in this state. Kilgore v. Northwest Texas Baptist Educational

Ass'n, 90 Tex. 139, 37 S. W. 598. In the case cited it was said, in effect, that the unconditional declaration by one party that he would abandon a contract yet to be performed was not a breach of it, but only afforded the other party the opportunity of electing to accept such renunciation.

[3] The rule being then as we have stated it, what facts are disclosed by the record in this case that makes the rule applicable? The facts are that Smith, who was the custodian of and held in escrow the deed, notes, and deed of trust executed by appellant and King, respectively, advised King and his attorney on February 2, 1910, that, acting under instructions from appellant, he refused to deliver such instruments. We think such refusal far short of the unconditional declaration held by our Supreme Court to be necessary in such cases, particularly so when it is considered that the time for performance had not arrived, which was the earliest moment when King had the right to demand the instruments held by Smith.

[4-6] But conceding that the refusal to deliver the several instruments to King and his attorney in order that they might, as between themselves, close the matters, was in effect a renunciation, there is in the record a total absence of evidence tending to show that appellees elected to accept or act upon such renunciation, so far as relates to their cause of action. From the time of the execution of the contract to convey by appellant and King, wherein appellant agreed to pay appellees' commissions, no act or declaration by appellees is shown upon which a holding can be based that appellees elected to abide by or act upon the renunciation. Complete silence has been maintained by appellees on that issue since the refusal to deliver the deeds, etc. But it is further contended that King did, on February 3, 1910, elect to accept the renunciation made by appellant, and that his election set the date of the accrual of appellees' cause of action. We believe the contention untenable and without support in the rule invoked. The contract was to convey the property to King and to pay appellees' commissions for securing a customer, who would accept same upon the terms therein recited, and was hence a divisible contract. Elliott, Contracts, vol. 2, § 1543. By the contract appellees' right to commissions was not necessarily dependent upon a conveyance by appellant to King, since by the rule in such cases, which is projected as matter of law into such contracts, the broker is entitled to his commissions whenever he secures a customer ready, able, and willing to purchase upon the authorized terms, which cannot at least be defeated by the refusal of his principal to convey or the failure of his principal's title. Accordingly a refusal by appellant to convey to King cannot be said to be a direct or implied renunciation of her contract to pay appellees' com-

missions, since such declaration is insufficient to support such holding in reference to an independent provision and obligation thereof.

[7] Further, there never was in law on the part of King an acceptance of the renunciation by appellant. As we have seen from the rule stated the renunciation by appellant, if it was a renunciation, did not ipso facto breach the contract. To effect a breach it was necessary for King to have acted upon or accepted appellant's renunciation. The form of acceptance in this proceeding would ordinarily have been a suit for the damages sustained by him as a consequence of the renunciation. This King did not do. On the contrary, he proceeded in affirmance of the contract by suit for specific performance, which it would be wholly illogical to construe into an election to breach the contract. The most that can be made of the fact that King commenced his suit before the time of performance is that it was prematurely brought, which fact is of no controlling importance in this case. The explanation of King's attorney is that he sued when he did in order that the suit might be pending when the contract expired. It has been said in connection with such explanation that:

"The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests." 9 Cyc. 636.

It may be that it was for the purpose of keeping open and preserving unimpaired the efficacy of his rights under the contract to convey that induced King to sue, even though prematurely. Such a holding is sustained by the testimony of his attorney, and is more in consonance with law than it would be to hold that a suit in affirmance of the contract was in fact one in renunciation thereof.

[8] It thus results that there was never at any time an acceptance by either appellees or King of appellant's breach of the contract, and that the contract itself controls in reference to when the cause of action accrued, which by our statutes was February 12, 1910, and, this suit having been commenced before the expiration of four years thereafter, it was not barred.

[9] On the issue that appellee Kendall deceived appellant as to who was purchasing the property and as to the value of same and induced her to sell it for less than its value, we can only say that the issue is without support, even in her own testimony. By her admissions she knew that the contract to convey was with Kendall for the benefit of another, and that she was to pay him a commission for his services. On the day aft-

er signing the contract with Kendall she executed deed to King, the one she supposed was to purchase the property. She says in her testimony that the property was worth more than \$100,000, but fails to give her own opinion as to its value. Notwithstanding that evidence as to the real value of the property was obviously obtainable from other sources she failed to introduce it. So that such issue is totally lacking any support from the evidence and the issue as a consequence is not raised in this court.

For the reasons stated and because the record fails to disclose reversible error, the judgment is affirmed.

BARBIAN v. GRANT et al. (No. 8468.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 18, 1916.)

1. LIMITATION OF ACTIONS ⇨37(2)—SUIT FOR RESCISSION AND DAMAGES.

Where the action for equitable relief of a party induced by deceit to buy lands is not barred by limitation, the court will not apply differing standards of limitation to the right to rescission and the right to damages, but, upon establishment of the material allegations showing plaintiff's right to rescind, will proceed to administer all relief, legal and equitable, to which plaintiff may show himself entitled, such as a judgment for payments made before discovery of the fraud, the value of the property defendants may have placed beyond their power to restore, etc.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 183; Dec. Dig. ⇨37(2).]

2. VENDOR AND PURCHASER ⇨45—RESCISION—QUESTION FOR JURY.

In an action for rescission by a party who purchased realty, the fact that defendants denied the fraud charged to them, and denied making the representations, merely presented a conflict in the testimony which it was the jury's province to determine.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 77, 78; Dec. Dig. ⇨45.]

3. VENDOR AND PURCHASER ⇨33—RESCISION—FRAUD—STATEMENTS MADE ON AUTHORITY OF ANOTHER.

The fact that a seller of land, in describing it to the buyer, merely repeated what another had told him of it, did not relieve him of liability to the buyer for rescission if the repeated statements amounted to a representation of the character of the land that induced the buyer to take it, exchanging his land and giving notes therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 88, 40-43, 66; Dec. Dig. ⇨33.]

4. VENDOR AND PURCHASER ⇨123—PARTIES INTERESTED AS BUYERS—QUESTION FOR JURY.

In a suit for rescission by the buyer of realty who gave notes and a conveyance of his land, whether certain defendants were jointly interested in and participated with another defendant in the acquisition of plaintiff's property held for the jury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 221-227; Dec. Dig. ⇨123.]

5. PRINCIPAL AND AGENT —171(5)—ACCEPTANCE AND RETENTION OF FRUITS OF FRAUD—SALE OF REALTY.

Where two defendants in a suit for rescission by the buyer of realty participated with another defendant in the acquisition of plaintiff's property, they could not retain the fruits of the other defendant's fraud, if any, on the ground that individually they made no representations, since the other defendant was their agent, and an acceptance and retention of the fruits of his fraud subjected them to liability.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 649; Dec. Dig. —171(5).]

6. VENDOR AND PURCHASER —118—RESCISSIO—TENDER BACK OF LAND RECEIVED—FORFEITURE BY STATE.

Where plaintiff was induced to purchase a tract of state school land by fraud, and such land was not forfeited to the state for failure to pay interest until after the institution of plaintiff's suit for rescission, wherein a reconveyance was tendered defendants, the forfeiture by the state was no defense to the action.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 210, 211; Dec. Dig. —118.]

7. EVIDENCE —114—RELEVANCY.

In a suit to rescind a purchase of realty, a defendant should have been required to answer the question if it was not true that the \$6,000 consideration mentioned in the deed to him for certain land was not in fact paid by a transfer or conveyance of a certain right in a maize header patented to him, and in which the two other defendants owned a certain interest at the time, since an affirmative answer would have tended to support plaintiff's allegations and evidence that the other two defendants were interested with the witness in the land conveyed to plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125-132; Dec. Dig. —114.]

8. EVIDENCE —230(1)—ADMISSIONS.

In a suit to rescind a purchase of land for fraud, testimony that a defendant stated in the presence of another defendant that the land was rich and good agricultural land, and was north of a certain town which was not the case, was admissible as in the nature of an admission against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835, 840, 845, 851; Dec. Dig. —230(1).]

9. WITNESSES —379(1)—CONTRADICTION.

The conversation was also admissible as contradictory of defendant's testimony on the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1247; Dec. Dig. —379(1).]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Suit by Peter Barblian against W. C. Grant and others. From a judgment for defendants, plaintiff appeals. Reversed, and remanded for new trial.

J. W. Moffett and Eugene De Bogory, both of Abilene, for appellant. Cunningham & Oliver, B. A. Cox, and Scarborough & Davidson, all of Abilene, for appellees.

CONNER, C. J. This is an appeal from a judgment in response to an instructed verdict in a suit instituted by appellant, Peter Barblian, against appellees, W. C. Grant, John Wiltshire, and W. B. Wiltshire, for rescission. As alleged, Peter Barblian on the

2d day of December, 1911, conveyed to the defendants 20 acres of land in Taylor county of an agreed value of \$800, and 9 certain promissory notes aggregating \$3,165, executed by one T. H. Barksdale and secured by a vendor's lien upon 120 acres of another survey of land situated in Taylor county, and also gave 16 promissory notes executed by himself aggregating the sum of \$3,100, with a credit thereon of \$1,550, all of which was given by him in exchange for a tract of 471 acres of state school land situated in Lamb county, Tex.; the plaintiff as part of said transaction agreeing to assume and pay to the state of Texas the interest and unpaid purchase money due upon said 471-acre tract of land.

The plaintiff alleged, in substance, that at the time of said exchange the title to said 471 acres stood in the name of the defendant W. C. Grant, but that, in fact, all of the defendants alike were partners and interested in it together; that the defendants at and before said exchange of properties represented the said 471 acres of land to be good, level agricultural land and situated about six miles north or a little northeast of the town of Olton, the county seat of Lamb county, and of the reasonable market value of \$12.50 to \$15 per acre bonus over and above the state debt of \$5.25 per acre. It was charged that the plaintiff was not acquainted with the location and quality of the particular section of land named, but was acquainted with the section of Lamb county in which said land was represented to be, and that he fully trusted in and believed the defendants' said representations, but that, in truth and in fact, they were false and fraudulent. It was further alleged that in truth said 471 acres of land were situated some 10 or 12 miles south and west of said town of Olton and in the sand hills, where lands were of little or no substantial market or other value. The plaintiff prayed for a cancellation of all the transfers mentioned, and sought to recover the property that had been so conveyed by him in exchange for said 471 acres of land, together with some \$300 of interest and purchase money that he had paid to the state since said exchange. He further prayed in the alternative that, if it should be found that any or all of said property had been so disposed of as that a rescission and recovery could not be had, he then be permitted to recover his damages, which were laid in the sum of \$3,000.

The defendant answered by general and special exceptions, by general and specific denials, including a verified denial of the partnership alleged.

The court overruled all demurrers and exceptions, except one which will be hereinafter noticed, and, after the introduction of the testimony, gave the peremptory instruction to the jury to find for the defendants.

Appellant first assigns error to the action of the court in sustaining the following exception:

"This defendant specially excepts to that part of plaintiff's petition in which he asks for damages because the same is barred by the two-year statute of limitation."

As stated, the conveyances which appellant seeks to rescind were executed on the 2d day of December, 1911, and this suit to rescind, as shown by the record, was not instituted until the 7th day of November, 1914. It thus appears that about three years elapsed between the date of the alleged fraud and the institution of the plaintiff's suit. The plaintiff, evidently with the view of avoiding any attempted defense by limitation, alleged that the fraud specified in his petition had not been discovered by him until on or about the 29th day of September, 1914, setting forth certain circumstances, not thought to be necessary to mention, as a reason why he had failed to discover the fraud earlier. In 25 Cyc. 1181, it is said:

"As a general rule, where the statutes do not otherwise provide, a right of action at law to recover damages for a fraud accrues, and the statute begins to run when the fraud is successfully consummated, not when it is discovered. So, in cases where a purchase of property is induced by fraud, the statute begins to run against the purchaser's right of action from the time when the sale is completed. * * * But the equitable rule that the statute runs from the discovery of the fraud applies to actions of deceit in those jurisdictions where that rule has been adopted by common-law courts, or has been adopted in statutes applicable to actions at law."

We have found among our own decisions no case in which the distinction made in the text from which we have quoted has been applied. Most of the cases that we have examined have been cases where a rescission of conveyances or annulment of decrees were sought, and they all recognize the equity doctrine that fraud will prevent the running of the statute in favor of the party who perpetrated the fraud until discovered, or by the use of reasonable diligence it ought to have been discovered. See *Brown v. Brown*, 61 Tex. 45; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 998; *Hodges v. Hodges*, 27 Tex. Civ. App. 537, 66 S. W. 239; *Calhoun v. Burton*, 64 Tex. 510; *Smalley v. Vogt*, 166 S. W. 1; *Mitchell v. Simons*, 53 S. W. 76. The last two cases cited will be found, we think, on examination to be cases where the plaintiffs merely sought a recovery for damages because of the alleged frauds, and hence would be maintainable as actions for deceit at law. These two cases, however, as do the others cited, proceed upon the assumption that the statute of limitations will not begin to run until the fraud was discovered, or by the exercise of reasonable diligence might have been discovered. So that we would think it reasonably safe to disregard the distinction suggested by the reading from Cyc. and assume, in this state, where distinctions between law and equity are disregarded in the

pleadings, to hold that in cases of fraud limitation will not begin to run as against the injured party until the fraud has been discovered, or until it might have been discovered by the use of reasonable diligence. The reason upon which the ruling of the court under discussion was based does not appear from the record. We infer, however, that it was not so much, if at all, because of any distinction to be made in actions for rescission and in actions for damages because of deceit, but rather on the ground that the facts alleged by the plaintiff as his excuse for not having earlier discovered the fraud were wholly insufficient. If we deemed the question material, we perhaps would be inclined to agree with this view of the plaintiff's petition. *Bass v. James*, 83 Tex. 110, 18 S. W. 336; *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970; *Gordon v. Rhodes & Daniel*, 102 Tex. 300, 116 S. W. 40; *Id.*, 117 S. W. 1023. But even in those states where the statute runs from the commission of the fraud it is held that, "where purely equitable relief is sought aside from, or in addition to, a mere money judgment, the statute runs only from the date of the discovery." See 25 Cyc. 1178. And in the case before us the gist—the very essence—of appellant's case was for rescission, a purely equitable relief, and against which, under our authorities, the statute of limitation does not begin to run until four years. Revised Statutes, art. 5690; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *Groesbeck v. Crow*, 91 Tex. 74, 40 S. W. 1023.

[1] The plaintiff's action for rescission therefore not having been barred by limitation, the court will not apply two differing standards of limitation, but upon the establishment of the material allegations showing plaintiff's right to rescind will proceed to administer all relief, both legal and equitable, to which the plaintiff may show himself entitled, such as a judgment for payments made to the state before discovery of the fraud, the value of such property, if any, as defendants may have placed beyond their power to restore, etc. See *Evans v. Goggan*, 5 Tex. Civ. App. 129, 23 S. W. 854; *Railway Co. v. Hawkins*, 163 S. W. 132; *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *McCord v. Nabours*, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144.

Appellant also assigns error to the action of the court in giving the peremptory instruction, and we think the assignment must be sustained. A consideration of appellees' evidence renders it very plain that it tends to prove his allegations of fraud and misrepresentations relating to the character and location of the 471 acres situated in Lamb county. Indeed, appellees' testimony, at least apparently, makes a clear case for rescission.

[2, 3] The fact that the defendants denied the fraud and denied making the representations charged merely presented a conflict

which it was the province of the jury to determine. Nor does the fact that appellee Grant, in describing the land, merely repeated what another had told him of it, relieve him, if the statements so repeated amounted to a representation of its character that induced the appellant to make the exchange. *Boles v. Aldridge*, 175 S. W. 1052. Nor do we think it can be said that, as a matter of law, the appellees John and W. B. Wiltshire are to be discharged under the evidence. True, neither appellant nor any other witness testified that either of the Wiltshires made any representation as to the character of the land, but it seems undisputed that appellee John Wiltshire assisted Grant in negotiating the exchange, and there was evidence tending to show that he was present and heard the representations made by Grant and made no denial of their truth. Indeed, according to the testimony, he seems to have been the principal speaker in the negotiations, and while he stated that he knew nothing of the character of the land except what the appellee Grant had said, yet appellant's testimony as well as an ex parte deposition of the appellee Grant, and perhaps other circumstances, indicated that the Wiltshires were interested together with Grant in the land, and it is undisputed that they received the vendor's lien notes secured by the 120 acres of land. They also received part of the series of notes executed by the appellant. They testified that these things were purchased from Grant, contending that in part payment therefor they extinguished an indebtedness of Grant's to them. They yet hold at least two of the notes executed by appellant.

[4, 5] Through foreclosure proceedings they yet possess the 120 acres of land upon which the nine Barksdale notes rested, and under all of the circumstances we think it was for the jury to say whether the Wiltshires were jointly interested in and participated with the appellee Grant in the acquisition of appellant's property. If they did, they cannot retain the fruits of appellee Grant's fraud, if any, on the ground that individually they made no representations. In that state of the case it must be held that Grant was their agent, and that an acceptance and retention of the fruits of his fraud cannot be upheld without incurring liability. See 31 Cyc. 1235. It is there said:

"Under the doctrine of equitable estoppel two persons may find themselves charged with all the consequences of agency as to third persons, when as between themselves there exists as a matter of fact no agency at all, or no agency for the particular purpose in question. Strictly speaking, agency by estoppel should be limited to cases in which there is no real, but only an apparent, agency; for, when an actual agency is shown, whether by express or implied appointment, it is quite unnecessary to invoke the aid of estoppel. Practically, however, this distinction is not clearly made, and it is often impossible from the facts brought out by the evidence to determine whether the agency is actual or ostensible. In most cases the distinction would not affect the rights of the parties,

but, as elsewhere pointed out, occasionally a case may turn on whether the agency is implied or is one by estoppel. The doctrine of estoppel involves apparent or ostensible agency, which exists where the principal intentionally, or by want of ordinary care, induces third persons to believe another to be his agent, although he did not in fact employ him. As to third persons the distinction between actual and apparent or ostensible agency is unimportant, as the liability of principal and agent is the same in either case, but as between the parties themselves, of course, the ostensible agent is no agent at all. Apparent or ostensible agency is really agency by estoppel, and it is more strictly accurate to say that liability arises for the acts of such a so-called agent, not because there is any agency, but because the principal will not be permitted to deny it."

See, also, 20 Cyc. 85.

We are therefore of the opinion that because of the error of the court in giving the peremptory instruction the judgment must be reversed.

[6] In view of another trial we think it should also be said that a forfeiture by the state, if any, of the Lamb county school lands for failure to pay interest, etc., constitutes no defense to the plaintiff's action if the forfeiture did not occur until in August, 1915, after the institution of the plaintiff's suit wherein a reconveyance of the property was tendered to the defendants. A tender previous to the institution of the suit was alleged, and one was certainly made in the plaintiff's petition, and if the land was then in good standing and not subject to forfeiture, and the plaintiff then in an attitude to reconvey and place the defendants in statu quo, his right to rescind existed, and if thereafter the interest was unpaid and the land became subject to forfeiture, the defendants at least knowingly participated in the neglect, and hence cannot interpose the failure as a defense to the action. *Culbertson v. Blanchard*, 79 Tex. 486, 15 S. W. 700.

[7] We think also that the appellee Grant should have been required to answer the question if it was not true that the \$6,000 consideration mentioned in the deed to him for the Lamb county land was not in fact paid by a transfer or conveyance of a certain right or interest in a maize header patented to him, and in which John and W. B. Wiltshire owned a certain right or interest at the time. The bill of exception to the refusal of the court to require the witness to answer this question states that Grant would have answered the question in the affirmative. If so, the answer would have tended to support the plaintiff's allegations and evidence to the effect that the Wiltshires were interested with Grant in the land conveyed to the plaintiff as a result of the negotiations in December, 1911.

[8, 9] So, too, we think the court should have overruled the objections to the testimony of the witness A. Bontke, to the effect that he had a conversation with the defendant W. C. Grant on or about December 1, 1911, in which Grant stated in the presence

of the defendant W. B. Wiltshire that the Lamb county land was rich and good agricultural land and was north of the town of Olton. The conversation with Bontke was admissible as in the nature of an admission against interest and as contradictory of Grant's testimony on the trial.

For the error of the court in taking the case from the jury, it is ordered that the judgment be reversed, and the cause remanded for a new trial.

PANHANDLE & S. F. RY. CO. et al. v. HUBBARD. (No. 1080.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 20, 1916.)

1. LIMITATION OF ACTIONS — 32(1)—NATURE OF ACTION—TORT—DAMAGES TO SHIPMENT.

A petition for damages to an automobile during shipment alleging that the damages occurred in transit and consisted in the loss of a number of the parts and injury to others, stating the reasonable value at destination in good condition, and in the condition in which it did arrive, states an action in tort, not on contract, to which the two-year statute of limitation applies.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 143, 145; Dec. Dig. 32(1).]

2. LIMITATION OF ACTIONS — 119(2)—COMMENCEMENT OF ACTIONS—DELAY IN SERVICE—VACATING.

Where the petition was filed and citation issued some time before the action was barred, but the citation was not sent by plaintiff's attorneys to the sheriff for service for nearly two months, at which time the right of action was barred, the plaintiff must show a bona fide intention to have the process served in time, and a reasonable excuse for not having done so.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 530; Dec. Dig. 119(2).]

3. LIMITATION OF ACTIONS — 199(1)—QUESTIONS FOR JURY—EXCUSE FOR DELAY—SERVICE.

Where a citation was not sent for service until two months after it was issued and after the right of action was barred by limitations, plaintiff's intention to have it served and the reasonableness of his excuse present questions for the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 727; Dec. Dig. 199(1).]

4. CARRIERS — 91—CONVERSION OF GOODS—DEMAND FOR EXCESSIVE FREIGHT.

Where the carrier demands excessive and illegal freight charges and on the refusal of the shipper to pay them declines to deliver the goods, and sells the goods for the charges, there is a conversion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-356; Dec. Dig. 91.]

5. CARRIERS — 191—STORAGE CHARGES—WRONGFUL DETENTION.

A carrier is not entitled to storage charges on goods wrongfully detained by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 878; Dec. Dig. 191.]

Appeal from Hale County Court, W. B. Lewis, Judge.

Action by B. A. Hubbard against the Panhandle & Santa Fé Railway Company and

another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Terry, Cavin & Mills, of Galveston, Geo. Thompson, of Ft. Worth, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for appellants. W. W. Kirk and Y. W. Holmes, both of Plainview, for appellee.

HALL, J. The following statement of the nature and result of the suit is adopted from appellee's brief:

"Appellee, B. A. Hubbard, brought this suit in the county court, August 28, 1915, against appellants, the Panhandle & Santa Fé and the Texas & Pacific Railway Companies, for alleged damages to an automobile shipped by him from Plainview to Weatherford, Tex., on October 7, 1913, consigned to H. G. Gilbert, alleging that the damages occurred in transit, and the damages being the loss of a great number of parts and injury to two parts to the extent of worthlessness; that the reasonable market value at destination in the condition in which the automobile should have arrived was \$700; that the reasonable market value in the condition in which the same did arrive was \$405, and further for conversion of the automobile in the condition in which the same did arrive at destination, the conversion occurring in either one or two ways, viz. the first alleged being that consignee refused to accept the automobile by reason of its damaged condition, and that when plaintiff called at Weatherford to pay the proper freight charges thereon and to receive same the agent of defendants at destination demanded payment of plaintiff excessive freight charges, which he refused to pay, and the same sued for in this instance of conversion being \$405, the alleged reasonable market value of the car at destination at the time of arrival, the second instance of conversion being alleged that thereafter, without the knowledge or consent of plaintiff, the defendants removed the car from destination to Weatherford, thereby converting the same, and the sum sued for in this instance being whatever the reasonable market value of the car might be at destination at the time of such removal as proof might show upon trial, and setting out that freight charges had not been paid, and asking for judgment against the defendants in the sum of \$700, less proper freight charges."

Defendants answered by general demurrer, special exceptions, general denial, plea of two-year statute of limitation; that the shipment arrived at destination as alleged by plaintiff, but that it arrived in the same condition in which it was received by them for shipment; that they had tendered the automobile to the consignee at destination upon his paying freight charges to the amount of \$52.80; that freight charges and demurrage at the time of suit was \$104.40, for which they ask judgment. The answer also tendered the automobile to plaintiffs upon payment of said sum.

The issue of limitation is raised by several assignments. It is shown that the shipment was made from Plainview October 7, 1913, and arrived at Weatherford, its destination, October 12, 1913. The consignee was notified of its arrival October 13, 1913. It was understood that consignee would pay the freight. Appellee testified that he was noti-

fied by appellants' agent at Weatherford about ten days after its arrival there that appellee would not accept the automobile.

The original petition was filed August 28, 1915, and citations were issued the same day. The first regular session of the county court convened September 6, 1915, and the second regular session December 6, 1915. The sheriff of Hale county, where service was made upon the Panhandle & Santa Fé Railway Company, testified that the citation to said company was received at his office October 23, 1915; that he served it October 25, 1915, as appears from the return of the writ; that if it had reached him August 28, 1915, he could have served it on that day; that, according to his recollection, he received the citation from one of appellee's attorneys. The return on the citation served on the Texas & Pacific Railway Company shows that it was issued August 28, 1915, by the county clerk of Hale county, was received by the sheriff of Nolan county, where said company had an agent, October 18, 1915, and executed the same day by service on the local agent of said railway company. It further appears that November 9, 1915, alias citations were issued, and that the one issued to Hale county was returned the same day, duly served; but the one issued to be served on the Texas & Pacific Railway company was not found in the files.

[1] According to the allegations in the petition, plaintiff did not base his action upon the contract of shipment, but endeavored to hold the defendants liable in tort, and therefore the two-year statute of limitation applies to the action. *Elder, Dempster & Co. v. St. Louis & Southwestern Railway Co. of Texas* (Sup.) 154 S. W. 975.

[2] The petition was filed within the two-year period of limitation, and citations were issued the same day. The first question to be considered is: Were they served in time to prevent the bar? The shipment arrived at Weatherford October 12, 1913, and the consignee was notified the next day but refused to pay the freight and accept the automobile on account of its battered condition and because some parts were missing. Appellee's right of action to recover for such damages accrued October 13, 1913. In the absence of a sufficient excuse for the delay in having the first citations which were issued August 28, 1916, served, the action is barred as to all such damages. In regard to that part of appellee's action for conversion, by reason of the demand by the station agent of an illegal amount of freight, the record is not very clear. When the demand was made, and when the proper sum was tendered, is left uncertain, even by the testimony of appellee himself. The evidence of the clerk of the court and the sheriff of Hale county tends to show that the citations were in the hands of appellee or his attorneys between August 28,

1915, and the dates they were received by the sheriffs of Hale and Nolan counties, respectively. Under such circumstances appellee must show a bona fide intention to have the process served and a reasonable excuse for not having done so. *Faires v. Loessin*, 46 Tex. Civ. App. 551, 102 S. W. 924; *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645; *Estes v. McWhorter*, 182 S. W. 887; *Wiggs v. Dooley*, 28 Tex. Civ. App. 61, 66 S. W. 306.

[3] We think in the light of the record these were questions of fact which should have been submitted to the jury, and the court erred in refusing appellants' special charge, requesting such submission. *Gulf, etc., Ry. Co. v. Flatt*, 36 S. W. 1031; *Wood v. Railway Co.*, 15 Tex. Civ. App. 322, 40 S. W. 24.

[4] Where the carrier demands an excessive and illegal freight charge, and upon the refusal of the shipper to pay it declines to deliver the goods and sells them for the charges, it is a conversion. *P. & N. T. Ry. Co. v. Porter*, 183 S. W. 98, and authorities cited.

[5] The wrongful detention of goods by a carrier will defeat its claim for storage. *Sou. Pac. Co. v. Redding et al.*, 17 Tex. Civ. App. 440, 43 S. W. 1061.

What has been said disposes of all the material questions presented, and the remaining assignments are overruled.

Reversed and remanded.

SILVER VALLEY HORSE CO. v. O. V. EVANS & CO. (No. 5698.)

(Court of Civil Appeals of Texas. Austin. Nov. 15, 1916. On Motion for Rehearing, Jan. 6, 1917.)

1. PLEADING \S 248(2) — AMENDMENT — NEW CAUSE OF ACTION.

Where any evidence introduced under appellant's third amendment to its petition could have been offered under its first or second amendment, the same defenses urged against each, the same measure of damages recovered, and a recovery had upon either would have barred a recovery upon the others, no new cause of action is pleaded by the third amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 687; Dec. Dig. \S 248(2).]

2. LIMITATION OF ACTIONS \S 127(13) — AMENDED PLEADING — NEW CAUSE OF ACTION.

Where appellant's original petition to recover damages for appellee's refusal to furnish him with another stallion of equal value in place of one purchased which proved unsatisfactory was filed within four years after the breach of contract, appellant's amended petition, filed more than four years later, alleging the same facts and in addition that appellees were bound to furnish another stallion "of the same kind and breed, and of equal value," which was omitted in the contract by mutual mistake, did not set up a new cause of action, but merely set out the entire contract and implied the facts pertaining thereto, and was not barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 545; Dec. Dig. \S 127(13); Pleading, Cent. Dig. \S 688.]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by the Silver Valley Horse Company against C. V. Evans & Co. Exceptions to amended petition sustained and suit dismissed, and plaintiff appeals. Reversed and remanded.

Hill, Lee & Hill, of San Angelo, and Woodward & Baker, and Critz & Woodward, all of Coleman, for appellant. Snodgrass, Dibrrell & Snodgrass, of Coleman, for appellee.

RICE, J. This suit was brought October 12, 1911, by appellants, plaintiffs below, in the district court of Tom Green county, to recover damages by reason of alleged breach of contract on the part of appellees, and afterwards, on plea of privilege, was transferred to the district court of Tom Green county, where the same was finally tried; appellant alleging that on the 9th of April, 1910, it purchased from appellees for \$1,800 a certain stallion for breeding purposes, the latter guaranteeing that the stallion was a satisfactory and sure breeder, and agreeing that in the event he should prove not to be as represented, that they would furnish appellant another stallion of equal value. Further alleging that the stallion, upon trial, proved worthless for the purposes mentioned, and that it had tendered such stallion back demanding of appellees that they replace him with another stallion of the same kind and breed and of equal value, which they refused to do. Thereafter on November 20, 1911, and on April 22, 1912, respectively, appellant filed its first and second amended original petitions, wherein it set out substantially the same facts, amplifying the same in matter of detail, but pleading the same contract between it and appellees, which it alleged was in writing, setting up the breach thereof by the latter, adding, however, in each that the appellees agreed to take said stallion back and give appellant another stallion of equal value, thereby meaning that if said horse proved unsatisfactory under said contract and agreement, and that if said stallion failed to be as represented, they agreed to take said stallion back and to give appellant another of equal value, thereby meaning another stallion of the same kind and breed and of equal value. Thereafter on December 13, 1915, appellant filed its third amended original petition, which set out substantially the same facts as previously alleged, except that it alleged that the original contract between the parties bound appellees to furnish appellant, in the event said horse proved to be unsatisfactory, another of the same kind and breed and of equal value, which it was averred was omitted from the original contract by mutual mistake.

Appellees addressed special exceptions to the last-named petition, insisting that said pleading set up a new cause of action from that alleged in the amended petitions, which

said new cause of action was not pleaded until four years after it accrued, for which reason it was barred by the statute of limitations.

This exception was sustained, and appellant, declining to amend, the suit was dismissed, from which judgment appellant prosecutes this appeal, urging that the court erred in sustaining such exception, insisting by its proposition thereunder that its third amended original petition only enlarged upon the cause of action theretofore pleaded, alleging more specifically the terms and conditions of the contract of guaranty, the breach of which was the foundation of its cause of action; so that the only question for our determination is the correctness of the ruling of the court upon such exception.

It is always permissible for the plaintiff to amplify and set out more fully the facts upon which the cause of action originally sued upon was based, in order to make the pleading conform to the facts sought to be offered in evidence to sustain it; and this we understand to be the settled law of this state, supported by many adjudicated cases. See *Thouvenin v. Lea*, 26 Tex. 612; *Burton-Lingo Co. v. Beyer*, 84 Tex. Civ. App. 276, 78 S. W. 248; *T. & N. O. Ry. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155; *Cotter, True-love & Co. v. Parks*, 80 Tex. 589, 16 S. W. 307; *Booth v. Houston Packing Co.*, 105 S. W. 46; *Mayes v. Magill*, 48 Tex. Civ. App. 548, 107 S. W. 368; *Green v. Loftus*, 182 S. W. 502; *McWhorter v. Estes*, 175 S. W. 846; *W. U. Telegraph Co. v. Smith*, 146 S. W. 332; *S. A. & A. P. Ry. Co. v. Bracht*, 157 S. W. 269; *W. U. Telegraph Co. v. Smith*, 183 S. W. 1062; *Baker v. Gulf, C. & S. F. Ry. Co.*, 184 S. W. 257, recently decided by this court, not yet officially reported.

The case of *Thouvenin v. Lea*, supra, was one where the plaintiff sued to recover land and the value of certain improvements. The land had been sold under a parol contract, and the plaintiff claimed the value of certain improvements by virtue of a parol agreement that he should be paid for making them. By amendment the plaintiff set out more fully the terms of the contract under which he claimed. To this the defendant pleaded the two-year statute of limitation, which was sustained by the trial court. The Supreme Court, in passing on the question, said:

"Nor should the exceptions to the amended petition, upon the ground that it set up a new cause of action which was barred previous to the filing of the amendment, have been sustained by the court. The cause of action presented in the original petition was the breach of contract in the sale by parol of a tract of land, by reason of which, it was alleged, appellant became liable to pay for the improvements made upon the land. The amended petition merely enlarges and states more fully and accurately the facts with reference to the same contract upon which the original petition was based. It only states an additional stipulation in the agreement between the parties, which was omitted in the original petition. It enlarges, but in no manner contradicts, the allegations previous-

ly made. The very object of an amendment is to supply the omissions of the original pleadings. And it never has been supposed that the statute of limitations would present any impediment to its being done at any time during the progress of the cause. The statute only operates as a bar when it is sought under the name of an amendment to present a new suit."

The case of *Western Union Telegraph Co. v. Smith*, 133 S. W. 1063, was one where plaintiff sued to recover damages from the telegraph company for failing to deliver a death message. The court in that case held that the plaintiff, not having alleged a contract on the part of the company to deliver the message, the demurrer was properly sustained. The same case upon a second trial (146 S. W. 332) announces the doctrine that, although the plaintiff had failed in his original petition to allege a contract with the company to transmit and deliver the message, the amendment setting up the contract and alleging payment of the fees demanded by the company, and which amendment was filed more than two years after the injury occurred, was not barred by the statute of limitation of two years, and did not set up a new cause of action. Mr. Chief Justice Key, in passing upon the question, said:

"We held on the former appeal that the petition then under consideration did not allege that the defendant had entered into a contract, or had otherwise obligated itself to transmit and deliver the telegram referred to. The amended petition cured those defects; but the defendant took the position in the court below that the amended petition was in fact the commencement of a suit, and, as more than two years had elapsed, the cause of action was barred by limitation. The trial court overruled that contention, and that ruling is assigned as error. It is also contended that the amended petition set up a new cause of action, and, as more than two years had elapsed, it was barred by limitation. We overrule both of these contentions, and hold that, although the plaintiff's original petition was so defective as that it did not sufficiently state a cause of action, the amended petition, which supplied the omissions and stated a cause of action, was not barred by limitation. Both petitions sought a recovery on account of defendant's negligence and delay in the transmission and delivery of a certain message. The first failed to allege facts showing that any legal duty rested upon the defendant concerning the message; and the second supplied that omission. The first, although essentially defective, arrested the statute of limitations."

In *Mayes v. Magill*, supra, it was said:

"But if the amended petition in any way retained even a part of the cause of action as asserted by the original petition, and afterward reasserted by the amended petition, it is sufficient to prevent the running of the statute after the original petition was filed."

In *San Antonio & Aransas Pass Ry. Co. v. Bracht*, supra, the court, in pointing out the four tests for determining whether a new cause of action is pleaded, said:

"(1) Would a recovery had upon the original bar a recovery under the amended petition? (2) Would the same evidence support both of the pleadings? (3) Is the measure of damages the same in each case? (4) Are the allegations of each subject to the same defense?"

[1] In the present case appellant relied for recovery upon the breach of the same con-

tract, based upon the same facts, made at the same time between the same parties; and we are of opinion that any evidence introduced under the third amended petition could have been offered under the first or second, and that the same defenses could have been urged against each—the same measure of damages could have been recovered under the one as under the other, and a recovery had upon either would have barred a recovery upon the others. It is true, the entire contract was not set out in the original petition or in the first two amendments; but appellant had the right, we think, to amend its pleading and set up the entire contract and all facts upon which it sought a recovery, provided, of course, it did not set up a new cause of action.

In the instant case it occurs to us that under the allegations of the first two amendments, appellant had the right to show the purpose for which the horse was purchased, and if he was not suitable for such purpose that appellees guaranteed to replace him with another of equal value, and that by the expression "equal value," under the circumstances of this case, was meant a horse of like kind and breed.

Believing that the court erred in sustaining the exceptions above discussed, its judgment is reversed, and the cause remanded for another trial.

Reversed and remanded.

On Motion for Rehearing.

[2] We have carefully read and considered appellees' motion for rehearing, together with the cases therein relied upon, and are constrained to believe that they are not applicable to the point raised in this appeal. This was not a suit to reform and enforce a contract; but, on the contrary, was a suit to recover damages for breach of an alleged written contract. The original petition and the two amendments having failed to state fully the entire terms of the contract, the third amended petition undertook to do so, averring that certain portions thereof, setting the same out, were omitted through mutual mistake. Appellees contend that since this last amendment was filed more than four years after the date of the contract and the discovery of the mistake, it was barred by limitation, which it urged by its demurrer as a defense to plaintiff's right to recover in this action. If plaintiff had brought the suit to recover damages more than four years after the breach of the contract, then it is conceded that appellees' exception ought to have been sustained. This is not the case, however, but, on the contrary, the suit was brought to recover damages before it was barred, but the plaintiff in its petition omitted to set out portions of the contract which it subsequently did by its amendment; and as the amendment was made four years after the cause of action arose, it is contended on the part of appel-

less that the statute of limitation could be urged against it. It was not setting up or undertaking to set up a new cause of action, but merely an amplification of the original cause of action partially pleaded.

While the petition undertook to recover for a breach of the contract, it omitted to fully state what the contract really was; and plaintiff had the right, we think, by amendment, to plead the contract as it in fact existed. The allegation that a part of the contract was omitted by mutual mistake may be stricken out; and still the petition as finally amended shows a good cause of action for a breach of contract.

We therefore adhere to our original opinion in holding that the court erred in sustaining the demurrer, and overrule the motion for rehearing.

Motion overruled.

FIRST NAT. BANK OF EMORY v. HERRELL (No. 7650.)

(Court of Civil Appeals of Texas. Dallas. Dec. 16, 1916.)

1. JUDGES —DISQUALIFICATION TO ACT—RELATIONSHIP TO PERSON INTERESTED.

A judge of the county court, who presided at the trial of a cause, who was related within the third degree to one of the sureties on the appellant's bond against whom judgment should have been rendered, by reason of his undertaking as such surety, should have recused himself as disqualified, and declined to make any order in the case on appeal to the county court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208-212; Dec. Dig. —45.]

2. JUDGES —42—DISQUALIFICATION TO ACT.

Where a judge had actual knowledge that the allegations of a cross-action in a suit in the justice's court were sufficient to show a cause of action against him, and the record fails to show that the purpose for making him a party was to disqualify him to try the original suit, having thus been made a party to the suit, he should have held himself disqualified to sit in the case on appeal to the county court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 190-200; Dec. Dig. —42.]

3. APPEAL AND ERROR —493(2)—RECORD—SHOWING RESERVATION OF GROUND FOR REVIEW—BILL OF EXCEPTION.

Where a transcript does not show that the necessary order was made and entered of record, showing what disposition was made of a plea in abatement for nonjoinder of necessary parties, and it does not appear, except by bill of exception, that the plea was called to the attention of the court and action taken thereon, the plea cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2296; Dec. Dig. —490(2).]

4. USURY —110—RECOVERY OF USURY PAID—NECESSARY PARTY.

The joint and several obligors with the defendant on contracts claimed to be usurious are necessary parties to an action to recover the usurious interest paid.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 270, 271; Dec. Dig. —110.]

5. JUSTICES OF THE PEACE —146(1)—DECISIONS REVIEWABLE—"FINAL JUDGMENT."

A judgment in a justice court in favor of the plaintiff, though it failed to expressly dispose of

the defendant's cross-action or plea in reconvention, is a "final judgment," which will support an appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 490, 491; Dec. Dig. —146(1).]

For other definitions, see Words and Phrases, First and Second Series, Final Judgment.]

6. PLEADING —214(1)—DEMURRER—ADMISSIONS BY DEMURRER.

For the purpose of a general demurrer, the allegations of a cross-bill must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529; Dec. Dig. —214(1).]

7. PLEADING —148—CROSS-BILL—SUFFICIENCY.

In action to recover usury on promissory notes, a cross-bill, alleging that the plaintiff and others had entered into a conspiracy to bring suits against the defendant bank, charging it with dealing unfairly with its customers, and that plaintiff's counsel was to accept as compensation a part of whatever moneys could be obtained from this defendant, that in pursuance of this conspiracy this suit was brought by plaintiff willfully and maliciously to injure the defendant, and that by the bringing of the suit the defendant has been injured in damages stated was sufficient to show a cause of action in reconvention or cross-action and authorize the admission of evidence to support it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 301; Dec. Dig. —148.]

8. APPEAL AND ERROR —554(1)—STATEMENT OF FACTS—AFFIDAVIT AS TO DEPRIVATION OF.

In an action to recover usury charged on notes, an affidavit that a statement of facts had been prepared, signed by attorneys for both parties, as a fair and correct statement, but that the trial judge had refused, either to approve or disapprove of same, stating that he intended to prevent an appeal, was sufficient to warrant the conclusion that appellant and counsel did all possible to procure a statement of facts in accordance with the statute, and that they were deprived of such statement by the arbitrary action of the judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472-2474, 2476, 2477; Dec. Dig. —554(1).]

9. APPEAL AND ERROR —571—STATEMENT OF FACTS—PROCEEDINGS TO COMPEL—SETTLEMENT AND SIGNING.

Where a trial judge arbitrarily refused to approve a statement of facts made out and agreed to by the parties, or to make and file one himself, the appellant's remedy is by mandamus to compel the trial judge to discharge his statutory duty, and not to have the judgment against him reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2550-2553; Dec. Dig. —571.]

Appeal from Rains County Court.

Suit by J. B. Herrell against the First National Bank of Emory. From a judgment of the county court for plaintiff on appeal, and from a judgment of the justice court for plaintiff, defendant appeals. Reversed and remanded.

W. B. Wynne, of Wills Point, and O. H. Rodes and W. H. Clendenin, both of Emory, for appellant.

TALBOT, J. This suit was instituted in the justice court of precinct No. 1, Rains county, Tex., by the appellee to recover of

the appellant the sum of \$53 as usury, alleged to have been charged appellee on three certain promissory notes set out in his pleadings. The appellant answered by a general denial, and by way of a cross-action or plea in reconvention alleged, among other things:

"That it is engaged in the banking business, and the life and interest of its business is dependent largely upon its dealings with the citizenship of Rains county and its honesty and fair dealings with its customers is one of its chief assets. And defendant charges that for the purpose of destroying this defendant's business this plaintiff has entered into a conspiracy with a large number of citizens of Rains county to bring suits against this defendant, charging it with dealing unfairly with its customers, and thereby destroying its business and its business interests. And that in pursuance of this conspiracy this suit was filed against it. That W. W. Berzett and J. B. Allred have joined with this plaintiff as coconspirators to bring this suit, W. W. Berzett agreeing to act as counsel, agreeing to accept as compensation a part of whatever moneys could be obtained from this defendant. That this is done solely and purely for the purpose of destroying this defendant's business and injuring it. And in pursuance of this conspiracy and agreement this suit was brought by this plaintiff willfully and maliciously to injure this defendant, and that by the bringing of this suit this defendant has been injured and damaged in the sum of \$125."

In this pleading appellant asked that W. W. Berzett and J. B. Allred be made parties defendant and served with citation, and that it have judgment against all of the defendants in its said cross-action in the sum of \$125. It seems that the justice of the peace refused to have the said W. W. Berzett and J. B. Allred served with citation, and the case went to trial on the appellee's pleading and the appellant's cross-action as to appellee, and the trial resulted in a judgment for the appellee in the sum of \$53. From this judgment the appellant appealed to the county court of Rains county, in which court a trial without a jury resulted again in favor of the appellee for the sum of \$53, and the appellant perfected an appeal to this court.

There is no appearance in this court on the part of the appellee, and the case was submitted on the brief of appellant.

[1] Numerous assignments of error are presented, but we shall not undertake to state and discuss them in detail. The first question for decision is whether or not the county judge erred in not holding himself disqualified to try the case. The record as pointed out by the appellant discloses that before the parties announced ready for trial the appellant, by proper pleadings, suggested to the trial judge, the Hon. J. B. Allred, that he was disqualified to sit and try the case, because appellant had, in its pleadings in the justice court and in the county court, over which said judge was presiding, made him a party defendant to the cross-action filed in the cause, and because of his relationship by marriage to J. K. Woosley, one of the sureties on the appellant's appeal bond filed in the justice court for removing the cause by appeal from that court to the county court, and

that thereupon the said judge admitted that he was a second cousin to the said Woosley's wife, who was then living, but refused to hold himself disqualified to try the case. It is the law of this state that no judge of the district or county court shall sit in any case wherein he may be interested, or where either of the parties thereto may be connected with him by affinity or consanguinity within the third degree. Judge Allred, who presided at the trial of this cause, being related to J. K. Woosley, one of the sureties on the appellant's bond, against whom judgment might and should have been rendered by reason of his undertaking as such surety for the amount recovered by appellee against appellant, should have recused himself and declined to make any order in the case.

[2] But if he was not disqualified by reason of his relationship to said surety, he had, by appellant's pleadings, been made a party to the suit, and for that reason he was and should have held himself disqualified to sit in the case. The allegations of the cross-action were sufficient to show a cause of action against Judge Allred, of which he had actual knowledge, and the record fails to disclose that appellant's purpose in making him a party thereto was to disqualify him from trying the original suit.

[3] The complaint made in the third assignment of error, to the effect that the county court erred in overruling appellant's plea in abatement or nonjoinder of necessary parties plaintiff, cannot be considered, because it does not appear, except by bill of exception, that said plea was called to the attention of the county court and action taken thereon. If this plea was passed on by the trial court, an order should have been made and entered of record, showing what disposition was made of it, and a copy of that order should have been sent up in the transcript.

We have found no such order, and a bill of exception will not suffice.

[4] We will state, however, in view of the probability of another trial of the case, that the plea of nonjoinder of parties in question, charged, in substance, that several other parties named were joint and several obligors with the appellant on the contracts claimed in this suit to be usurious, and prayed that each of them be made parties thereto. The law upon this subject seems to be well settled. *Alston v. Orr*, 105 S. W. 234, decided by the Court of Civil Appeals for the Third District of this state, was an action for the recovery of the penalty given by our statute to any person or persons aggrieved for having been required to pay usurious interest, and the court held that all the makers of a joint and several note are necessary parties to an action to recover the usurious interest paid thereon. The court said:

"The right of recovery of the penalty, being based upon the statute, is in its nature indivisible"; that in such a "case there is but one cause of action based upon the usurious contract, * * * and the law does not con-

template, * * * the bringing of separate and distinct suits."

Of course the rule applies to joint and several makers of a note, and not to sureties thereon.

[5] The contention that the county court erred in assuming jurisdiction of the cause because the record fails to show that a final judgment had been rendered in the justice court, in that it does not appear that appellant's plea in reconvention or cross-action had been disposed of in that court, is not, under the comparatively recent decisions of the Supreme Court of this state made in *Trammell v. Rosen*, 106 Tex. 132, 157 S. W. 1161, well founded. Following that decision of the Supreme Court, this court, in *Parker v. Emerson*, 176 S. W. 146, held that a judgment in the justice court in favor of the plaintiff, though it failed to expressly dispose of the defendant's cross-action or plea in reconvention, was a final one which would support an appeal.

[6, 7] The record shows that the county judge sustained a general demurrer urged by the appellee to appellant's plea in reconvention or cross-action, which has been set out in the former part of this opinion, and that ruling of the court is assigned as error. We are of the opinion that the assignment should be sustained. The allegations of appellant's cross-bill for the purposes of the general demurrer must be taken as true, and, while not as full and specific as they should have been, were sufficient to show a cause of action and authorize the admission of evidence in support thereof.

[8, 9] It is made to appear by the affidavit of W. H. Clendenin, one of the appellant's attorneys, that it has been deprived of a statement of facts, and appellant insists, under an appropriate assignment of error, that the case should be reversed and remanded for this reason, if for no other. The affidavit of the attorney referred to appears to have been made and filed in the county court of Rains county on the 24th day of November, 1915. It recites that a statement of the facts in the case was prepared in the affiant's presence, and agreed to and signed by both the attorneys for the appellant and appellee as a fair, true, and correct statement of all the facts proved on the trial of the case; that said agreed statement so signed was presented by the affiant to J. B. Allred, county judge of Rains county, Tex., before whom the cause was tried, on three several days and dates, to wit, October 23, 1915, November 20, 1915, and November 23, 1915, with requests on each occasion that he approve same or prepare and file himself a statement of facts in the case within the time required by law, and that each time such request was made the said county judge refused either to

approve or to disapprove the said agreed statement of facts, and refused to prepare and file a statement of facts himself. The affidavit further declares that the county judge did not claim that the agreed statement of facts was not fair, true, and correct, but that on the 23d day of November, 1915, the last time it was presented, he made the following statement:

"You have no right to appeal this case, and it is my business to see that you don't appeal it, and I will not do another thing in this case."

This affidavit is sufficient to warrant the conclusion that appellant and his counsel did all they could in the way pointed out by the statute to procure a statement of facts material to appellant's appeal, and that it was deprived of such statement by the arbitrary action of the judge who tried the case. In *Joachim v. Hamilton*, 186 S. W. 251, the opinion is expressed that it is well settled that where an appellant has been deprived of a statement of facts material to his appeal, without fault or negligence of himself or counsel, he is entitled to a reversal of the judgment from which he has appealed. But, according to decisions of the Supreme Court of this state, it seems that no matter how faultless an appellant's efforts may have been to secure a statement of facts in the manner prescribed by the statute, and no matter how arbitrary and unwarranted the trial judge may have been in refusing to approve a statement of facts made out and agreed to by the parties or to make and file one himself, the appellant is not entitled on appeal to have the judgment against him reversed, because his remedy was by mandamus to compel the trial judge to discharge his statutory duty in this regard. *Reagan v. Cope-land*, 78 Tex. 551, 14 S. W. 1081; *Railway Co. v. Lane*, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18; *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613. In the cases cited the court holds that in the exercise of proper diligence it is incumbent upon the parties aggrieved by the failure or refusal of the trial judge to approve or prepare and file a statement of facts to apply for a writ of mandamus to compel him to do so. In *Railway Co. v. Lane*, supra, the court said that:

"Since the passage of the statute which permits a statement of facts under * * * circumstances to be filed after the elapse of ten days from the adjournment of the court, no reason exists why a party who has used diligence to procure a statement of facts may not, by mandamus, compel the trial judge to prepare and file one when he has failed to do so."

There are other questions raised, but they have been disposed of by what we have already said, or cannot be considered in the absence of a statement of facts, or do not disclose reversible error.

For the reasons indicated, the judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. v. LUCAS. (No. 7674.)

(Court of Civil Appeals of Texas. Dallas. Dec. 23, 1916.)

1. SALES \Leftrightarrow 52(5) — PURCHASE OF GOODS — CONTRACT — AGENCY — EVIDENCE — SUFFICIENCY.

In an action against a railroad to recover for groceries and supplies furnished by the plaintiff to the defendant's section hands and laborers pursuant to an alleged agreement with defendant's foreman that defendant would be responsible for the amount of bills incurred by said laborers, evidence held insufficient to show either an express or implied contract on the part of defendant to pay for the goods or to show that any agent of the defendant acting within the scope, or within the apparent scope of his authority who bought the goods or authorized their sale and delivery to support a judgment for the plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139; Dec. Dig. \Leftrightarrow 52(5).]

2. SALES \Leftrightarrow 52(2)—PURCHASE OF GOODS—EVIDENCE—BURDEN OF PROOF.

In an action against a railroad to recover for groceries furnished defendant's section hands and laborers pursuant to an alleged agreement with defendant's section foreman that defendant would be responsible for the goods, the burden of proof was upon the plaintiff to show his right to recover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 124, 125, 127, 128; Dec. Dig. \Leftrightarrow 52(2).]

Appeal from Dallas County Court; T. A. Work, Judge.

Suit by H. J. Lucas against the Texas & Pacific Railway Company. From a judgment of the county court for plaintiff on appeal and from a judgment of the justice court for plaintiff, defendant appeals. Reversed and rendered.

George Thompson, Flippen, Gresham & Freeman and Walter G. Miller, all of Dallas, for appellant. C. M. Means and W. M. Pierson, both of Dallas, and L. P. Pierson, of Winnsboro, for appellee.

TALBOT, J. This suit was instituted in the justice court of Dallas county, Tex., by the appellee, H. J. Lucas, by petition filed on August 30, 1913, to recover of the appellant the sum of \$185.20, which appellee alleged was for groceries and supplies furnished by the appellee, Lucas, to section hands and laborers working on the railway company's tracks and right of way during the months of January, February, and March, 1913. Appellee, Lucas, alleges that T. C. Archer, the section foreman of the railway company, contracted and agreed with appellee that the appellant railway company would pay appellee and hold him whole and harmless for the amount of bills incurred by said laborers, not to exceed 75 cents a day for each laborer; that said goods sued for were sold on the faith and credit of defendant; that said persons were and are transient and mostly Mexicans; and that it was very necessary to defendant's business that said em-

ployés, or similar employés, be retained in its service, they being trackworkers, "transient, shiftless," and without funds to pay their usual and necessary living expenses. The railway company plead a general demurrer, a general denial, and specially denied the authority of the section foreman, Archer, to purchase groceries or supplies from the plaintiff Lucas and charge same to appellant, alleging that, if Archer made representations to the plaintiff that the defendant railway company would pay for merchandise and supplies purchased from appellee, in so doing he was not acting within the scope or apparent scope of his authority; further, that it had no notice of such representations or transactions between Archer and the appellee. Upon trial in the justice court judgment was rendered against appellant for amount sued for, and the defendant railway company perfected an appeal to the county court of Dallas county at law, Dallas county, Tex. Upon trial in the county court of Dallas county, at law, the case was submitted to the jury upon special issues, and on the findings of the jury in that court judgment was rendered in favor of appellee against appellant for the sum of \$207.42, which included interest, from which judgment this appeal is prosecuted.

The first assignment of error complains of the trial court's refusal to give a special charge requested by appellant, directing the jury to return a verdict in its favor, appellant's contention being that the evidence adduced was insufficient to show that it was liable in any manner for the claim sued on; that if the evidence shows that appellant's section foreman, Archer, contracted and agreed with the appellee, Lucas, that appellant would pay him for goods sold and delivered to its section hands, it fails to show that Archer in making such contract was acting within the scope, or apparent scope, of his authority as appellant's agent. This is the controlling question arising on the appeal, and the strongest testimony found in the record in support of the ruling here complained of is that of the appellee himself, which can be better understood by setting it out practically in full. Appellee testified:

"I am the plaintiff in this suit, and am suing the Texas & Pacific Railway Company for \$185.20, same being for supplies which were furnished by me during the months of January, February, and March, 1913, while I was engaged in the grocery business at Grand Prairie. I know T. C. Archer, who was section foreman at that time for the T. & P. Railway Company. He had men working for him who were mostly negroes and Mexicans, who were mostly classed as transient people. I did not credit Mr. Archer or the Mexicans working under him individually, but I credited the Texas & Pacific Railway Company. These people were working for the Texas & Pacific Railway Company. These supplies consisted of eatables—different kinds of groceries. I have an itemized statement of these supplies which were sold and delivered by me, and same is true and correct. I did not keep

any books; I just had the McCasky system. This system is where you take an order and it makes a duplicate form, and you give the customer a duplicate and keep the original yourself and bring the amount forward, and you keep all the tickets with the amount forwarded, and your last bill always shows the whole grand total. The statements which I have here are the originals. These originals represent the accounts, and I have not received payment for any of this \$185.20 for which I am suing, and which amount is still due and unpaid. There are not any lawful offsets to it or payments or credits. These tickets showing the items of supplies furnished and the cost of same are made out to Archer or headed to Archer, by such and such an individual, and that is turned into Archer each pay day. These slips are made out to Archer as a matter of form. Sometimes I just keep it under the name of each individual Mexican or laborer. I have been out at Grand Prairie about eight years. I was raised near there. I had been there about five years at the time this account arose, and during all of such time I was engaged in business at Grand Prairie. During such time I knew that the Texas & Pacific Railway Company had its general offices in Dallas. I also knew that it had a paymaster. I saw the pay car come to Grand Prairie each month. I also then knew that Mr. Archer, the section foreman, was working under a higher officer. I then knew that there was a roadmaster over each division and who were over the section foreman. I never spoke to Mr. Everman, the general superintendent of the Texas & Pacific at Dallas, as to whether or not the Texas & Pacific would pay for these groceries. I never had any conversation about it with anybody except Archer or some other section foreman who was there. Just the section foremen are the only ones I had anything to do with. All of these tickets are made out to Archer with the date, showing the Mexican or particular laborer who got the merchandise, with the amount brought forward on each ticket. None of the tickets are made out to the Texas & Pacific Railway Company. I never did make out and mail to the officers of the Texas & Pacific any bill or ticket for any of these supplies or for any other supplies at any time. I merely gave the tickets to the section foreman and he paid me. The section foreman always paid me, with the exception of this time, and the amount for which I am now suing. The section foreman always called upon the 1st of the month, I think it was, and I give him all the claims I had. They gave me the privilege of extending 75 cents a day credit, and no more. I took the precaution not to go over that. On the 1st they called for these bills, and I suppose they turned them in with the board bills, but I don't know. These bills are for January, February, and March, 1913, and are for groceries furnished Mexicans during those months. On February 1st Archer, the section foreman, I think, paid part of the amount due for January. I think he gave me \$59 at that time. I don't remember how much balance that left due for January. Archer at that time claimed that the full amount of the board bill had not been allowed at the general office. He did not pay on March 1st the balance due for January and for the month of February; he running away some time in March, I believe. There were two months that he failed to pay up like he had before. When he fell behind and failed to pay I did not write or say anything to the paymaster or write to the Texas & Pacific at Dallas. I trusted the section foreman and believed what he said, and thought he would come up all right. In a way I accepted what he said, but I investigated it the best I could through our ticket agent, Mr. G. M. Doyle. Anyhow, all the information I had was what the section foreman gave me and those whom I had

dealings with. I turned the statements over to them and they paid me the amount of the bills. There was no section house at Grand Prairie. At that time the Texas & Pacific had built a siding and put some box cars out there and had some tents, and these Mexicans slept and cooked there, and I think one of the section foremen lived at Eagle Ford for a long time. That section foreman's name was Columbus Moore. They did not get all their groceries from me all the time, but quite frequently they did. I have been a resident of Grand Prairie about eight years, and during such time the Texas & Pacific section foreman did not trade with me regularly all the time. Maybe they trade six or eight months during the year with me, and then switch off, and then they get some things from the general supply house the company has. I suppose they have dealt with me in this manner during at least half of the time, or more than half the time. During all of that time I never turned in any bill to any official of the railroad at Dallas, nor to the roadmaster. I always turned in my bills to the section foreman. The section foreman told me that my bills were turned in to the general office as board bills of the Texas & Pacific which he collected and paid me. This must have gone on something over four years. I never received any notice from the Texas & Pacific or any of its agents or employees that they objected to this course of dealing. I never communicated with any of the officers or employees about it, except the section foreman. Some of these Mexicans or laborers who were working under Archer when he skipped out, and who should have been paid by Archer, but were not, were later paid by the company. These supplies were furnished for the Texas & Pacific. These men who got the supplies were working for the Texas & Pacific. I knew the Texas & Pacific agent at Grand Prairie. He knew of my course of dealing with the section foremen with reference to furnishing supplies. He never raised any objection to it. I never heard of any objections being raised in the course of my dealings until this particular case came up. I understood that Archer went off with a lot of money on the pay roll. I did not know anything about Archer's, the section foreman's, dealings with the head office. I did not know that on the first of March the Texas & Pacific paid Archer \$265 for board alone. I did not know that for the month of January the Texas & Pacific paid Mr. Archer something like \$150 or more for board for men working under him. I did not know what Archer got. During such time I knew that the Texas & Pacific had a supply house at Marshall, but I don't know about Ft. Worth. I have heard the laborers or the section foreman working for the Texas & Pacific say that the Texas & Pacific had a supply house where they could present orders and get groceries. During such time I knew that they sometimes got supplies from Marshall. The railway company worked these men on the section that I furnished these groceries to. I did not know of any secret limitation on the authority of the section foreman to purchase these groceries for the Texas & Pacific. I did not inquire of any of the Texas & Pacific officials as to whether or not there were any restrictions upon Archer's authority. The Texas & Pacific Railway Company did not make any objections to me as to my course of dealing with Archer, or with any of the other section foremen with whom I had had dealings. I never had any instructions or communication or any advice or any objections from any of the Texas & Pacific officials."

The practically undisputed testimony offered by the appellant is to the effect that during the months the goods involved in this suit were purchased from appellee upon the

alleged contract made with the section foreman Archer, and for a long time prior thereto appellant had supply houses located in each division of its road and an agreement with them to furnish service supplies to its section foremen, and from which houses such supplies could be obtained by its section foremen, both for themselves and the section men working under them; that appellant had an arrangement with its section foremen, including the said T. C. Archer, whereby they could board section men and get board deduction orders from them, properly signed, and send them in with his time book, and the amounts, if correct, would be deducted on the pay rolls from the time of the men, in the foreman's favor, but that neither Section Foreman Archer, nor any other section foreman working for it, had ever been permitted at any time to buy goods of any character from appellee or any other merchant of Grand Prairie to be charged to or paid for by the appellant; that Foreman Archer worked in H. M. Levinson's division and under his control and subject to his orders and instructions, and that Levinson did not give Archer authority to contract bills for himself or for any of his laborers with the appellee at Grand Prairie or anywhere else; that Levinson never gave Section Foreman Archer, or any other section foreman working for appellant prior to him at Grand Prairie, authority to buy supplies for himself, or laborers under him, to be paid for by the appellant, and that he (Levinson) never made any contract with the appellee, Lucas, or any other merchant at Grand Prairie, to pay for goods and merchandise supplied Archer or laborers working under him, and that he did not know of any one else who had for the appellant done so; that Foreman Archer had the privilege of boarding the laborers working under him, but that no statements or bills for goods, groceries, or supplies furnished Archer or his laborers were received by the appellant.

[1] Obviously this testimony is insufficient to support the judgment of the lower court. It fails to show either an express or implied contract on the part of appellant to pay for the goods sued for by the appellee. It fails to show that any agent of the appellant acting within the scope or apparent scope of his authority bought the goods or authorized the sale and delivery of them to the parties to whom appellee claims they were sold and delivered. Its lack of sufficient probative force to show liability on the part of appellant for the payment of the amount charged therefor is apparent. The phrase "any evidence" does not mean the slightest scintilla of evidence, but such as from which a jury might reasonably infer the existence of the alleged fact. In *Hyatt v. Johnston*, 91 Pa. 200, cited with approval in *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059, it is said:

"Since the scintilla doctrine has been exploded, both in England and in this country, the

preliminary question of law for the court is not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, it should be withdrawn from the jury."

[2] The burden of proof was upon the appellee to show his right to recover, and since, in our opinion, there was no evidence adduced from which the jury could properly conclude that this burden had been discharged, we hold the peremptory instruction asked by the appellant should have been given.

From this it follows that judgment should have been rendered in the court below in favor of the appellant, and that it becomes our duty under the statute to render such judgment in this court.

It is therefore ordered that the judgment of the court below be reversed, and that judgment be here rendered in favor of the appellant.

HOEFS et al. v. SHORT. (No. 625.)

(Court of Civil Appeals of Texas. El Paso.
Nov. 23, 1916. Rehearing Denied
Jan. 5, 1917.)

1. WATERS AND WATER COURSES ⇄115—SURFACE WATER.

A creek flowing through a well-defined channel and well-defined banks and bed fed by rains falling within its watershed outside of the defendants' land, and through which water flows only after a rainfall, was not diffused surface water flowing across defendants' land which could be regarded as their absolute property.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 126; Dec. Dig. ⇄115.]

2. WATERS AND WATER COURSES ⇄38—NATURAL WATER COURSES—RIPARIAN RIGHTS.

A creek flowing through a well-defined channel and well-defined banks and bed fed by rains falling within its watershed outside of the defendants' land, and through which water flows only after a rain fall, is not water flowing in a water course to which riparian rights attach or of which an appropriation under the doctrine of riparian rights could be made.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 30; Dec. Dig. ⇄38.]

3. WATERS AND WATER COURSES ⇄130—APPROPRIATION OF RIGHTS—TITLE TO WATERS—WATER RIGHTS IN LANDS OF STATE.

Title to water in a creek flowing through a well-defined channel and well-defined banks and bed, fed by rains falling within its watershed outside of the defendants' land, and through which water flows only after a rainfall, not having been legally appropriated, and not being subject to appropriation under the doctrine of riparian rights, remains in the state and the water is subject to appropriation under Acts 33d Leg. c. 171, § 1.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 145; Dec. Dig. ⇄130.]

4. WATERS AND WATER COURSES ⇄152(11)—SURFACE WATERS—APPROPRIATION.

A decree enjoining the defendants from placing or maintaining any obstruction across

a well-defined channel in which surface water flows, which would divert from the creek water in excess of amount named and to permit water in excess of that amount to flow down to the dam of the plaintiff did not require the defendants to maintain works to deliver water to the plaintiff and the enforcement of the plaintiff's right to its continued flow does not constitute the imposition of a new right of way or easement upon the lands of the defendants.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 156; Dec. Dig. § 152(11).]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Suit by J. C. Short against Otto Hoefs and others. From the judgment, the defendants appeal. Affirmed.

See, also, 178 S. W. 11.

Clay Cooke, of Pecos, for appellants. Ross & Hubbard, of Pecos, for appellee.

HIGGINS, J. This suit was brought by Short against appellants, Otto, Rudolph, Edwin, and Arthur Hoefs. The material allegations of plaintiff's petition are substantially as follows: That he is the owner of section 58 in block 13, Houston & Great Northern Railway Company survey, which is crossed by an intermittently flowing stream called Barilla creek, situated in the arid or semiarid region of the state, where irrigation is required to grow crops; that said creek is fed by rains falling within its watershed, which lies south of his land; that the creek flows in a well-defined channel, with well-defined banks and bed, to a point below and north of his land; that for many years there had been maintained a dam across the creek, known as the "U" dam, about two miles south of his land; that the residue of the water diverted by the dam for many years after its use for stock watering and irrigation has been permitted to flow back into the channel of the creek and has flowed to and across plaintiff's land; that the water so obstructed by the "U" dam and which flowed around the ends thereof and returned to the channel, in times of flood, aggregated much more than 100 cubic feet per second of time, and was ample to afford plaintiff the water to which he was entitled as well as to satisfy any superior legal rights which the defendants might have; that a permit had been legally issued by the board of water engineers to plaintiff permitting him to appropriate and divert 40 cubic feet of water per second for 24 days of 24 hours each annually from the flood or storm waters of the creek by means of a diversion dam located on his section for the purpose of irrigation; that plaintiff had begun and completed construction of his dam within the time required by law; that defendants own a section of land lying between plaintiff's land and the "U" dam, and are threatening to construct a dam on their land, together with a canal leading therefrom, which will result in diverting all the flood

waters of the creek away from the channel of the creek and onto defendants' lands remote from the creek.

An injunction was asked restraining defendants from placing any dam or obstruction in the channel of the creek or any canal or ditch as an adjunct thereto in such manner as that same would divert and withhold from the plaintiff the water to which he was entitled by virtue of his appropriation.

Defendants pleaded that when they and their predecessors in title acquired their lands (describing same) the draw or depression known as Barilla draw did not exist thereon; that they were flat, or only slightly depressed, and they acquired their lands and the state parted with title thereto long before the draw washed out and before the Legislature attempted to reserve title to any waters flowing thereon, and there was no title in the state to any portion of said lands when plaintiff applied for his permit, and no title in the state to any waters flowing across said lands, and no easement or right of way therein by which plaintiff or the state could require defendants to run said waters across their lands, but the title was in defendants free and clear of any claim, reservation, easement, right of way, or any other right in the state; that the lands were owned in fee simple, and neither the state, the Legislature, nor the board of water engineers had the right to limit defendants in the enjoyment thereof, including the right to use the rainwaters falling upon and flowing across same; that the "U" dam was constructed in 1899 by the Wilson-Popham Cattle Company, and since that date all rainwaters reaching the depression had been held up and diverted; that all of said waters were actually appropriated and applied to beneficial uses by the said cattle company, and defendants long prior to the time plaintiff acquired his land from the state; that section 323, upon which is located the diversion dam complained of, was patented in 1874, and all of defendants' lands were patented and acquired by them long prior to the passage of any legislative act attempting to reserve or hold any rainwaters or other flowing waters, and as to such lands no such reservation had ever been or could be made; that at said times and long prior to the time alleged by plaintiff there was no draw or depression across defendants' lands, but all of the waters in the creek were held up, appropriated, and applied to beneficial uses at the "U" dam; that defendants have acquired from the Wilson-Popham Cattle Company a right to the use of the waters diverted at the "U" dam; that on January 24, 1914, defendants Otto Hoefs and said cattle company, being the joint owners of said diversion dam, filed their statement and plat in accordance with the act relating to the appropriation of waters proposing to appropriate at said point 100 cubic feet of water per second of

time; that Barilla draw is without water most of the year, and has no water flowing therein, except from rainfall, and none of the rainfall collects or is collected below the "U" dam. Defendants further deny that the plaintiff had procured any appropriation according to law, and deny that there were any unappropriated waters subject to appropriation, and that plaintiff has no right of way across defendants' lands to carry water.

The cause came on for trial, and judgment was entered as follows:

"That the defendants, Otto Hoefs, Rudolph Hoefs, Edwin Hoefs, and Arthur Hoefs, be, and they hereby are, perpetually enjoined from placing or maintaining any dam or obstruction in or across the channel of Barilla creek or draw, or any canal, levee, or ditch as an adjunct thereto or leading therefrom in manner or form as that such obstruction, dam, canal, levee, or ditch will divert from or away from said Barilla creek in excess of 100 cubic feet of water per second of time, unless and until such obstruction dam, canal, levee, or ditch be so constructed and maintained as that the same will permit to flow unimpeded in and into the channel of said Barilla creek and down to the dam of plaintiff, J. O. Short, such excess of water over and above said 100 cubic feet per second (if any) as may be flowing in said channel, or would flow into and therein if not obstructed or impeded by defendants, up to 40 cubic feet of water per second of time for 24 days of 24 hours each, annually, and not to exceed 1,920 acre-feet of water per annum."

From this judgment the defendants prosecute this appeal.

The facts material to a consideration of the questions presented by this appeal are as follows:

Barilla creek or draw rises in the Davis Mountains many miles south of the land described in the pleadings, and extends in a northerly direction. The area drained by the creek south of the "U" dam is about 350 square miles, or 225,000 acres. It only has water in it when it rains; all the water flowing therein being rainfall. After a big rain, it will run a day or two. A light rain runs immediately off. It usually runs from one to twenty-two times annually, on an average about five or six times. There is testimony that the creek had a well-defined channel extending 50 or 60 miles above (south) the "U" dam and a well-defined channel below such dam to and through plaintiff's land. The channel at sections 323 and 58 is 40 to 75 feet wide at the present time and 5 to 10 feet deep. There is testimony that in 1885 or thereabouts there was not a very well-defined channel at plaintiff's land; that there was very little channel, if any, then across defendant's section 323, but the same stopped at the Old Ft. Stockton road, below the "U" dam, and the water then spread out over the country. It has since washed out 75 to 100 feet wide. In 1887 what is now the draw below the Stockton road (above the Hoefs' dam) was covered with soil and grass, with the exception of an occasional small hole or washout. There was then no

continuous defined channel there. The waters then would spread out over the country at least one-half mile in time of freshet. Section 323, belonging to defendants, was crossed by the draw; likewise section 58, belonging to plaintiff. Defendants constructed a diversion dam upon section 323. This is the dam complained of, and is situate some distance below (north) the "U" dam. Plaintiff's dam was upon section 58. Plaintiff acquired section 58 in 1911, and has some of it in cultivation. On June 10, 1914, the board of water engineers issued to him a permit to annually appropriate 40 cubic feet per second for 24 days of 24 hours to be diverted from said creek at the diversion dam on section 58. Defendant Otto Hoefs owned section 323, upon which he and his codefendant had constructed the dam complained of. Said section 323 was patented in 1874, and title by mesne conveyances passed to the defendants. The "U" dam was about a mile south of the defendants' dam on section 323. The "U" dam was constructed in 1899 by the Wilson-Popham Cattle Company, and had been diverting water since its construction. On January 24, 1914, Otto Hoefs and said cattle company filed in the county clerk's office a sworn statement of water appropriation from the draw at the "U" dam, proposing to appropriate at said point 100 cubic feet of water per second of time, and filed certified copy thereof in the office of the board of water engineers.

Plaintiff finished his dam in October, 1914, and the defendants built the dam complained of in February, 1915. Both dams washed out, and the plaintiff had commenced rebuilding his, and defendants were intending to rebuild theirs, which, being higher up on the draw, will prevent the water flowing to plaintiff's dam. When the water comes down the draw it covers a space sometimes as wide as 300 yards, depending on the size of the rains, spreading out over the lands.

It is feasible for Hoefs to construct and equip his dam so as to divert the 100 cubic feet of water as per his appropriation, and permit the excess, if there should be any, to flow on down to plaintiff's dam. The lands of the parties are in the arid or semiarid region of the state, and require irrigation to grow crops. Plaintiff has not acquired, by purchase or condemnation, any right of way or easement, to carry his 40 cubic feet of water across defendant's lands.

Appellants, in support of their assignments, complaining of the decree entered by the court, present three propositions of law, as follows:

"First. The act of the Legislature permitting the appropriation of waters belonging to the state of Texas, under which plaintiff claims the right to the injunction, by its express terms only permits the appropriation of the 'ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rainwaters of every river or

natural stream, canyon, ravine, depression, or watershed, within the state of Texas, the title to which has not already passed from the state,' and, it appearing that the lands of defendants across which said rainwaters flow passed from the state of Texas in 1874 long prior to any attempted reservation of said waters, the right to said rainwaters was vested in defendants absolutely, and said act has no application thereto, nor could same be appropriated in the manner sought, it being incumbent on plaintiff to show that the title to said depression and the watershed thereof was in the state of Texas at the time of the passage of said act.

"Second. It appearing that the dam of defendants is constructed upon their own land, patented by the state of Texas in 1874, prior to the passage of the act of the Legislature attempting to reserve flood or storm waters in the state of Texas, and that said dam is not across any flowing stream to which riparian rights attach, the sole claim of plaintiff being based upon his permit granted by the board of water engineers to take 40 cubic feet of water per second from said draw at his dam under the provisions of said act of the Legislature, the defendants cannot be compelled to maintain works upon their land for the delivery of said water to the plaintiff, nor to grant plaintiff an easement or right of way across their land for the conduct of said water to his dam, nor abridged in their use of their own premises, as same would be the taking of private property for private use without compensation or the consent of the owner.

"Third. The proof showing conclusively that long prior to the passage of the act of the Legislature permitting the appropriation of public waters the title to the land of defendants had passed from the state of Texas, said act and the acts of plaintiff and the board of water engineers thereunder can have no application to said land, nor abridge the use and enjoyment thereof by defendants to the same extent as they might have used and enjoyed same prior to the passage of said act."

The appellee claims the right to an injunction in protection of his water appropriation made under the provisions of chapter 171, Laws Thirty-Third Legislature (Reg. Sess.), the first section of which reads:

"The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rainwaters of every river or natural stream, canyon, ravine, depression or watershed, within the state of Texas, the title to which has not already passed from the state, are hereby declared to be the property of the state, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided."

See article 4991, Vernon's Sayles' Civil Statutes 1914. This act by its terms relates to unappropriated waters, the title to which has not already passed from the state. It does not refer to the lands upon which such rivers, streams, canyons, ravines, depressions, and watersheds are situate.

No question is raised as to the manner and form of appellee's appropriation and that it was for, and is being applied to, a purpose provided by law, namely, irrigation. So it must be determined whether the water flowing in Barilla creek is to be considered as water the title to which had not passed from the state, so that it might be lawfully appropriated, and the right to its use acquired,

by plaintiff. Appellants' first proposition rests upon the premise that the title to his lands passed from the state in 1874, which was long prior to any attempted reservation of the waters in Barilla creek flowing across the same, and thereby he became vested absolutely with the right and title to such waters as appurtenant to his lands, and that the appropriation act could have no application, and such waters could not be appropriated unless the state had title to Barilla creek and its watershed at the time of the passage of the act. We have found no authority in support of such a contention, and appellants have cited none. They refer to *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398, *Barnett v. Matagorda*, etc., 98 Tex. 355, 83 S. W. 801, 107 Am. St. Rep. 636, and *Batla v. Goodell*, 53 Tex. Civ. App. 178, 115 S. W. 622, but their pertinency is not apparent.

In *McGhee*, etc. v. *Hudson*, the court had under consideration the act authorizing the condemnation of land for irrigation purposes. The irrigation company was seeking to condemn so much land as was necessary for the construction of a dam across the Concho river and the opening of a ditch. The Concho river is a flowing stream to which riparian rights had attached, and it was held that section 2 of the act could not operate, and probably was not intended to operate, on the rights of riparian owners existing when the law was passed, but was intended to operate only on such interests as were in the state by reason of its ownership of lands bordering on rivers or natural streams; that land included everything attached to it, as trees, herbage, and water, and plaintiffs were entitled to have the water flow through their land in its accustomed channel, and to use it for all purposes for which a riparian owner may use water so flowing; that, if the irrigation company undertook to divert such water, they, in effect, took land, and could not do so without making compensation to the riparian owner for the water of which he was deprived by such diversion. In that case, however, the question of riparian rights upon a flowing stream was involved, which is not the case here. Appellants make no such claim, and in their second proposition affirm that their dam was not across any flowing stream to which riparian rights attached.

The other cases cited by appellants simply relate to questions of drainage rights arising out of the obstruction of the flow of surface waters. Under the common-law rule adopted in this state, such waters are regarded as a common enemy which the lower landowner may keep from coming from upper lands, and which either owner can get rid of as best he can, provided there is no artificial accumulation thereof discharged upon another's land. Those cases relate to drainage questions rather than of title to such waters. Appellants insist that the waters attempted

to be appropriated are mere surface waters flowing across their lands during times of rainfall, and their rights with respect thereto must be governed by the rules of law prior to the passage of the appropriation act, and such water is not subject to appropriation. It is stated by Mr. Well in his work on Water Rights in the Western States (8d Ed. § 349) that diffused surface water cannot be appropriated against the landowner on whose land it lies; that its presence and movements are too capricious to found any right upon distinct from the land where it is gathered, and such water is owned by the owner of the land where it happens to lie. Mr. Well in the section noted says further:

"The English cases have gone into this quite thoroughly. In *Rawstrom v. Taylor* it was held that, in the case of common surface water flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although he cut it off from plaintiff's mill which it had supplied. In *Broadbent v. Ramsbotham* it was decided that a landowner has a right to impound surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook the stream of which had for more than 50 years worked the plaintiff's mill. Baron Alderson, in delivering the judgment of the court in that case, says: 'No doubt, all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel.'

"All the many cases already cited considering whether there was or was not a water course held that, if there was not a water course, but only diffused surface water, neither the law of riparian rights nor the law of permanent rights by priority of appropriation applies."

Mr. Kinney (2 Kinney on Irrigation & Water Rights [2d Ed.] § 654) announces the same rule, quoting with approval *King v. Chamberlin*, 20 Idaho, 504, 118 Pac. 1099. In that case King had collected and impounded on his own land surface water which was not flowing in a well-defined channel. Chamberlin sought to appropriate the water under the water appropriation statutes of that state. It was held that:

"If a man collect and impound surface and flood waters from his own land before they reach any natural stream or channel and holds the same on his land and premises, the fact that he may not use it for irrigation or any other commercial purpose does not render it any less his property or authorize any one else to invade his property or appropriate and divert the same. A permit from the state engineer cannot give any sanction to such a procedure. The state engineer has no right to grant permits to one man to use another man's property."

In that case it will be noted that the landowner's absolute right to surface water flowing across his land was conditioned upon it being impounded before it reached a natural stream or channel. Diffused surface waters have been thus defined:

"Surface waters are waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channel in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows, occasional outbursts of water which in time of freshet or melting of snows descend from the mountains and inundate the country; and the moisture of wet, spongy, springy, or boggy ground." 24 Am. & Eng. Ency. Law (1 Ed.) 896.

40 Cyc. 639, defines surface waters to be: "Such as diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh."

See, also, 8 Farnham on Waters, § 978.

Barilla creek has all of the essential characteristics of a water course to which riparian rights would attach, except a permanent source of water supply. It has a channel, consisting of a bed and banks, but it is held without dissent that these characteristics alone will not constitute a water course in its legal sense to which riparian rights attach; that in addition there must be running water, which has a definite source of supply, and is permanent in the sense that similar conditions will always produce a flow of water and that these conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream; that ravines, gullies, canyons, sloughs, and swales through which mere surface water from rain or melting snow, at irregular periods, is discharged from a higher to a lower level, and which at other times are destitute of water, are not water courses in a legal sense to which riparian rights will attach. 1 Kinney on Irrigation & Water Rights (2d Ed.) §§ 301 to 315; Farnham on Waters, §§ 455, 455a, 457, and 459; 40 Cyc. 556; 30 Am. & Eng. Ency. Law (2d Ed.) 325; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Parke County v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; *Los Angeles, etc., v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

So it is apparent that the water which flows in Barilla creek is not mere diffused surface water as above defined and which may not be subject to appropriation. And, for reasons indicated, it is not water flowing in a water course to which riparian rights attach. But it is surface water which has collected from a very large area and is flowing in a well-defined channel, with a bank and bed. We see no reason why such water cannot be appropriated under our appropriation statute.

Mr. Well says that diffused surface water cannot be appropriated against the owner of the land on which it lies because its presence and movements are too capricious to found

any right upon distinct from the land where it is gathered. But this objection does not apply to surface water which flows in a canyon, ravine, or depression, with a well-defined channel, and flows with sufficient regularity during the growing season to be of value for irrigation of agricultural products, as is the case with Barilla creek. We therefore hold that such water is subject to appropriation under the first section of chapter 171, Acts 33d Leg. (Reg. Sess.) if the title thereto has not heretofore passed from the state by appropriation or otherwise.

Of course, the title to this water was originally vested in the state. The title thereto has not passed to riparian owners of land upon the creek under the doctrine of riparian rights, because it is not a water course to which such rights would attach. No such contention is made.

There is no contention made that title has passed from the state by virtue of any prior appropriation, except the prior appropriation of 100 cubic feet of water per second of time claimed by Otto Hoefs and the Wilson-Popham Cattle Company by virtue of their statement filed January 24, 1914, and the decree protects this appropriation and subordinates appellees' appropriation to the same.

In the absence of a divestiture of its title under the doctrine of riparian rights or by virtue of legal appropriations, there is no reason why the water in Barilla creek should not be regarded as water "the title to which has not already passed from the state," and it is so held.

There is no reason why the water which falls upon the vast area of land in the watershed of the creek south of appellants' land should be in any wise regarded as belonging to appellants or in any wise appurtenant to their land so as to be considered as a part thereof. It does not fall upon their land, and assuredly appellants have no better title to such water than landowners further up the creek, and unless the accident of location be a controlling factor, they have no better title than landowner further down the creek. But whatever may be the relative rights of the parties to this litigation to the water, it has no bearing upon the question of whether the title thereto has heretofore passed from the state. Upon that phase of the case we conclude:

[1] 1. That it is not diffused surface water falling upon or flowing across appellants' land which possibly may be regarded as their absolute property, and not subject to appropriation. Whether or not such water is subject to appropriation it is not necessary to decide, and we express no opinion upon that question.

[2] 2. That the title thereto has not passed from the state by prior appropriation or under the doctrine of riparian rights.

[3] 3. This being true, the title to such wa-

ter remains in the state, and is subject to appropriation under the laws of our state.

Under this view of the case, it is immaterial when the title to the lands in the creek's watershed passed from the state and when the state parted with its title to appellants' lands.

[4] Taking up appellants' second proposition, it is first asserted they cannot be compelled to maintain works upon their land for the delivery to plaintiff of water flowing in the creek. There is nothing in the court's decree requiring appellants to maintain any works to deliver water to appellee. Under the decree appellants are at liberty to demolish the dam which they have constructed upon section 323. An inspection of the decree will readily disclose that it imposes no duty to maintain any works upon their land. It simply undertakes to regulate and impose conditions upon the placing and maintenance of such works so that appellees' appropriation may be protected. Neither does it grant an easement or right of way across their land to conduct water to appellee's dam, nor unduly affect appellants in the use of their own property. Every man must use his own property with due regard for the rights of others. The water the flow of which was obstructed by appellant's dam was surface water flowing in a well-defined channel. It had flowed in that channel or depression across appellants' lands for many years, and the enforcement of the right to its continued flow does not constitute the imposition of a new right of way easement.

The right to flow in its accustomed channel, and to have it so flow, results necessarily from the rule which forbids the obstruction of water flowing in a well-defined channel. By his appropriation appellee became vested with a property right in a portion of the waters of Barilla creek, and the court properly protected that right by prohibiting the placing of such obstructions in the channel by an upper landowner as would result in diverting from the creek, water to which such upper landowner has no title, but which must pass in such channel across his premises before reaching appellee's point of diversion upon his own land.

What has been said disposes of the further contention made in the second proposition that the decree constitutes a taking of private property for private use.

From what has been said it follows that the third proposition is regarded as without merit.

The decree seems most adequately and properly to protect the rights of both parties to this litigation, and it is in all things affirmed.

HARPER, C. J. (concurring). Appellants accept in their motion for rehearing the statement of the nature and result of the case, and likewise the findings of facts in the majority opinion.

By the first assignment and its proposition it is urged that the state of Texas parted with its title to the land upon which their dam is situated in 1874, together with all the rights thereto in any wise appertaining including the depression now known as Barilla draw, and that the act of the Legislature (article 4991, R. S. 1913) declaring that "the ordinary flow, * * * collections of * * * rainwaters of every * * * ravine, depression or watershed * * * the title to which has not already passed from the state" has no application thereto, unless plaintiff shows that the title to the depression in question and the watershed thereof was in the state at the time of the passage of the act.

Therefore, they say, by their third assignment, the court erred in its decree in enjoining the construction and maintenance of the dam in question "unless it be so constructed as that it will permit all waters over 100 cubic feet, etc., to flow down to appellee," because, they further say, it places an unjust burden upon defendant, in that it compels them at great expense to construct for the benefit of plaintiffs an irrigation work for the delivery of water to the plaintiff and to maintain same, etc., and that the decree is an unjust and illegal interference with the use and enjoyment of private property and constitutes the taking of private property without compensation.

By their second they say that to comply with the provisions of this decree would require them to construct and maintain such expensive concrete dams as to render their property unprofitable; therefore they offer to permit plaintiff to construct such works as he may see fit at his own expense upon their property, so as to permit the excess over and above the amount apportioned to them, 100 cubic feet, etc., to flow down to his (plaintiff's) property.

If I comprehend the contentions of the appellants, they are that: (a) The uncontradicted facts establish, first, that the waters sought to be appropriated by the parties to this suit are surface waters; (b) that, being surface waters, they have the right to use their premises as they may see fit to impel or impound them and without regard to the location of appellee's premises, i. e., that appellee has no right to have the waters flow across their premises down to him; (c) and that being surface waters, not owned by the state, because not having fallen upon state lands, the act the provisions of which are sought to be invoked by appellee has no application.

If these are surface waters as contended for by appellant, his propositions are correct, but I concur in the holding of the majority of this court that, "under the facts, they are not surface waters in the true meaning of the term"; therefore the rule of the common law "that an owner in the ordinary use of his prop-

erty may divert them" does not apply. *Batla v. Goodell*, 58 Tex. Civ. App. 178, 115 S. W. 622. But they are waters which have fallen upon a large area of country, not claimed by appellant, and afterwards by virtue of the natural drainage of the country, come together or accumulate, from time to time in a canyon, ravine, or depression, with a well-defined channel, and flow with sufficient regularity during the crop season to be of value for irrigation. Therefore the waters therein become subject to ownership or appropriation by those who may own irrigable lands adjacent thereto, in the proportion that the relative rights of the parties may obtain, and as to such rights, i. e., as to the equitable distribution to persons entitled thereto, the law must and does furnish the rules by which they may be obtained.

Under the statement of facts in this case there is no evidence that the state owns (by any means known to the law) the lands upon which these waters fall nor the depression through which they flow; consequently there is no ownership in the state of the water flowing thereon. Therefore the statute invoked does not apply, unless said statute was intended to and does fix a new and definite rule, in the place of the common-law rule, for the distribution of the waters of this and similar natural water courses. And I see nothing in this statute, which by its provisions, by strict construction, or, by necessary intendment, indicates that it was intended to give a new rule applicable to the distribution of such waters; and, since there is no proof that it, the state, owned the waters by any of the means known to the law, I conclude that the rule of common law adopted in *Fleming v. Davis*, 37 Tex. 178, is the rule by which we must determine the relative rights of the parties to this litigation. The property of appellee being below that of appellant, and it appearing that he (appellee) is entitled to water for irrigation from Barilla creek, and appellants having admitted that appellee is entitled to water, first, by applying for a permit from the state, and, by their second assignment, agreeing that they may have it, etc., I conclude that the judgment entered meets the equities in this case, because appellants must so use their premises as not to injure the property rights of appellee. And if they must construct a dam in order to convert the water due them from the usual flow of this depression, they must so construct it as not to take waters to which appellee is entitled. And, since there is no question raised as to the distribution made by the state being equitable, appellee is entitled to his injunction, whether the rule as enunciated in the statute or the common-law rule applies.

I therefore concur in the final conclusion or result of the majority opinion, but not in the reasoning upon which it is based.

PECOS & N. T. RY. CO. v. MALONE et al.
(No. 1062.)

(Court of Civil Appeals of Texas. Amarillo.
Nov. 29, 1916. Rehearing Denied
Jan. 10, 1917.)

1. EMINENT DOMAIN \S 172—PROCEEDINGS TO
TAKE PROPERTY—JURISDICTION.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, providing that, when any railroad company is sued for property occupied by it for railroad purposes or for damages thereto, the court in which the suit is pending may determine all matters in dispute, including the condemnation of the property on cross-bill, chapter 21A, providing for the incorporation of gas, electric current, and power companies, granting to such companies by article 1283c the power to own and hold lands and structures necessary for their corporate purposes, and providing by article 1283d for condemnation in the manner provided by law in the case of railroads, a district court has jurisdiction, in an action by a railroad in trespass to try title, to adjudge the condemnation of the property in question in favor of the defendant electric light and ice company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 470-472; Dec. Dig. \S 172.]

2. EMINENT DOMAIN \S 198(1)—PROCEEDINGS
TO TAKE PROPERTY—DETERMINATION OF NE-
CESSITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1121, \S 73, permitting creation of water and ice, and electric light and power companies, an electric light and ice company had the power to determine whether the appropriation of land of a railroad company was necessary, and its decision was not subject to review by the courts, in the absence of abuse, and where it is not shown that the use of the right of way by the railroad will be seriously impaired.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 525, 528; Dec. Dig. \S 198(1).]

Appeal from District Court, Hale County;
R. C. Joiner, Judge.

Action by the Pecos & Northern Texas Railway Company against C. A. Malone, and another. From the judgment, plaintiff appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, Madden, Trulove, Ryburn & Pipkin, of Amarillo, and L. R. Pearson, of Plainview, for appellant. Randolph & Randolph, of Plainview, and L. C. Penry, of Ft. Worth, for appellees.

HALL, J. May 6, 1912, appellant railway company sued, in trespass to try title, C. A. Malone and the Malone Light & Ice Company, to recover a designated portion of its right of way and station grounds in the town of Plainview. Defendants disclaimed as to all except a small portion of the land, upon which the east end of its icehouse is situated. Appellant amended its original petition, seeking to recover only that portion of its right of way as claimed by the defendants. February 10, 1916, the Texas Utilities Company, a private corporation, intervened, alleging, in substance, that it was duly incorporated under the laws of the state of Texas, for the purpose of generating and supplying

electric lights and motor power to the public, and operating waterworks for the supply of water to the public, and for the maintenance and supply of ice to the public; that since the institution of the suit it had acquired all the physical properties, franchises, and easements of the Malone Light & Ice Company, assuming all the duties and obligations resting upon the Malone Light & Ice Company, for furnishing water, light, etc., to the city of Plainview; that at the time of the filing of the suit the original defendants were in possession of the land sued for and other lands, and of the building containing its electric light and ice plant, which had been erected and was being used for the benefit of the public; that it has such building on said property, together with some poles and other improvements thereon, so placed for the use of intervenor's customers in the transaction of its business for the public; that the public have a right at all times to use the electric current for lighting and motor power when so furnished by intervenor, upon the payment of reasonable and satisfactory charges therefor, and that the intervenor, as such purchaser, from said Malone Light & Ice Company, is operating under proper franchises from the city of Plainview, and is, as such, a public service corporation, legally authorized to condemn all property necessary for the transaction of its business for the public, and on such account petitioner prays for condemnation of the property sought to be recovered by plaintiff, together with an additional strip.

On the same day plaintiff filed its supplemental petition, replying to the intervenor's plea of intervention, by general and special demurrers, general denial and special pleas raising specifically all the questions presented in the brief.

On February 11, 1916, the original defendants filed an answer, consisting of exceptions, general denial, and special pleas, and, in addition alleging that the Malone Light & Ice Company had acquired by purchase certain parts of block 5, in the Wye addition to Plainview, which block lies immediately west of the ground in controversy; that it had placed its icehouse and other valuable improvements upon said property through mistake, thinking it was building upon its own land.

Upon a trial before the court, without a jury, judgment was entered that appellant railway company recover the tract of land described in its petition, and further ordering that the property described in the intervenor's plea of intervention be condemned to the use and occupancy of intervenor for the purpose of erecting and constructing poles and wires, and maintaining its house thereon. It was further ordered that \$50 damages be allowed the plaintiff as the value of the property so condemned. It is shown that

appellant was the owner of the land sued for and sought to be condemned; that the value of the strip involved is \$50; that the Texas Utilities Company acquired by purchase since the institution of the suit all of the physical property and franchises of the Malone Light & Ice Company; that the franchises so acquired granted the right to construct and operate and maintain, over, along, and across all streets, alleys, and public highways of the city of Plainview, in accordance with all reasonable ordinances of the city then in force and thereafter to be passed by the city council, an electric light and power plant; that the original company had acquired a site for its plant, wells, pumping station, ice factory, a block of land in the Wye addition, lying immediately west of the land sued for; that C. A. Malone, as manager of the Malone Light & Ice Company, by mistake as to the true location of the dividing line between the two properties, constructed the icehouse of his company so that it extends about 6.4 feet at its south end and about 8 feet at its north end, over on the appellant's right of way and station grounds; that such building is of such construction that it cannot be moved without practically destroying it; that a strip 9 feet wide off of the west end of plaintiff's land would take all of the ground on which the house is located, and where two poles stand, and where it is desired to place two other poles; that intervenor is seeking to condemn such strip for placing more poles and wires, and for the purpose of egress and ingress; that the principal business and residence part of Plainview are on the opposite side of the railway company's right of way from defendant's plant, so that the most direct line for poles and wires from the plant as situated would be south along the strip of land, and the dividing line between plaintiff's and defendant's properties.

[1] The first assignment of error assails the jurisdiction of the district court to determine appellee's right to condemn the property, insisting that it is a question wholly cognizable in the county court. Art. 6331, Vernon's Sayles' Civil Statutes, provides that when any railroad company is sued for any property occupied by it for railroad purposes, or for damages thereto, the court in which such suit is pending may determine all matters in dispute, including the condemnation of the property, upon cross-bill asking such remedy by defendant. Chapter 21A, Vernon's Sayles' Civil Statutes, providing for the incorporation of gas, electric current, and power companies in this state, grants to such companies, by article 1283c, the power to construct, maintain, and operate such plants, and to own, hold, and use such lands, rights of way, easements, buildings, and structures as may be necessary for its corporate purposes. It is provided by article 1283d of the same chapter that such a corporation may enter upon, condemn, and appropriate the

lands, rights of way, easements, and property of any person or corporation, and that the manner and method of such condemnation shall be the same as is provided by law, in the case of railroads. It is clear from the articles of the statute mentioned that the district court had jurisdiction to condemn the property upon appellee's cross-bill.

[2] Vernon's Sayles' Civil Statutes, art. 1121, § 73, permits the creation of private corporations in this state so as to include two or more of the following purposes, viz.: The supply of water and ice to the public, and the generation of and supply of electric lights and motor power to the public. Appellant insists that no necessity for taking its land is shown, and that the only reason assigned by the appellee for such taking is that it made a mistake in locating the boundary of its lot, and erected a part of its building on land owned by appellant. The Legislature has empowered any person or corporation to condemn land of another for the purposes mentioned above, and has, by its enactment, relieved the appellee of the burden of showing any necessity, and deprived the courts of their right to inquire into it. *Croley v. St. Louis Southwestern Railway Co.*, 56 S. W. 615; *Henderson v. Lexington*, 22 L. R. A. (N. S.) 64, note. 10 B. C. L. "Eminent Domain," §§ 158, 159, in discussing the subject of necessity for the taking, uses this language:

"The Legislature, in providing for the exercise of the power of eminent domain, may directly determine the necessity for appropriating private property for a particular improvement, or public use, and it may select the exact location of the improvement. In such a case it is well settled that the utility of the proposed improvement, the extent of the public necessity for its construction, the expediency of constructing it, the suitability of the location selected, and the consequent necessity of taking the land selected for its site, are all questions exclusively for the Legislature to determine, and the courts have no power to interfere or substitute their own views for those of the representatives of the people. Similarly, when the Legislature delegated the power of eminent domain to municipal or public service corporations, or other tribunals or bodies, and has given them discretion as to when the power is to be called into exercise and to what extent, the courts will not inquire into the necessity or propriety of the taking. The Legislature, or the party to whom the power is delegated, has the same discretion in determining what estate or interest in the required property shall be condemned, and while ordinarily only an easement is taken, if it is deemed advisable to acquire a fee, the owner cannot have the decision reversed by a court, except in a plain case of abuse. * * * The mere fact that the statute gives the corporation making the taking power to take land 'necessary' for its purposes does not, however, give the court any greater power to review the question of necessity than when the grant of power is not so limited, since the grantee of the power is the primary judge of the necessity, and the right of the court to review its decision in case of bad faith or abuse is the same in either case."

It does not appear that the condemnation of a strip of land 9 feet wide and the length of appellee's building will destroy the right of way or its use to the railway company,

nor, indeed, that it will seriously impair that right.

We will not undertake to discuss the many assignments in detail; analyzed, they present, in different forms, the questions decided. The assignments are therefore all overruled, and the judgment is affirmed.

NELSON et al. v. BUTLER. (No. 5746.)

(Court of Civil Appeals of Texas. San Antonio.
Dec. 13, 1916. Rehearing Denied
Jan. 10, 1917.)

1. DAMAGES ⇐81 — LIQUIDATED DAMAGES — CONTRACT OF SALE.

There is a valid stipulation for liquidated damages, the sum fixed not being exorbitant or out of proportion to what may have been the actual damages, a contract for sale of land providing that if the purchasers refused the deed the money deposited as earnest money should be forfeited as liquidated damages, but if a good and merchantable title could not be shown the money should be returned to the buyers.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. ⇐81.]

2. VENDOR AND PURCHASER ⇐130(6) — GOOD MARKETABLE TITLE—ERROR IN DEED.

Relative to a vendor having good marketable title, errors in description of land in deed from R. to P. are cured by reference therein to deed of H. to R. "for a full description of the land herein conveyed," the record book in which H.'s deed is recorded being given, and the records containing a proper description, so that the premises can be readily identified.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 246; Dec. Dig. ⇐130(6).]

3. VENDOR AND PURCHASER ⇐130(2) — "GOOD MARKETABLE TITLE."

A good marketable title is one that is free from reasonable doubt, and not necessarily one free from every possible suspicion.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 246; Dec. Dig. ⇐130(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Good Title*; *Marketable Title*.]

4. VENDOR AND PURCHASER ⇐130(2) — MARKETABLE TITLE—ERROR IN JUDGMENT.

That judgment setting apart land describes it as having been rendered in one county, when it was rendered in another, does not prevent the title from being a good marketable one.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 246; Dec. Dig. ⇐130(2).]

5. APPEAL AND ERROR ⇐1050(1) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting certificate of person who prepared an abstract of title, that the records of the county where the land was situated showed a person's name only once as grantee and once as grantor, was harmless; the description being sufficient without the certificate.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⇐1050(1).]

6. DAMAGES ⇐85 — SPECIFIC PERFORMANCE ⇐53 — LIQUIDATED DAMAGES — EFFECT OF STIPULATION.

A contract for sale of land having fixed a certain amount as liquidated damages for refusal of vendees to accept deed, the vendor can-

not have specific performance or greater damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. ⇐85; *Specific Performance*, Cent. Dig. §§ 179, 180; Dec. Dig. ⇐58.]

Appeal from District Court, Karnes County; F. G. Chambliss, Judge.

Action by S. C. Butler against John A. Nelson and others. Judgment for plaintiff, and defendants appeal, plaintiff making cross-assignments. Affirmed.

Williamson & Klingemann, of Karnes City, and Sansom & Metcalfe, of Georgetown, for appellants. Jno. W. Thames, of Kenedy, and L. H. Browne, of San Antonio, for appellee.

FLY, C. J. This is a suit instituted by appellee against J. A. Nelson, C. J. Anderson, and Emil Gustafson, appellants, for specific performance or to recover \$6,072, alleged to be due as damages arising from the breach of a contract of purchase of certain land. The cause was tried by the court, without a jury, and judgment rendered in favor of appellee for \$1,000. All parties appealed.

It appears from the evidence that a contract was entered into between appellants and appellee on July 6, 1914, whereby the latter was to sell to appellants a certain 1,200-acre tract of land out of the William T. Hatton league in Bee county. An abstract of title was to be furnished by appellee "showing a good and merchantable title to said land" in himself. He furnished such abstract, but appellants refused to comply with their contract. It was provided in the contract that if the appellants failed or refused the deed tendered them by appellee on January 2, 1915, "then in that event said sum of \$1,000 deposited as earnest money shall be forfeited to the party of the first part as liquidated damages, and this contract shall become null and void."

[1] The language of the contract as to the damages in case of a breach by appellants is clear and unmistakable and evinces a desire of the parties to settle the amount of damages. Not only was it provided that appellants should lose the \$1,000 in case of a breach, but it was also provided that in case "a good and merchantable title" could not be shown by appellee the earnest money should be returned to appellants. *Durst v. Swift*, 11 Tex. 273; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467; *Half v. O'Connor*, 14 Tex. Civ. App. 191, 37 S. W. 238; *Railway v. Schutz*, 37 Tex. Civ. App. 14, 83 S. W. 39. The sum fixed in the contract is not exorbitant nor out of proportion to what may have been the actual loss.

[2] The errors in the description of the land in the deed from Raley to Parker were cured by the reference in the deed to the deed of Hatton to Raley "for a full description of the land herein conveyed." The record book in which the deed is recorded was

given. The records contained a proper description of the land. The premises could be readily identified. *Berry v. Wright*, 14 Tex. 273; *Early v. Sterrett*, 18 Tex. 116; *Kings-ton v. Pickins*, 46 Tex. 101; *Ragsdale v. Robin-son*, 48 Tex. 398; *Wilson v. Smith*, 50 Tex. 370; *Steinbeck v. Stone*, 53 Tex. 385; *Aram-bula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *Devlin, Real Estate*, §§ 1016-1018.

In a case in which a party refused to accept a deed from another on the ground of the land being misdescribed in a deed forming a link in the title the Court of Appeals of New York held that the title was marketable. The court said:

"The long-established rules with reference to the construction of descriptions, contained in conveyances require courts to adopt such an interpretation thereof as shall give effect to the instrument according to the intention of the parties, if that is discoverable from legitimate sources of information. * * * In giving effect to such intention it is also their duty to reject false or mistaken particulars, provided there be enough of the description remaining to enable the land intended to be conveyed to be located." *Brookman v. Kurzman*, 94 N. Y. 273.

[3, 4] A good marketable title is one that is free from reasonable doubt, and not necessarily one free from every possible suspicion. The description of the land in the deed to Parker by Raley leaves no doubt as to its identity with the land conveyed by Hatton to Raley; the only error being that the judgment which set apart the 383 acres of land is described as having been rendered in Orange county when it was rendered in Travis county.

[5] If it was error to admit the certificate of the person who prepared the abstract of title, that the records of Bee county, where the land is situated, showed the name of C. W. Raley only one time as a grantee and one time as a grantor, it was immaterial error because the description was sufficient without the certificate.

[6] There is no merit in the cross-assignments of appellee. Appellee contracted to be satisfied with \$1,000 if appellants breached the contract, and is in no position to claim other relief. He cannot lawfully demand specific performance or greater damages than were given him, because he had contracted that \$1,000 was the extent of appellants' liability if they breached the contract.

The judgment is affirmed.

CLEGG v. BRANNAN et al. (No. 5602.)

(Court of Civil Appeals of Texas. Austin.
Nov. 22, 1916. Rehearing Denied
Dec. 23, 1916.)

1. SPECIFIC PERFORMANCE — 32(3) — CONTRACT TO CONVEY — MUTUALITY OF REMEDY.

A contract whereby defendant bargained and sold to plaintiff a certain ranch at a certain price, free and clear, for a recited consideration of \$1, and the plaintiff's conveyance of certain described properties to the defendant,

not signed by the plaintiff, was a unilateral contract, lacking in mutuality; and, since it bound defendant alone to convey, and since he could not have enforced specific performance against plaintiff, plaintiff could not enforce specific performance against him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92-98; Dec. Dig. 69.]

2. FRAUDS, STATUTE OF — 69 — ORAL CONTRACT — SALE OF LAND.

Such contract, not having been signed by the plaintiff, was in contravention of the statute of frauds (*Vernon's Sayles' Ann. Civ. St. 1914, art. 3965*), and was not binding upon him, without allegations showing him to be entitled to specific performance by reason of possession, part payment, etc.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 111; Dec. Dig. 69.]

3. SPECIFIC PERFORMANCE — 8 — REMEDY — DISCRETION OF COURT.

The granting of specific performance is not a matter of absolute right, but is within the discretion of the court, and it may be granted or rejected according to the circumstances of each particular case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. 8.]

4. SPECIFIC PERFORMANCE — 44 — ORAL CONTRACT TO CONVEY — POSSESSIONS.

Specific performance of an oral contract to convey land will not be enforced, in the absence of possession or permanent improvements made thereon, though the purchase money has been paid, as the payment of the purchase money, unaccompanied by possession, will not support an oral sale of land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 126; Dec. Dig. 44.]

5. SPECIFIC PERFORMANCE — 43 — ORAL CONTRACT — PART PERFORMANCE.

That a party to an oral contract to convey land has conveyed to the other party will not, standing alone, be accepted as a part performance, since such act is merely equivalent to a payment by him, not entitling him to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 126, 130, 131, 134-139; Dec. Dig. 43.]

6. FRAUDS, STATUTE OF — 110(1), 158(3) — CONTRACT FOR SALE OF LAND — MEMORANDUM — DISCRETION.

A memorandum of agreement for the exchange of lands, which did not describe a tract of land or give field notes from which it could be identified, parol evidence being inadmissible to aid such description, was insufficient within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 226-231, 375; Dec. Dig. 110(1), 158(3).]

Appeal from District Court, Schleicher County; J. W. Timmins, Judge.

Suit by T. J. Clegg against J. H. Brannan and others. Demurrer to petition sustained, and judgment for defendants, and plaintiff appeals. Affirmed.

D. T. Bomar, of Ft. Worth, and Wright & Harris, of San Angelo, for appellant. W. B. Silliman, of Eldorado, and Cornell & Wardlaw, of Sonora, for appellees.

RICE, J. On the 15th day of May, 1914, appellee Brannan executed and delivered to

appellant Clegg the following instrument of writing:

"The State of Texas, County of Tom Green.

"Know all men by these presents: That I, J. H. Brannan of Schleicher county, Texas, have this day bargained and sold to T. J. Clegg of Tom Green county, Texas, about 7,391 acres of land lying and being situated in Schleicher county, Texas, and known as the Fury ranch, and including other lands owned by me for the consideration of \$8 per acre, free and clear of any and all incumbrances whatsoever, on the following terms and conditions, to wit: \$1.00 cash in hand paid, the receipt of which is hereby acknowledged, and a good title and conveyance in law to the following described property and real estate, situated in and near Carlsbad, Tom Green county, Texas: Being all of blocks Nos. 281, 282 and 288, in Mason Perry Co.'s subdivision No. 1 of the Collins ranch, a total of 329.67 acres at \$75 per acre, a total of \$24,725.25; the waterworks system in Carlsbad, Texas, at a price of \$12,106.90; the waterworks system to constitute the standpipe, well, engine, mains, tools, and franchise for both water and electric lights in Carlsbad, Texas, and a perpetual right for pipe line running through block No. 288, in Mason Perry Co.'s subdivision No. 1 of the Collins ranch to the North Concho river, and with the perpetual right to use water at the junction of pipe with the said river for supplying the town of Carlsbad, Texas, with water, it being understood, however, that the pipe is to be sunk to a depth in the ground that it will not interfere with plows or other work, and that no conveyance to the land shall pass on account of such perpetual right as expressed; also there goes with the waterworks system the whole block of lots on which the standpipe is located; also one-fourth acre of land surrounding the well, with right of ingress and egress, the gin now located in the northeast corner of block No. 288, in Mason Perry Co.'s subdivision No. 1 of the Collins ranch at \$5,590.61, together with the two acres of ground out of the northeast corner of said land; the Plaza block in the town of Carlsbad, Texas, on which is located the bathhouse, pavilion, the Bethesda mineral well; lots Nos. 15, 16, 17, and 18 in block No. 29, of the town of Carlsbad, Texas, on which is located the Ben Hur mineral well; also what is known as the Bethlehem mineral well, with two lots therewith (it being understood that if either of the lots have the old schoolhouse located thereon, T. J. Clegg shall have the right to remove said house) the bathhouse at a price of \$7,081.17, the pavilion and mineral wells at a price of \$2,927.08.

"On account of repairs necessary to be done the waterworks system T. J. Clegg is to deed to the said J. H. Brannan five (5) vacant lots in the town of Carlsbad, Texas. On account of repairs necessary to be done the gin, T. J. Clegg is to deed to the said J. H. Brannan five (5) vacant lots in the town of Carlsbad, Texas; on account of differences in valuation, T. J. Clegg is to deed to the said J. H. Brannan seven (7) vacant lots in the town of Carlsbad, Texas, all of said lots are to be selected by the said Brannan and are those now owned by the said T. J. Clegg.

"It is understood T. J. Clegg assumes in this transaction the sum of \$11,000.00 due by the said J. H. Brannan to H. P. Drought & Co. and also assumes \$4,486.00 due the state of Texas, with the understanding that the said J. H. Brannan assumes and obligates himself in an indebtedness against the property to be conveyed to him by the said T. J. Clegg of \$9,400.00 the same to be secured by a vendor's lien, or mortgage or both, and reserved in the conveyances. The idea being the valuations should even up as stated.

"Interest on all amounts assumed by both J. H. Brannan and T. J. Clegg to be calculated to date of conveyances. It is hereby agreed

and understood by and between both the said J. H. Brannan and T. J. Clegg that good abstracts, showing good titles in law, will be prepared and delivered to each other within thirty days from the date hereof, or sooner, if possible.

"In testimony whereof, witness the signature of the maker hereof, this the 15th day of May, A. D. 1914. [Signed] J. H. Brannan."

Which was duly acknowledged.

This suit was brought by appellant, Clegg, against appellee Brannan, to enforce specific performance of the above instrument, and against appellees O. C. Roberts and the First National Bank of Eldorado, Tex., whom it was alleged were claiming some interest in the land sold by appellee to appellant, arising subsequent to the making of the instrument above set out. Appellant further alleged, as appears from his brief, that with the execution and delivery of said writing he paid to appellee \$1 in cash; that he agreed to pay, and did pay, in the assumption of an indebtedness due from appellee to H. P. Drought & Co., \$11,000; that he agreed to pay, and did pay, by the assumption of an indebtedness due from appellee to the state of Texas on some of the lands, \$4,486; that he agreed to pay, and did pay, by the conveyance to appellee of blocks 281, 282, and 288 in Mason Perry Company's subdivision No. 1 of Collins ranch, in Tom Green county, Tex., containing 329.67 acres, the sum of \$24,725.25; that he agreed to pay, and did pay to appellee, by the conveyance of the waterworks system in Carlsbad, Tex., which included the standpipe, well, engine, mains, tools, franchises for both water and electric light and perpetual right for pipe line through block 288 in Mason Perry Company's subdivision No. 1 to the North Concho river, together with perpetual right to use water out of said river, etc., the sum of \$12,106.90; that he agreed to pay, and did pay, by the conveyance of a gin located on the northeast corner of block 288, together with two acres of ground, \$5,590.61; that he agreed to pay, and did pay, by the conveyance to him of the Plaza block in Carlsbad, Tex., upon which is situated the bathhouse, pavilion, and the Bethesda mineral well, and lots Nos. 15, 16, 17, and 18 in block No. 29 of the town of Carlsbad, Tex., upon which is situated the Ben Hur mineral well, and lots 11 and 12 in block 54 in said town, on which is situated the Bethlehem mineral well, \$10,108.25. And further alleged that by the delivery of said instrument of writing by appellee to him, it was intended that appellant should, and that he did, assume, in the acceptance of same, to do and perform all of the things therein stipulated to be done and performed by the terms of said instrument, including the assumption of the incumbrances due H. P. Drought & Co. and the state of Texas; that he paid appellee Brannan the \$1 therein recited; and that both appellant and appellee acted upon and treated said instrument of writing as binding

both parties thereto to do all of the things therein provided to be done.

[1, 3] Appellee addressed, and the court sustained, the following exception to appellant's petition, to wit: Defendant specially excepts to so much of said paragraph 1 as purports to set out the above instrument in writing, and says that the same is wholly insufficient, because upon its face it is, if anything, in law a contract for the exchange of lands, a contract by defendant Brannan to convey to plaintiff lands in exchange for lands to be conveyed by plaintiff to him; and said contract is unilateral and lacking in mutuality, and particularly lacking in mutuality with reference to remedies, since plaintiff did not sign or execute said contract, and since it is a contract required by the statute of frauds to be in writing, and was and is unenforceable as against plaintiff, Clegg.

Appellant declining to amend his petition, judgment was entered in favor of appellees, from which appellant has prosecuted this appeal, urging that the court erred in sustaining said demurrer.

It will be observed that appellant, Clegg, did not sign the contract sued upon. The same, in our opinion, was a unilateral contract, lacking in mutuality, since it bound appellee alone to convey, and he could not, in our judgment, have enforced specific performance of it against appellant. It is true that it is alleged that appellant accepted the contract and executed the conveyances called for thereby. This transaction, however, was in effect only an agreement to exchange lands, and, not having been signed by appellant, was in contravention of our statute of frauds (article 3965, Vernon's Sayles' Rev. Civ. Stats.), and was not binding upon him, in the absence of allegations showing that he was entitled to specific performance, such as having gone into possession, paying part of the purchase money, or making valuable improvements thereon, because the granting of specific performance is not a matter of absolute right, but is within the discretion of the court, and may be granted or rejected according to the circumstances of each particular case. See 36 Cyc. 548D.

[4] Specific performance of an oral contract to convey land will not be enforced, in the absence of possession or permanent improvements made thereon, though the purchase money has been paid. See *McCarty v. May*, 74 S. W. 804. The payment of purchase money, unaccompanied by possession, will not support a parol sale of land. *Dixon v. McNeese*, 152 S. W. 675. In *Brown* on the Statute of Frauds, § 76, it is said:

"It is undoubtedly the settled law of this country, as of England, that the conveyance of lands by a verbal exchange or bartering merely is invalid by virtue of that statute [meaning the statute of frauds]."

See, also, same author, section 271.

[5] The fact that plaintiff has conveyed to defendant should not, standing alone, be accepted as part performance, since that act is merely equivalent to a payment by him. 36 Cyc. 688, 5. and authorities cited in note 37 thereunder. For other authorities bearing upon this question, see *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814. See, also, *Wright v. Berrow*, 13 Tex. Civ. App. 146, 35 S. W. 190, where it is held, as shown by the syllabus that under a parol contract for the exchange of lands, the mere fact that one of the parties has deeded to the other the land to be conveyed by him is not such a part performance as entitles the former to specific performance of the contract.

[6] In addition to the above it will be seen that the contract declared on is insufficient, in that it fails to describe the one-fourth acre of land mentioned therein surrounding the well; as no field notes are given, it would be impossible to identify same. It has been held that a memorandum relied on must contain a description of the land intended to be conveyed, and parol evidence is inadmissible to aid such description. See *Brown* on the Statute of Frauds, §§ 371, 385; *Jones v. Carver*, 59 Tex. 293.

Believing, for the reasons stated, that the court did not err in sustaining the demurrer, its judgment is affirmed.

Affirmed.

PIERCE-FORDYCE OIL ASS'N et al. v. STALEY. (No. 1063.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 22, 1916. On Motion for Re-hearing, Jan. 3, 1917.)

1. PROCESS ⇐149—RETURN—EVIDENCE.

The return of service by a sheriff or a disinterested person, authorized by law to make it, is prima facie evidence of the material facts recited therein.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202-205; Dec. Dig. ⇐149.]

2. JUDGMENT ⇐461(4)—EQUITABLE RELIEF—DEGREE OF PROOF REQUIRED—"CLEAR AND SATISFACTORY."

Equity should not set aside a default judgment for lack of service of process upon defendant, except on clear, satisfactory, and convincing proof of lack of such service; "clear and satisfactory" evidence meaning that the nature of the case demands a closer scrutiny of the weight of evidence than in an ordinary controversy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895; Dec. Dig. ⇐461(4).]

For other definitions, see Words and Phrases, First and Second Series, Clear Evidence or Proof.]

3. JUDGMENT ⇐461(4)—EQUITABLE RELIEF—FAILURE TO SERVE DEFENDANT.

In suit to set aside default judgment for want of service, evidence held not clear and convincing proof sufficient to impeach the constable's official act.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895; Dec. Dig. ⇐461(4).]

On Motion for Rehearing.

4. COURTS \S 89—RULES OF DECISION.

The weight of precedents establishing a certain rule of evidence is not lessened by the fact that such precedents have changed the ordinary rule as to evidence and applied a more strict rule without any legislative enactment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. \S 89.]

Appeal from District Court, Wilbarger County; J. A. Nabers, Judge.

Action by O. R. Staley against the Pierce-Fordyce Oil Association and others. From judgment for plaintiff, defendants appeal. Reversed and rendered.

J. Shirley Cook, J. M. Doran, and Harry Mason, all of Vernon, for appellants. Berry, Stokes & Morgan, of Vernon, for appellee.

HENDRICKS, J. On August 22, 1910, the appellant Pierce-Fordyce Oil Association obtained a judgment by default in one of the justice courts of Dallas county, Tex., against the appellee for the sum of \$55.70, said judgment based upon a verified account. This judgment recited that the defendant Staley was duly cited, as required by law. The judgment does not seem to have been introduced in evidence, but is pleaded by the appellant Pierce-Fordyce Oil Association, and, as we interpret plaintiff Staley's supplemental petition, the same was not denied, but admitted.

In March, 1915, the sheriff of Wilbarger county, J. D. Key, levied an execution upon said judgment on certain automobile casings, but before the sale of the seized property the plaintiff Staley sought and obtained a temporary injunction from the district judge of that district, restraining the sale of said property, on the ground that he was never served with citation in the justice court suit in Dallas county, and did not owe the debt evidenced by said judgment to the appellant. At the regular term upon the merits, the jury, on the submission of special issues, found in favor of plaintiff on both questions upon which the district court perpetuated the injunction.

It is assigned that the testimony of Staley, contradicting the officer's return of service, is not sufficiently corroborated by other testimony, and it is argued that the evidence is not of that clear and satisfactory nature established by the decisions of this state as that said officer's return should be set aside.

The principal reliance by appellant is upon the case of *Randall v. Collins*, 58 Tex. 232, where it is said by Chief Justice Gould:

"* * * If equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol evidence for the purpose of having an unjust judgment by default set aside, we are of opinion that it should require the evidence to be clear and satisfactory. It is not like an ordinary issue of fact to be determined by a mere preponderance of testimony."

Chief Justice Gould, citing the case of *Driver v. Cobb*, 1 Tenn. Ch. 490, further asserted that one witness alone would not suffice to successfully impeach the return of an officer upon a citation, but there should be two witnesses or one witness with strong corroborative circumstances. It was further said:

"* * * Upon general principles, it would seem essential to the peace and quiet of society that these solemn official acts should not be set aside with the same ease as an ordinary act in pais."

That part of the opinion, that evidence to set aside a judgment must clearly and satisfactorily contradict the sheriff's return, seems to be the general rule, without any opposing authority that we are able to find, in other jurisdictions. *Matchett v. Liebig*, 20 S. D. 171, 105 N. W. 171; *Smoot v. Judd*, 134 Mo. 545, 83 S. W. 493; *Jensen v. Crevier*, 33 Minn. 373, 23 N. W. 542; *Huntington v. Crouter*, 33 Or. 414, 54 Pac. 209, 72 Am. St. Rep. 729; *Connell v. Gallagher*, 36 Neb. 760, 55 N. W. 233; *Abraham v. Miller*, 52 Or. 14, 95 Pac. 816. All those cases cite, and some of them quote, from the Texas case of *Randall v. Collins*, supra. The rule seems to be subsequently recognized by the following Texas authorities: *Gatlin v. Dibrell*, 74 Tex. 38, 11 S. W. 909; *Wood v. Galveston*, 76 Tex. 130, 13 S. W. 228; *Land Co. v. Graham*, 24 Tex. Civ. App. 528, 60 S. W. 476; *Kempner v. Jordan*, 7 Tex. Civ. App. 278, 279, 26 S. W. 871.

It is noted that the Supreme Court said, relative to the impeachment of the return of citation:

"It is not like an ordinary issue of fact, to be determined by a mere preponderance of testimony."

We admit, of course, that the obligation of the rule would not require uncontradicted proof, and, necessarily, it is hard to determine and enunciate just what quantum of proof would meet the rule so as to demonstrate an equitable application to a record except one of exclusion.

[1, 2] The case of *Matchett v. Liebig*, supra, quoting from the case of *Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139, states the rule in a form as follows:

"The return of service, either by a sheriff or by a disinterested person authorized by law to make it, is prima facie evidence of the material facts recited therein, and a court of equity should not set aside a judgment except upon clear, satisfactory, and convincing proof of lack of service of process by the person making it."

This character of proof, bounded by the strict rule mentioned, is placed "upon grounds of public policy."

That a fact must be shown by "clear and satisfactory" evidence means that the nature of the case demands a closer scrutiny of the weight of the evidence than in an ordinary controversy. *Peterson v. Bauer's Estate*, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361, 362, 124 Am. St. Rep. 812. We of course assume that preponderance, which ordinarily

means the greater weight of the testimony, would still apply; and it is also the case that the slightest difference in the weight of the evidence in ordinary cases is a preponderance. But this case starting with the strong presumption founded on public policy, of the verity of an officer's return, illuminates the meaning of Chief Justice Gould that this was not like an "ordinary issue of fact determined by a mere preponderance." The preponderating evidence should be of a "clear and satisfactory" nature, and we think this record is in such a condition that it becomes a legal question.

There is no allegation or element of fraud in this case with reference to the judgment, or the service of citation, unless you say it is interposed by the denial of service, and that Staley did not owe the debt.

[3] We have repeatedly and carefully considered this record and think that such a verdict, and the judgment based thereupon, applying the rule, should not stand.

The appellee testified that he never purchased any of the character of supplies embodied in the affidavit upon which the judgment was predicated from the Pierce-Fordyce Oil Association, at any time nor for any purpose. Manis, the agent of appellant, at Vernon, Tex., though he did not have the records at hand, also positively testified that he sold to Staley \$200 or \$300 worth of supplies, and the account upon which the judgment was rendered was a balance which Staley failed to pay. He distinctly says that Staley made several payments on the running account at different times, the dates of which he could not remember, and that he presented the particular balance, and the appellee told him he could not pay, but would as soon as he got the money. This particular statement was not denied, unless it is considered to be inferentially contradicted by the testimony that Staley claimed to have never bought any goods from the Pierce-Fordyce Oil Association. If you admit Staley's testimony it means the fabrication of an account, with a verification thereto by the Pierce-Fordyce Oil Company or its agents, if you assume, as argued, that his denial of the debt is also relevant to the question of lack of service; and that an officer falsely and fraudulently made a return of service, of which there is no proof except the testimony of Staley, several years after the service, that he was not served. Homer Evans, the constable of Staley's precinct in Wilbarger county, though he had no independent recollection of the fact of personal service upon the defendant Staley, positively testified that it was his official signature to the return on the citation, and that, as constable, he personally served all papers. It is clearly deduced from his testimony that from those facts he knew that he served the writ and made the return thereupon; otherwise his signature thereto would not have been in existence. Without citing the au-

thorities on evidence this is clearly original and probative testimony of the fact recited in the instrument.

Staley's testimony intended to convey the inference that prior to his purchase of the Buick Car No. 36, he did not own an automobile. The record as to the registration of the numbers affording information as to who were owners of automobiles in Wilbarger county, Tex., clearly contradicted such an impression manifestly intended to be conveyed and manifestly untrue. While this is a collateral circumstance, it bears upon the rule, in affecting the credibility of the plaintiff.

We have given due consideration to this man's testimony as to his ownership of a certain building and the time of its vacancy and its occupancy by the Brown Buggy Company, and of another witness that he never knew of Staley having been in the garage business, and the fact that the appellant was not very diligent in enforcing the judgment, but regard the circumstances as relevant to the question of lack of service, of very little, if any, probative strength. The denial of Staley that he was not served imports the conclusion that an officer (without a single suspicious circumstance, except the denial) fraudulently and falsely, without any service whatever, made a return, but who, upon every other consideration, was presumably impartial and unprejudiced in the pursuit of his duty. Such a record, upon considerations of public policy, is not "clear and satisfactory" proof of impeachment of such an official act.

Without further analysis of this record, we are convinced that the verdict and judgment are erroneous, and, as the case was probably developed, we reverse and render the judgment, with the order that Staley's petition for injunction be dismissed.

Reversed and rendered.

On Motion for Rehearing.

[4] We cited the rule mentioned by Chief Justice Gould in *Randall v. Collins*, 58 Tex. 232, in regard to two witnesses, or one witness with corroboration, for the impeachment of a service of citation, but did not base the opinion in this case upon that part of the Supreme Court's opinion. A careful reading of the main opinion would make plain the real ruling in this case. In commenting on the two-witnesses rule, or one witness with corroborating circumstances, as to the proof necessary to overturn return of service of citation, appellant asserts that wherever the ordinary rule with reference to evidence has been changed and a more strict rule applied, it has been done so by legislative enactment. This is a mistaken view. Without going into a history of the law upon this subject, one notable exception in this state—and there have been others—is expressed by Justice Stayton as follows:

"In a long line of decisions by this court it has been established that the testimony of a single witness, testifying to the declarations of a deceased person, alleged to be a trustee, holding the legal title for another, is not sufficient to establish title to land in an alleged cestui que trust, in opposition to a deed which upon its face purports to convey the legal title to such alleged trustee; and this is a wholesome rule, having its foundation in a sound public policy." *Grace, Adm'r. v. Hanks*, 57 Tex. p. 15.

The motion is overruled.

SANDERS v. ELBERTA FRUIT CO.
(No. 1675.)

(Court of Civil Appeals of Texas. Texarkana.
Nov. 9, 1916.)

1. PRINCIPAL AND AGENT §155(1)—LIABILITY OF AGENT.

Where the manager of a fruit company undertook to handle and sell a farmer's tomatoes solely for the interest and benefit of the farmer, the legal relation between the manager and the farmer was that of principal and agent, and the manager individually, and not the fruit company, was liable to the farmer for prices realized from the sale of the tomatoes.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 574, 578; Dec. Dig. §155(1).]

2. PRINCIPAL AND AGENT §103(1)—LIABILITY OF AGENT—CONTRACT.

Where the manager of a fruit company purchased a farmer's tomatoes for the fruit company, and agreed to pay a fixed price, the farmer could recover of the fruit company such price, unless the manager was not acting within his powers as agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278, 281, 358, 367; Dec. Dig. §103(1).]

3. PRINCIPAL AND AGENT §24—ACTION ON AGENT'S CONTRACT TAKING CASE FROM JURY.

In an action against a claimed principal on a contract made by its agent, the court may take the case from the jury only if there is not sufficient evidence tending to prove agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. §24.]

4. PRINCIPAL AND AGENT §124(3)—AUTHORITY OF AGENT—PURCHASE—QUESTION FOR JURY.

In a farmer's action against a fruit company to recover an agreed price for tomatoes, which plaintiff claimed the fruit company had bought through its manager, whether the manager, as agent, was acting within the scope of his authority, so as to bind his principal by a purchase of plaintiff's tomatoes, *held* for the jury.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 724; Dec. Dig. §124(3).]

5. PRINCIPAL AND AGENT §123(7)—DEALING WITH AGENT — FAILURE TO MAKE INQUIRY—EFFECT.

In an action by a farmer against a fruit company for the price of tomatoes, which plaintiff claimed defendant had purchased through its manager, the circumstance that plaintiff, in dealing with the manager, made no inquiry, and did not ask if he was acting for the fruit company, could not be regarded as conclusively showing a want of any contract to sell to the fruit company.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 426; Dec. Dig. §123(7).]

6. PRINCIPAL AND AGENT §124(3)—DEALING WITH AGENT — PRUDENCE — QUESTION FOR JURY.

In a farmer's action against a fruit company for the price of tomatoes claimed to have been purchased through its manager, whether plaintiff failed to use reasonable prudence in dealing with the manager, as agent of the fruit company, *held* for the jury under the evidence.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 724; Dec. Dig. §124(3).]

Appeal from Smith County Court; Jesse F. Odom, Judge.

Action by Joe A. Sanders against the Elberta Fruit Company. From a judgment for defendant, plaintiff appeals. Judgment reversed, and cause remanded.

N. W. Brooks, of Tyler, for appellant. J. A. Bulloch, of Tyler, for appellee.

LEVY, J. The appellant claims that the appellee, a private corporation, is indebted to him in the sum of \$141.97 for a certain number of pounds of tomatoes sold and delivered to its authorized agent at Bullard, Tex., in June, 1915. And the appellee pleads a denial of the purchase of the tomatoes by it or by any one having authority from it to do so. The court, after all the evidence was in, peremptorily instructed the jury to return a verdict in favor of the defendant. And the question presented for review on appeal is that of error or not in giving the peremptory instruction.

[1, 2] As disclosed by the evidence, the Elberta Fruit Company is a private corporation for the purpose of general farming and growing and selling fruit and vegetables. The terms of the charter do not extend to buying fruit and vegetables of outside parties, and the company had never purchased fruit and vegetables grown by other persons. The appellee has its farm at Bullard, Tex. Fred J. Sackett is the manager, and has been for eight years, of the farm for the company, and is the only person authorized to transact its business. In the season of 1915 the appellee had grown a large crop of tomatoes to be sold in the Northern markets. Appellant, a farmer near Bullard, raised a tomato crop during the season of 1915, and, it appears, delivered to Mr. Sackett at Bullard, on June 11, 1915, 2,350 pounds of tomatoes and also 907 pounds of tomatoes, and on June 15, 1915, 2,490 pounds of tomatoes. There is a clear difference, as disclosed by the evidence, between the testimony of appellant and that of Mr. Sackett as to whether appellant was to be paid for the tomatoes the fixed market price of the day of delivery of 2½ cents per pound for the 907 pounds, and 3 cents per pound for the remainder, or appellant was to receive such amount of money as was actually realized for the tomatoes when shipped to and sold in the Northern markets by Mr. Sackett. This disputed matter rests, though, it may be said, upon the determination of the ultimate

fact of whether or not in handling the tomatoes of appellant Mr. Sackett was acting solely for the benefit and account of appellant as sales agent for him, or purchased the tomatoes at Bullard as agent and for and in behalf of the Elberta Fruit Company; for the evidence of appellant goes to show a sale and purchase of the tomatoes at Bullard for a fixed price by Mr. Sackett for and in behalf of the Elberta Fruit Company; and the evidence in behalf of appellee goes to show that, in undertaking to handle the tomatoes of appellant, Mr. Sackett was doing so solely as sales agent for the appellant, and without charge therefor, or as an accommodation to appellant. Thus, if it be true that the handling and selling of the tomatoes was undertaken by Mr. Sackett, as he contends, solely for the interest and benefit of appellant, then clearly the legal relation between appellant and Mr. Sackett is that of principal and agent, and Mr. Sackett individually, and not the Elberta Fruit Company, would be liable to appellant for such prices as was realized from the sale of the tomatoes in the shipment to the Northern markets. But if it be true that Mr. Sackett, as claimed by appellant, purchased the tomatoes at Bullard for and in behalf of the Elberta Fruit Company and agreed to pay a fixed price for them, then the appellant may recover of the Elberta Fruit Company such agreed price, unless it further appears that the appellant has no right or claim against the Elberta Fruit Company thereon because Mr. Sackett was not acting within his powers as agent so as to bind his principal. And upon the facts of the present record it may not be said, it is believed, as a matter of law, that Mr. Sackett did not have the requisite authority to bind his principal by the particular contract of purchase, if it be true that he was acting in behalf of the fruit company and not solely as sales agent for appellant. There is no dispute in the evidence that Mr. Sackett was in fact the manager for the Elberta Fruit Company, and there is ample evidence going to support a finding, if so made, that he was acting for the Elberta Fruit Company in the handling and disposing of the tomatoes. There is evidence to show that the draft for each car of tomatoes sold was drawn on the consignee for the account of the Elberta Fruit Company, and when the drafts were paid the money was deposited in the bank to the credit of the Elberta Fruit Company. Mr. Sackett paid the employes loading the cars, and the outside tomato growers, in checks on the bank, which checks were signed, "Elberta Fruit Co., by Fred J. Sackett, Manager." As testified by Mr. Sackett:

"The Elberta Fruit Company had a large crop of tomatoes in the season of 1915, and so did the Douglas farm, of both of which I had the management. For convenience in handling and disposing of crops from these farms, and to enable me to load the tomatoes from these farms in carload lots, I agreed with the other

tomato growers to handle their tomatoes with mine. * * * It was solely for the purpose of enabling me to ship the tomatoes of Elberta Fruit Company and those of the Douglas farm in carload lots that I undertook to handle the tomatoes of other growers. It was greatly to the advantage of Elberta Fruit Company to have its tomatoes shipped and sold in carload lots. * * * I bought some cash tomatoes to put in the cars. Those that I paid cash for I made a difference of 15 to 20 cents per crate less than the prices given to the customers of the customers of the merchants."

[3, 4] The court may only take the case from the jury if there is not sufficient evidence tending to prove agency. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; 1 *Clark & Skyles on Agency* (Ed. 1905) § 70. And in the evidence it would appear that Mr. Sackett, as manager for the Elberta Fruit Company, had authority to ship the tomatoes in carload lots. The question then is whether it was within the scope of his authority, as such agent, to purchase tomatoes from other parties "solely for the purpose," as Mr. Sackett testifies, "of enabling me to ship the tomatoes of Elberta Fruit Company and those of the Douglas farm in carload lots." As further said:

"It was greatly to the advantage of the Elberta Fruit Company to have its tomatoes shipped and sold in carload lots."

The purchase, if done, of other tomatoes would be with the purpose of promoting the business of the principal, by making it to the advantage and profit of the principal of shipping in carload lots. Having the authority, as Mr. Sackett had, of shipping and selling the tomatoes of the Elberta Fruit Company in carload lots, such authority would carry with it, as an incident, all the powers which are necessary, proper, usual, and reasonable as a means of effectuating the purposes for which the original authority of shipping and selling to the best advantage was conferred. It is the rule that incidental powers, or such powers as are necessarily and reasonably incidental to the actual authority, are elements that go to make up an agent's apparent scope of authority. See rule in *McAlpin v. Cassidy*, 17 Tex. 449; 1 *Clark & Skyles on Agency*, § 209; 31 Cyc. p. 1344, subd. 5. So it may not be held, as a matter of law, that the evidence fails to show that Mr. Sackett, as agent, was acting within the scope of his authority so as to bind his principal by a purchase, if made, of tomatoes of the appellant.

We have not attempted to set out all the evidence in the record. But upon considering all the evidence, we have concluded there was error in giving a peremptory instruction.

[5, 6] Appellee argues, besides other points, that appellant may not recover, because appellant, in dealing with Mr. Sackett, never made inquiry and did not ask Mr. Sackett whether he was acting for the Elberta Fruit Company or not in taking the tomatoes. This particular circumstance, in view of the other

circumstances in evidence, may not be regarded as conclusively showing a want of any contract to sell the Elberta Fruit Company the tomatoes. And the circumstances in evidence concerning the dealing of appellant with Mr. Sackett are of that force and extent that the court may not hold, as a matter of law, that appellant failed to use reasonable prudence in dealing with Mr. Sackett as agent of the Elberta Fruit Company.

The judgment is reversed, and the cause remanded for trial.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS et al. v. MILLER & WHITE.

(No. 8460.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 4, 1916. Rehearing Denied Dec. 2, 1916.)

1. CARRIERS \Leftrightarrow 180(3)—JOINT LIABILITY—LIABILITY FOR PROPORTIONATE PART OF DAMAGES.

While in intrastate shipments, which are not through shipments, a carrier may by contract limit its liability to damages occurring by reason of negligence on its own line, if the damages proven are shown to have resulted at least partially from the joint negligence of two carriers, each may properly be held responsible for the proportion of the damages accruing which its negligence bears to the entire negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 821; Dec. Dig. \Leftrightarrow 180(3).]

2. CARRIERS \Leftrightarrow 150—LIVE STOCK—STIPULATION AGAINST LIABILITY FOR NEGLIGENCE.

A common carrier may not stipulate so as to relieve itself from liability arising from its own negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 654-659; Dec. Dig. \Leftrightarrow 150.]

3. CARRIERS \Leftrightarrow 228(5) — CARRIAGE OF LIVE STOCK—NEGLIGENT REFUSAL OR FAILURE TO ACCEPT SHIPMENT — SUFFICIENCY OF EVIDENCE.

In an action for delay in shipment of live stock in transit, evidence held sufficient to justify a finding of a negligent refusal or failure of a defendant railway to accept the shipment at a connecting point.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. \Leftrightarrow 228(5).]

4. CARRIERS \Leftrightarrow 219(4) — CARRIAGE OF LIVE STOCK—JOINT LIABILITY OF ROADS.

Where the negligence of a railroad in failing or refusing to accept a shipment of live stock at a connecting point, concurred with the negligence of a connecting road in failing to deliver the shipment in question, on the transfer track, both companies were responsible for delays and the consequent damages proximately resulting from such negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 950; Dec. Dig. \Leftrightarrow 219(4).]

5. CARRIERS \Leftrightarrow 219(4) — CARRIAGE OF LIVE STOCK—DELAY.

If the failure of a railroad to receive a shipment of live stock when tendered it by a connecting road was negligence, and such negligence prevented the shipment of the cattle that night to destination, the railroad cannot excuse itself from liability on the ground that it did not actually receive the shipment until the next day.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 950; Dec. Dig. \Leftrightarrow 219(4).]

6. TRIAL \Leftrightarrow 296(11)—INSTRUCTIONS—CURE OF ERROR.

In an action against two railroads for delay in shipment of live stock in transit, the court charged that if the jury found for plaintiffs against both defendants, they should apportion such damages if any, according to and in proportion to the respective liabilities of the defendants, and state in their verdict the amount of damages, if any, found against each defendant. The charge was objected to as failing to inform the jury what the liabilities of the two defendants were, or to afford any guide in assessing damages against them. The court charged specially at the request of a defendant that the undisputed evidence showed that the live stock was shipped over the line of such defendant under a written contract under the terms of which it was agreed that defendant would only be liable for any damage which might occur on the line of defendant, or as the result of its negligence, so that plaintiffs could not recover against defendant for any damages except such as the evidence showed was occasioned by the negligence of defendant, its agents or employees. Held, that any deficiency in the main charge was cured by the special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 715; Dec. Dig. \Leftrightarrow 296(11).]

7. APPEAL AND ERROR \Leftrightarrow 1140(1)—EXCESSIVE DAMAGES—REMITTITUR.

In an action for delay in the shipment of live stock in transit, that the verdict is excessive to the extent of the improvement in selling appearance of the cattle on Thursday when they were sold over Wednesday, the day when they arrived, was at most only a question of requiring a remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462, 4464, 4470-4474; Dec. Dig. \Leftrightarrow 1140(1).]

8. APPEAL AND ERROR \Leftrightarrow 1032(1)—PREJUDICIAL ERROR—BURDEN.

The burden is on appellant to show probable injury as well as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051; Dec. Dig. \Leftrightarrow 1032(1).]

9. APPEAL AND ERROR \Leftrightarrow 1140(1)—SMALL ERROR IN VERDICT—REMITTITUR.

In an action for delay in shipment of live stock in transit, error in the verdict in that it left undetermined only the question of 25 cents per hundredweight on 470 pounds, due to decline in market from Tuesday to Thursday, was too small to even require remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462, 4464, 4470-4474; Dec. Dig. \Leftrightarrow 1140(1).]

10. EVIDENCE \Leftrightarrow 471(35)—OPINION OR CONCLUSION OF WITNESS.

In an action for delay in shipment of live stock, the question to plaintiffs: "Can you, by looking at this account sales, tell what the difference in the market value of the cattle in question were on Thursday, the 18th of December, 1913, and on Tuesday, when you should have gotten there?" was improper, so far as the part "when you should have gotten there" was concerned as calling for an expression of opinion, and a conclusion on a mixed question of law and fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2185; Dec. Dig. \Leftrightarrow 471(35).]

11. APPEAL AND ERROR \Leftrightarrow 1048(5) — HARMLESS ERROR—EVIDENCE.

The impropriety of such question in that it called for an expression of opinion was harmless, where the witnesses answered, showing the dif-

ference in the market value of each kind of stock included in the shipment on Tuesday and Thursday.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4143, 4151, 4153, 4159; Dec. Dig. § 1048(5).]

12. EVIDENCE § 471(35)—OPINION.

In an action for delay in a shipment of live stock, where the market value of the cattle on Thursday was established practically beyond question by the introduction of the account sales, it being agreed that it showed the market value of the different animals sold, plaintiffs were properly permitted to testify as to the difference in the market value of their cattle on Tuesday and Thursday, rather than stating what the market value was on the two dates, and leaving to the jury the question of determining the difference.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2185; Dec. Dig. § 471(35).]

13. APPEAL AND ERROR § 203(3)—RESERVATION OF GROUNDS OF REVIEW—TESTING ACCURACY OF WITNESS.

Where appellant failed to test the accuracy of a witness on certain matter, it could not complain on appeal of the answer made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 203(3); Witnesses, Cent. Dig. § 536.]

14. CARRIERS § 230(6) — CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—QUESTION FOR JURY.

In an action against two defendants for delay in shipment of cattle, the question whether a road was liable as partially responsible for the delay, held for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230(6).]

15. CARRIERS § 228(5)—CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—SUFFICIENCY OF EVIDENCE.

In an action against two railroads for delaying a shipment of live stock, evidence as to negligent delay by defendants held sufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228(5).]

Appeal from Comanche County Court; J. H. McMillan, Judge.

Suit by Miller & White against the St. Louis Southwestern Railway Company of Texas and another. From a judgment for plaintiff, both defendants appeal. Judgment against each defendant affirmed.

Kearby & Kearby, of Comanche, A. R. Eldson, of Hamilton, and Keith & Pittman, of Stephenville, for appellants. H. N. Goodson, of Comanche, for appellee.

BUCK, J. This is the second appeal of this case; the opinion of this court on the first appeal being found in 176 S. W. 830. The pleadings on both trials are the same, and the evidence largely so. The cause was submitted to the jury in a general charge, and the jury found for the plaintiffs against the defendant St. Louis Southwestern Railway Company, hereinafter called the Cotton Belt, \$214.36, and against the Receivers' Railway Company, \$109.10, without interest; the aggregate amounts so found being the sum for which suit was brought. Thereupon

judgment was rendered for the plaintiff in conformity with the verdict. Both defendants appeal.

The damages alleged by plaintiffs are itemized in their petition as follows:

(11) The plaintiffs allege that the car of live stock billed out in the name of H. L. White, contained 34 head of cattle and one hog, and the car in the name of H. W. Miller contained 32 head of cattle.

(12) The plaintiffs allege that by reason of the premises set out that the different items of their damage and injury are as follows:

As to the car last named, shipped in the name of H. W. Miller, as follows:

To 25 cents per hundredweight decline in market from Tuesday to Thursday, on the entire shipment in said car of 22,150 pounds	\$55.37
To 10 per cent. damage in selling appearance and market condition on 22,150 pounds	22.15
To 50 pounds per head shrinkage on 30 head of grown stuff in said car at market price of same on December 16th, and 25 pounds per head shrinkage on 2 calves at market price of same on December 16th	80.49

On said other car in name of H. L. White, as follows:

To 25 cents per hundredweight on said entire shipment decline in market from Tuesday, the 16th, to Thursday, the 18th, of December on 19,960 pounds	\$ 49.90
To 10 cents per hundredweight damage in selling appearance on 19,960 pounds	19.96
To 50 pounds per head shrinkage on all grown cattle and hogs and 25 pounds per head shrinkage on all calves in said shipment at market price on Tuesday, December 16th	88.09
To extra feed bill on both cars	11.50
To total damage on both cars	\$323.46

We do not find any error in the refusal of the trial court to give defendant receivers' proffered peremptory instruction, as claimed in its first assignment, because, as asserted, the plaintiffs were not entitled to recover against the defendants separately, because of a plea of joint liability, without any allegation as to the amount or character of any several liability, the evidence showing that contracts of shipment entered into between the plaintiffs and the two defendants were several, and not joint.

The plaintiffs alleged both separate acts of negligence and joint negligence, and pleaded both several and joint liability, specifying the negligent handling of the cattle between Lampkin and Comanche by the Cotton Belt, and until the delivery by it to its co-defendant, and then alleged acts of negligence on the part of the Receivers' Railway between Comanche and North Ft. Worth. They alleged negligence on the part of the Cotton Belt for failure to deliver to its co-defendant the shipment in question within a reasonable time, and negligence on the part of the Receivers' Railway for failure to receive the shipment promptly upon tender. Allegations of negligence against each road

were made because of delays and rough handling. The court submitted to the jury only the question of several liability, and the jury found as to the several liability, assessing the damage against each defendant in proportion as its negligence caused, or contributed to cause, the total damage.

[1] While in intrastate shipments, the same not being through shipments, a carrier may by contract limit its liability to damages occurring by reason of negligence on its own line, yet, if the damages proven are shown to have resulted, in part at least, from the joint negligence of the two carriers, each carrier may properly be held responsible for the proportion of the damages accruing which its negligence bears to the entire negligence. *T. & P. Ry. Co. v. Slaughter*, 37 Tex. Civ. App. 624, 84 S. W. 1085; *G. C. & S. F. Ry. Co. v. Godair*, 8 Tex. Civ. App. 514, 22 S. W. 777.

[2] A carrier may not stipulate so as to relieve itself from liability arising from its own negligence. *H. & T. C. Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308, aff. 88 Tex. 593, 32 S. W. 510; *M. P. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785. Therefore we overrule the first assignment.

Under the second assignment appellant receivers further allege error in the failure of the court to give the peremptory instruction requested, because, as claimed, the evidence shows without dispute that the receivers, by contract, limited their liability to injuries received, or damages occasioned, by their own negligence, after said cattle had actually been received for transportation, and that the evidence does not show that these receivers were guilty of any negligence in detaining said cattle at Comanche, nor in the condition of its pens at said place, nor was there any evidence of the market value of said cattle at the time they should have arrived at their destination if the receivers had exercised ordinary care after receiving the same, which time of arrival was Wednesday morning, nor was there any evidence of the difference in the market value between Wednesday morning and the time the cattle were sold, to wit, Thursday morning.

The evidence shows that the cattle arrived at Comanche from Lampkin before Receivers' north-bound cattle train reached Comanche. Plaintiff Miller testified upon this point as follows:

"No, we didn't unload the cattle, because we didn't want to break the seal, and we didn't want to unload. We wanted to go to Ft. Worth; we wanted to be transferred to the Frisco and go on to Ft. Worth, but the agent of the Frisco said they didn't have any orders to take us, and the Cotton Belt unloaded us at their pens. Yes, the Cotton Belt had time to have set the car before the Frisco went north, but did not do so. It was about 30 minutes after I got to the depot before the north-bound Frisco came in. The cattle were unloaded in the Frisco pens about 9 o'clock next day (Tuesday), and remained in there for about 12 hours."

Plaintiff White testified:

"Yes, the Cotton Belt agent told us that we would get here [Comanche] in time to get the Frisco that night. We expected to be transferred to the Frisco, but they backed us back to the stock pens and unloaded us. I don't know what was said; a boy was there acting as agent. We went over to the Frisco and asked him what about it, and he said he had no orders to take our cattle. When the Frisco run in he asked the conductor if he was going to take our cattle, and he said he didn't have any orders to take us. The agent didn't come until we went to the Frisco. Miller had left and went back, and the conductor said he had no orders to take us. Yes, I told the agent I wanted the cattle to go; I asked him if there wasn't a switch or something he could come over and get our cattle, and he said he couldn't do it. I don't know how long the Frisco stayed after it got there."

Upon cross-examination by counsel for the Cotton Belt, witness was asked:

"You got here a good while before the Frisco came in, didn't you? A. Yes, sir."

G. W. Jessup, agent for receivers, testified in part:

"I don't know why we didn't take the cattle that night; the train was due here at 9:13 o'clock at night and due in North Ft. Worth, or West Yards, at 5:15 a. m."

It was agreed that R. N. Davis, conductor for Receivers' train, handled the shipment in question from Comanche to Ft. Worth, and if present would testify that he received the cattle on December 16, 1913, 10:30 p. m. (Tuesday), that they arrived at West Yards, 10:40 a. m., December 17th (Wednesday).

[3,4] We think the evidence is sufficient to justify a finding of a negligent refusal or failure of the Receivers' Railway to accept the shipment on the night of Monday, the 15th. If this negligence concurred with the negligence of the Cotton Belt in failing to deliver on the transfer track the shipment in question, both railway companies would be responsible for delays and the consequent damages proximately resulting from such negligence. *G. C. & S. F. Ry. v. Terry et al.*, 89 S. W. 792; *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App. 78, 88 S. W. 392; *T. & P. Ry. Co. v. Slaughter*, 37 Tex. Civ. App. 624, 84 S. W. 1085.

[5] If the failure of the defendant Receivers' Railway to receive the shipment in question when tendered on Monday night was negligence, as the jury was justified in finding, and such negligence prevented the shipment of the cattle Monday night to Ft. Worth, the defendant receivers would not be permitted to excuse themselves from liability on the ground that they did not actually receive the shipment until the following day. Therefore the second assignment is overruled.

In paragraph 5 of its main charge the court charged the jury as follows:

"If you find for the plaintiffs as above instructed against both defendants, you will apportion such damages, if any, according to and in proportion to the respective liabilities of said defendants, and state in your verdict the

amount of damages, if any, you find against each of said defendants."

This charge is objected to in receivers' third assignment:

"Because said charge fails to inform the jury what the liability of the two defendants are or to afford them any guide in assessing such damages against the several defendants."

The following special charge, omitting formal parts, was given at the request of receivers:

"The undisputed evidence in this case shows that plaintiffs' live stock was shipped over the line of the defendant receivers from Comanche, Tex., to North Ft. Worth, Tex., under a written contract, under the terms of which contract it was agreed that said defendant carrier would only be liable to the plaintiffs for any damages which might occur to their live stock in said shipment on the line of said carrier, or as the result of the negligence of said carrier, or that of its employees. I therefore instruct you in this case that the plaintiffs herein cannot recover against the carrier above named for any damages except such as the evidence, if any, in this case might show was occasioned by the negligence of said carrier, or that of its agents or employees."

[6] We think any deficiency in the main charge was cured by the giving of this special charge, and the third assignment is overruled. It appears the court gave every special charge tendered.

In the fourth assignment it is claimed the verdict of the jury is contrary to and unsupported by the evidence, as against the receivers, in that:

"The undisputed evidence shows that said cattle were not received for shipment by these receivers until Tuesday about 10 a. m., contract of shipment being made that same afternoon, and that the earliest market said cattle could have been delivered upon at Ft. Worth after such receipt was Wednesday morning, and there is no evidence in the record of the difference in the market value of said cattle on Wednesday's and Thursday's market, but only as to the difference in Tuesday's and Thursday's."

From what we have said in the discussion of prior assignments as to the concurring negligence of defendants causing the delay at Comanche, we hold that the proper measure of damages was to be determined, in part, by the difference in the market value on Tuesday, the date when said shipment would have reached the market except for the delay occurring at Comanche, and that between Comanche and Ft. Worth, and the Market value on the day on which they were sold, the evidence showing that the cattle were sold on the first market after reaching Ft. Worth.

The fifth assignment urges error in the way of failure of proof to sustain the verdict, as to the item of damage of 10 cents per hundredweight in damaged selling appearance on a total of 42,110 pounds or \$42.11. We are referred to the fact that plaintiff Miller testified:

"When I testified that the cattle were damaged 10 per cent. in selling appearance, I had reference to their condition when they arrived at Ft. Worth Wednesday afternoon. * * * Yes, sir; the cattle looked better the next morn-

ing. Yes, sir; as a whole, they all looked better the next morning."

Appellant receivers claim that as there was no evidence as to the amount of improvement in selling appearance on Thursday, when the cattle were sold, over Wednesday, when they arrived at Ft. Worth, and as the jury found the full amount claimed, that the verdict is excessive to the extent of the improvement in selling appearance of the cattle on Thursday over Wednesday.

[7, 8] This, at most, would only be a question of requiring a remittitur, and as the appellant receivers have failed to show that the verdict is materially excessive, if at all, and, as the burden is on the appellant to show probable injury as well as error (*K. C., M. & O. Ry. v. Beckham*, 152 S. W. 228, and other cases cited in *Vernon's Annotated Civil Stats.* under article 1628, p. 904, § 8), the assignment is overruled.

[9] The sixth and seventh assignments allege excessiveness of verdict as to the one hog shipped. The allegations, as will be noted, as to the hog included in the car shipped in the name of H. L. White, are "25 cents per hundredweight" and "50 pounds per head shrinkage." The evidence shows that the hog weighed at time of shipment 532 pounds, and at time of sale 470 pounds, making a loss of 62 pounds. Allowing 50 pounds for shrinkage, as pleaded, for improper handling, would leave only the question of 25 cents per hundredweight on 470 pounds due to decline in market from Tuesday to Thursday undetermined by the verdict. Such amount is too small to even require a remittitur in our opinion, on the theory of *lex non curat de minimis*, and therefore it becomes immaterial that the hog in fact was sold on Wednesday instead of Thursday, as alleged in the petition.

[10, 11] The eighth assignment is leveled at the action of the court in admitting the answer of the plaintiffs while testifying in their own behalf to the following question:

"Can you, by looking at this account sales, tell what the difference in the market value of the cattle in question were on Thursday, the 18th of December, 1913, and on Tuesday, when you should have gotten there?"

To which the witnesses answered, showing the difference in the market value of each kind of stock included in the shipment on Tuesday and on Thursday. While that part of the question, to wit, "when you should have gotten there," was undoubtedly improper, as claimed by appellant, as calling for an expression of opinion and a conclusion on a mixed question of law and fact, as held in a number of cases, including the *Roberts Case* in 101 Tex. 421, 108 S. W. 808, and *G., C. & S. F. Ry. Co. v. Bogy*, 178 S. W. 577, yet the answer, being a mere statement of the difference in the market value of the cattle and hog on the two days mentioned, we think any impropriety or error is thereby rendered harmless. Therefore we overrule

this assignment, and likewise the ninth, which attacks the action of the court in permitting the plaintiffs to testify as to the difference in the market value of the cattle in question on Tuesday, the 16th, and Thursday, the 18th, rather than stating what the market value was on the two dates mentioned and leaving to the jury the question of determining the difference.

[12, 13] Since the market value on the 18th was established practically beyond question by the introduction of the account sales, it being agreed by all parties that the same showed the market value of the different animals sold, the answer constituted merely a shorthand rendition of testimony as to the market value on the two days mentioned. If appellant desired to test the accuracy of the witness as to the stated percentage or depreciation, he could have done so, and, having failed so to do, he cannot here complain of the answers made. *T. & P. Ry. Co. v. Fambrough*, 55 S. W. 188-190; *St. L. I. M. & S. Ry. v. Boshear*, 108 S. W. 1032.

For reasons heretofore given we overrule the tenth assignment of appellant receivers.

[14] Appellant Cotton Belt's first assignment is directed to the refusal of the court to give a peremptory instruction in its behalf, and for the reasons given in discussing the like question raised by its coappellant, and for the further reason that the testimony shows that there was considerable delay in going from Lampkin to Comanche, a trip of 21 miles, requiring some three hours, and further that the evidence shows that the Cotton Belt had time to place two cars containing appellees' live stock on the transfer track, from which it would have been the duty of the Receivers' Railway to take them, and that if it had so placed the cars, and said cars had been attached to the train of receivers, which came into Comanche after the arrival of the Cotton Belt train, said shipment would have, in due course, reached North Ft. Worth in time for Tuesday's market, we think the assignment is without merit. *J. C. Gayle*, conductor on the Cotton Belt, testified:

That whenever they had a car to be carried on the Frisco, they put it on the transfer track, and that was all they had to do. "Yes, sir; the transfer is made by putting the car on the transfer track. No, I don't think I left the car on the transfer track. I had plenty of time to have left it on the track. Yes, according to the agreement between the Cotton Belt and Frisco, if I had left it on the transfer track that would have been a delivery. Yes, if I had pushed them up across the road or street, that would

have been a delivery. Yes, sir; I understood this to be the rule."

[15] Nor do we find any merit in appellant Cotton Belt's second specification of error that the verdict is not supported by the evidence, in that the undisputed evidence in this case showed that the defendant only agreed to carry the plaintiff's live stock to Comanche, and there to deliver it to its connecting carrier, and the undisputed evidence further shows that the defendant did safely carry said live stock to Comanche in time for said cattle to have been carried to Ft. Worth on the night of the 15th, and that said receivers failed and refused to accept said shipment for transportation on said night.

In addition to the testimony of the conductor, quoted above, plaintiffs testified that instead of placing the two cars of cattle on the transfer track, appellant Cotton Belt's conductor ordered the said two cars back to its pens there to be unloaded. And the evidence further shows that plaintiffs were using their utmost endeavors on the agents and employes of both roads to get their cattle shipped through to Ft. Worth Monday night. The evidence shows that on their arrival at Comanche the cattle looked "all right; not particularly damaged or drawn." Plaintiff Miller testified:

"Yes, sir; the agent at Lampkin told us we would get the Frisco train that night. We told him we didn't want to be billed out if we couldn't make it."

Plaintiff White testified:

"Yes, we tried to get the Cotton Belt to transfer us that night, but they did not, and the next morning about 9 o'clock they were unloaded in the Frisco pens. Yes, they were unloaded in the Cotton Belt pens, reloaded, and then unloaded in the Frisco pens."

From the verdicts returned against each of the defendants, the jury evidently concluded from the evidence that the appellant Cotton Belt was largely responsible for the delay at Comanche, and that if it had placed the cars on the transfer tracks, where it is admitted they should have been placed, in order to constitute a tender of the shipment to the receivers' line, that the main part of the damage would have been avoided.

Without discussing separately each of the other six assignments contained in appellant Cotton Belt's brief, we feel it sufficient to say that we have carefully examined the same and find no reversible error.

All assignments are overruled, and the judgment against each defendant is affirmed.

MOSELEY et al. v. BRADFORD et al.
(No. 8458.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 11, 1916. Rehearing Denied
Dec. 16, 1916.)

1. HIGHWAYS §20 — ESTABLISHMENT BY STATUTORY PROCEEDINGS — PUBLIC NECESSITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 6860, 6861, 6871, 6883, 6889, 6894, relating to the establishment of public roads by the commissioners' court, that court cannot lay out highways unless a public necessity therefor exists.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 26; Dec. Dig. §20.]

2. HIGHWAYS §64 — ESTABLISHMENT BY STATUTORY PROCEEDINGS — RESTRAINING OPENING OF ROAD.

While the commissioners' court has wide discretion in opening a public road, an abuse thereof may be enjoined, especially as Vernon's Sayles' Ann. Civ. St. 1914, art. 6882, confines the issues upon appeal to the amount of damages, leaving the only remedy that of injunction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 165, 334; Dec. Dig. §64.]

3. EMINENT DOMAIN §196(1)—EVIDENCE—CONDEMNATION RECITALS.

Recitals as to necessity in condemnation proceedings to establish a public road do not controvert positive and uncontroverted testimony in a suit to enjoin establishment, because there was no public necessity for the road.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 531; Dec. Dig. § 198(1).]

4. EMINENT DOMAIN §18—EXTENT OF POWER—TAKING PROPERTY FOR PRIVATE BENEFIT.

Taking private property for a highway for the benefit of an individual by a municipal body is a legal fraud upon the owner's rights, although there was no fraudulent intent in doing so.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 18.]

5. HIGHWAYS §55 — ESTABLISHMENT BY STATUTORY PROCEEDINGS—WAIVER OF DEFECTS.

Plaintiffs did not waive their right to enjoin the opening of a public road by presenting to the condemnation commissioners a claim for damages which reserved the right to contest such opening, especially where waiver was not pleaded.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 173-175; Dec. Dig. §55.]

6. HIGHWAYS §55 — ESTABLISHMENT BY STATUTORY PROCEEDINGS — PLEADING — WAIVER OF DEFECTS.

Waiver of the right to contest the opening of a road upon the ground of lack of public necessity is not available, unless pleaded.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 173-175; Dec. Dig. §55.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Suit by Margaret C. Moseley and others against J. H. Bradford and others. From an order dissolving a temporary injunction, the plaintiffs appeal. Reversed and rendered.

W. H. Penix, of Mineral Wells, Hood & Shadle, of Weatherford, and D. M. Alexander, of Ft. Worth, for appellants. J. T. Ranspot and W. F. Smith, both of Palo Pinto, for appellees.

DUNKLIN, J. J. H. Bradford owns a survey of 160 acres of land situated in Palo Pinto county, which is wholly within and surrounded by a ranch, known as the Moseley ranch, of 3,000 acres. Mrs. Margaret C. Moseley owns a life estate in the land constituting the ranch, and the children of Mrs. Moseley and her husband, H. L. Moseley, own the fee-simple title in said ranch, subject to said life estate. On June 16, 1915, Mrs. Moseley and her husband filed this suit in the district court of Palo Pinto county against J. H. Bradford, the county judge, and other members of the commissioners' court, and the road overseer, to enjoin the opening of a public road of the second class, which had theretofore been established by said commissioners' court, extending from the home of said J. H. Bradford to a point on the Lipan public road, which had theretofore been ordered opened. At the same time they applied for and obtained a temporary writ of injunction, restraining any further action on the part of the defendant looking to the opening of the road. On June 29, 1915, the defendants filed a motion to dissolve the temporary writ, which was heard and granted on the 9th of July following. The plaintiffs gave notice of appeal from said order to this court, but they failed to take any further steps to prosecute said appeal. After such failure to prosecute the appeal, the commissioners' court ordered the road opened in compliance with their former orders, and the road was thereafter opened by the road overseer in compliance with the terms of said order. Thereafter, on October 6th, plaintiffs filed in the district court their first amended original petition, alleging that the action of the commissioners' court in opening the road was void, and asking that said court be enjoined from opening and maintaining the same, and that the fences erected to fence off the road from the balance of the Moseley ranch be removed. The case was tried without a jury, and the trial judge filed findings of fact and conclusions of law, which are as follows:

"Findings of Fact.

"The Allen Williams survey of land is owned by Mrs. Margaret C. Moseley, one of the plaintiffs herein, who has a life estate in said survey with the remainder in her children.

"(2) The J. W. F. Stone survey is owned by J. H. Bradford and is entirely surrounded by said Allen Williams survey.

"(3) J. H. Bradford has no road or outlet from his place except across the Allen Williams survey.

"(4) For years J. H. Bradford has had a gated road leading from his place to the old Lipan road, thence to his post office and trading point.

at Brazos, Tex. This road has been moved by plaintiffs herein at will, and the location of same has never been certain or definite since the defendant J. H. Bradford has owned and occupied the said Stone survey.

"(5) On the 14th day of April, 1915, J. H. Bradford and others posted three notices, as required by law, stating that a petition would be presented to the commissioners' court of Palo Pinto county at its May term, 1915, asking for the opening and establishment of the road in controversy.

"(6) On the 9th day of May, 1915, J. H. Bradford filed with the clerk of the commissioners' court a petition in writing signed by himself and 44 others, freeholders of road precinct No. 14, of Palo Pinto county; that the said petition stated, among other things, that it was necessary for the convenience of the petitioners and the public generally that the road therein asked for be opened, same being the road in controversy.

"(7) On the 13th day of May, 1915, the commissioners' court of Palo Pinto county acted upon said petition, and found that a necessity existed for the opening of the said road, granted said petition, and appointed a jury of view to lay out the said road.

"(8) On the 25th day of May, 1915, an order for the jury of view to view out the said road and assess the damages incident thereto was duly issued by J. W. Brock, county clerk of Palo Pinto county, Tex., directed to J. B. Riggs, F. J. Kahlbau, Tom Harrison, L. M. Blucher, J. M. Watson, jury of view theretofore appointed by the said commissioners' court of Palo Pinto county, and that said order for the jury of view was on the 27th day of May, 1915, served upon each member of the said jury of view by W. G. Abernathy, sheriff of Palo Pinto county, Tex.

"(9) Thereafter said jury of view took the oath, as required by law, and thereafter gave notice to Mrs. Margaret O. Moseley and H. L. Moseley, her husband, of the time and place at which said jury of view would meet to lay out and survey said road and to assess damages thereto; said notice was served upon the said Mrs. Margaret O. Moseley and H. L. Moseley in Parker county on the 1st day of June, 1915, by Geo. Gore, sheriff of Parker county, Tex.; said notice was given for more than five days before the time set for the meeting of the said jury of view.

"(10) On the 10th day of June, 1915, the said jury of view met at the time and place mentioned in their notice to the plaintiffs and proceeded to lay out said road in compliance with the order of the commissioners' court and to assess damages to land taken from Mrs. Margaret O. Moseley for said road at the sum of \$50 and other damages incident to the opening of the same at the sum of \$10; and on the 14th day of June, 1915, filed with the clerk of the commissioners' court a report of their action.

"(11) On the 15th day of June, 1915, the commissioners of Palo Pinto county acted upon said report of the said jury of view, and ordered the said road opened and established as a road of the second class, 30 feet wide, and further ordered that the sum of \$100 be deposited with the county treasurer of Palo Pinto county to the order of Mrs. Margaret O. Moseley as compensation for land taken, and ordered that J. H. Wharton, overseer of road precinct No. 14, open and fence said road.

"(12) When the said jury of view met to lay out the said road and to assess damages thereto the plaintiffs, H. L. Moseley and Mrs. Margaret O. Moseley, filed with the said jury of view a claim for damages for land taken in the sum of \$100, and further incidental damages claimed in the sum of \$500.

"(13) Said road is located as follows: Beginning at an iron stake 200 feet of the northwest corner of the J. W. F. Stone survey; thence in

a northerly direction across the Allen Williams survey 1,700 feet to a stake at the crossing of a branch; thence in a westerly direction 436½ feet to a stake in the center of a gate near the residence of T. B. Roquemore and intersecting the old Lipan road at the said point; that the said road is now open and used by the public.

"Conclusions of Law.

"Upon the whole evidence and the foregoing findings of facts, I conclude as a matter of law:

"1. The commissioners' court of Palo Pinto county had the legal right to order the said road opened, and that the said court acted within its legal authority in opening the same.

"2. The petition of J. H. Bradford was in due and legal form; the same was signed by the requisite number of freeholders, and due notice of the presentation of the same had been given.

"3. All orders passed by the commissioners' court of Palo Pinto county in reference to the opening of the said road were in due and legal form and made in conformity with law.

"4. The jury of view were legally sworn and qualified, the notices given to the plaintiffs H. L. Moseley and Mrs. Margaret O. Moseley were in legal form, and the same were given for the length of time required by law.

"5. The plaintiffs, in appearing before the said jury of view and presenting a claim for damages, waived any and all irregularities, if any had existed, in the proceedings of the court up to the said time.

"6. The commissioners' court of Palo Pinto county had jurisdiction and full power to open said road and to make any and all orders necessary to be made in the opening of the same.

"7. The district court is without jurisdiction to inquire into any of the matters in controversy in this suit further than to ascertain that the commissioners' court did not abuse the right of discretion vested in it concerning the opening of public roads.

"8. The commissioners' court had jurisdiction of the entire subject-matter involved in this suit, and the said court has not abused its discretion, and therefore the plaintiffs are not entitled to the restraining order prayed for in their petition."

Plaintiffs alleged in their petition that the road was established for the sole benefit of J. H. Bradford, and not for the benefit of the public at large, and that therefore the action of the commissioners' court in establishing the road was void because it was an abuse of the discretion vested in said court by the statutes in the matter of laying out and opening public roads. And the contention pressed most strongly upon this appeal is that the truth of those allegations of fact was established by uncontroverted proof.

[1] It is hardly necessary to say that the power of the commissioners' court to lay out public roads did not exist except in cases of public necessity therefor, and that it did not have authority to lay out such roads for the sole purpose of benefiting Bradford only. See Vernon's Sayles' Texas Civil Statutes, arts. 6860, 6861, 6871, 6883, 6889, 6894; 15 Cyc. pp. 578, 579, 581 to 585; 10 R. C. L. §§ 22, 23, 28; 37 Cyc. 45 to 50. In *Re Tuthill*, 163 N. Y. 133, 57 N. E. 308, 49 L. R. A. 781, 79 Am. St. Rep. 574, the following language was used:

"Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at and whether the

plan has such an obvious, or recognised, character of public utility, as to justify the exercise of the right of eminent domain, or of the power of taxation, in its favor."

It is also true that the fact that some parties are more benefited than others by the use of the highway seems no objection thereto if the public interest and convenience are thereby subserved. *Ross v. Davis*, 97 Ind. 79; *In re Burns*, 155 N. Y. 23, 49 N. E. 246; *G., H. & S. A. Ry. v. Baudat*, 18 Tex. Civ. App. 595, 45 S. W. 939. In 37 Cyc. 47, it was said:

"It is not requisite, however, in order to justify the establishment of a highway, that it should both begin and end at pre-existing highways, or other public places, provided it is a public necessity, and if laid out will be a public utility and convenience. It is sufficient if one terminus be at an existing highway or other public place. Accordingly, a cul-de-sac may be established as a highway if public necessity, utility, or convenience requires. Under such circumstances the road when laid out need not be a thoroughfare."

To the same effect is *Decker v. Menard County*, 25 S. W. 727.

[2] It is well settled that, while the commissioners' court in opening a public road has a wide discretion in determining whether or not it is a public necessity, it may be enjoined from so doing upon a showing of an abuse of that discretion. *Bourgeois v. Mills*, 60 Tex. 76.

The statement of facts filed in the case shows that the documents referred to in the court's findings of fact were introduced in evidence such documents showing the proceedings taken for opening the road and consisting of the petition for the same, appointment of the jury of view, order approving their report, etc. Those instruments are not copied in the statement of facts, but they are attached to the plaintiffs' petition as exhibits, and presumably they are the ones considered by the court and referred to in his findings of fact.

Aside from those documents the only evidence introduced was the testimony of H. L. Moseley, one of the plaintiffs in the suit. He testified as follows:

"My coplaintiff Mrs. Margaret C. Moseley is my wife, and owns a life estate in two tracts of land, known as the Allen Williams survey, consisting of about 3,000 acres, and which property is known as the Moseley ranch, the title to said land being in our children named in the petition herein; that the defendant J. H. Bradford owns and occupies the J. W. Stone survey of 160 acres, which lies wholly within the inclosure of said Moseley ranch; that the road in controversy, the opening of which is sought to be enjoined in this suit, is a short road about one-third of a mile long, and extends from the yard of the residence of the defendant J. H. Bradford, on said J. W. F. Stone survey out through the said Moseley ranch to a public road, which runs along the west side of said Moseley ranch and is commonly called the Lipan road; that defendant J. H. Bradford has lived on said Stone survey, inside of the Moseley ranch, for a number of years, and always had free and easy access to his said land and home by a road, or several roads out through said ranch to said Lipan road, through a gate, or gates, in

the outside fence of the said Moseley ranch, said road and roads being clear of any obstruction of any sort, except one gate; that the said J. H. Bradford had lived on said Stone survey for a number of years and used the roadway furnished him by the plaintiffs through the said Moseley ranch; that the road so furnished the defendant J. H. Bradford was the shortest and nearest way from the residence of the said Bradford to his post office, schoolhouse, gin, etc.

"That the petition for said road was signed by a number of citizens, who did not live near the said road, and who signed the petition for said road at the request of the defendant J. H. Bradford; that said road, as opened by the commissioners' court of Palo Pinto county, Tex., who are the other defendants herein, was opened as a second class road through the land in cultivation on plaintiffs' ranch and through growing crops on said land, and caused the plaintiffs very great inconvenience, as it cut their field in two with a lane and compelled the plaintiffs to open two gates in passing from one part of their field to the other part; that there was no necessity in his opinion for said road, as there was already a good road with a gate on it from the defendant Bradford's house out through plaintiff's land, which was easily accessible both for the plaintiffs and the general public.

"That when a matter of opening said road came up for consideration before the commissioners' court of Palo Pinto county, he went before said commissioners' court for the purpose of contesting the opening of said road, but that said commissioners' court declined to permit plaintiffs to produce any evidence as to the necessity of opening said road, or his damages sustained thereby, and declined to hear any evidence from the plaintiffs as to the opening of said road and the public necessity thereof.

"That the defendant J. H. Bradford told him that the reason that he wanted said road opened was because he thought it would add to the value of his place to have an open road from his front gate out to the public road; that he wanted to sell his place, and thought he could sell it easier with an opened lane than with a third-class road, and that he intended to get the road if the law would give it to him. 'I have been notified that Palo Pinto county has deposited with the county treasurer \$100, payable to the order of my wife, Mrs. Margaret C. Moseley, in payment for damages and land taken. Money is no object with us; we do not want an open road through our land.'

"That there had been no trouble about the road in times past between plaintiffs and the defendant J. H. Bradford; that the said J. H. Bradford never made any complaint of any sort as to the road furnished him by plaintiffs as an outlet through said Moseley ranch over said Williams survey.

"That said road, as opened by the court, was solely for the benefit of the defendant J. H. Bradford, and only extended from Bradford's front gate out to said Lipan road, and is not used by the public for any purpose except to visit said Bradford.

"That the public in times past easily reached said Bradford's land by a road with a gate in it; that the effect of opening said road was to make plaintiffs open two gates instead of defendant Bradford having to open one, and caused plaintiffs very great inconvenience and trouble."

In *McIntire v. Lucker*, 77 Tex. 259, 13 S. W. 1027, it was held that a commissioners' court, at the instance of a property owner whose land was taken for a public road, could be enjoined from opening the road upon a showing that in the condemnation proceedings the statutory requirements for first giving notice to the owner before such con-

demnation was made were not complied with. After citing the statute requiring such notice to be given, the court said:

"The service of this notice in the manner required by this statute is indispensable to the exercise of jurisdiction by the commissioners' court. It is a jurisdictional fact which must be affirmatively shown to sustain the jurisdiction of the commissioners' court in making an order establishing and directing that a public road be opened on the land of a citizen. Without proper service of such notice the action of the jury of freeholders and the order of the commissioners' court are nullities."

To the same effect are *Vogt v. Bexar Co.*, 5 Tex. Civ. App. 272, 23 S. W. 1044; *Evans v. Santana Live Stock & Land Co.*, 81 Tex. 622, 17 S. W. 232; *Morgan v. Oliver*, 98 Tex. 218, 82 S. W. 1023, 4 Ann. Cas. 900; *Crawford v. Frio County*, 153 S. W. 388; *Parker v. F. W. & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518. The case last cited was a suit by Parker against the railway company in trespass to try title to land which had theretofore been condemned for the use of the railway in a condemnation proceeding instituted in the county court, and the decree of condemnation was relied on by the railway company as a defense to the action to the extent of the right of way awarded. In the opinion rendered in that case the Supreme Court used the following language:

"Many objections were urged to the admission in evidence of the petition seeking condemnation of right of way, to the report of the commissioners, and to the decree of condemnation; but it is not necessary to notice more than two of them. It was urged that the decree was inadmissible, in the absence of evidence that such notice had been given to owners as the law prescribes, and we are of opinion that this objection should have been sustained. The proceeding to condemn land for public use is special in its character, and its validity must depend upon a compliance with the law authorizing it. Nothing is to be presumed in favor of the power of such a special tribunal, and it is incumbent on one seeking to show right under its decree to show that the court had acquired jurisdiction to render it. Notice to the owner of the land sought to be condemned is necessary to jurisdiction, and this cannot be presumed from declarations contained in the report of the commissioners, nor from recitals in the decree of condemnation, but must be proved" (citing a number of authorities).

In 4 *McQuillin, Municipal Corporations*, § 2110, it was said:

"The prevailing rule is that public improvement proceedings and the recital of record relative thereto are usually conclusive as against collateral attack. But defects in such proceedings which go to the jurisdiction of municipal authorities may be attacked collaterally."

And in *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496, 41 Am. St. Rep. 771, it was held that an injunction will lie to restrain the taking of property for the benefit of an individual, and not for the benefit of the public.

It is also to be noted that by article 6882 of our statutes, the right of the owner to appeal from the decision of the commissioners' court in condemning his property for a public

road is limited to a complaint that the damages allowed are not adequate, thus leaving the only remedy open to him for resisting the unauthorized taking of his property by the commissioners' court to a suit for injunctive relief in the district court, which was followed in the present suit.

The existence of a public necessity for a road being prerequisite to the authority of the commissioners' court to lay out and establish a public road is also a jurisdictional fact, and what is said with reference to the necessity of proof of another jurisdictional fact, to wit, the service of notice upon the owner of land, would apply here also.

[3] In those cases the burden of proving notice was placed upon the defendant. Even though it should be said that in the present case the plaintiff assumed the burden of proving that there was no public necessity for opening and establishing the road in controversy, he has discharged that burden by undisputed proof, which made out a prima facie case and also a prima facie showing that in establishing the road the commissioners' court were moved by a desire to confer a benefit upon Bradford only, and not by a purpose to benefit the public. As noted already, the testimony of plaintiff H. L. Moseley was not controverted at all. The defendants failed to introduce the commissioners, or Bradford, or any one else; and, as settled by the authorities noted, the recitals in the condemnation proceedings could not be considered as any evidence controverting Moseley's testimony. And in this connection it is to be noted, further, that no excuse is shown for making the proposed road a second class road, which could not be closed by gates, rather than a third class road which could have been so closed under article 6899 of the statutes, and which apparently would have furnished Bradford, the same facilities of access to his land with the exception of the necessity of opening gates.

[4] The action of a municipal body in taking private property for the benefit of an individual only, under the guise of a benefit to the public, is held by the authorities to be a legal fraud upon the rights of the owner of the property taken, and upon that theory may be impeached and set aside, even though the officers who take it had no fraudulent intent in same. *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201, 78 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766.

In the case of *Huggins v. Hurt*, 23 Tex. Civ. App. 404, 56 S. W. 944, the owner of land sought to enjoin the commissioners' court from opening a public road across the land. The chief complaint was the insufficiency of damages awarded for the land taken, and the contention that of the persons who signed the petition upon which the road was opened, not exceeding five were freeholders residing in the precinct through which the road was opened, while the statutes required that such

a petition should be signed by eight freeholders. In that case this court affirmed the judgment of the trial court, denying the prayer of complainant for an injunction restraining the commissioners from opening the road. That ruling was based upon the following grounds: First. That the right of appeal from the award of damages given by article 4693 (now 6882) of the Statutes was the only remedy for relief against an allowance of damages in an adequate amount. Second. That a petition to open a public road signed by freeholders was not a prerequisite to the authority of the commissioners to establish the road, but that they had that power, upon their own initiative, under the provisions of article 4671 (now 6860). Third. That the decision of the commissioners upon the qualifications of the petitioners was conclusive. And in connection with the latter holding the following was said:

"The inference therefrom is that the Legislature intended that the action of the commissioners' court as to the necessity of the road, its proper location, the form of the petition, the qualification of its signers, and all other issues save that relating to the damages, should be conclusive."

To a like effect are *Howe v. Rose*, 35 Tex. Civ. App. 323, 80 S. W. 1019; *Allen v. Parker County*, 23 Tex. Civ. App. 536, 57 S. W. 703. But no contention was made in any of those cases that there was no public necessity for opening the road nor that the commissioners' court had abused its discretion in ordering it opened nor in any other respect. In the absence of such an attack, what was said would be correct. The language quoted had reference alone to that condition of the record as is shown by the opinion of the same court in *Allen v. Parker County*, *supra*, wherein it was held that the action of the commissioners' court in establishing a public road will not be enjoined for mere irregularities in the proceedings, where such irregularities are not fatal to its jurisdiction to do so. None of those decisions is in conflict with our conclusions in the present suit.

[5, 6] Neither are plaintiffs precluded from a recovery herein upon the theory that, by

appearing before the jury of view and presenting their claim for damages, they thereby waived their right to complain that the commissioners' court abused its discretion, and in so doing acted beyond the scope of its authority to open the road. True, the trial court held that by such acts "they waived any and all irregularities, if any had existed, in the proceedings of the court up to the said time." But the ground of objection that the court acted without lawful authority was not a mere irregularity in the proceeding, but went to the authority of the court to open the road at all. Furthermore, it appears that the claim for damages which was presented to the jury of view by the plaintiffs was in writing, and was made upon the following condition:

"Subject to our intention to contest in court the right of the commissioners' court of Palo Pinto county to open the proposed road through the Moseley ranch from the Jack Bradford place to the Roquemore place, and under protest we file with you the following written claim for damages in the event said road is ever opened."

Then follows the claim for damages referred to in the court's findings. Further still there was no plea of waiver filed by the defendants, based upon the fact that plaintiffs presented said claim, and it is well settled that, in the absence of a plea of waiver, the waiver cannot be given effect, even though it be proven without objection. *Murchison v. Implement Co.*, 37 S. W. 606; *Hollisfield v. Landrum*, 31 Tex. Civ. App. 187, 71 S. W. 979; *Moody v. Rowland*, 100 Tex. 363, 99 S. W. 1112.

From the foregoing conclusions, it follows that the judgment of the trial court must be reversed, and judgment here rendered, granting plaintiffs the injunctive relief prayed for in their petition, and requiring the removal of the fences erected to fence off the road from the balance of plaintiffs' land, without the discussion of other assignments appearing in appellants' brief, the determination of which becomes unnecessary.

Reversed and rendered.

CALLAN et al. v. WALTERS et al.
(No. 5700.)

(Court of Civil Appeals of Texas. Austin.
Dec. 13, 1916.)

1. EASEMENTS ⇐1—DEFINITION.

An "easement" is the right which one person has to use the land of another for a specified purpose.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. ⇐1.]

For other definitions, see Words and Phrases, First and Second Series, Easement.]

2. EASEMENTS ⇐12(2)—GRANT—WRITING.

An easement may be created by a grant, in which case it must be done with the same formality as is necessary for the conveyance of a fee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-38; Dec. Dig. ⇐12(2).]

3. EASEMENTS ⇐17(1)—CREATION—IMPLIED GRANT.

Where the owner of an improved lot with an entrance by a wooden stairway leading from the sidewalk on the east side of the building conveyed lots east of the building, by deed in the usual form making the east wall of the original building the west line of the lots sold, without reserving any right of way for a stairway on the lot sold, and, after the grantee had erected a two-story building with a stairway at its southwest corner affording entrance to the original building, conveyed such building and lot without reference to the stairway, the grantee took no right to its use.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 45; Dec. Dig. ⇐17(1).]

4. EASEMENTS ⇐8(1)—PROPERTY SUBJECT—PARTIES.

The use of a wooden stairway outside of a building did not create an easement in the owner's adjoining lot; for no man can have an easement on his own property.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 27-33; Dec. Dig. ⇐8(1).]

5. FRAUDS, STATUTE OF ⇐60(1)—INTEREST IN REALTY—EASEMENT.

An oral agreement that the owner of lots should have an easement of way to his adjoining building in consideration of the use of its wall by the grantee, even if the use of the wall might be considered in payment of the purchase price, was within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 94; Dec. Dig. ⇐60(1).]

6. EASEMENTS ⇐8(4)—BONA FIDE PURCHASER—POSSESSION—EASEMENT.

The use of a way over the land of another when the owner is also using it is not such adverse possession as will serve as notice of a claim of right; as it is not inconsistent with a license from the owner.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 27-33; Dec. Dig. ⇐8(4).]

7. EASEMENTS ⇐8(1)—WAY—NOTICE.

Where the owner of a building with an outside stairway conveyed the adjoining lot to a bank of which he was the president and principal stockholder, there was nothing in the bank's use of the wall as a partition wall to cause inquiry as to what the consideration therefor was, so as to lead to the discovery that it was the right to use the stairway through the bank to the other building.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 27-33; Dec. Dig. ⇐8(1).]

8. EASEMENTS ⇐7(2)—PRESCRIPTION—TIME.

To acquire an easement of way by prescription, the limitation must have continued for a period of ten years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 17, 27, 33; Dec. Dig. ⇐7(2).]

9. ADVERSE POSSESSION ⇐58, 85(3) — DEGREE OF PROOF—PRESUMPTION OF GRANT.

As prescription is founded upon the supposition of a grant, the use or possession on which it is founded must be adverse or of a nature to indicate that it is claimed as a right, and not by permission or by any compact short of a grant, and evidence of such adverse possession must be clear and positive.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 279-281, 503, 688-690; Dec. Dig. ⇐58, 85(3).]

10. EASEMENTS ⇐18(2)—WAY OF NECESSITY—CREATION.

An easement of way by necessity arises where the owner of land sells a part thereof, and it is necessary to pass over the land sold in order to reach that which he has retained, and will not arise as a matter of convenience, but only in case of an absolute necessity without which the party claiming it would be totally deprived of the use of his land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 51; Dec. Dig. ⇐18(2).]

11. EASEMENTS ⇐18(3)—WAY OF NECESSITY.

Where the owner of a building could have obtained access to the upper story by an inside stairway, which, though it might lessen, would not destroy the value of the frontage, and where the building would be benefited from closing an opening in the side wall which had formerly afforded entrance for an outside stairway, the use of a stairway in a building on the adjoining lot built to the wall was not necessary to the use of the upper story.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 53; Dec. Dig. ⇐18(3).]

12. EASEMENTS ⇐36(1)—PRESCRIPTION—WAY—PRESUMPTION AND BURDEN OF PROOF.

The rule that the burden of proof rests upon one asserting a right of way over another's land by prescription to establish the negative fact that the owners of the servient estate were free from legal disability during the prescription period applies only where prescription is claimed against those who are not parties to the suit; and no more proof is required as against a defendant in a suit to establish an easement by prescription than to establish title by limitation in a suit for trespass to try title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 89; Dec. Dig. ⇐36(1).]

13. EASEMENTS ⇐35—EXCEPTIONS—PLEADING.

If there are exceptions taking the case of a prescriptive easement of way out of the statute, they must be pleaded.

[Ed. Note.—For other cases, see Easements, Dec. Dig. ⇐35.]

Appeal from District Court, San Saba County; N. T. Stubbs, Judge.

Suit for injunction by Mrs. Maud Callan and others against G. A. Walters and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Rector & Rector, of San Saba, for appellants. Walters & Baker, of San Saba, for appellees.

Findings of Fact.

JENKINS, J. In February, 1905, and prior thereto, W. K. Ray was the owner of two lots on the north side of the public square in the town of San Saba, each being 30 feet front. Upon the west lot Ray had erected a two-story stone building, the entrance to which was by a wooden stairway, leading from the sidewalk on the east side of said building. The east lot at that time was vacant. At the date above mentioned Ray sold the east lot to the First National Bank of San Saba. Ray was the president and principal stockholder of said bank. He entered into an oral agreement with the bank that it could erect a two-story house upon the vacant lot, and tie the same onto the east wall of the stone building, and that the bank was to build a stairway at the place occupied by the wooden stairway, and that he was to have the right to use the same as an entrance to the stone building. The calls in the deed executed by Ray to the bank are as follows:

"Parts of lots 8 and 9 in block No. 12 of the old town division of San Saba, more particularly described as follows: Beginning at a stake in the south boundary line of said block No. 12, at the S. E. corner of the stone storehouse owned by said Ray on said block No. 12 for the S. W. corner of this subdivision; thence north with the east wall of said building to its N. E. corner and continuing north with the line of said east wall the full distance of 100 feet from said beginning corner to an iron pin set for N. W. corner of this subdivision; thence east parallel with the south boundary line of block No. 12 30 feet to an iron pin set for N. E. corner of this subdivision; thence south parallel with the west line of this subdivision 100 feet to an iron pin set on south boundary line of said block No. 12 for S. E. corner this subdivision; thence west with south boundary line of said block No. 12 30 feet to the place of beginning, being 30 feet front on the public square"—with the usual habendum clause and covenants of warranty.

It will thus be seen that this deed was in the usual form, making the east wall of the stone house the west line of the lot sold, and not reserving any right of way for a stairway in the lot sold. Thereafter the bank erected a two-story brick house on its lot, with a stairway at its southwest corner, landing in a hall, by means of which entrance through the door as it formerly existed in the east wall of the stone building was made to said building. On September 28, 1906, Ray conveyed the lot upon which was situated the stone house to E. T. Neal, properly describing the same by metes and bounds, with the usual habendum clause and covenants of warranty. No reference was made in this deed to the right to use the stairway in the bank building. On December 13, 1906, the bank, for a valuable consideration, conveyed the east lot to G. A. Walters, the description in said deed being the same as in the deed to the bank.

On November 28, 1913, E. T. Neal conveyed the west lot to Mrs. Maud Neal, now Callan, the description in said deed being the same

as in the deed to him. All of these deeds were promptly filed for record in San Saba county. The tenants of W. K. Ray and of E. T. Neal and of Mrs. Maud Callan used the stairway in the bank building as a means of ingress and egress to the stone building until shortly before this suit was filed, November 4, 1915, at which time the appellee herein closed up the door in said east wall with solid masonry. It should have been stated that prior to bringing this suit G. A. Walters sold an undivided half interest in the bank lot to the other appellee herein, J. H. Baker. Neither Walters nor Baker, at the time of their purchase, had any actual notice of the oral agreement between Ray and the bank with reference to the use of said stairway. No objection to such use was made by the bank while it owned said building, nor by Walters, until some time in May, 1913, at which time appellee Walters wrote E. T. Neal at Ft. Worth, Tex., where said Neal was then residing, that he did not wish him to longer use said stairway, and that he desired him to close the door leading from the upper landing into the stone building. Thereafter, in the summer of the same year, Walters testified that he had a conversation with E. T. Neal in the town of San Saba, in which, after discussing the matter of common use of the stairway leading to the upper stories of said buildings, he agreed with and promised said Neal that, if he would see that his tenants did not injure or deface said stairway, or the walls thereof, he (Neal) might have and enjoy the use of said stairway so long as he owned said building. Neal admitted receiving this letter, to which he did not reply, but denied the subsequent conversation; but, as the court before whom this case was tried without a jury rendered judgment in favor of appellees, it is our duty to find the facts in accordance with Walters' testimony, and we accordingly do so. Walters testified that he closed the door in the store building by consent of the agent of appellant, but this was denied by said agent.

J. P. Callan, the husband of Mrs. Callan, was joined pro forma as party defendant in the suit. This suit was brought to enjoin appellees from interfering with appellant's use of the stairway, and to establish her easement therein. The court rendered judgment in favor of appellees.

Opinion.

[1] An easement may be briefly defined as the right which one person has to use the land of another for a specific purpose. 9 R. C. L. p. 735; Stephenson v. Ry. Co., 181 S. W. 568; Harrison v. Boring, 44 Tex. 267; Jackson v. Trullinger, 9 Or. 397.

[2] It may be created by grant, express or implied, by estoppel, and by a way of necessity. If by grant it must be in writing.

"That an easement over land is such an interest in the land as to require in its conveyance the same formality as is necessary for the con-

veyance of the fee is too well settled for discussion." King v. Driver, 160 S. W. 416, citing Railway Co. v. Durrett, 57 Tex. 48; Shepard v. Railway Co., 2 Tex. Civ. App. 535, 22 S. W. 287; Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 275, 52 S. W. 101; San Antonio v. Grandjean, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476.

See, also, Bowington v. Williams, 166 S. W. 719; Railway Co. v. Johnson, 156 S. W. 256; Ives v. Edison, 124 Mich. 402, 83 N. W. 120, 50 L. R. A. 134, 83 Am. St. Rep. 329.

As Ray did not expressly reserve in his deed to the bank the right to use the stairway when erected, and as the bank never executed a written conveyance of such easement to Ray, it follows that no easement was created in the stairway by express grant.

[3] Appellants insist that the deed from Ray to Neal conveyed such easement by implication. If it had done so in express terms, it would be of no avail, except as a basis for limitation, if Ray had no such easement. He could not convey a greater estate than he had. Ray, as is evident from the authorities above cited, had no easement in the stairway, unless he obtained the same by estoppel, by prescription, or by way of necessity, which features of this case will be discussed in a subsequent part of this opinion.

Appellants rely chiefly upon the case of Howell v. Estes, 71 Tex. 693, 12 S. W. 62, in support of their proposition that the easement passed by implication in the deed from Ray to Neal. That case differs from this in the essential feature that Howell owned both buildings, and therefore had the right to convey an easement in the stairway in one as appurtenant to the other. Having erected the two buildings, and provided but one stairway, it was to be presumed that he intended it as the permanent and only passway to both buildings, and his conveyance of the buildings carried with it, by necessary implication, the right to permanently use such stairway for both buildings. That this is the ground upon which said decision rests is evidenced by the following language, quoted with approval by the court from Gale & Wheatley on Easements:

"Strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement on his own property, but he obtains the same right by the exercise of another right, *the general right of property* [italics ours]; but he has not thereby permanently altered the quality of the two parts of his heritage; and if, after the annexation of the peculiar qualities, he alienates one part of his heritage, it seems but reasonable that, if the alterations thus made are palpable and manifest, a purchaser should take the lands burthened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it." 71 Tex. 693, 12 S. W. 62.

[4] In the instant case Ray did not own the bank building at the time of his conveyance to Neal, and therefore had no right to burthen it with an easement over the stairway. His deed to Neal being in the ordinary form, no implication arises that he intended to do so. Ray's deed to the bank being in

the ordinary form, there is no implication that he intended to reserve a right to use the stairway thereafter erected by the bank as a means of access to the upper story of his building, unless the same was a way of necessity. So far as the deed is concerned, it does not appear that the bank was under any obligation to erect a stairway, or even a building on the lot which it purchased from Ray. It might have erected a one-story building, or it might have put its stairway on the east instead of the west side of its building. The wooden stairway theretofore used by Ray did not create an easement on his adjoining lot, "for no man can have an easement on his own property." Howell v. Estes, supra; Alley v. Carleton, 29 Tex. 78, 94 Am. Dec. 260.

[5] Did Ray acquire an easement in the stairway as against the bank by estoppel? Appellants insist that he did by reason of the oral agreement that he should have such easement in consideration of the use of his wall by the bank, and that said agreement was acted upon. If permitting the use of the wall by the bank may be considered the payment of the purchase money, as we think it should, that alone would not take the oral agreement out of the statute of frauds. Jones v. Carver, 59 Tex. 296; Sullivan v. O'Neal, 66 Tex. 435, 1 S. W. 185; Ward v. Stuart, 62 Tex. 335; Munk v. Weidner, 9 Tex. Civ. App. 491, 29 S. W. 410.

The record shows no act upon the part of Ray which would work an estoppel in pais. He made no improvements upon his building, and spent no money thereon in reliance upon the oral agreement that he was to have the right to use said stairway. If the bank was still the owner of the lot which it bought from Ray, and it paid no consideration for the use of Ray's wall except its verbal promise to allow him the use of its stair, and now refused to permit such use, Ray might recover of it the value of the use of said wall, and thus recoup himself by an action at law, without recourse to the equitable doctrine of estoppel in pais.

[6] But whatever might be said in support of estoppel as against the bank, there is no estoppel as against appellees, for the reason they are innocent purchasers for value, without notice, actual or constructive, of the alleged equities in favor of Ray and his assignees. Appellants contend that Walters had notice of Ray's claim of easement for the reason that his tenants were using the stairway at the time Walters purchased from the bank. But the bank was also using the stairway. Ray's use was not exclusive, and therefore apparently not adverse. It was consistent with a license from the bank to so use such stairway. Possession is constructive notice, the same as a recorded deed. Watkins v. Edwards, 23 Tex. 443; Calvert v. Roche, 59 Tex. 463; Harold v. Sumner, 78 Tex. 581, 14 S. W. 995. But, to operate as notice, such possession must be adverse,

thereby giving notice of a claim of right. The use of a way over the land of another when the owner is also using the same is not such adverse possession as will serve as notice of a claim of right, for the reason that the same is not inconsistent with a license from the owner. *Bowington v. Williams, supra*; *Railway Co. v. Johnson, supra*; *Galveston v. Menard*, 23 Tex. 410; *Long v. Mayberry*, 96 Tenn. 378, 36 S. W. 1040; *Dunham v. Joyce*, 129 Mo. 5, 31 S. W. 337. If this doctrine would not apply to the bank by virtue of actual notice of Ray's claim of right by virtue of the oral agreement, it would apply to Walters who had no notice of such agreement.

[7] Appellants say that the fact that the bank building was using Ray's wall as a partition wall was open and visible, and should have led Walters to inquire what consideration was paid therefor, and that such inquiry would have led him to a knowledge of the fact that the consideration was the right to use the stairway. There was nothing in the fact that the bank was using Ray's wall as a partition wall to excite inquiry as to what consideration was paid therefor. Ray owned the stone building, and he was president of the bank. Presumably he received a satisfactory consideration for the use of the wall, and no other presumption arose from the facts known to Walters. As Ray was the principal stockholder in the bank, he received a financial benefit by allowing the use of his wall as a partition wall, thereby saving the bank the expense of building a wall; and Walters might reasonably have presumed that this was the consideration received by Ray for the use of the wall.

Appellants argue that the price paid by the bank for the lot (\$600) should have indicated to Walters that some additional consideration must have been paid for the use of the wall. There is nothing in the record to indicate that the lot, together with the right to use the wall, was worth more than the consideration recited in the deed to the bank.

[8, 9] If limitation ran in favor of Ray and his assigns, in order for him to acquire an easement by prescription, such limitation must have continued for a period of ten years. *Martin v. Burr*, 171 S. W. 1046. Without deciding whether or not limitation ran against the bank, we hold that it did not run against Walters, for the reason that he had no actual notice of Ray's claim of right to use the stairway, and the use of the same by Ray jointly with the owners of the bank building was not such adverse possession or user as implied the assertion of a legal right, rather than a license to so use the same. *Long v. Mayberry, supra*; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 338; *Williams v. Kuykendall*, 151 S. W. 629; *Railway Co. v. Johnson*, 156 S. W. 254.

"Since prescription is founded upon the supposition of a grant, the use or possession on

which it is founded must be adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence or of any compact short of a grant. If the enjoyment is consistent with the right of the owner of the tenement, it confers no right in opposition to such ownership." 9 R. O. L. p. 776, and authorities cited in note 2.

"Evidence of adverse possession must be clear and positive, and should be strictly construed." 9 R. O. L. p. 782.

The bank purchased the lot from Ray in February, 1905. It sold the same to Walters in December, 1906. So that, if limitation ran against the bank, it continued for a period of less than two years. Even if limitation ran against Walters, so long as he did not object to the use of the stairway by Ray and his assigns, such limitation ceased to run in the summer of 1913 (eight years after the conveyance to the bank), when Walters asserted his right to the exclusive control of the stairway, and Neal agreed to continue its use as the licensee of Walters.

[10-12] Ray did not acquire an easement in the stairway by way of necessity. Such right is acquired where the owner of land sells a part thereof, and it is necessary for him to pass over the land sold in order to reach that which he has retained.

"A way of necessity must be more than a way of convenience; it must be an absolute necessity, without which the party claiming it would be wholly deprived of the use of his land." *Williams v. Kuykendall, supra*, 151 S. W. 630; *Bowington v. Williams, supra*; 9 R. O. L. p. 763.

In the instant case Ray or his assigns could obtain access to the upper story of the stone building by means of a stairway inside thereof. The front of this building is 30 feet. This would lessen, but not destroy, the value of such front. The erection of such stairway would cost something; the amount is not shown in the record. On the other hand, it appears that such building would receive a benefit from closing the door in the east wall, by reason of the fact that it would reduce the rate of insurance. But whether or not the cost would exceed the benefit is immaterial, it clearly appearing that the use of the stairway in the bank building is not necessary to the use of the upper story of the stone building.

We do not assent to appellees' proposition that the burden was on appellants to show that the owners of the bank building were not under disability during the period claimed as prescriptive. Appellees cite in support of their contention *West v. City of Houston*, 163 S. W. 679, in which Mr. Justice Higgins, speaking for the Court of Civil Appeals at El Paso, said:

"It seems to be settled in this state that the burden of proof rests upon one asserting a right of way over another's land by prescription to establish the negative fact that the owners of the servient estate were free from legal disability during the prescriptive period, against whom a prescriptive right might be acquired by adverse use."

We think, as intimated by our Supreme Court in *City of Austin v. Hall*, 21 Tex. Civ. App. 174, 57 S. W. 573, that this rule applies only where prescription is claimed against those who are not parties to a suit. The other cases cited in *West v. Houston* rest upon the supposed authority of *Austin v. Hall*, which expressly limits its holding to those who are not parties to the suit. We see no reason why more proof should be required, as against a defendant to a suit, to establish an easement by prescription than to establish title by limitation in a suit of trespass to try title.

[13] In such suit, if there be exceptions taking the case out of the statute, they must be pleaded. *Ortiz v. Benevides*, 61 Tex. 63; *Lewis v. Terrell*, 7 Tex. Civ. App. 314, 26 S. W. 754; *Phillips v. Sherman*, 39 S. W. 187; *Byers v. Carll*, 7 Tex. Civ. App. 423, 27 S. W. 190; *Childress v. Grim*, 57 Tex. 56. This applies also to other forms of actions. *Jume v. Brubaker*, 5 Tex. Civ. App. 79, 24 S. W. 79.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

CHICAGO, R. I. & G. RY. CO. v. WHALEY. (No. 1072.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 13, 1916. On Motion for Re-
hearing, Jan. 10, 1917.)

1. CARRIERS ⇐218(5) — CARRIAGE OF LIVE STOCK—NOTICE OF INJURIES.

Stipulations in a contract for the interstate shipment of live stock for written notice to the agent of the initial carrier of a claim for loss, injury, detention, or delay in transportation thereof, as a condition precedent to recovering damages and that the notice be given within one day are not unreasonable, since Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, makes the delivering carrier the agent of the initial carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696; Dec. Dig. ⇐218(5).]

2. CARRIERS ⇐218(10) — CARRIAGE OF LIVE STOCK — INTERSTATE COMMERCE ACT — "TRANSPORTATION."

In view of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1913, § 8563), including in an interstate shipment everything from an order for cars to final delivery under the term "transportation," damages to an interstate shipment of cattle occasioned by a delay at pens before starting falls within the terms of a contract of shipment requiring notice of claim for loss or injury by delay in "transportation" as a condition precedent to recovery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 947; Dec. Dig. ⇐218(10).]

For other definitions, see *Words and Phrases*, First and Second Series, *Transportation*.]

3. COURTS ⇐365—STATE DECISIONS—EFFECT.

The holdings of the state courts that injuries received before the voyage began do not fall under the term "transportation" or the contract of shipment are not controlling in the case of an interstate shipment, in view of Interstate Commerce Act, § 1, including every-

thing from order for cars to final delivery under the term "transportation."

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. ⇐365.]

Appeal from Sherman County Court; O. H. Rowland, Judge.

Action by G. T. Whaley against the Chicago, Rock Island & Gulf Railway Company. Judgment for the plaintiff, and defendant appeals. Reversed and rendered.

Lassiter, Harrison & Rowland, of Ft. Worth, and J. Y. Powell, of Houston, for appellant. Jno. H. H. Stahl, of Stratford, for appellee.

HUFF, C. J. This is an action brought by appellee in the county court of Sherman county February 26, 1915, to recover damages to a shipment of cattle transported over the Chicago, Rock Island & Gulf Railway Company and the Chicago, Rock Island & Pacific Railway Company from Conlen, Tex., to Kansas City, Mo. The negligence alleged was delay and rough handling. It is also alleged the cattle were shipped under a written contract with the initial carrier, and notice was given in the pleadings to produce the same upon trial.

The appellant railway company denied the negligence, and set up certain provisions of the contract, among which was clause 7, as follows:

"That as a condition precedent to claiming or recovering damages for any loss or injury to or detention of live stock or delay in transportation thereof, covered by this contract, the second party [plaintiff] as soon as he discovers such loss or injury, shall promptly give notice thereof in writing to some general officer, claim agent, or station agent of the first party [Chicago, Rock Island & Gulf Railway Company], or to the agent at destination, or to some general officer of the delivering line, before such stock is removed from point of shipment or from the place of destination, as the case may be, and before such stock is mingled with other stock, and such written notice shall in any event be served within one day after delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. It is agreed that a failure to strictly comply with all the foregoing provisions shall be a bar to the recovery of any and all such claims."

The appellant alleged notice was not given and that there was an agent and officer who maintained an office and place of business easy of access to any shipper of live stock to that point, as provided in the contract of shipment. John Fox is shown to have been the livestock agent for the Chicago, Rock Island & Pacific Railway Company at Kansas City, and at that time W. H. Herbig was the agent there. Fox's office was located at room 808, Live Stock Exchange Building, and Herbig's office was about two blocks therefrom. Herbig had a representative who looked after live stock shipments and maintained an office in room 810, Live Stock Exchange Building, adjoining Fox's office. It was the

custom of shippers and claimants to present notices of claims for damages to a shipment of live stock through Fox's office. There was no such notice or claim presented on this shipment to his office or to Herbig's office. It was also necessary for shippers and caretakers of live stock into Kansas City over its line of road to present their contract in Mr. Herbig's office at room 810, Live Stock Exchange Building, to procure free transportation home. The trial court finds there was no notice given, as required by the contract.

The appellee in this case accompanied the shipment of cattle to Kansas City, and it is shown that he had been engaged in the cattle shipping business for the past 12 years, shipping from two to three shipments during each season; that he knew the location of these offices, and had presented himself to these officers for return passes, and on this occasion did so. He made no effort to find any agent to whom he could present his claim for damages. He also testifies that until he received his "account sales" he did not know of the loss of two head of cattle. He claims that he lost two head in transit, which the court finds was true upon conflicting evidence. The appellee also testified, in connection with the statement that he knew of the Rock Island offices, that he did not know what Rock Island officer or agent maintained the office; that he could have inquired of them where the local agent, the claim agent, or some general officer of the Chicago, Rock Island & Pacific Railway Company was located.

The trial court found that the provision above set out under the pleadings and facts was unreasonable, nonenforceable, and rendered judgment for the appellee. This action of the court in so rendering judgment is presented under two assignments of error. We believe the assignments to be well taken, and that the court should not have so rendered judgment.

[1] The appellee contends that the notice was required to be given to the agent of the initial carrier, which upon its face was unreasonable. This was a through interstate shipment, and the delivering carrier, under the Interstate Commerce Act, is the agent of the initial carrier. The Supreme Court of the United States, in passing upon a stipulation substantially like the one here in question, held:

"In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter." *Railway Co. v. Wall*, 241 U. S. 87, 38 Sup. Ct. 493, 60 L. Ed. 905; *Clegg v. Railway Co.*, 203 Fed. 971, 122 C. C. A. 273.

The trial court held the provision requiring one day's notice unreasonable. The case just cited holds the contrary, and that the stipulation in that case is valid and should be enforced. The facts being undisputed it will be our duty, under that case, to here enforce it.

[2] It is contended that the damages were occasioned by delay at the pens before the cattle were started on the trip, by being held there some 24 hours before shipment. The appellee sues on a breach of the written contract, which he in part sets up and calls for its production. Under Interstate Commerce Act, § 1, the damages received by the cattle at pens will fall under the term, "transportation."

[3] The holdings of the state courts that such damages do not fall under the contract of shipment are not controlling in this case. The act of Congress includes everything from the order for cars to the final delivery under the term "transportation." This is the conclusion reached by this court in the case of *Railway Company v. Smyth*, 189 S. W. 70, and *Railway Co. v. Bell* (No. 1064) 189 S. W. 1097, where the authorities of the Supreme Court of the United States are cited.

Under the contract and the undisputed evidence the court was in error in rendering judgment for appellee for anything, but should have rendered judgment for appellant.

The judgment of the trial court will therefore be reversed and rendered for appellant.

On Motion for Rehearing.

We shall request counsel for appellee to possess his soul with patience until he gets a case in which the acts of Congress declaring the provisions of the contract here set out void shall apply. We admit with shamefacedness that we have held that injuries received before the voyage began did not fall under the term "transportation," and therefore the bill of lading as to such damage did not apply, and that we were then following the rule established by the courts of this state; but, to our consternation and confusion, the Supreme Court of the United States called attention to section 1 of the Interstate Commerce Act, pointing out that from the order of the cars until final delivery at destination it was of one piece, and a part of the transportation covered by the terms of the contract of shipment; that the law would not tolerate a splitting up of these several acts constituting transportation.

With all deference to learned counsel for appellee, we are constrained to overrule the motion for rehearing.

BOYCE, J., not sitting.

JOHNSON et al. v. WAGGONER et al.
(No. 7661.)

(Court of Civil Appeals of Texas. Dallas. Dec. 16, 1916.)

1. APPEAL AND ERROR ⇐933(1) — SCOPE — PRESUMPTIONS.

Where at a regular term of court the case was called for trial, and one defendant was absent, and his plea of privilege to be sued in the county of his residence was overruled and judgment rendered, but on the following day motion for new trial was filed on the ground that counsel believed the case would be called on the day following that on which it was called, with sufficient grounds for such belief, and on appeal neither the transcript nor the statement of facts disclosed the action of the court, but the record disclosed subsequent proceedings, including a final judgment, the court will assume that the motion was sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8772; Dec. Dig. ⇐933(1).]

2. PLEADING ⇐110—ACTION IN COUNTY OF DEFENDANT'S RESIDENCE — PLEA OF PRIVILEGE—WAIVER.

In such case the defendant who entered the plea of privilege did not waive it by his absence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 231-233; Dec. Dig. ⇐110.]

3. PLEADING ⇐110—ACTION IN COUNTY OF DEFENDANT'S RESIDENCE—PLEA OF PRIVILEGE—WAIVER.

In such case, though the defendant filed his motion for new trial on the order overruling plea of privilege without reserving his right to insist thereon if the motion were granted, he did not waive such plea, since in a motion for new trial the applicant need not assert that all pleas to the merits are subject to the action of the court upon his privilege plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 231-233; Dec. Dig. ⇐110.]

4. PLEADING ⇐110—ACTION IN COUNTY OF DEFENDANT'S RESIDENCE — PLEA OF PRIVILEGE—WAIVER.

In such case, where frequent continuances were granted over the defendant's objection, the continuances being granted without prejudice to his plea save that of privilege, he did not waive the plea of privilege.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 231-233; Dec. Dig. ⇐110.]

Appeal from Kaufman County Court; James A. Cooley, Judge.

Action by J. A. Johnson and others against the Automatic Music Company and D. E. Waggoner, wherein Waggoner filed a plea of privilege of being sued in another county. From an order sustaining his plea and changing the venue, plaintiffs appeal. Affirmed.

Bumpass & Crumbaugh, of Terrell, for appellants. Lee R. Stroud, of Kaufman, for appellees.

RASBURY, J. Appellants initially sued the appellee Automatic Music Company to cancel certain promissory notes and for damages. Subsequently appellants amended their petition and made appellee Waggoner, who it was alleged had the notes in his possession, a party to the suit. Waggoner, among other matters, filed a plea asserting his privilege

of being sued in the county of his residence, which was alleged to be Dallas county. This plea was ultimately sustained, and the venue of the suit changed to Dallas county. The action of the trial court in that respect is the only issue presented on appeal. There is in the record an agreed statement of the facts which form the basis of the court's action. We will not undertake a detailed statement thereof, but state such of them, while considering the issue, as may be necessary to an intelligent consideration thereof.

[1] The first contention, in effect, is that the plea was erroneously sustained, for the reason that at a former term of court, when the case was called for trial, appellee Waggoner failed to present himself and insist upon his plea, whereupon the court overruled same, and as a consequence the plea was waived. The facts in support of the issue thus presented are that at a regular term of court the case was called for trial, and whereupon, appellee Waggoner not being present, the court overruled the plea of privilege and rendered judgment against all of the appellees as prayed. On the following day appellees filed motion for a new trial both as to the order overruling the plea of privilege as well as to the judgment on the merits. The first ground of the motion is that appellees and their counsel believed the case would be called on the day following the day on which it actually was called, accompanied with a full statement of the facts and circumstances on which they based such belief. The second and third ground is that the court was without jurisdiction as to appellee Waggoner, reciting the facts forming the basis of the contention. The other grounds had reference to the defense of all on the merits. Neither the transcript nor the statement of facts disclose the action of the court on such motion. The record does, however, disclose subsequent proceedings in the case, including the final judgment from which this appeal is taken, and we will, as does counsel, assume that the court sustained the motion and set aside the judgment.

[2] The effect of the action of the court in granting the motion for new trial was to reinstate the cause in the precise position it occupied before the order was entered. The fact that appellee was not present when the order was entered cannot serve as a basis for holding that, being so absent, he waived his plea. Appellee was not present in court, it is true, but the reason was that he believed the case would be heard the day following. The court considered he had good basis for his belief or the new trial would not have been granted. Certainly it cannot then be said that, when the case was called in advance of the setting and the plea overruled, appellee waived it. Before he could be held to have waived the plea it should at least appear that he had an opportunity to present same, or, having the opportunity, negligently failed

to do so. Here appellee had neither opportunity to present nor occasion to waive it, due to the misunderstanding in reference to the setting of the case.

[3] The next contention is, in substance, that when appellee filed his motion for new trial on the order overruling his plea of privilege, without reserving his right to insist thereon in the case the motion was granted, thereby waived it. We have in discussing the first issue presented by appellant stated the substance of the motion for new trial, which was that the case was heard on a day other than the one appellee understood it would be heard, and hence the absence of himself and counsel, that the court was without jurisdiction, and then a statement of his defenses on the merits followed by prayer for new trial. We conclude that in a motion for new trial it is not necessary for the applicant to assert, as he does in case of pleading before trial, that all pleas to the merits are subject to the action of the court upon his plea setting up his privilege to be sued in another county. The motion for new trial serves to point out the alleged errors at the trial, and we know of no reason why the applicant may not follow any order he deems convenient in that respect. The question of the order of pleading is settled long anterior to the filing of the motion for new trial, and whether there has been due order of pleading must be determined by an inspection of the pleading rather than the order in which the pleading is referred to in motion for new trial. Further, as we construe the holding in *Wolf v. Sahm*, 55 Tex. Civ. App. 564, 120 S. W. 1114, 121 S. W. 561, cited by appellant, it decides the precise question adversely to the contention here.

[4] It is next urged that the plea of privilege was waived by appellee in not reserving his right to thereafter insist on the same at a term of court when the case was continued upon application of appellant and over the objections of appellee. The facts upon which this issue is based are that at the September term of court, after appellee's motion for new trial had been granted, the case was

called for trial, and appellant sought a continuance of the case, which appellee Waggoner contested. The application was granted. Appellee Waggoner did not, when the case was so continued, over his objections, reserve the right thereafter to insist on his plea of privilege. It does appear, however, that appellee was made a party to the suit in June, 1914, and at each continuance thereafter, so the statement of facts recites, the case was continued without prejudice to his plea, save the one which he contested. The case had in the meanwhile been placed upon the jury docket. Under the facts stated we conclude as an original question that such a continuance would not be a waiver of appellee's plea of privilege, since it would, in our opinion, be illogical to hold that one who contests the action of the court in continuing his plea of privilege had consented thereto, and hence waived it. However, the issue has on other grounds been decided adversely to appellant. *Dorroh v. McKay*, 56 S. W. 611. There it is said, on authority of *Aldridge v. Webb*, 92 Tex. 122, 46 S. W. 224, that the purpose of article 1910, Vernon's Sayles' Civ. Stats., which requires all dilatory pleas to be determined during the term at which they are filed, is to call the attention of the court to the plea in order to enable the court in the expedition of business, to dispose of it before trial upon the merits, and hence the party presenting the plea was obliged to bring the plea to the attention of the court at the first term of court. The court then holds that, when the plea is called to the attention of the court at the first term thereof, as was done in the instant case, and continued with the consent of the court or otherwise, later continuances of the case is not a waiver, since, when the plea is called to the attention of the court, and he fails to dispose of it, he does so on the ground that expedition will in no way be hindered by passing it until the trial upon the merits. Such a presumption here is clearly to be indulged when it is considered that both the facts of the plea, as well as the merits, were to be determined by jury, and could not be separated. The judgment is affirmed.

PANHANDLE & S. F. RY. CO. v. CURTIS.
(No. 1088.)(Court of Civil Appeals of Texas. Amarillo.
Dec. 27, 1916.)**1. EVIDENCE — 317(2)—HEARSAY EVIDENCE—ADMISSIBILITY.**

Where a shipper did not accompany cattle, his testimony in an action for damages in shipment that they brought him a certain amount, that he was not at the destination and did not see them weighed, but that the commission company stated they weighed a certain amount, and further testimony that one animal which was killed in transit weighed a certain amount at destination, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1175, 1192; Dec. Dig. — 317(2).]

2. EVIDENCE — 593—SUFFICIENCY—IMPROPER EVIDENCE.

Where there is no evidence to support the judgment save inadmissible hearsay evidence, it must be reversed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2430; Dec. Dig. — 593.]

3. EVIDENCE — 572 — EXPERT WITNESSES — WEIGHT OF TESTIMONY.

In an action by an inexperienced shipper of live stock for damages in transit, it was not error to permit him to testify as an expert as to the shipment, though his inexperience went to the weight of his testimony, and not its admissibility.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. — 572.]

Appeal from Gray County Court; Siler Faulkner, Judge.

Action by R. J. Curtis against the Panhandle & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Terry, Cavin & Mills, of Galveston, and Hoover & Dial, of Canadian, for appellant. Chas. C. Cook, of Pampa, for appellee.

HALL, J. [1, 2] Appellee sued appellant for damages to cattle shipped from Pampa, Tex., to Wichita, Kan. The cattle were sold on the market. Appellee did not accompany the shipment but over the objections of appellant, he was permitted to testify as to the weight of the cattle and the market price at Wichita. His testimony is that he did not accompany the shipment; that they brought him \$8 per cwt.; that he was not there and did not see them weighed, but he knew what he received for them and what the commission company sent to the bank to his credit; that the commission company wrote him the cattle weighed 33,890 pounds at Wichita; that his knowledge was obtained from that letter and from the account sales sent him by the commission company. It appears that one animal was killed in transit, and over appellant's objections appellee was also permitted to testify what this animal weighed at destination and what its market value was. This evidence was all hearsay and should not have been admitted. Since the facts sought to be proven by appellee were

not established by the testimony of any other witness, the judgment must be reversed. *Railway Co. v. Startz*, 97 Tex. 167, 77 S. W. 1; *Railway Co. v. Cauble*, 41 Tex. Civ. App. 348, 91 S. W. 244; *T. & P. Ry. Co. v. Leggett*, 44 Tex. Civ. App. 296, 99 S. W. 176.

[3] We think the court did not err in permitting appellee to testify as an expert, and his limited experience in the business of shipping cattle to market affected the weight of the testimony, and not its admissibility.

Reversed and remanded.

SOUTHERN SURETY CO. v. WESTERN INDEMNITY CO. (No. 7575.)(Court of Civil Appeals of Texas. Dallas.
Nov. 18, 1916. Rehearing Denied
Jan. 6, 1917.)**1. CONTRACTS — 233—CONSTRUCTION—MAINTENANCE OF AGENCY—EXPENSES.**

Where one surety company sold to another its business under a contract which required the seller to maintain an agency to aid in transferring the business and to handle the business in a certain state during the year, and provided that the seller should receive a percentage of the commissions collected, the seller was required to pay the expenses of maintaining that agency and the salary of subagents thereunder, since those duties were imposed by the contract, so that the compensation therein fixed by the parties is controlling.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1098; Dec. Dig. — 233.]

2. CONTRACTS — 229(2) — COMPENSATION — PERCENTAGE OF PROFITS—COMPUTATION.

Where a surety company sold its pool exercise business to another under a contract which entitled the seller to a percentage of the net profits for a year ending June 15th, and it appeared that the year in that business began October 1st, so that a portion of the premiums collected during the period of the contract was not earned at its expiration, the percentage of the profit was to be figured only on the portion of the premiums received which was actually earned at the expiration of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1045; Dec. Dig. — 229(2).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by the Western Indemnity Company against the Southern Surety Company. Judgment for the plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Albert G. Moseley, of St. Louis, Mo., for appellant. Love & Taylor and Carden, Starling, Carden, Hemphill & Wallace, all of Dallas, for appellee.

RAINEY, C. J. Both appellant and appellee are incorporated. The appellee, as successor to the Federal Union Surety Company, on January 4, 1915, brought suit against appellant for a settlement on a contract between appellant and Federal Union Surety Company alleging appellant to be due it the sum of \$4,896.30, and asks judgment therefor. Appellant answered, denying any indebtedness to appellee, but alleged appellee

indebted to it in the sum of \$10,380.15, and asks for judgment therefor. A trial was had without the intervention of a jury, and judgment was entered against appellant for \$4,893.30, from which this appeal is taken.

The case was tried upon an agreed statement of facts, a brief résumé of which made in appellant's brief we adopt, which is as follows:

The Southern Surety Company, hereinafter styled defendant, has its principal office in St. Louis and does a general surety business in the various states. The Western Indemnity Company, hereinafter styled plaintiff, does a casualty, fidelity business in Texas and other states.

On May 18, 1912, defendant and Federal Union Surety Company made a written contract whereby the latter transferred to defendant its surety business and good will and agency force and agreed to establish and maintain at its own expense a general agency office for the defendant at Indianapolis, Ind., for one year, which said agency was to co-operate with the Federal Union Surety Company in turning over the business and agency of the Federal Union Company to the defendant, and the defendant agreed to take over the business and agency of the Federal Union Company. By the terms of the contract the defendant agreed to pay the Federal Union Company for the business that the defendant should write for one year through the general agency and the said agency force of the Federal Union Company 35 per cent. of the gross premiums received by the defendant for writing two classes of business obtained through the general agency and agency force of the Federal Union Company, to wit: (a) Bonds in substitution or renewal of Federal Union Surety Company bonds theretofore written; and (b) the first bond written by the defendant for a person who had theretofore within 12 months patronized the Federal Union Company by contracting to pay it any premiums on account of a bond executed by it, by which was meant, according to the contract, the total gross premiums less return premiums, cancellations, and that portion of the premiums received which might be paid out for reinsurance. The contract also provided that, in lieu of commissions, defendant would pay the Federal Union Company 50 per cent. net profits derived by it from the pool excise business as might be done by the defendant within one year from June 15, 1912, in excess of 4 per cent. of such pool excise business, it being agreed that the net profits should be ascertained by subtracting from the gross premiums derived from the pool excise business for one year, commissions paid to agents, losses, cancellations, and returned premiums accrued during the year, on account of the business for which the gross premiums were collected, but no loss should be considered upon which claim had not been made within 60 days after the expiration of the year.

It was also agreed that the defendant would pay the Federal Union Company upon new business that might be written by the defendant through the agency established at Indianapolis and the agency force that might arise within the state of Indiana a general agent's commission of 35 per cent. of the gross premiums received, all expense of procuring such new business and all agents' commissions therefor to be paid by the agency or by the Federal Union Company; it being understood that the new business is not of a class or kind that may be embraced in any of the classes of business above mentioned. The contract provided that the defendant would handle the business hereinbefore mentioned from its St. Louis office, except the business arising in Indiana, at any time it should so desire, and that the agents then in the employ of defendant in Indiana and elsewhere were to continue to report the business secured by them direct to the St. Louis office of defendant, and that such agents were in no case to come under the supervision or control of the general agency to be established at Indianapolis by the Federal Union Surety Company, nor should such general agency receive commissions on business written through such other agents. Final settlement was to be made between the defendant and the Federal Union Company at the end of one year after June 15, 1912, and no losses, cancellations, returned premiums, or portions of premiums paid for reinsurance should be charged against the Federal Union Company that had not arisen out of the business within one year from and after June 15, 1912. The plaintiff succeeded to all the rights and interests that the Federal Union Surety at any time had under the contract referred to above, and became responsible for all liabilities of the Federal Union Company under the contract.

The gross premiums covered by the said contract between the defendant and the Federal Union Company, other than the pool excise business, and which were collected by the Federal Union Surety Company, amounted to \$42,395.56, and it is agreed that the Federal Union Surety Company is entitled to the following credits, to wit:

Commission, at 35%.....	\$14,838 44
Cash paid by the Federal Union Surety Company to defendant....	15,506 40
Postage	30 00
Ætna Trust Company.....	355 02
Commission on outside business...	446 82
One-half of brokerage and one-half of license fees.....	837 47

Or a total of..... \$32,014 15

Leaving a balance which the defendant claims to be due it upon this part of the statement of \$10,380.41.

The business provided for in the contract over which this controversy arose was transacted in the states of Indiana and New York, and are controlled by separate provisions.

[1] 1. Under the provisions relating to the

business to be done in Indiana the appellee claims the sum of \$5,360.19 as expenses paid to subagents, and this sum was allowed by the trial court as just. Appellant insists that the court erred, in that it is contrary to the terms of the contract.

The contract, in effect, provides that the Federal Union Surety Company should maintain an agency in Indiana, pay all expenses, and account to appellant in consideration therefor; for such services it was to receive 35 per cent. of the gross premiums received. We are of the opinion that the terms of the contract providing for the consideration to be paid excludes the idea of any further amount being paid. The maintaining of an agency necessarily involves the expense of subagent, and, as appellee had contracted to maintain an agency, it must necessarily bear the burden thereof. *Boren v. Life Ins. Co.*, 99 Ga. 238, 25 S. E. 314; *Montgomery v. Life Ins. Co.*, 97 Fed. 913, 38 C. C. A. 553; *Clark & Skyles on Agency*, vol. 1, § 352.

The compensation having been fixed in the contract for the services rendered, it controls.

In *Clark & Skyles*, supra, the rule is thus stated:

"A contract of agency may expressly fix the amount of compensation, and may also fix the mode of payment and the conditions on the happening of which it shall be deemed to have been earned, and when this is the case the express terms of the contract are controlling. In other words, an express agreement as to compensation, if there is no breach of contract by the principal, will exclude any implied contract or custom to pay compensation otherwise than as agreed, and the agent cannot recover on a quantum meruit under such a contract. There is 'no standard of value that could be more satisfactory than that which the parties fix for themselves, and where there is a special contract fixing the terms and conditions on which one party shall serve another, in the absence of proof rescinding and altering it, it is conclusive.' Thus, if the contract provides that the principal shall pay the agent what the principal thinks right after the services are performed, the compensation fixed by the principal is conclusive, in the absence of fraud or bad faith, although considerably less than the reasonable value of the services."

It was error for the court to allow appellee the amount paid subagents in rendering his judgment.

[2] 2. Pertaining to the business in the state of New York there is a difference between the parties. The appellee claims that under the contract it is entitled to the sum of \$9,916.52, which was allowed by the trial court; while the appellant concedes the amount to be \$5,831.52 and charges that the evidence does not show a larger amount. Relating to this branch of the case, the contract reads:

"In lieu of commission, Southern Surety Company will pay to Federal Union Surety Company 50 per cent. of the net profits derived by it from the pool excise business of Federal Union Surety Company in the state of New York taken over by Southern Surety Company for one year from the date of acceptance hereof, it being understood that the 50 per cent. of the net profits herein provided for shall be calculated upon so much of such excise business as may be done by

Southern Surety Company within one year from June 15, 1912, in excess of 4 per cent. of such pool excise business, which, it is hereby agreed, has been or will be assigned to Southern Surety Company in its own right. The net profits aforesaid shall be arrived at by subtracting from the gross premiums derived from such business for the period mentioned commissions paid to agents, losses, cancellations, and returned premiums accrued during such year on account of the business for which such gross premiums are collected, provided, however, that no loss shall be considered upon which the claim is not made within sixty days after the expiration of such year."

"Seventh. Complete and final settlement is to be made at the end of one year after June 15, 1912, between Southern Surety Company and Federal Union Surety Company, and no losses, cancellations, returned premiums, or portions of premiums paid for reinsurance shall be charged against Federal Union Surety Company that have not arisen out of the business hereinbefore described or that have not occurred within one year from and after June 15, 1912."

The excise agreement marked Exhibit B, to which appellant was a party, is a mutual reinsuring agreement to which the Federal Union Surety Company was not a party. It shows that the pool excise year began October 1st of each year and ended September 30th the following year. Appellee "in its first amended original petition contends that it has the right to recover a share in the whole business done by Southern Surety Company from October 1, 1912, to September 30, 1913. Southern Surety Company says that it is willing to pay such share of those earnings as are properly proportionable to the period of the year extending from October 1, 1912, to June 15, 1913, or such share as would be based upon seventeen twenty-fourths of the year's earnings." The contention of Southern Surety Company is that the interest of plaintiff attaches to only seventeen twenty-fourths of these gross premiums, for only seventeen twenty-fourths thereof would be earned by June 15, 1913, and that the remaining seven twenty-fourths thereof would not be earned until after June 15, 1913—in other words, would not be earned at all within the year covered by Exhibit A.

The excise business done began October 1, 1912, and ended September 30, 1913, and gross premiums paid in advance about October 1, 1912, amounted to the sum of \$733,708.70. Said premiums were to run for the following 12 months. The commissions for said year were \$127,174.14, and cancellations amounted to \$5,980, or making the total deduction, \$133,154.14, leaving net premiums to the amount of \$600,554.86. This amount represents total premiums for the period of 12 months from October 1, 1912, to September 30, 1913.

On June 15, 1913, of these premiums only that portion actually earned up to that date should be considered in any statement of profits; in other words, while premiums may have all been paid within one month, they were paid in advance for a period of 12 months, and were only available for the computation of profits when actually earned;

so in arriving at the profits for 8½ months of this period it is only fair to take into account the earned premiums for this period or from October 1, 1912, to June 15, 1913, which, after making the proper deductions, would leave for the share of each \$5,861.52. Deducting this amount from the amount of \$10,380.41 to which appellant is entitled leaves due appellant \$4,518.89, for which judgment in its favor is here rendered.

Believing the evidence shows that the trial court erred in rendering judgment in favor of appellee, it is reversed, and judgment here rendered for appellant for said sum of \$4,518.89.

Reversed and rendered.

HUNTER v. RICE et al. (No. 7767.)

(Court of Civil Appeals of Texas. Dallas. Nov. 18, 1916. Rehearing Denied Jan. 6, 1917.)

MUNICIPAL CORPORATIONS—§918(3)—BONDS—ELECTION—NOTICE—SUFFICIENCY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 606, providing that a proposition for issuance of municipal bonds shall distinctly specify the purpose, the amount, the time payable, and the rate of interest, and article 616, providing that any city or town providing for issuance of bonds shall provide for levy and collection of a tax annually of sufficient amount to pay annual interest and a sinking fund to retire the indebtedness, and article 884, providing for an ad valorem tax to pay interest and creating a sinking fund, the notice for an election on a bond question need not specify the rate of the tax to be levied, but that is left to the city council or town board.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1921; Dec. Dig. § 918(3).]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Injunction by R. T. Hunter against E. Rice and others. Judgment for defendants, and order overruling motion for new trial, and complainant appeals. Affirmed.

Shurtleff & Cummings and J. E. Clarke, all of Hillsboro, and Chas. L. Black, of Austin, for appellant. Morrow & Morrow, of Hillsboro, for appellees.

TALBOT, J. The following statement of the nature and result of the suit is taken from appellant's brief: This suit was filed by the appellant, R. T. Hunter, against the appellees, E. Rice, W. S. Ford, J. N. Collier, A. D. Rhea, P. J. Sherman, and J. O. Finley, the appellant seeking to enjoin the issuance and sale of certain bonds of the town of Whitney, Tex., and the levy and collection of a tax to pay the interest on, and provide a sinking fund for the payment of, said bonds. The cause was tried before the court without a jury, and, after hearing the case, the court rendered judgment in favor of appellees. Appellant thereupon filed his motion for new trial and said motion, upon con-

sideration, was overruled by the court, and appellant excepted to such action and gave notice of appeal, and has in due time and manner perfected his appeal to this court.

The appellant, R. T. Hunter, alleged that he was a qualified voter and property taxpayer of and resided in the town of Whitney, Hill county, Tex., and further alleged that the appellee E. Rice was the duly elected, qualified, and acting mayor of the said town, and that the other defendants named were the duly elected, qualified, and acting aldermen of said town. Appellant further averred that, on September 14, 1915, the appellees, in their official capacity, passed an order, whereby they ordered that an election should be held in said town of Whitney on October 19, 1915, to determine whether or not the appellees should be authorized to issue the bonds of said town in the sum of \$15,000, payable 40 years after date, bearing interest at the rate of 5 per cent. per annum, "and to levy a tax sufficient to pay the interest on said bonds and create a sinking fund sufficient to redeem them at maturity," for the purpose of constructing a waterworks system in said town. He further averred that on October 19th, the said election was held, and that the appellees thereafter, on October 25th, declared the result of said election as being in favor of the issuance of said bonds and the levy of said tax, and that the appellees were seeking and preparing to issue said bonds and to levy the said tax, and would do so unless restrained by the court. Appellant further averred that the election was void, and all the orders and proceedings of the appellees were void for the reasons: (1) That there was no law of the state authorizing the town of Whitney to issue bonds for the purpose specified in said order; (2) that no legal and sufficient notice of the election had been given before the same was held; (3) that the order for the election was void, because the same did not specify, as required by law, the rate of taxes to be voted to pay the interest on said bonds and provide a sinking fund for their redemption. Appellant prayed for a writ of injunction to issue, restraining the appellees from issuing said bonds and from selling the same when issued and from levying or attempting to levy or collect the said tax. The appellees answered by general demurrer, general denial, and by special answer that the bonds referred to in plaintiff's petition were regularly issued, and that all the proceedings had and done with respect to their issuance were valid, and that proper notice was given, etc.

The appellant presents but one assignment of error, namely:

"The court erred in denying the injunction prayed for, for the reason that the order for the bond election did not specify the rate of taxation proposed to be assessed and levied to support the said bonds, as required by the laws of this state, and the said order was therefore

void, and the election ordered was therefore void, and the said bonds illegal and void."

The order for the election in question was regularly made by the appellees on September 13, 1915, and by its terms ordered that an election be held in the town of Whitney on the 19th day of October, 1915, and that at said election the following proposition be submitted:

"Shall the city council of the city of Whitney be authorized to issue the bonds of said city in the sum of fifteen thousand dollars (\$15,000.00), payable (40) forty years after date, with the option of redeeming same at any time after ten years from date, bearing interest at the rate of (5%) five per cent. per annum, payable annually and to levy a tax sufficient to redeem them at maturity, for the purpose of constructing a waterworks system in the said city of Whitney?"

The question presented is, Does the law require that the order for a bond election of the character involved in this proceeding shall specify the rate of taxation to be levied and collected for the payment of the bonds? Article 606 of Vernon's Sayles' Texas Civil Statutes prescribes how the proposition in such cases shall be submitted to a vote of the qualified taxpaying voters of the city, and reads as follows:

"The proposition to be submitted for the issuance of bonds shall distinctly specify the purpose for which the bonds are to be issued, the amount thereof, the time in which they are payable, and the rate of interest; and all voters desiring to support the proposition to issue bonds shall have written or printed upon their ballots the words, 'For the issuance of bonds,' and those opposed shall have printed upon their ballots the words, 'Against the issuance of bonds.'"

This statute, as will be observed, does not require, as one of the requisites of the order to be made for the election, that it state, either in a general way or specifically, the tax to be levied, and we have found no statute to that effect. The case differs materially from *Parks v. West*, 108 S. W. 466, seemingly relied on by appellant, and the case of *Lowrance v. Schwab*, 46 Tex. Civ. App. 67, 101 S. W. 840, cited in the *Park-West* Case. In those cases the statute under which the elections were authorized and held required that the order therefor should state the amount of the tax to be voted on, and the orders made in both cases were to the effect that the purpose of the election was to determine whether or not a tax not to exceed in any one year a certain number of cents on the \$100 valuation of property subject to taxation in the respective districts shall be levied, etc. In holding in those cases that the election for the bond issue and tax levies was

void because the orders therefor did not state the exact rate of the tax which it was proposed to levy, the conclusion was reached that under the provisions of the statutes applicable, the vote at such an election must be for a specific tax, and vested in the authorities ordering the election no discretion, either as to whether the levy of the tax should be made or as to its amount; that said provisions, taken together, clearly meant that the petition fixes the amount for which the election is to be ordered, and the order enables the voter to vote for the specific sum proposed to be levied, thus leaving nothing to the discretion of those ordering the election, but rendering their duties purely ministerial. In discussing the *Lowrance-Schwab* Case, which met with the approval of this court when the opinion in the *Parks-West* Case was written, and which still meets its approval, it was pointed out that in view of the fact that the order for the election stated that its purpose was to determine whether or not a tax not to exceed 20 cents on the \$100 valuation of taxable property, the commissioners' court under the election held might have levied any sum up to 20 cents on the \$100 valuation and that there was no authority in the law for the delegation of the discretion of the voter to the commissioners' court. The reasons for declaring the elections void in the cases referred to because the orders therefor did not specify the rate of the tax which it was proposed to levy do not exist in the present case. Here the statute, not only directs that the city council shall, at the time it authorizes the execution of bonds, provide for the levy and collection of a tax sufficient to pay the annual interest on such bonds and create a sinking fund for the redemption of the bonds at maturity, but that the city council or other municipal authorities shall levy such a tax. Vernon's Sayles' Texas Civil Statutes, 616, 884. In no provision of the statute is it required that the amount of the tax be stated in the order for the election, or that the amount of the tax shall be determined by a vote of the qualified taxpaying voters of the city. As we understand the statutes relating to cases like the present, the Legislature, perhaps because the amount of the tax to be levied for the payment of the bonds was based on taxable values, which might change each year, has clothed the city council with the authority to ascertain the amount of that tax and to levy the same.

The judgment of the court below is affirmed.

CANALES et ux. v. CANALES et al.
(No. 5842.)

(Court of Civil Appeals of Texas. San Antonio.
Dec. 6, 1916. Rehearing Denied
Jan. 10, 1917.)

HOMESTEAD \S 209½ — SALE UNDER EXECUTION—TEMPORARY INJUNCTION.

In a suit to restrain sale under execution of an alleged homestead, the plaintiffs were entitled to a temporary injunction, restraining a sale of the property, to prevent a cloud upon the title, until the cause could be tried on its merits.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 209½.]

Appeal from District Court, Jim Wells County; V. W. Taylor, Judge.

Suit for injunction by Fructuoso Canales and wife against Andres Canales and others. From an interlocutory order refusing a temporary injunction, plaintiffs appeal. Reversed, and temporary injunction granted.

S. H. Woods, of Alice, for appellants. Canales & Dancy, of Brownsville, and J. F. Carl, P. H. Swearingen, Jr., and Geo. G. Clifton, all of San Antonio, for appellees.

FLY, C. J. This is a suit instituted by appellants to restrain the sale under execution of a certain tract of land alleged to be the homestead of appellants, and consequently exempt from sale under execution. There was a preliminary hearing of the cause, and this appeal is perfected from an interlocutory order of the court refusing a temporary injunction.

The evidence was conflicting as to whether the land in dispute was a homestead or had been abandoned by appellants, but the question was one of fact, and forms a reasonable ground for the belief that appellants will probably sustain great harm if this property is sold under execution, and that nothing but a short delay will be encountered by appellees. We think, therefore, that the court should have granted the temporary writ of injunction and restrained a sale of the property until the cause could be tried on its merits. *Friedlander v. Ehrenworth*, 58 Tex. 350; *Daniels v. Daniels*, 127 S. W. 569.

Even if the old rule of refusing an injunction, when the applicant has an adequate legal remedy, were in force in Texas, the right to an injunction to restrain the sale of a homestead, under execution, would exist. The sale would cast a cloud upon the title to the property, and the owners would have the right to an injunction to prevent such cloud. *Joyce on Injunctions*, §§ 708, 709; *Van Matcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Mann v. Wallis*, 75 Tex. 611, 12 S. W. 1123; *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250; *Wylde v. Capps*, 27 Tex. Civ. App. 112, 65 S. W. 648; *Barr v. Simpson*, 54 Tex. Civ. App. 105, 117 S. W. 1041.

Appellants have a case which should be

determined, if they so desire, by a jury, on its merits, and they should not have a cloud placed on their title before a final trial, which they will be compelled to have removed.

The judgment of the trial court is reversed, and a temporary writ of injunction is granted, restraining the sale of the land described in the petition until the cause is finally disposed of on its merits.

FIDELITY TRUST CO. v. RECTOR et al.
(No. 1068.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 6, 1916. Rehearing Denied
Jan. 3, 1917.)

1. GIFTS \S 49(4)—SUFFICIENCY OF EVIDENCE—INJUNCTION.

Evidence, in an action to restrain a sale of property under execution in satisfaction of a judgment against the husband of the principal plaintiff, held to sustain a finding that the property in question was acquired by such plaintiff as a gift from persons to whom she and her husband had sold property, and not as part consideration for such property.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 99; Dec. Dig. \S 49(4).]

2. FRAUDULENT CONVEYANCES \S 44—DEED TO EQUITABLE OWNER.

A vendor cannot commit a fraud on creditors by making a deed to a grantee, to whom the land already belongs by equitable title.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 102-104; Dec. Dig. \S 44.]

3. APPEAL AND ERROR \S 934(2)—FINDINGS TO SUPPORT JUDGMENT—PRESUMPTION.

Where, in an action to enjoin the sale of property in satisfaction of a judgment against the husband of the principal plaintiff, the issue whether a prior contract between such plaintiff and those from whom she claimed to have acquired the property as a gift was a contract of sale or a mortgage is not requested to be submitted, or submitted to the jury, and a finding that such contract was a contract of sale is necessary to the judgment, it will be presumed on appeal that that the trial court so found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. \S 934(2).]

Appeal from District Court, Fisher County; Jno. B. Thompson, Judge.

Suit by Madeline E. Rector and others against R. P. House and others, and the Fidelity Trust Company intervened. From judgment for plaintiffs, intervener appeals. Affirmed.

Thompson & Barwise, G. W. Wharton, and Geo. Thompson, Jr., all of Ft. Worth, and L. H. McCrea, of Roby, for appellant. Woodruff & Woodruff, of Sweetwater, for appellees.

HUFF, C. J. The appellant alone briefs this case, and we adopted the following statement of the pleadings as set out in its brief:

"This is an injunction suit, brought by Madeline E. Rector, joined pro forma by her husband, E. R. Rector, seeking to restrain R. P. House, sheriff of Fisher county, Tex., and the Royston State Bank, a corporation, from sell-

ing 176.725 acres of land in Fisher county, Tex., as well as lots Nos. 13 and 14, in block 12, in the city of Royston, Fisher county, Tex., under alias execution issued out of the district court of Fisher county, Tex., on the 15th day of July, A. D. 1915, by J. C. Hilburn, clerk of the said court, in cause No. 696, style Royston State Bank v. E. R. Rector et al., to satisfy the balance due on said judgment amounting to the sum of \$49.10. The petition of injunction alleged that the said property levied upon by the sheriff was the separate property of Madeline E. Rector, and was acquired by her as a gift, and that a cloud has been placed upon her title by reason of the levy made by the sheriff under the said alias execution and advertisement of sale of the said property; said petition prayed for the issuance for a writ of injunction, restraining R. P. House, sheriff, from selling, or from further offering for sale, the property described, and further praying that the cloud so cast upon the title of Madeline E. Rector to the said property be removed upon final hearing, and that the said levy made by the sheriff under the alias execution be declared null and void and be held for naught. Said petition for injunction was granted by the court, and, appellee having filed a bond, as required by the court, the clerk of the district court of Fisher county, Tex., on September 4, 1915, issued a writ of injunction, restraining the sheriff, R. P. House, from selling the property, heretofore described, said writ of injunction being served upon the said R. P. Moore, sheriff, on September, 6, 1915, by T. W. Benson, constable of Fisher county, Tex., and being returnable to the district court of Fisher county, Tex., on September 28, 1915.

"On December 30, 1915, the Fidelity Trust Company, appellant herein, intervened in said injunction suit, and alleged: (1) That it was trustee for the Royston State Bank, all the assets of the said Royston State Bank having been duly transferred and assigned to it, among which assets was the judgment of the Royston State Bank v. E. R. Rector et al., upon which the levy of the property in controversy was made. (2) That the property in controversy and previously described, and which was levied upon by the sheriff, R. P. House, was community property of E. R. Rector and wife, Madeline E. Rector, the title to said property being in Madeline E. Rector as a matter of record. (3) That said property in controversy was not the separate property of Madeline E. Rector, appellee herein, and was not acquired by her as a gift by reason of the fact that said property was conveyed to the said Madeline E. Rector at the instance and request of Broad & Bomar of the city of Ft. Worth, who had been presented for a long time prior thereto with a claim of E. R. Rector for certain demands and moneys which the said E. R. Rector asserted that the said Broad & Bomar owed him, and an equitable interest in 4,000 acres of land, situated in Jones, and Fisher counties, Tex. (4) That the said Broad & Bomar, in order to quiet E. R. Rector in his demands and claims as set forth, and with the purpose of compromise and settle once and for all the said claims and demands held by the said E. R. Rector against Broad & Bomar, had the property in controversy conveyed to Madeline E. Rector upon the instance and request of her husband, E. R. Rector, and with the purpose and intention of placing said property beyond the reach of E. R. Rector's creditors, and to hinder and delay them from collecting their debts and demands. (5) That at the time Broad & Bomar had the property in controversy conveyed to appellee, Madeline E. Rector, the said Madeline E. Rector and her husband, E. R. Rector, executed a release to Broad & Bomar, extinguishing all of their demands and claims against Broad & Bomar, the said release being in the form of a general warranty deed from E. R. Rector and wife, Madeline E. Rec-

tor, to Broad & Bomar, conveying all of their right, title, and interest in a certain 4,000-acre tract of land in Jones and Fisher counties, out of which the original claim or claims of E. R. Rector against Broad & Bomar arose. (6) Intervener denied that the property in controversy belonged to the separate estate of Madeline E. Rector, denied it was a gift to her, denied that her husband E. R. Rector, had no interest therein, and generally denied all of the allegations of appellee, and demanded strict proof thereof. (7) Intervener alleged that the property in controversy, levied upon and advertised for sale by the sheriff, R. P. House, belonged to the community estate of appellee, Madeline E. Rector, and E. R. Rector, and as such it was subject to execution and levy so made by the sheriff—by reason of all of which allegations, appellant prayed that upon a hearing the property in controversy be declared the community property of E. R. Rector and Madeline E. Rector, and that the writ of injunction be dissolved, and that the court direct the sheriff to readvertise the sale of said property and sell same under said alias execution."

The first assignment of error is that the court should have instructed a verdict for Intervener on the ground that the undisputed evidence shows that Rector and wife had a community interest in land deeded to Broad & Bomar, for the land and lots in question, and that this community interest was so conveyed upon a compromise agreement or settlement between the parties, and that the title was put in Mrs. Rector with intent to protect it from the creditors of Rector. On March 11, 1913, Broad & Bomar entered into a contract with E. R. Rector, the husband of appellee, by which Rector sold to Broad & Bomar something over 4,000 acres of land at \$10 per acre, amounting in the aggregate to \$41,070, \$30,000 to be paid in cash, and the assumption of liens on the land, it being understood that all liens that could be discharged were to be discharged by payment in cash, and the balance assumed by Broad & Bomar. Broad & Bomar gave Rector an option to repurchase the land for one year after its date, at the price paid by them, plus 8 per cent. interest, and it was also agreed therein that Broad & Bomar would lease the land to Rector, and that Rector was to pay for the lease annually a stipulated sum, which would equal 8 per cent. on the purchase price of the land, plus the taxes. The facts in this case are sufficient to show that Rector did not exercise his option, but that a controversy arose perhaps as to the time in which he should have to exercise the option and whether or not he was to have more money, he contending for more, perhaps. These contentions were denied by Broad & Bomar; they contending that they had paid him the contract price according to the contract. It sufficiently appears from the facts in this case that Broad & Bomar paid the money they agreed to pay, and this was paid to the creditors of Rector, and Bomar says that before they could get the abstract, they found they had in fact paid more to the creditors than the cash consideration which they were to pay amounted to, and that they decided to institute suit on the

indebtedness, which was secured by a lien on the 4,000 acres of land which they discharged, and they did institute suit and foreclosed the lien. Rector and his wife, however, did not make a deed to the land, as they had agreed to do in the contract.

On the 26th day of June, 1915, Rector and his wife did execute a deed to the 4,000 acres of land, reciting the consideration of \$1. It further appears from the evidence that the 176-acre tract of land, and the lots levied on by the appellants, by virtue of an execution issued on a judgment in favor of the Royston State Bank against the Royston McCauley Mercantile Company and E. R. Rector. This land, the 176 acres, stood in the name of J. E. Willis, who owned one half of the land and held the other half in trust for Broad & Bomar, and the lots were owned by Broad & Bomar. On the 29th day of June, 1915, J. E. Willis conveyed the land to Mrs. Madeline E. Rector, as her separate property and for her sole and separate use, and Broad & Bomar conveyed the lots in the town of Royston, levied on, to Mrs. Rector. Bomar testifies by deposition in this case that they had paid for the 4,000 acres of land, and did not owe Mr. Rector anything therefor, and that there was no legal obligation on their part to pay Mr. Rector anything more for this land, and that they recognized no such obligation, but that they gave to Mrs. Rector the property in controversy, and procured Mr. Willis to make her a deed to that effect. He states:

"It is a fact that the conveyance made to Mrs. Rector of the land and lots in question was not made in payment of anything that we recognized as a valid, enforceable obligation, either legally or morally, but was made to her in the discharge of what Mr. Broad and I believed, under the circumstances, to be absolutely fair and just as between man and man, and was intended by us as a gift to Mrs. Rector that should be protected from the creditors of E. R. Rector. It is a fact that E. R. Rector never instituted any suit or suits against us, and it is a further fact that he never at any time threatened to institute any suit or suits against us. It is a fact that we did tell Mr. Rector that we did not owe him anything or pay him anything, but that we were going to make a donation to Mrs. Rector and have them both feel that they had been decently treated. Mr. Rector never requested us to convey this land to his wife. This was my own conception; in fact I did not think that Rector realized the necessity of the property being protected from his creditors; he did not seem to. I cannot say that there is any bias or leaning in this suit towards anybody," etc.

At another place he says:

"I do not know whether the conveyance of this property to Mrs. Rector was a gift or not, but it was intended by Mr. John W. Broad and myself as being a discharge of what we believed as between ourselves and our God as to what was fair and decent for us to do under the circumstances, and without the slightest belief on our part that we lawfully owed E. R. Rector or his wife anything. Yes; it is a fact that at the time we made this conveyance to Madeline E. Rector, we were not indebted in any manner to E. R. Rector or his wife, and it is a fact that E. R. Rector or his wife, Madeline E. Rector, ever paid or promis-

ed to pay us anything whatever for the making of said conveyance of land and lots."

The trial court submitted the following issues:

"A. A gift is the act by which the owner of a thing voluntarily transfers the title and possession of the same to another without consideration.

"B. A compromise is an agreement made between two or more parties as a settlement of matters in dispute between them, and in order to make a consideration for a compromise a binding one, there must be some matter of doubt between the parties as to whether a legal obligation exists or not.

"Bearing in mind the foregoing instructions, you will answer the following questions as above directed:

"Special issue No. 1. Was the deeds made by and at the instance of Broad & Bomar to Mrs. Madeline E. Rector on the 29th day of June, 1915, to the property in controversy, executed as a gift by Broad & Bomar, to said Mrs. Madeline E. Rector, as a gift is above defined?

"Special issue No. 2. Did the consideration, or any part thereof, by which Broad & Bomar had the land in controversy in this suit conveyed to Mrs. Madeline E. Rector grow out of any compromise, difference, or settlement between Broad & Bomar and E. R. Rector, out of the failure of E. R. Rector to exercise his option to redeem a 4,000-acre tract of land from Broad & Bomar under the terms of said option contract, executed March 9, 1913?"

The jury answered the issues as follows:

"To special issue No. 1, we answer, 'Yes.'"

"To special issue No. 2, we answer, 'No.'"

[1] It seems to us the only issue raised by the pleadings was submitted by the trial court to the jury, for their determination. The questions were whether the land was given to Mrs. Rector by Broad & Bomar, or whether it was deeded to her in consideration of the equity of Rector in the 4,000 acres of land ascertained upon compromise. The jury answered that this was a gift. The evidence in this case will support the findings, and Bomar's testimony shows, together with the written contract, that Broad & Bomar bought something over 4,000 acres of land, agreeing to pay therefor \$10 per acre, amounting in the aggregate to \$41,070. They were to pay about \$30,000 in cash and to assume certain indebtedness secured by a lien on the land. Before the abstract was completed they had paid out something over the cash payment to various creditors of Rector. The contract gave Rector an option for one year to repurchase the land, and in the meantime he should occupy it as tenant and pay rent on the land equal to 8 per cent. on the purchase price. If he repurchased, he should pay the sum so paid and assumed, with 8 per cent. thereon, less the rents theretofore paid. Rector never exercised his option, but brought on some kind of controversy, claiming apparently that he should have further time to repurchase and, perhaps, the payment of additional sums of money. Broad & Bomar refused to recognize his contention, and contended for a compliance with the contract. In order to protect themselves further they brought suit of foreclosure against the land on the debts paid by them, which were se-

cured by a lien on the land. The liens they foreclosed, and it is inferable at least from the evidence that the land was purchased thereunder by them. Up to this time Rector and his wife had not made a deed to the land, as they had agreed to do. If the jury found that these facts were true, the title to the land under the contract and foreclosure vested in Broad & Bomar, and if this issue was not submitted to the jury, the presumption is that the court found the fact, in the absence of any special issue requested on that point. Rector, therefore, had no such interest in the land, which could be appropriated by any other creditor, after Broad & Bomar had paid the contract price as agreed in the written contract. The mere fact that Rector claimed such an interest did not necessarily make his claim true. The record shows repeatedly that Broad & Bomar denied that he had any such interest. The deed from Rector and wife may have cleared the record, but it was not necessary, if the facts, as found, were true, to vest the title in Broad & Bomar. The land and lots given Mrs. Rector at the time of the gift certainly were not subject to the claims of Rector's creditors, and would not be so after the gift, unless the community property of Rector and wife paid for them. The jury, from the facts, were authorized to find that the community property did not pay for the land. All that is shown is that there was an exchange of the deed to the 4,000 acres, to which Broad & Bomar had already the legal and equitable title. They had this title by having paid all that was agreed to be paid under the written contract enforceable under the law and by foreclosure of liens against the land. Whatever the motive of Broad & Bomar was in giving the land and lots to Mrs. Rector ought not affect the matter. This property was theirs to give. It did not deprive the creditors of Rector of any right therein to which they were before entitled. It withdrew nothing from the reach of the creditors subject to the payment of their debts; nothing belonging to Rector or the community went into the lands so given, if Bomar's testimony is to be believed, to which the jury appears to have given credence. The mere claim of Rector itself did not make it an asset; it was never recognized by Broad & Bomar as a valid claim or legal claim of any value. At most, the testimony only shows that Broad & Bomar felt that it would be fair to give Mrs. Rector this property; whether it was conscience money or what not is immaterial. It was nothing placed beyond the reach of creditors which they could have subject to their debt.

[2, 3] A vendor cannot commit a fraud on creditors by making a deed to a grantee to whom the land already belonged by equitable title. *Barnett v. Vincent*, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98; *Peck v. Jones*, 10 Tex. Civ. App. 835, 30 S. W. 382. We interpret the contract by Rector with Broad & Bomar as a contract of sale, vesting title to the 4,000 acres upon the payment of the consideration stipulated for, and not as a mortgage; but, if the contract is to be interpreted in the light of the facts as to whether it was a contract of sale or a mortgage, the facts in this case were sufficient to authorize the trial court to find that it was a contract of sale, and that the purchase price of the land was paid, and the presumption will prevail that he so found in support of the judgment. This particular issue was not requested to be submitted, or submitted to the jury for their finding, and under the statute the presumption is the court so found, if that is necessary to the judgment in this case.

The second, third, and fourth assignments of error are grouped, and relate to the refusal of the court to give special issues Nos. 1, 2, and 3. Issues Nos. 1 and 2 are substantially covered by issue No. 2, submitted by the court. Issue No. 3 appears to have been requested upon the same paper, or with 1 and 2. The court, having, as we consider it, substantially covered 1 and 2, properly refused to give the requested issues, as presented, and there was no error in refusing them. Issue No. 3, besides, was not warranted under the pleadings in this case, and the issues presented thereby. It was not shown in the pleading that the Royston Bank, at the time of these conveyances, was a creditor of Rector. The facts are sufficient to show that, but the pleadings do not allege it. Besides, in briefing the case, there is no proposition presenting the question of fraud under these three assignments, and the brief is insufficient to present the question of fraud, and does not present it in such manner as will authorize us to consider it.

The sixth and seventh assignments are overruled for the reasons stated in overruling the first assignment.

The eighth assignment is overruled. The assignment to the admission of the testimony of Mrs. Rector and the objections stated to the admission of her testimony do not present such error as will require a reversal, if any error at all.

As we view the case, there is no reversible error, and the judgment of the lower court will be affirmed.

HARTMAN v. HARTMAN. (No. 5708.)

(Court of Civil Appeals of Texas. Austin. Dec. 18, 1916.)

1. DIVORCE — 25 — CRUEL TREATMENT — MOTIVE OF WIFE IN SUING.

Where a wife, as shown by her own testimony, sued for divorce not on account of her husband's cruel treatment, alleged in her petition, but because of his refusal to sell their home and move to some other community, she was not entitled to divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 61, 106; Dec. Dig. 25.]

2. DIVORCE — 108 — PLEADING — EVIDENCE.

In a wife's suit for divorce on the ground of cruel treatment, the husband need not answer at all to render it the court's duty to hear testimony showing that the wife has been guilty of similar acts of misconduct toward the husband, so that she is not entitled to divorce, since the rules of pleading applying in other cases do not apply to a defendant in a divorce suit in Texas.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349-352; Dec. Dig. 108.]

3. DIVORCE — 108 — PLEADING — ANSWER — EVIDENCE.

In wife's suit for divorce on ground of cruel treatment, husband's answer alleging facts as to wife's acts of cruelty toward him as justification of his conduct in having her tried on a charge of insanity, sufficiently pleaded such facts to admit evidence of the wife's cruel acts, if the answer in a divorce suit were to be tested by the general rules of pleading.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349-352; Dec. Dig. 108.]

Appeal from District Court, Coleman County; John W. Goodwin, Judge.

Suit for divorce by Rozella Hartman against William Hartman. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Snodgrass, Dibrell & Snodgrass, and Critz & Woodward, all of Coleman, for appellant. Woodward & Baker, of Coleman, for appellee.

KEY, C. J. [1] This is a divorce suit wherein judgment was rendered for the defendant, and the plaintiff has appealed. We have considered all the questions presented in appellant's brief, and have reached the conclusion that the judgment should be affirmed. The criticisms urged against the charge of the court are not regarded as tenable; nor do we think the court erred in refusing to give appellant's requested instructions. But if error was committed in any of the respects referred to, we are still of opinion that the judgment should be affirmed.

Appellant produced no other witness than herself to prove her allegations that her husband had assaulted and cursed and abused her; and it has been decided that, under such circumstances, the plaintiff should produce some corroborating testimony in order to obtain the decree of divorce. *Lohmuller v. Lohmuller*, 135 S. W. 751. But in this case appellee produced the testimony of many witnesses, most of whom were their children, directly contradicting appellant's testimony in the respect referred to; and, in allowing a bill of exception, the trial judge indicated his opinion to the effect that, under the testimony submitted, appellant was not entitled to a divorce. Our statute does not authorize a divorce except upon satisfactory proof, and it has been held that if the proof is not satisfactory the trial court should disregard the verdict of the jury and decline to grant a divorce. *Moore v. Moore*, 22 Tex. 237; *Haygood v. Haygood*, 25 Tex. 576. And it has also been held that the same rule applies on appeal, and that the appellate court has the same power in that regard as the trial court. Furthermore, appellant's own testimony shows that her real reason for seeking a divorce was not on account of the cruel treatment alleged in her petition, but was because of her husband's refusal to sell their home and move to some other community; and for that reason she is not entitled to a divorce. *Dority v. Dority*, 62 S. W. 106, and cases there cited.

[2, 3] We overrule appellant's contention that appellee had no right to prove that appellant had been guilty of similar acts of misconduct toward him. Appellant contends that appellee's answer was not sufficient to admit such proof, though it is admitted that he alleged such facts in his answer as a justification of his previous conduct in having plaintiff tried upon a charge of insanity. The rules of pleading which apply in other cases do not apply to a defendant in a divorce case in this state, and although he may not answer at all, it is the duty of the court to hear any testimony which would show that the plaintiff is not entitled to a divorce. *Bostwick v. Bostwick*, 73 Tex. 182, 11 S. W. 178. However, in this case we think the facts referred to were sufficiently pleaded by appellee, even though the answer should be tested by the general rule.

No reversible error has been shown, and the judgment is affirmed.
Affirmed.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SCOTT & CO. v. O. D. MANN & SONS et al.
(No. 5687.)

(Court of Civil Appeals of Texas. Austin. Nov. 15, 1916. Rehearing Denied Dec. 23, 1916.)

JUSTICES OF THE PEACE \hookrightarrow 174(8)—APPEAL—AMENDMENT OF PLEADING.

Where suit on a note was brought in justice court by a business house described as a corporation because its attorney was ignorant that the corporation had been dissolved and the business continued by a partnership, the action of the county court in allowing plaintiffs to amend to allege that they were a partnership was not violative of Rev. St. 1911, art. 759, declaring that no new cause of action shall be set up when a case has been appealed from a justice court to the county court, since the members of the firm had the right to intervene in the county court and assert that the demand sued on belonged to them and not to the corporation, which was what they substantially did.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 670; Dec. Dig. \hookrightarrow 174(8).]

Appeal from McCulloch County Court; G. A. Walters, Special Judge.

Suit by O. D. Mann & Sons and others against Scott & Co. From a judgment for plaintiffs, defendants appeal. Judgment affirmed.

Adkins & Adkins and Sam McCollum, all of Brady, for appellants. Shropshire & House, of Brady, for appellees.

KEY, C. J. O. D. Mann & Sons brought this suit in a justice of the peace court, seeking to recover upon a promissory note, and to foreclose a chattel mortgage given to secure the note. They described themselves as a corporation, and obtained a judgment in that capacity. The defendants appealed the case to the county court, where the plaintiffs were permitted to amend their pleading by alleging that they were not a corporation, but a partnership, consisting of J. T. and O. Duke Mann. They further alleged that their business had formerly been incorporated under the name of O. D. Mann & Sons, and that the attorney who brought the suit in the justice court was not aware of the fact that the corporation had been dissolved, and that the partnership had continued the business in the same name as it was conducted by the corporation. The plaintiffs recovered judgment in the county court, and the defendants have appealed.

It is earnestly urged on behalf of appellants that reversible error was committed in permitting the plaintiffs to file the amendment referred to and recover in the capacity of partners; the contention being that such action of the trial court was violative of article 759 of the Revised Statutes, which declares that no new cause of action shall be set up when a case has been appealed from a justice court to the county court. We overrule that contention and hold that the trial

court ruled correctly in the respect referred to. *Amarillo Commercial Co. v. Railway Co.*, 140 S. W. 377; *Davis v. Bank & Trust Co.*, 116 S. W. 393; *Railway Co. v. Scott*, 156 S. W. 295; *Grayson v. Hollingsworth*, 148 S. W. 1135; *Rector v. Mill Co.*, 100 Tex. 591, 102 S. W. 402; *Freeman v. Walker & Sons*, 175 S. W. 1133. J. T. and O. D. Mann had the right to intervene in the county court and assert that the demand sued upon belonged to them and not to the corporation; and, in substance, that is what they did.

There are some other questions presented in appellants' brief which we do not care to discuss in this opinion. They have been considered, and are decided against appellants.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

THOMAS v. KEAN. (No. 7632.)

(Court of Civil Appeals of Texas. Dallas. Nov. 18, 1916. Rehearing Denied Jan. 6, 1917.)

1. APPEAL AND ERROR \hookrightarrow 1071(1)—HARMLESS ERROR — FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The failure of the trial court to file conclusions of fact and law does not require reversal of the judgment, where the action was on a note, the answer alleging failure of consideration was not properly verified, and defendant did not appear at the trial, so that the note set out in the transcript furnished all the material that could be furnished by the conclusions of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4284; Dec. Dig. \hookrightarrow 1071(1); Trial, Cent. Dig. § 940.]

2. PLEADING \hookrightarrow 302 — VERIFICATION — INFORMATION.

Under the verification of Pleading Act 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1827-1829, 1829a, 1829b, 1902), requiring the affiant to state that the pleadings were true or that he believed them to be true, an affidavit by an attorney that the allegations are true and correct to the best of his knowledge formed on information from his client is insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 898-903; Dec. Dig. \hookrightarrow 302.]

Appeal from Dallas County Court; T. A. Works, Judge.

Action by George Kean against J. L. Thomas on a note. Judgment for the plaintiff, and defendant appeals. Affirmed.

Lewis & Roark, of Dallas, for appellant. Lovejoy & Youngblood, of Dallas, for appellee.

RAINEY, C. J. Appellee sued appellant on a note for \$800, with interest and attorney's fees of 10 per cent., alleging \$399.58, with interest and attorney's fees, for bringing suit, was due and unpaid. Appellant was cited, and he filed an answer, but did not otherwise appear and present his defense. On July 8, 1915, the case was heard by the court without a jury, and judgment rendered for appellee for \$498.81, with 8 per cent. interest

thereon. On July 28, 1915, appellant filed a motion for new trial, which was heard on same day and overruled, but judgment thereon was not entered until August 3, 1915. Notice of appeal was given and 30 days after adjournment given to file statement of facts and bills of exceptions. No statement of facts was filed, and bills of exceptions were not filed until December 15, 1915. A motion was made for the court to file his conclusions of fact and law, which he sustained, but failed to comply therewith.

Conclusions of Law.

[1] 1. It is complained that the court failed to file his conclusions of fact and law, and reversal of the judgment is asked for that reason. The statute requires when a cause is tried by the court without a jury, when requested to do so, it is his duty to file his conclusions of fact and law, and ordinarily his failure to do so will cause a reversal of the judgment. In this case no injury resulted to appellant from the failure to do so, and it is not reversible error. The petition stated a cause of action upon a note which, being set out in the transcript, furnishes all the matter that would have been furnished in the court's conclusions of fact and law. *Implement Co. v. Templeton*, 14 S. W. 1015; *Bank v. Stout*, 61 Tex. 567.

[2] 2. Error is assigned to the court's action in that it did not consider appellant's answer denying innocent purchaser of the auto by appellee, for which the note was given, and setting up the plea of failure of consideration, for that the cause was brought and tried under the verification of Pleading Act 33d Leg. c. 127 (*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 1827-1829, 1829a, 1829b,

1902), and appellant's answer was verified and was not denied by verified pleas of appellee. We see no error in this action as the affidavit to appellant's answer was not in conformity to said act, which requires that the affiant must state the pleadings are true or "believes" them true. The affidavit to the answer is:

"Before me, the undersigned authority, on this day personally appeared S. C. Lewis, one of the attorneys for defendant herein, who deposes and says that the things set forth in the foregoing answer are true and correct to the best of his knowledge, formed upon information furnished by his client."

The attorney, it will be noted, swears that the foregoing answer is "true and correct to the best of his knowledge formed upon information furnished by his client." The affidavit should be positive as to the truth of the statements made in the answer or it must show that affiant believes them to be true. It is not enough to state it is true from information, but affiant must go further and state from his knowledge he believes them to be true. This appellant did not do; consequently the affidavit was defective, which rendered the answer defective and inoperative. The judgment shows that neither the appellant nor his attorney appeared at the trial, but does not show the defenses set up were called to the court's attention and presented to it on the trial. The plaintiff's cause of action being a promissory note, there was nothing requiring the court to take notice of the defenses pleaded in the answer.

3. The motion for new trial was not filed for more than two days after the trial. It contained no legal or equitable excuse for its not being filed sooner.

The judgment is affirmed.

BEARD et al. v. BANK OF OSCEOLA.
(No. 45.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. VENDOR AND PURCHASER ⇐265(4) — VENDOR'S LIEN — BONA FIDE PURCHASERS OF NOTE—PURCHASERS AFTER RELEASE OF LIEN.

Where the deed of the original grantor merely recited the execution of the notes, but did not expressly reserve a lien, the innocent purchaser of such notes, in view of Kirby's Dig. § 510, providing that a vendor's lien, when expressed upon or appearing from the face of the deed, shall inure to the benefit of the assignee of the note given for the purchase money, had a lien or interest superior to that of innocent purchasers of the property subsequent to the execution of a deed releasing the vendor's lien, as the subsequent purchaser was bound to take constructive notice of the deed on record, and to have protected himself by demanding a surrender of the notes, and as he had the best opportunity to protect himself by requiring an exhibition or surrender of the notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 710; Dec. Dig. ⇐265(4).]

2. VENDOR AND PURCHASER ⇐261(2) — VENDOR'S LIEN — ASSIGNMENT OF NOTE — STATUTE.

Under Kirby's Dig. § 510, providing that a lien possessed by the vendor of realty when expressed upon or appearing from the face of the deed shall inure to the assignee of the note, the lien passes by the assignment of the notes, though not expressly reserved.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 679-686; Dec. Dig. ⇐261(2).]

3. VENDOR AND PURCHASER ⇐246—VENDOR'S LIEN—NATURE.

A vendor's lien is not a creature of contract, but of equity, and arises by operation of law out of the contract for the payment of the purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 615; Dec. Dig. ⇐246.]

4. VENDOR AND PURCHASER ⇐230(3)—VENDOR'S LIEN — NOTICE — SUBSEQUENT PURCHASERS.

A subsequent purchaser of land must take notice of the recital of a deed in the line of his title, and a recital that the purchase money is unpaid is sufficient to put all parties upon notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 508; Dec. Dig. ⇐230(3).]

5. VENDOR AND PURCHASER ⇐261(4) — VENDOR'S LIEN — PURCHASE OF NOTICE — ANTECEDENT INDEBTEDNESS.

The fact that vendor's lien notes were assigned to secure antecedent indebtedness does not impair the right of the assignee to assert claims of an innocent holder of the notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 691; Dec. Dig. ⇐261(4).]

6. VENDOR AND PURCHASER ⇐230(3) — VENDOR'S LIEN—REMOVAL OF DEED—NOTICE.

The recital in a deed of a consideration of \$1,500 to be paid by one note for \$250, another note for \$250, and the balance ten years from date, the notes bearing interest until paid, and of the retention of a lien on the land, was sufficient to show that there was unpaid purchase money due to the extent of \$1,500, as it could be

inferred that a note was executed for the balance, as well as for the other two payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 508; Dec. Dig. ⇐230(3).]

Appeal from Mississippi Chancery Court; Chas. D. Frierson, Chancellor.

Action for foreclosure by the Bank of Osceola against W. A. Beard and John G. Powell. Judgment for plaintiff, and defendants appeal. Affirmed.

A. G. Little and Churchill M. Buck, both Blytheville, for appellants. Lamb & Rhodes, of Osceola, for appellee.

McCULLOCH, O. J. This is an action instituted by the plaintiff, Bank of Osceola, in the chancery court of Mississippi county, Chickasawba district, to foreclose certain liens on three 40-acre tracts of land in that county described as the W. ¼ of the N. W. ¼, and the S. E. ¼ of the N. W. ¼, of section 25, township 16 N., range 11 E.

There is no dispute about the material facts of the case, which are as follows: On September 2, 1909, J. W. Barron and O. R. Lilly sold and, by warranty deed, conveyed to Ben Bunch one of said 40-acre tracts, the S. E. ¼ of the N. W. ¼ of section 25, for the sum and price of \$1,300, evidenced by a negotiable promissory note of that date executed by said Bunch to Barron and Lilly, bearing 10 per cent. interest per annum, due and payable ten years after date. Barron assigned his interest in the note before maturity to Lilly, and Lilly assigned the note before maturity to plaintiff. On December 1, 1909, J. P. Meador executed to Barron and Lilly two deeds of trust on the W. ½ of the N. W. ¼ of section 25, one to secure a negotiable promissory note in the sum of \$1,000 and the other to secure a negotiable promissory note in the sum of \$2,000, both of which notes were assigned before maturity to plaintiff by Barron and Lilly. On March 4, 1910, Meador sold and by warranty deed conveyed to Bunch the S. W. ¼ of the N. W. ¼ of section 25, for the price of \$1,000, as evidenced by a negotiable promissory note executed by Bunch to Meador, due and payable ten years after date, with interest at the rate of 10 per cent. per annum, and this note was by Meador assigned before maturity to Lilly, and by Lilly assigned before maturity to plaintiff. The assignments of the various notes set forth above to the plaintiff were for the purpose of securing the payment of certain indebtedness of Barron and Lilly to the plaintiff, which has not been paid.

On the 7th of May, 1910, Meador conveyed the N. W. ¼ of the N. W. ¼ of section 25 to M. A. Rudder and J. A. Hopkins, who subsequently conveyed to one Fisher, and on November 14, 1910, Bunch conveyed to Fisher the S. ½ of the N. W. ¼ of section 25, which said conveyances put the legal title in Fisher

subject to the lien for the purchase-money and mortgage notes referred to above. On April 12, 1912, Barron and Lilly executed to Fisher a quitclaim deed conveying all their interest in the aforescribed tracts, said deed reciting a consideration of \$1, and also reciting that the deed was made for the purpose of releasing the deeds of trust and vendors' liens arising under the deeds already described. On April 15, 1912, Fisher conveyed all of said lands to W. A. Beard, one of the defendants herein, who subsequently mortgaged the land to John G. Powell, who is also made defendant. All of the deeds hereinbefore referred to were promptly placed of record in Mississippi county. It is not definitely shown whether said notes were assigned to the plaintiff before or after the execution of the release deed by Barron and Lilly to Fisher on April 12, 1912, and for the purposes of this decision we assume that they were assigned after the execution of that deed, but before the maturity of the notes and for an antecedent indebtedness.

The chancellor decreed in favor of the plaintiff for a foreclosure of the liens, and defendants Beard and Powell have prosecuted an appeal to this court.

[1-3] Counsel for appellants have brought to our attention in the brief various authorities from other courts bearing on the points at issue, but we are of the opinion that every point raised in the case has been heretofore decided by this court against the contention of appellants' counsel. The principal contention is that, as between the two innocent parties—that is, the appellants, as innocent purchasers of the property subsequent to the execution of the release deed from Barron and Lilly to Fisher, and the plaintiff bank as the holder of the lien notes—the former is entitled to the first consideration, and that the lien of the notes in the hands of the bank should not be held to be superior to the rights of appellants as subsequent purchasers of the land. This contention has been expressly decided against appellants in the recent case of *Driver v. Lacer*, 186 S. W. 824, and cases cited therein. The facts of the case just cited are very similar in all essential respects to the facts of the case at bar. The notes in that case were, as in the present case, assigned after the execution of the deed by the original grantor, which would otherwise have operated as a release, and we held that the release was ineffectual against the rights of an innocent holder of the negotiable promissory note. We said that the subsequent deed of the original purchaser was not in the line of the title of the purchaser of the notes, and he was not, therefore, bound to take constructive notice of that deed on the record, and that the subsequent purchaser of the land, in order to protect himself, must have demanded a surrender of the notes. "In no other way," we said, "could he protect himself against a

bona fide holder of the notes before their maturity."

It is true that there is this difference between the two cases: In *Driver v. Lacer* the deed recited an express reservation of the vendor's lien, whilst in the present case the deeds, or at least one of them, merely recite the execution of the notes but do not in express terms reserve a lien. That, however, is an unimportant distinction between the two cases. Our statute (Kirby's Digest, § 510) provides that the lien possessed by the vendor of real estate, "when the same is expressed upon or appears from the face of the deed or conveyance shall inure to the benefit of the assignee of the note or obligation given for the purchase money of such real estate." It is not essential therefore that the lien be expressly reserved, as it is only necessary that the lien shall "appear from the face of the deed." Stephens v. Anthony, 37 Ark. 571. The lien is not a creature of contract, but is a creature of equity and arises by operation of law out of the contract for the payment of the purchase price, and the effect of the statute is merely to preserve that lien to the purchaser of the note when the same is "expressed upon or appears from the face of the deed or conveyance." The notes and the lien are inseparable, and the lien passes by the assignment of the notes. Pullen v. Ward, 60 Ark. 90, 28 S. W. 1084; *Driver v. Lacer*, supra.

[4, 5] It is insisted that this case is different from *Driver v. Lacer* in another respect, namely, that the negotiability of the notes does not appear from the face of the deed so as to constitute notice to subsequent purchasers of the land. The answer to this contention is that the statute itself, which we have already quoted, makes the lien inure to the benefit of an assignee of the note, and the subsequent purchaser of the land must take notice of the recital of the deed, for that is in the line of his title. The recital that the purchase money is unpaid is sufficient to put all parties upon notice, and they must protect themselves by evidence of the fact that the purchase money has been paid and that negotiable promissory notes are not outstanding in the hands of innocent purchasers. Any other construction would defeat the manifest purpose of the lawmakers in enacting this statute. The fact that the notes were assigned to plaintiff to secure antecedent indebtedness does not impair the right to assert claims of an innocent holder of the notes. *Exchange National Bank v. Coe*, 94 Ark. 387, 127 S. W. 453, 81 L. R. A. (N. S.) 287, 21 Ann. Cas. 934.

It is urged with considerable zeal that, as between the holders of the note and a subsequent purchaser of the land, the latter should be protected for the reason, it is said, that the holder of the note had better opportunity to protect himself. We think, however, that the reverse is true, and that the subsequent purchaser has the best opportuni-

ty to protect himself by requiring an exhibition or surrender of the evidences of the indebtedness on the purchase money of the land. This is the basis of our decision in *Driver v. Lacer*, supra, which is conclusive of that question.

[6] Finally, it is contended that the lien for the note given as consideration by Bunch to Meador could not be declared a lien against appellants for the reason that the deed itself fails to show that any note was executed, and also that it negatives the fact that the lien was reserved. The deed from Meador to Bunch recites the consideration as follows:

"\$1500.00 to be paid as follows: One note for \$250.00, due and payable Nov. 1, 1912, and one note for \$250.00, due and payable Nov. 1, 1913, and balance due and payable ten years from date. Said notes bearing interest at the rate of 10 per cent. per annum from date until paid. A lien is retained on said land to secure the payment of said notes."

The recital is sufficient to show that there is unpaid purchase money due to the extent of \$1,500, and it is fairly inferable from the language used that a note was executed for the thousand dollars due and payable in ten years, as well as for the other two payments of \$250 each. It is not a fair construction of the language to say that it was only intended to recite that there were two notes for \$250 each, and that there was a reservation of a lien only to secure those two notes.

It is unnecessary to say anything further with respect to the lien of the notes secured by the mortgage executed by Meador to Barron and Lilly, for what we have said about the assignment of the notes secured by the vendor's lien applies with equal force to the lien of the notes secured by the mortgage. *Pullen v. Ward*, supra.

The principles here announced having been recognized and decided in repeated opinions of this court, and having become rules of property in this state, we deem it unnecessary at this time to determine whether or not those decisions are in line with the weight of authority in other jurisdictions.

Our conclusion being that the decision of the chancellor was correct, the decree is therefore affirmed.

TWIST et al. v. MULLINIX. (No. 47.)

(Supreme Court of Arkansas. Dec. 18, 1916.)

1. MALICIOUS PROSECUTION — 34 — TERMINATION OF PROSECUTION — NECESSITY.

In an action for malicious prosecution, it is necessary that plaintiff show that the original prosecution instituted against him has been legally terminated.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 70; Dec. Dig. 34.]

2. MALICIOUS PROSECUTION — 64(1) — EVIDENCE — SUFFICIENCY.

In an action for malicious prosecution for embezzlement, evidence held sufficient to show that defendant had abandoned a criminal prose-

cution instituted by him against the plaintiff before a justice of the peace.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 151, 153; Dec. Dig. 64(1).]

3. EVIDENCE — 158(5) — ORAL EVIDENCE — ADMISSIBILITY.

In an action for malicious prosecution oral proof was competent to show an abandonment by the defendant of a criminal prosecution instituted by him against the plaintiff before a justice of the peace.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 476, 482, 483, 485, 487; Dec. Dig. 158(5).]

4. MALICIOUS PROSECUTION — 35(1) — TERMINATION OF PROSECUTION — ABANDONMENT.

When a justice of the peace dismissed a prosecution and discharged the defendant therein without objection or protest by the prosecutor, there was an abandonment of the proceedings by the prosecutor.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-76; Dec. Dig. 35(1).]

5. EVIDENCE — 181 — SECONDARY EVIDENCE — CONTENTS OF JUSTICE'S DOCKET.

In view of Kirby's Dig. §§ 2149, 4562, 4604, in relation to justices of the peace, providing that every justice of the peace shall keep a docket in which he shall enter his proceedings in every case, in an action for malicious prosecution, oral proof of a judgment of dismissal entered by a justice of the peace in the criminal prosecution instituted by the defendant against the plaintiff would not be competent until a sufficient foundation had been laid by showing that the justice had kept no docket or that his docket had been lost or destroyed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 600; Dec. Dig. 181.]

6. APPEAL AND ERROR — 204(3), 260(1), 301 — RESERVATION IN LOWER COURT OF GROUNDS FOR REVIEW — EVIDENCE.

Where defendant made no objection at the time, saved no exception to the ruling of the court, and did not make such ruling a ground for his motion for new trial, he could not complain on appeal of the court's ruling permitting a justice of the peace to testify that a criminal prosecution instituted by defendant against plaintiff was dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1503, 1743, 1753-1755; Dec. Dig. 204(3), 260(1), 301; Trial, Cent. Dig. § 172.]

7. TRIAL — 306 — VERDICT — DUTY OF JURY.

It is the duty of the jury to apply the law as declared by the court to the facts which they find established by the evidence and decide the issues of fact in accordance with the preponderance of evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 731, 742; Dec. Dig. 306.]

8. TRIAL — 194(1) — INSTRUCTIONS — MATTERS OF FACT.

Under Const. art. 7, § 23, providing that courts may not charge juries with regard to matters of fact, the court cannot invade the province of the jury to tell them what weight they should give to the testimony as a whole or to that of any witness.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439, 440, 450; Dec. Dig. 194(1).]

9. NEW TRIAL — 159 — SCOPE OF REVIEW — EVIDENCE.

On motion for new trial, it is the province of the trial court to review the evidence and determine whether or not the jury has correct-

ly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 319; Dec. Dig. ¶159.]

10. APPEAL AND ERROR ¶1005(4)—REVIEW—MOTION FOR NEW TRIAL.

A ruling of the trial court overruling a motion for new trial and sustaining the verdict of the jury as in accord with the preponderance of the evidence will not be reviewed and the verdict set aside by the appellate court if there was sufficient evidence to sustain it, even though such court is convinced that the verdict is clearly against the weight of the evidence, unless it is manifest that the court abused its discretion by acting improvidently, arbitrarily, or capriciously in making such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3950; Dec. Dig. ¶1005(4).]

11. NEW TRIAL ¶163(2)—DETERMINATION—FINDINGS—CONSTRUCTION.

On motion for new trial by the use of the words "the verdict will not be disturbed merely because it is against the preponderance of the evidence," following a statement that the finding upon one essential point was against the preponderance of the evidence, the finding of the court was positive that the verdict was against the weight of the evidence on the essential point mentioned; as "merely" means "purely," "only," "solely," and is often misused for "simply."

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 331; Dec. Dig. ¶163(2).]

For other definitions, see Words and Phrases, Second Series, Merely.]

12. NEW TRIAL ¶72 — DETERMINATION — FINDINGS.

Where on motion for new trial the court found specifically that the verdict was against the weight of the evidence on an essential point, it erred after thus finding in not setting aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. ¶72.]

Hart and Humphreys, JJ., dissenting.

Appeal from Circuit Court, Crittenden County; J. F. Gautney, Judge.

Action by J. W. Mullinix against Ira F. Twist and another. From judgment for plaintiff after a remittitur of part of the verdict and from an order overruling a motion for a new trial, defendant Ira F. Twist appeals. Reversed, and remanded for a new trial.

J. W. Mullinix, who at that time lived in Mississippi, was employed by Ira F. Twist to manage his plantation in Arkansas. After a few months Twist became dissatisfied with Mullinix as manager, claiming that he was incompetent, and discharged him.

Mullinix, after his discharge, returned to Mississippi, leaving his family and household effects temporarily in a house that he occupied at Earle, Ark. Twist claimed that upon investigation he ascertained that Mullinix had misappropriated and converted to his own use funds in his hands belonging to Twist amounting to something more than \$200, and after consultation with an attorney, and upon his advice, he made an affidavit before a justice of the peace charging Mullinix with the embezzlement of \$200, and

also at the same time instituted a civil suit for that sum and had an attachment issued and levied upon Mullinix's household goods. Mullinix returned to Arkansas to defend the attachment suit, and was arrested on the warrant charging him with embezzlement. He was allowed to go at liberty until the next day, when the attachment suit was tried before the justice.

The civil suit resulted in a judgment for Mullinix. After the civil suit was disposed of, and while Twist and his attorney were present, the attorney for Mullinix called the justice's attention to the criminal case and told the court that the facts were the same in the two cases, and moved the court that the criminal case be dismissed and Mullinix discharged. The court sustained the motion; no objection being made to same by Twist or his attorney.

Mullinix afterwards instituted this suit against Twist for malicious prosecution. There was a verdict in favor of Mullinix in the sum of \$20,000. Twist moved for a new trial. The court had a remittitur entered for the sum of \$15,000, to which Mullinix agreed. The motion for new trial was overruled and final judgment was rendered in Mullinix's favor in the sum of \$5,000, from which this appeal comes. Other facts will be stated in the opinion.

Hughes & Hughes, of Memphis, Tenn., and Allen, Humphrey & Converse, of Springfield, Ill., for appellant. Caruthers Ewing, H. C. Williamson, Jr., and A. B. Shafer, all of Memphis, Tenn., for appellee.

WOOD, J. (after stating the facts as above). [1] I. Before appellee could maintain his action for malicious prosecution it was necessary for him to show that the original proceeding instituted against him had been legally terminated.

"It is a sufficient termination of the original proceeding to serve as a basis for an action for malicious prosecution that plaintiff was discharged, or the original proceeding was dismissed at a preliminary hearing, or before trial, as upon an abandonment of the proceedings." 26 Cyc. 55 et seq. 59.

[2, 3] Appellant, while conceding that an abandonment of the original proceedings by Twist would be a sufficient termination of the original proceedings, nevertheless contends that the criminal prosecution was not abandoned. But, giving the testimony its strongest probative value in favor of the appellee, it was sufficient to warrant a finding that Twist had abandoned the criminal prosecution instituted by him against the appellee before the justice of the peace. Oral proof of what took place before the justice was competent to show an abandonment. The testimony shows that after the verdict had been returned in the civil action an attorney for the appellee stated that the facts were about the same in the two cases and

moved the court to dismiss the criminal charge, and that the court dismissed that charge and released the appellee. Appellant, Twist, and his counsel were present and offered no objection to this proceeding. When such affirmative action was being taken by the court in the presence of Twist and his counsel with reference to the prosecution that had been instituted by him it was incumbent upon him at least to object to the dismissal. He was called upon to speak then, and, having failed to do so, he cannot set up that the prosecution was not abandoned because the same facts were afterwards presented by him to the grand jury upon which an indictment was returned.

[4] The proceedings before the grand jury were entirely independent of the proceedings before the justice of the peace. If the justice had held appellee to answer to the grand jury on the charges instituted against him by Twist, then the proceedings before the grand jury might be regarded as a continuation of the original prosecution. But when the justice dismissed the prosecution and discharged the appellee without objection or protest from appellant, that was an abandonment of the proceedings before the justice. See *Costello v. Knight*, 4 Mackey (15 D. C.) 65.

This is not like a case where a criminal prosecution is dismissed by mutual consent. Here the testimony tended to show that the facts upon which the prosecution was based had been developed in a civil action, and the appellee, in asking the justice to dismiss the prosecution and to discharge him, was but contending that the cause had been heard, and that he was entitled, as a matter of legal right, to a judgment dismissing the prosecution.

There was no mutual consent between the appellee and the appellant that the prosecution should be dismissed, but a positive demand for dismissal upon the part of the appellee, and a failure to object thereto on the part of appellant. The facts of this case are entirely different from those cases cited in appellant's brief in which a nolle prosequi of the criminal case is procured at the instance of the defendant therein, or where there has been a compromise and the case is dismissed by mutual consent of the prosecutor and the defendant. There was testimony from which the jury might have found that appellant, Twist, abandoned the criminal prosecution instituted by him against appellee before the justice of the peace. Such abandonment, as we have seen, constituted a legal termination of that prosecution.

[5] II. There is no competent evidence in the record showing that the criminal prosecution against appellee pending before the justice had been dismissed. Such fact could only be established by the best evidence thereof, which would be the judgment of dismissal entered on the justice's docket or

minutes of his proceedings. Oral proof of such judgment would not be competent until a sufficient foundation had been laid for such proof by showing that the justice had kept no docket or that the justice's docket had been lost or destroyed. Our statute provides that every justice of the peace shall keep a docket in which he shall enter his proceedings in each case. See Kirby's Dig. 2149, §§ 4562, 4604.

[6] The appellant, however, is not in an attitude to complain of the ruling of the court in permitting the justice of the peace to testify that the criminal case against the appellee was dismissed. Appellant made no objection to such testimony at the time, saved no exceptions to the rulings of the court, and did not make such ruling a ground of his motion for a new trial. We would not reverse the case therefore for the ruling in admitting this incompetent testimony, and only mention it here in view of a new trial.

III. Appellant urges that there was probable cause for instituting the criminal prosecution against appellee before the justice, and that no malice upon the part of Twist was shown; also that the verdict was excessive, and actuated by passion and prejudice. The testimony bearing upon these questions is quite voluminous. No useful purpose could be subserved by discussing it in detail. These were issues of fact upon which the court properly instructed the jury, and there was evidence to sustain the verdict. We find no reversible error in the rulings of the court on any of these grounds.

IV. In overruling the motion for a new trial the court said:

"While the jury determined by their finding that Twist did not make a full and complete statement of all of the facts within his knowledge when consulting said attorney, in my judgment, the finding upon that question was against the preponderance of the evidence. However, the verdict will not be disturbed merely because it is against the preponderance of the evidence."

[7] Under our judicial system it is the peculiar province of the jury to determine issues of fact, being guided in their deliberations by instructions or declarations of law announced by the trial court applicable to the facts which the testimony adduced in the cause tends to prove. It is the duty of the jury to apply the law as declared by the court, to the facts which they find established by the evidence and decide the issues of fact in accordance with the preponderance of the evidence.

[8, 9] In order to determine which of the parties litigant has the preponderance of the evidence in his favor, the jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. Under our Constitution the trial court cannot invade the province of the jury to tell them what weight they should give to the testimony as a whole, or to that of any witness. They cannot charge juries with regard to matters of fact. Const. Ark. art. 7, § 22.

But after the jury has concluded its deliberations and returned its verdict, if there is a motion for a new trial setting up that the verdict is not sustained by sufficient evidence, or that it is contrary to law, or both, it is then the province of the trial court to review the verdict and to determine whether or not the jury has correctly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence.

Under the law the verdict of a jury should be in favor of that party who has established the issues of fact for which he contends by a preponderance of the evidence. If the jury has not so decided, then its verdict is not correct, and it is the peculiar and exclusive province of the trial court to correct such error by granting a new trial. When the trial court becomes convinced that the verdict is not sustained by a preponderance of the evidence, then it is his duty to set aside that verdict. And if the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on a material issue of fact, then it must set aside such verdict. The trial court presides over the trial. He observes and hears the witnesses, and has the same opportunity as the jury in this respect, and that is the reason why it is made his peculiar and exclusive function to determine the issue on a review of the verdict as to whether it is responsive to the preponderance of the evidence in the cause. This court cannot do that for the reason that it has no such opportunity.

[10] Hence the rule is firmly established by the authority of our own decisions, as well as courts of last resort in many other jurisdictions, that a ruling of the trial court overruling a motion for a new trial and sustaining the verdict of a jury, as in accord with the preponderance of the evidence, will not be reversed and the verdict set aside by the appellate court, even though such court may be convinced that the verdict of the jury is clearly against the weight of the evidence. This court will not pass upon the issue as to whether or not a verdict is responsive to the preponderance of the evidence, but will leave that issue where it belongs, under our judicial system, to the trial court. But when the trial court has passed upon that issue and announced its finding, this court must see as a matter of law that the party entitled thereto gets the benefit of such finding.

The rule setting forth the respective functions of the jury and the trial court and this court is well expressed in *Richardson v. State*, 47 Ark. 562, 567, 2 S. W. 187, 189, where we said:

"But the weight of evidence and the credibility of witnesses are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But, when the case reaches us, the question is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the

statements of a witness who has testified fully and fairly. But the question is whether there is a failure of proof on a material point. To order a new trial because we differ in opinion from the circuit judge as to the weight of the testimony, or the truth or falsity of a witness, is to substitute our discretion for his discretion. And in this matter he is supposed to enjoy some advantages over us."

And again in *Blackwood v. Eads*, 98 Ark. 304, 310, 135 S. W. 922, 924, where we quoted from *Taylor v. Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962, as follows:

"The trial judge still has control of the verdict of the jury after and during the term it was rendered. Because of his training and experience in the weighing of testimony, and of the application of legal rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed in their verdict to do justice and enforce the right of the case under the testimony and instructions of the court. This is a necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors."

In *Blackwood v. Eads*, *supra*, we said further:

"Where there is a decided conflict in the evidence, this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for a new trial or overruling same. * * *

"The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused."

See, also, *McDonnell v. Railway Co.*, 98 Ark. 334, 135 S. W. 925; *McIlroy v. Arkansas Valley Trust Co.*, 100 Ark. 596, 599, 141 S. W. 196.

The law requires that the verdict of a jury be in accordance with the preponderance of the evidence. The only tribunal, under our judicial system, vested with the power to determine whether or not a verdict is against the preponderance of the evidence, is the trial court, which has the same opportunity as the jury for seeing and hearing the witnesses. Where there is a conflict in the evidence, and the trial court finds that the verdict, upon a material issue of fact, is against the preponderance of the evidence, the logical and necessary result of such finding, as matter of law, is that the verdict must be set aside; otherwise it would be impossible to correct the error.

We are aware that a different rule prevails in some jurisdictions, but the rule which obtains in our own jurisdiction is the only logical and sound one, and it is supported by excellent authority elsewhere. Precisely the same rule prevails in *Tennessee Telephone Co. v. Smithwick*, 112 Tenn. 463, 79 S. W. 803; *Railway v. Neely*, 102 Tenn. 702, 52 S. W. 167; *Turner v. Turner*, 85 Tenn. 387, 3 S. W. 121. And see, also, *Railway v.*

Kunkel, 17 Kan. 172; Central Co. v. Harden, 113 Ga. 453, 38 S. E. 949; Tacoma v. Light Co., 16 Wash. 288, 47 Pac. 738. We cannot approve the doctrine that it is an invasion of the province of the jury for the trial court to set aside a verdict which he finds to be against the preponderance of the evidence. On the contrary, if he fails to do so, he surrenders his own province, ignores his duty, and by so doing destroys the integrity of the best system that thus far has been devised in this country for the administration of justice.

Perhaps in the majority of courts of last resort in this country the rule obtains that, where the trial court has sustained the verdict of a jury, the court of review will not reverse the ruling of the trial court in refusing to set aside such verdict where there is sufficient evidence to sustain it, even though, in the opinion of the appellate court, such verdict may be clearly against the weight of the evidence.

Learned counsel for the appellee cite us to several cases of our own court where the above rule is announced. Drennen v. Brown, 10 Ark. 138; Allen v. Nordheimer, 13 Ark. 339; Lindsay v. Wayland, 17 Ark. 385; Miss., etc., R. R. Co. v. Cross, 20 Ark. 443.

But the rule announced in these cases has no application whatever to, and should not govern trial courts in passing upon motions for a new trial. Having presided at the trial, and having seen and heard the witnesses testify, they have had the same opportunities as the jury, and hence are vested with the authority to ascertain whether or not the jury's verdict is in accordance with the preponderance of the evidence, and when they have found upon conflicting evidence that such verdict is, or is not, against the weight of the evidence, such finding will not be set aside unless it is manifest that the court abused its discretion; that is, acted improvidently, arbitrarily, or capriciously in making such finding. Such finding must avail the party entitled to the benefit thereof.

Now, if the court had simply overruled the motion for a new trial, without the statement quoted, this ruling would have been tantamount to a finding that the verdict was not against a preponderance of the evidence. But such deduction cannot be drawn here, for there was an affirmative finding of the court in the following language:

"While the jury determined by their finding that the defendant Twist did not make a full and complete statement of all of the facts within his knowledge when consulting said attorney, in my judgment, the finding upon that question was against the preponderance of the evidence."

This court has said in several cases that "it is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence," which means conversely that the trial judge should not set aside a verdict if the evidence is so evenly balanced that the court cannot see clearly that the

verdict is against the preponderance. In other words, the trial court should let the verdict stand if he is in doubt as to whether or not it is against the preponderance. Where he finds positively that it was, we must assume that he was convinced that such was the fact. When the language used by the court in ruling on the motion for new trial is closely analyzed, there does not appear to be any doubt or uncertainty in the mind of the court that the jury's finding was against the preponderance of the evidence. To be sure, where the language used by the court is such as to make it doubtful or uncertain as to whether the court actually found the fact to be that the verdict was against the preponderance of the evidence, then the ruling of the court in refusing to set the verdict aside should not be disturbed. But the language of the court was not such as to indicate that the testimony was so nearly at equipoise in the thought of the presiding judge as to leave him in doubt as to whether the verdict was against the preponderance of the evidence on the particular question mentioned. The word "merely" in the language quoted does not qualify the finding of the court on that issue. On the conclusion of fact as to the verdict being against the preponderance of the evidence, the language of the court is positive and unequivocal.

[11] The language "but, of course, the verdict will not be disturbed by me merely because it is against the preponderance" states the court's reason for the conclusion it had reached not to set aside the verdict. This language certainly does not indicate that there was any doubt or uncertainty in the mind of the court that the verdict was against the preponderance of the evidence. It rather emphasizes and strengthens the idea that the court had reached that conclusion. The language, however, does show that the court wholly misapprehended the rule of law that should be applied to such a finding. The language shows that the court was of the opinion that he could not disturb the verdict merely because it was against the preponderance; whereas that was the very reason why he should have set it aside.

The word "merely" means "purely," "only," "solely." "Merely" is often misused for "simply." Funk and Wagnall's New Standard Dictionary. As used in the sentence, it qualifies the word "because." So, giving the word any one of its natural and accepted meanings, and treating it in its grammatical relation to the other parts of the sentence, it does not show that the court was in any doubt whatever about the verdict of the jury being against the preponderance of the evidence. If the language of the court had been "the verdict will not be disturbed by me solely" (or "simply," or "purely," or "only") "because it is against the preponderance of the evidence," it would have had pre-

cisely the same meaning as the language actually used.

[12] Therefore we conclude that the finding of the court was positive that the verdict was against the weight of the evidence on the essential point mentioned, and that the court erred, after thus finding, in not setting aside the verdict. For this error the judgment must be reversed, and the cause remanded for a new trial.

HART, J. (dissenting). It is true that, according to the uniform current of authority in this state, it is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But this statement of the law was not intended to authorize the trial court to weigh the evidence and substitute its judgment for that of the jury; for, under our Constitution, this is clearly the peculiar province of the jury.

The inquiry in such cases is not whether the judge, acting as a juror, would or would not have come to the conclusion returned by the jury in their verdict, but whether reasonable men charged with the duty of finding facts from the evidence, under the court's instructions as to the law applicable to the case, would come to that result. *Doody v. Boston & Maine R. R.*, 77 N. H. 161, 89 Atl.

487, Ann. Cas. 1914C, 846; *Reeve v. Dennett*, 137 Mass. 815; *Railroad Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602. See, also, *State v. Tarrant*, 24 S. C. 593; *Beaudrot v. Southern Ry. Co.*, 69 S. C. 160, 48 S. E. 106; and *Oregon Cascade R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or. 178.

The fair inference to be deduced from the remarks of the trial judge is that, while upon the evidence adduced at the trial he would have found the other way, yet, after a full consideration of the matter, he was not so clearly of the opinion that the verdict of the jury was against the preponderance of the evidence that, as a matter of law, he was required to set it aside. This construction of his remarks is borne out by the fact that the court approved the verdict, and entered judgment thereon.

Our Constitution provides that judges shall not charge juries with regard to matters of fact, but shall declare the law. If the jury abuses this power, it is the duty of the trial judge to grant a new trial; but he should do this only when he is clearly of the opinion that the verdict of the jury is against the preponderance of the evidence, and not merely because he differs with the jury as to the preponderance of evidence.

I am authorized to state that Judge HUMPHREYS concurs in this dissent.

STATE ex rel. J. HAHN BAKERY CO. et al.
v. ANDERSON, Circuit Judge.
(No. 18992.)

(Supreme Court of Missouri. In Banc. Dec.
21, 1918.)

**DISMISSAL AND NONSUIT §18 — RIGHT OF
PLAINTIFF—TIME OF MOTION.**

Though Rev. St. 1909, § 1980, provides that plaintiff may dismiss or take a nonsuit at any time before final submission to the jury and not afterward, it does not authorize the plaintiff after trial and verdict for defendant, which verdict is set aside, to take a nonsuit pending the term of the trial, against the consent of a defendant who prays an appeal from the grant of such new trial.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 32; Dec. Dig. §18.]

Original proceedings in mandamus on the relation of J. Hahn Bakery Company and another against Thomas L. Anderson, Judge of the Circuit Court of the City of St. Louis, presiding in division 7 of said circuit court. Alternative writ made absolute.

Earl M. Pirkey, of St. Louis, for relators. Adolph Abbey, Wendell Berry, and Fauntleroy, Cullen & Hay, all of St. Louis, for respondent.

FARIS, J. This is an original proceeding by mandamus, whereby it is sought to compel respondent, as the judge of division 7 of the circuit court of the city of St. Louis, to reinstate a certain cause at one time pending in said court, and to grant an appeal therein, from an order sustaining a motion for a new trial.

The facts out of which this instant case grew run thus: At the December term, 1915, there was pending in division 7 of the circuit court of the city of St. Louis, in which division respondent sat as judge, a certain cause wherein Abraham Spivack and another were plaintiffs, and relators herein were defendants, and wherein the sum in dispute was \$10,000. The above action coming on for trial before a jury, a verdict was rendered in favor of defendants on January 28, 1916. (For brevity and clarity we will hereinafter refer to the parties in the original suit as "plaintiffs" and "defendants," and to the parties in the instant proceeding as "relators" and "respondent," respectively.) Within the allotted time thereafter, to wit, on February 1, 1916, plaintiffs in said cause filed their motion for a new trial, which was taken under advisement, and carried over by the learned respondent to a day in the February term, 1916, to wit, to March 6, 1916, on which latter date the respondent sustained the motion aforesaid and granted to plaintiffs a new trial, on the ground that the verdict of the jury was against the weight of the evidence. Thereafter on the 7th day of March, 1916, without the knowledge or consent of defendants in said cause, and in their

absence and in the absence of their counsel, plaintiffs came into court and dismissed said cause. Thereafter, at the same term in which the motion for a new trial was sustained and the dismissal of said cause was had by plaintiffs, and on the 17th day of March, 1916, defendants therein (who are relators herein), after due notice in such behalf had been served on plaintiffs, came into respondent's court and filed their motion to reinstate said cause, to the end that they might (as they prayed they might be allowed to do) appeal from the order granting the new trial. Relators filed, with said motion for reinstatement of the case and for appeal thereof, a proper affidavit for appeal. Respondent refused to reinstate said cause, or to allow an appeal therein, holding that plaintiffs had the right to dismiss the cause after the sustaining of a motion for a new trial thereof, even though defendants might during the same term of court desire to appeal from the action of the court in such behalf.

The return of respondent admits the facts to be substantially as we set them out. Relators thereupon moved for judgment upon the pleadings, and the case is at issue upon the single point whether a plaintiff, after trial had and verdict rendered, which verdict is set aside upon motion, may take a nonsuit pending the term at which the trial was had, against the consent of a defendant who prays an appeal from the action of the court in granting such new trial.

The precise point here mooted seems to be one of first impression in this state, and to be likewise unique by its rarity in other jurisdictions. While we have a statute which upon a casual reading might seem to cover the case, we are led to suspect that it does not; since we observe that both relators and respondent quote and urge this statute as furnishing a fairly satisfying reason why plaintiffs did and why they did not have the right to take a nonsuit. In this state of the briefs, we may well be excused for entertaining doubts whether a statute thus so confidently relied on by both parties furnishes an answer to the question mooted. The statute thus urged upon our attention reads thus:

"The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward." Section 1980, R. S. 1909.

We are of the opinion that the above section must be construed in the light of the facts and circumstances existing, and must be modified, if need be, by a consideration of other well-settled principles of law. Two of these principles we think settle this case beyond cavil. They are: (a) That by our practice and by the terms of our statute (section 2040, R. S. 1909) any party authorized, and *ceteris paribus* entitled to take an appeal,

may take the same at any time during the term at which the judgment, or order complained of, was rendered; in short, he has the whole of the current term within which to appeal. And (b) if a party entitled otherwise to an appeal be by construction of a statute prevented from the exercise of a right in such behalf given to all others in similar cases, there arises by such construction a refusal of due process of law to him who thus is deprived of his right. *State v. Gueringer*, 265 Mo. loc. cit. 416, 178 S. W. 67. In the latter case, apposite to the point last herein made, we said:

"For while the right of appeal is not essential to due process of law (*Reetz v. Michigan*, 188 U. S. loc. cit. 508 [23 Sup. Ct. 390, 47 L. Ed. 563]), yet, if an appeal be allowed to some persons and not to all persons similarly situated, such deprivation of the right to an appeal is equivalent to the denial of due process of law, for due process of law and the equal protection of the laws are secured only when 'the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan v. Missouri*, 152 U. S. loc. cit. 382 [14 Sup. Ct. 570, 38 L. Ed. 485]."

Manifestly, if it should be otherwise ruled, it would be always within the power of a plaintiff who had been cast by verdict, but who had succeeded in his motion for a new trial, to irrevocably and inevitably affirm the action of the trial court in sustaining such motion by the mere expedient of a hasty dismissal (such as occurred here) and the payment of the accrued costs, and—as was likewise done here—on the next or a subsequent day within the year, refile the cause of action and proceed. These considerations make it fairly manifest that, under the conditions and state of facts here existing, we must construe the statute (when invoked after one trial and one successful motion for a new trial in the same term) as if it read, "provided, such dismissal will not operate to deprive the defendant of the right to appeal during the term." For surely when the defendants won before a jury, and the court cut the victory from under their feet by sustaining a motion for a new trial, on the ground that the weight of the evidence lay against the verdict, defendants had the right by a solemn statute to appeal to this court and take our opinion upon the points: (a) Whether the court nisi was correct in his ruling, and (b) whether defendant should be further vexed by the litigation; which litigation was settled if the jury's finding on the facts was right and the court nisi was wrong.

In an early case upon a point measurably analogous, it was said by this court:

"No nolle prosequi or dismissal of a party ought to be allowed when it will produce any derangement in the rights of the defendants, deprive them of a legal defense, or subject them to increased difficulties or liabilities." *Browning v. Chrisman*, 30 Mo. loc. cit. 357.

It will be seen that the statute contains no specific authority for doing what was done here. While it permits the plaintiff to wholly dominate and manage his lawsuit, it yet con-

tains nothing which will allow plaintiff to do this in such wise as will work injury to the rights of the defendant.

We are cited by respondent to the case of *Wood v. Nortman*, 85 Mo. 298, as conferring authority for the procedure herein followed by the court nisi. While it is true that this *Nortman* Case contains a dictum which, if read without reference to the context, and without regard to the facts held in judgment in that case, would furnish some color to respondent's contention, it is not in point here, because no question of the right to test by an appeal the correctness of the action of the trial court was involved, and "because (and this reason is written in the court's opinion) it was understood by the court and the parties, before judgment was rendered, that the plaintiff might have the right of entering a nonsuit." *Wood v. Nortman*, 85 Mo. loc. cit. 303. Neither does the case of *Lanyon v. Chesney*, 209 Mo. 1, 106 S. W. 522, 123 Am. St. Rep. 510, 14 Ann. Cas. 92, militate in any serious degree against the view we here take. There are likewise dicta in the latter case which, when read outside their context, seem to uphold the contention of respondent. The question there up for judgment went to the right of a plaintiff to dismiss an action (wherein defendant had filed a counterclaim), regardless of the consent of the counterclaimant. The case rode off upon the finding that the counterclaim had not been so timely filed as to prevent plaintiff from exercising his otherwise plenary right of dismissal.

The case of *Randalls v. Wilson*, 24 Mo. 76, also aside from the facts there held in judgment, seems to lend color to respondent's position. But that was a case wherein both of the plaintiffs (cast as herein upon the trial) were infants when the action was commenced by them. When judgment was rendered against them, one of them was still an infant. The case rode off upon the theory that, since the judgment was an entirety, and since one plaintiff was an infant when it was rendered, it was utterly and wholly void as to both plaintiffs, and that it was the plain legal duty of the trial court to set it aside, and that defendant therein was therefore in no wise injured by plaintiffs taking a nonsuit after the setting aside of the judgment.

If it were or could be made absolutely certain that the action of the trial court in granting a new trial in the case out of which the instant proceeding grew in no wise hurt relators, then there would be some authority in the *Randalls* Case, supra, for respondent's position. If we could hold out of hand from something which appears upon the record that respondent's action in setting aside the verdict was as a matter of law indisputably correct, then we could say that it was impossible for relators to have been prejudiced by the dismissal of the case. But that is not this case; we are holding that relators are entitled to their appeal, so that the controverted matter of whether they were hurt

may be fully examined and determined by us. The principle involved in this holding is that invoked in all jurisdictions. 14 Cyc. 406, and cases cited; 6 Encyc. Pl. & Pr. 842; 9 R. C. L. 194. And this general rule is thus stated by Cyc. loc. cit. supra:

"While a plaintiff may dismiss any claim where such dismissal will not prejudicially affect the interests of defendant, he will not be permitted to dismiss, to discontinue, or to take a nonsuit, when by so doing he will obtain an advantage and defendant will be prejudiced or oppressed, or deprived of any just defense."

It follows that the alternative writ of mandamus heretofore issued herein should be made absolute. Let this be done. All concur.

LYONS v. ST. LOUIS SOUTHWESTERN RY. CO. (No. 17630.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916. Rehearing Denied
Dec. 30, 1916.)

DEATH \Leftrightarrow 49(1) — ACTION — PLEADING — STATUTE.

In an administrator's action for death of a railroad's switchman under Rev. St. 1909, § 5425, as amended by Laws 1911, p. 203, giving a right of action for damages for injuries resulting in death of a servant in certain cases, the petition, which averred that deceased left no surviving wife or children, but did not aver that he left surviving any person capable of inheriting, on account of the omission, stated no cause of action.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64-66, 69; Dec. Dig. \Leftrightarrow 49(1).]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by William E. Lyons, administrator of the estate of George Franklin Brittain, deceased, against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Judgment reversed.

White, Hackney & Lyons, of Kansas City, for appellant. Walsh, Aylward & Lee, of Kansas City, for respondent.

WALKER, J. This is an action brought by an administrator under section 5425, R. S. 1909, as amended (Laws Mo. 1911, p. 203), to recover damages for the death of George Franklin Brittain, killed while in defendant's employ as a switchman at Ilmo, Mo., in October, 1910. The petition was filed in the circuit court of Jackson county in July, 1911, and the case tried in that court in December, 1912, resulting in a verdict for plaintiff in the sum of \$10,000. From the judgment rendered therein defendant appeals.

The petition, otherwise in the usual form, avers that the deceased left no surviving wife or children, but did not aver that he left surviving any person capable of inheriting. The defendant contends on account of this omission that the pleading states no

cause of action. This is not an open question in this jurisdiction. The latest expression of the court on the subject will be found in the opinion of Graves, J., in *Johnson v. Dixie Mining Co.* (187 S. W. 1), in which the contention here made by the defendant is sustained. This case affirms a like ruling in the same case in the Springfield Court of Appeals. 171 Mo. App. 134, 156 S. W. 33. An earlier expression of the court will be found in *Kirk v. Railroad Co.*, 265 Mo. 341, 177 S. W. 592, in which Blair, J., speaking for the court, quotes with approval an opinion rendered by the St. Louis Court of Appeals (*Troll v. Gaslight Co.*, 182 Mo. App. 600, 169 S. W. 337), in which it was held that a petition drawn upon section 5425, R. S. 1909, would not be held sufficient, in the absence of the averment here contended to be necessary. In consequence of these rulings the judgment of the trial court must be reversed; and it is so ordered. All concur.

STATE ex rel. CAPTAIN et al. v. GRAVES, Clerk of Circuit Court. (No. 19651.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916. Motion for Rehearing Denied Dec. 30, 1916.)

1. MANDAMUS \Leftrightarrow 55—FUNCTIONS OF WRIT—ENFORCEMENT OF EXECUTION — DEFINITENESS OF ORDER.

Since that is certain which is capable of being made certain, an order requiring a trustee to pay over to two relators, in equal proportions, funds in its hands, less proper charges and expenses, and to stand finally discharged upon filing vouchers showing compliance, where the trustee filed its report, admittedly correct, showing the exact amount due, was sufficiently definite upon which to award mandamus to compel the clerk of court to issue an execution.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 109-112; Dec. Dig. \Leftrightarrow 55.]

2. EXECUTION \Leftrightarrow 74—REQUISITES AND SUFFICIENCY.

Under Rev. St. 1909, § 2172, providing that the party in whose favor any judgment, order, or decree is rendered, may have an execution in conformity therewith, it is not prerequisite to an execution that an express order for its issuance be made.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 163; Dec. Dig. \Leftrightarrow 74.]

3. MANDAMUS \Leftrightarrow 55—FUNCTIONS OF WRIT.

Mandamus is a proper remedy to compel issuance by clerk of court of a writ of execution.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 109-112; Dec. Dig. \Leftrightarrow 55.]

4. APPEAL AND ERROR \Leftrightarrow 485(2) — SUPERSEDEAS—EXECUTION.

Where certain cestuis secured a judgment that the trustee pay over to them their proportionate shares of the trust fund and such fund was claimed by a third person and the trustee took the position of a mere stakeholder and did not appeal, the appeal of the third person did not operate as a stay of execution in favor of the trustee, and the cestuis were entitled to execution on the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2268, 2270-2274; Dec. Dig. \Leftrightarrow 485(2).]

Original proceedings in mandamus by the State, on the relation of Ringrose J. Capitain and another, against Charles R. Graves, Clerk of the Circuit Court of the City of St. Louis, and James Hagerman, his successor. Alternative writ made peremptory.

Douglas W. Robert, of St. Louis, and Wm. F. McLaughlin, for relators. Benjamin H. Charles, R. E. Collins, and Edward D'Arcy, all of St. Louis, for respondent.

REVELLE, J. This is an original proceeding by mandamus to compel the clerk of the circuit court of the city of St. Louis to issue an execution on an order or alleged judgment entered in the circuit court, requiring the Mississippi Valley Trust Company, as trustee, to pay over a particular trust fund in its hands, less proper charges and expenses, to relators. Various phases of the case out of which this trust fund arose have received this court's attention on former occasions (*Priest v. Capitain*, 236 Mo. 446, 139 S. W. 204; *Capitain v. Mississippi Valley Trust Co.*, 240 Mo. 484, 144 S. W. 466), and its history need not be here repeated, serving as it would no legitimate purpose.

The order whose enforcement relators seek was made and entered upon their motion, but not until after the Wagner Electric Manufacturing Company had, upon petition of the trust company, been ordered to appear and interplead concerning its claim to the fund in question. In its intervening petition, the trust company, after reciting the history of the fund and the terms under which for many years it had been held, and after denying any claim to a beneficial interest therein, prayed that the relators here and the Wagner Electric Manufacturing Company be required to interplead and be perpetually restrained and enjoined from commencing, conducting, or prosecuting any action in any court for the recovery or enforcement of payment of the sum of \$9,656.60, which it pleaded it held in trust. It further asked that it be permitted to pay said sum into court, and that it be discharged from any and all liability to either of the defendants. It then alleged the following:

"Wherefore said Mississippi Valley Trust Company as trustee says it ought not to be compelled to render herein a final account of the trust created by the deed, * * * or to pay over the balance in its hands, together with interest thereon, less its reasonable charges and expenses until a final determination of the intervening petition filed by it in this court herein above stated, or if this court see fit to order this trustee to render a final accounting herein, that before making its order of final distribution of the fund in the hands of this trustee, that the court order that the Wagner Electric Manufacturing Company be summoned to appear in this cause and to intervene herein so as to establish its claim, if any it have, to the funds in the hands of this trustee."

It appears from the record that the Wagner Electric Manufacturing Company later filed its petition wherein it claimed the sum

of \$7,848 of the fund in question. Upon hearing, the court found that the Wagner Electric Manufacturing Company was not entitled to any part of the funds and dismissed its petition, giving also against it judgment for costs and ordering execution thereon. The court also made this order:

"The court doth further order, adjudge, and decree that the Mississippi Valley Trust Company pay over to Ringrose J. Capitain and Isabella Capitain Williams the funds in its hands, less its proper charges and expenses, in equal proportions, and, upon filing vouchers showing compliance with the above requirement, stand discharged from its trust herein."

From this judgment the trust company took no appeal, but the electric company did, and its appeal is still pending. It gave an appeal bond in the sum of \$500 to cover costs alone. At the term of court next after the above-recited order was made, the trust company filed its report showing that the amount which it held, less all proper charges and expenses, and for which it was liable, was \$9,350.81. Upon the filing of this report, relators, conceding its correctness, asked that the trust company pay over that amount to them. Upon the trust company's refusal to so do, demand was made on the respondent, as clerk of the court, for an execution; but this was refused for reasons which will be stated in the opinion.

I. Respondent says our writ should not be made peremptory: (1) Because the order or judgment, upon which it is sought, is not for a definite and specific sum; (2) because the alleged judgment does not contain an order for the issuance of execution thereon; and (3) because the appeal of the Wagner Electric Manufacturing Company, which company was brought into court at the trustee's instance, operates as a supersedeas and stays execution until the questions therein involved shall be finally determined.

[1] As to the first contention, it is a rule, which reason and adjudicated cases seem to make applicable to all propositions which require definiteness, that that is certain which is capable of being made certain. The instant order required the trustee to pay over to relators, in equal proportions, the funds in its hands, less proper charges and expenses, and to stand finally discharged upon filing vouchers showing compliance. In pursuance of this order, the trustee filed its report showing the definite amount for which it was liable. This report was not only not challenged, but accepted as correct. The order manifestly contemplated that when such a condition appeared no further judicial action was necessary, as it provided that then, and when payment had been made, the trustee should stand discharged. Practical administration and orderly procedure require no further judicial determinations in order to fix the relative rights of the trustee and relators. Respondent's official records disclose the exact and conceded amount to which relators are entitled, and, in referring

to such records, he, as clerk, is going no further than when ascertaining and determining the amount of interest to be added to any sum specified in a judgment for money, and this is a daily and approved practice.

[2] II. The second contention is likewise ruled adversely to respondent. Section 2172, R. S. 1906, expressly provides that the party in whose favor any judgment, order, or decree is rendered may have an execution in conformity therewith. In view of this provision and our holding on the first proposition, it follows that it was not a prerequisite to an execution that an express order for its issuance be made.

III. Does the appeal of the Wagner Electric Manufacturing Company operate as a stay of execution in favor of the trustee when the trustee did not appeal? The Wagner Company gave a cost bond only, and the trustee not only did not appeal, but took no other or further action to have the proceedings against it stayed, pending the appeal of the litigation between the other parties. The judgment, in so far as it affected the trustee, was that it pay the funds in its hands to the relators. In its intervening petition it did not place itself in the perfect position of a stakeholder. It first recited its functions and position as trustee for relators, and then undertook by generalities and statements of conclusions to make itself a stakeholder. The allegations relative to its position as stakeholder are hardly consistent with its prayer that:

"It ought not to be compelled to render herein a final accounting of the trust created by the deed of Ringrose J. Watson, or to pay over the balance in its hands, * * * until the final determination of the intervening petition filed by itself in this court as heretofore stated. * * *"

In order to make itself a mere stakeholder, its attitude should have been one of willingness and offer to terminate its position of trust for relators by tendering a final statement as trustee and paying into the court the trust funds then legally in its hands. It could not very well be a trustee for relators, charged with the duty of defending in good faith any action affecting the cestui que trust, and at the same time be a mere stakeholder with no substantial interest in the litigated matter. Whatever may be the correct rule in this and other jurisdictions as regards the right of a mere stakeholder to appeal from a judgment nisi in a case involving only the conflicting interests of two claimants, we are of the opinion that in this case, where the court rejected the trustee's prayer not to compel it to make a final settlement at the time the cestui que trust in a proper proceeding prayed it should, it could not comply with a part of the adverse judgment and at the same time refuse to obey the remainder, without taking proper legal steps to protect itself in such a course, whether these steps are steps by appeal or motion for a modification.

[3, 4] We are of the opinion that, upon the disclosures of this record, the appeal of the Wagner Electric Manufacturing Company does not operate as a stay of execution in favor of the Mississippi Valley Trust Company, and that relators were entitled to the execution for which they now pray. Mandamus is a proper remedy to compel the issuance of a writ of execution. *State ex rel. v. Renick*, 157 Mo. 292, 57 S. W. 713; *State ex rel. v. Vogel*, 14 Mo. App. 189; and, for the reasons heretofore stated, our writ is made peremptory. All concur.

STATE ex rel. KINLOCH TELEPHONE CO.
v. ROACH, Secretary of State.
(No. 19991.)

(Supreme Court of Missouri. In Banc. Nov.
29, 1916. Rehearing Denied
Dec. 21, 1916.)

1. CORPORATIONS — §37 — FEES — STATUTE.

The provision of Rev. St. 1909, § 2991, that the duration of a corporation should not be extended until it should pay the fee therein prescribed, if construed to apply to corporations formed subsequent to its passage as well as to those before its passage and under special acts, is not inconsistent with section 2977, authorizing amendments to the articles of incorporation, and providing that upon an amendment increasing the capital stock the additional amount provided by law for such increase shall be paid, and the two acts, being in pari materia, will be construed as if their provisions were in the same section.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 105; Dec. Dig. §37.]

2. STATUTES — §219 — CONSTRUCTION — PRACTICAL CONSTRUCTION.

The uniform interpretation of a statute by the executive officers, whose duty it is to enforce it, which has not been questioned for a long period of time, while not binding on the courts, is entitled to weight where there is doubt as to the meaning of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. §219.]

3. CORPORATIONS — §37 — FEES — STATUTES — CONSTRUCTION.

In Rev. St. 1909, § 2991, providing that the powers enumerated in the preceding section should vest in every corporation thereafter created, and that any corporation theretofore organized under any general or special law might accept the provisions of the general laws, upon which acceptance the existence of the corporation shall be extended for such period as was originally permissible, but that nothing therein should extend to any corporation organized or existing under a special law or charter any special privilege not possessed by corporations organized under general laws, with a proviso that the duration of such corporation should not be continued until it should pay into the state treasury certain fees, the proviso refers not only to corporations theretofore organized which have adopted the provisions of the general laws, but also to corporations thereafter organized under such laws, since otherwise there would be dissimilar provisions relating to different corporations, which it was the purpose of the general incorporation laws to avoid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 105; Dec. Dig. §37.]

Original application for mandamus by the State, on the relation of the Kinloch Telephone Company, against Cornelius Roach, Secretary of State. Demurrer to the petition sustained, and preliminary writ quashed.

Wm. R. Orthwein, of St. Louis, for relator. John T. Barker, Atty. Gen., and W. T. Ruthersford, Asst. Atty. Gen., for respondent.

REVELLE, J. On December 5, 1896, the relator was incorporated for the purpose of engaging in the general telephone and telegraph business in the state of Missouri. Its original capital was \$1,500,000, which from time to time has been increased until it is

now \$5,000,000. Neither its original nor amended articles of incorporation contained any statement of the number of years it was intended its corporate existence should continue. Its demise under these articles being near at hand, the board of directors and stockholders on June 22d last duly adopted an amendment to its charter extending its existence for a further period of 30 years. After the necessary preliminary steps had been taken, the proposed amendment was duly presented to the respondent, and, as secretary of state, he was requested to file the same and issue his official certificate thereof. This he refused to do because relator refused to pay an organization tax of \$3,000, and respondent seeks by this proceeding to compel such action.

It is conceded by both parties that, since the duration or life of the corporation was not expressed in the articles, the time allotted it by law was 20 years, the statute so providing. Relator justifies its refusal to pay the tax demanded upon the ground that it is not seeking to *extend*, but merely *amend*, its charter, and that the statute authorizing amendments requires the payment of no fee or tax, except in the case where the amendment consists of an increase in the capital stock. The section relied upon is section 2977, R. S. 1909, and provides merely that amendments, upon being made and filed with the secretary of state, shall become a part of the articles, but that no amendment can be made which gives any greater rights than though the subject of the amendment had been incorporated in the original articles, and, further, that upon an increase of capital stock the additional amount provided by law for such increase shall be paid.

The respondent denies that the extension of corporate existence is a legitimate matter or subject of amendment within the purview of the above section, and contends further that, even if it be such, relator is none the less subject to the payment of the tax prescribed in section 2991, R. S. 1909, which section alone, he asserts, provides authority for an extension of existence. If, as relator contends, section 2991, *supra*, does not apply to the subject-matter, and if, as respondent asserts, section 2977, *supra*, is not applicable, there is no statutory power given to corporations in this state to prolong their life. This power, however, seems not to be seriously questioned, and for a long number of years has been generally recognized and exercised, and for the purpose of this case we shall treat it as existent. Even if, as relator contends, it has power under the section authorizing amendments to make the proposed extension, it does not follow that it is not liable for the tax demanded, unless it appears that the section prescribing such tax is inapplicable to cases of its character. This section is as follows:

"Sec. 2991. The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized, and any corporation, including those heretofore organized and now in existence under any general or special law of this state, may accept the provisions of the general laws of this state relating to corporations, by filing with the secretary of state a certificate of such acceptance, signed by its president and secretary, duly authorized by its board of directors and approved by a vote of three-fourths of its stockholders, at any meeting duly and legally called for that purpose—notice of such meeting first having been given in manner and form as provided in Sections 2981 and 2982 of this article, or by three-fourths of the stockholders, in writing; and upon the filing of such certificate, the time of the existence of said corporation shall be extended for such period as was originally permissible to it, or as may be stated in its certificate of acceptance.

"But nothing herein contained shall extend or continue to any corporation organized or existing under a special law or charter any special privilege, immunity, franchises or exemptions not possessed by corporations organized under the general laws of this state; and any corporation organized or existing under special law or charter shall, by accepting or availing itself of the provisions of this section, be deemed and held to thereby waive and surrender any and all such special privileges, immunities, franchises and exemptions, and it shall be subject to all the duties and obligations of corporations under the general laws of this state: Provided, further, that the duration of such corporation shall not be continued as aforesaid, until such corporation shall pay into the state treasury fifty dollars for the first fifty thousand or less of the capital stock of the corporation, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law: Provided, that nothing in this section contained shall be construed to authorize the renewal, continuance or extension of the charter of any company engaged in the manufacture or sale of illuminating gas.

"R. S. 1899, § 972."

[1] If that part of this section which fixes the tax is construed as applicable to corporations organized since its passage and under the general laws as well as to those organized prior thereto and under special laws, there is still no repugnance nor inconsistency between it and the one authorizing amendments, in which event the two, being in pari materia, will be construed as if their provisions were embraced in the same section. The decision, therefore, of this case, depends upon the construction to be given the latter section, and whether it applies to corporations organized subsequent to its passage and under the general laws, such as was the relator.

[2] The provision in question, while enacted more than 30 years ago, has never been judicially reviewed. It has, however, been uniformly interpreted by the executive officers whose duty it has been to enforce it, and their construction has been acted upon without question for a long period of time. While this is in no sense binding upon the courts, it is entitled to some weight, where, as here, there is some doubt as to the meaning. State ex rel. v. Railway Co., 135 Mo. 618, 87 S. W. 532; Ross v. Railway Co., 111 Mo. 18, 19 S. W. 541.

[3] Prior to the adoption of the Constitution in 1865, corporations were organized only by special acts of the Legislature, and this led to "ill-advised, incongruous, and dissimilar charters." State ex inf. v. Lindell Ry. Co., 151 Mo. loc. cit. 170, 52 S. W. 249.

It was then written into the Constitution that corporations, except municipal, should hereafter be formed, if at all, only in pursuance of general laws, and in 1866 the General Assembly accordingly provided general laws therefor. The Constitution of 1875 extended the inhibition against the creation of corporations by special acts to municipal corporations. The manifest intention of those framing and adopting these constitutional provisions was to place the franchises and privileges of corporations on a basis of equality and uniformity and give to all for future operations a fair field with no favor. Legislative provisions calculated to bring specially formed corporations under the general laws were immediately enacted, so that in 1885, when the present section was enacted, we were thoroughly committed to the idea and policy of equal rights and privileges in corporations.

This was evidently in the mind of the Legislature when it inserted in the section under review the broad and sweeping language:

"Every corporation that shall hereafter be created or organized, and any corporation, including those heretofore organized and now in existence under general or special law of this state, may accept the provisions. * * *"

If the phrase found in the proviso that "the duration of such corporation shall not be continued as aforesaid" applies only to corporations organized prior to 1875, as relator contends, the segregation thus accomplished results in discrimination and does violence to the policy of equality. A corporation, having spent the life which the law gave it, can assert no inherent rights to further existence. Natural, not artificial, resuscitation is its relief, and this comes only through the law and as it decrees. Having provided equality in all other respects, it is not strange that the law would exact the same conditions of all when it comes to the matter of renewing the life.

In order to construe the section as relator urges, it would be necessary to rewrite same and strike therefrom all those provisions referring to corporations organized under the general laws and subsequent to its passage. The section specifically refers to corporations organized after its passage and under the general laws, and provides that, when certain conditions are complied with, the time of the existence of such corporations can be extended. It seems to us that in order to give full effect to the whole section, both its letter and spirit, it is necessary to construe the terms "such corporation," found in the proviso, as being applicable to all the different

classes of corporations expressly mentioned in the section.

On a similar, though slightly different, state of facts, the Supreme Court of New Jersey held as we do (*National Lead Co. v. Dickinson*, 70 N. J. Law, 596, 57 Atl. 138), that in order to extend the corporate existence the tax must be paid, and this is in accordance with the interpretation heretofore uniformly placed upon the section by the public and executive officers.

Respondent's demurrer to relator's petition is sustained, and the preliminary writ issued herein is quashed.

STATE ex rel. HARVEY v. SHEEHAN, City Auditor. (No. 18164.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

1. CONSTITUTIONAL LAW § 48—STATUTES—PRESUMPTION OF CONSTITUTIONALITY.

The court indulges the presumption that the Legislature did not intend to violate organic law, and places upon him who asserts the contrary the burden of so convincing them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48; Statutes, Cent. Dig. § 56.]

2. CONSTITUTIONAL LAW § 48—HARMONIZING STATUTES AND CONSTITUTION.

Acts of the Legislature and provisions of the Constitution must be read together, and so harmonized as to give effect to both when this can be reasonably and consistently done.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48; Statutes, Cent. Dig. § 56.]

3. DISTRICT AND PROSECUTING ATTORNEYS § 5(1)—CITY ATTORNEYS—COMPENSATION—STATUTES—CONSTRUCTION—"COUNTY."

Const. art. 9, § 23, requires St. Louis charter to be in harmony with constitutional law, and adjusts and provides the relationship between the county and city of St. Louis, and empowers the city to collect state revenue and perform all other functions in relation to the state as if it were a county. Rev. St. 1909, § 3508, divides the state into 114 counties and the city of St. Louis. Section 8057, subd. 19, provides that, whenever the word "county" is used in any law, it should be construed to include the city of St. Louis, unless inconsistent with such law or with a law specifically applicable to St. Louis. Laws 1913, p. 110, provides that the prosecuting or circuit attorney of cities of over 500,000 inhabitants is required to attend inquests in cases of violent death which may result in felony charges and shall receive a fee to be paid by respective "counties." Held, that the term "counties" should be construed as including the city of St. Louis, and, when so construed, the act is not meaningless or ambiguous, and the city of St. Louis may be required to pay the fee of the attorney.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18, 19; Dec. Dig. § 5(1).]

For other definitions, see Words and Phrases, First and Second Series, County.]

4. STATUTES § 102(1)—VALIDITY—LOCAL AND SPECIAL ACTS.

Such act is not special and local, and therefore not violative of Const. art. 4, § 53, subds. 2, 15, 32, prohibiting special and local laws regulating affairs of counties and cities, creat-

ing offices, or prescribing powers and duties or legalizing illegal acts of an officer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 114; Dec. Dig. § 102(1).]

5. EVIDENCE § 44—JUDICIAL NOTICE.

The court takes judicial notice of the fact that the city of St. Louis is the only city or county that has a circuit attorney.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 66; Dec. Dig. § 44; Appeal and Error, Cent. Dig. § 2959.]

6. OFFICERS § 100(1)—INCREASE OF EMOLUMENTS—ADDITIONAL DUTIES.

Laws 1913, p. 110, requiring the prosecuting or circuit attorney in cities of over 500,000 to attend coroner's inquests in certain cases, and providing an additional fee therefor, does not violate Const. art. 14, § 8, prohibiting increasing of compensation or fees of officers during their terms, since it places upon the officer additional duties and merely provides compensation therefor.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. § 100(1).]

Walker and Faris, JJ., dissenting.

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Mandamus by the State, on the relation of Thomas B. Harvey, against Jeremiah Sheehan, Auditor of the City of St. Louis. Judgment for respondent, and relator appeals. Reversed, with directions for issuance of peremptory writ.

Thomas B. Harvey, of St. Louis, for appellant. William E. Baird, Charles H. Daues, and Truman P. Young, all of St. Louis, for respondent.

REVELLE, J. This proceeding by mandamus originated in the circuit court of the city of St. Louis and seeks process against the city auditor to compel him to audit a certain certified itemized account for services rendered by relator for attending coroners' inquests, and to issue a warrant for the payment of said account.

The petition recites that appellant has since the 1st day of January, 1913, been circuit attorney of the city of St. Louis; that the city of St. Louis has more than 500,000 inhabitants; that the Forty-Seventh General Assembly of the state of Missouri enacted a law requiring the circuit attorneys of such cities to attend inquests held by coroners in cases of death caused by violence which might result in charges of felony, and provided further that said circuit attorneys should receive for such services the sum of \$10 for each inquest so attended and that such fee should be paid as "other costs" by the city; that said act was passed with an emergency clause and was in full force and effect during all the time for which appellant makes charges, which charges cover and include services performed in the pursuance of said act in connection with 44 inquests over bodies of the nature described in said act; that a duly itemized and certified account for such

services was certified to the city auditor for payment; that it then and there became the duty of such auditor to audit said account and to issue proper warrants in payment thereof; that there was at the time, and is now, sufficient money in the treasury of the city of St. Louis, appropriated and set apart for the maintenance of the office of the circuit attorney, to pay the amount of said claim; that the same cannot under the law be paid until it is first audited by the said auditor; and that the respondent has arbitrarily and unlawfully refused to audit said account or any part thereof.

The return admits that appellant is the circuit attorney as alleged, and that the respondent is the duly qualified and acting auditor of the city of St. Louis; that the city has more than 500,000 inhabitants, and that the law referred to in the petition was duly enacted with an emergency clause. The return alleges, however, that said act does not provide that the fee therein mentioned shall be paid by the city of St. Louis and that the said city is not liable to appellant for the fees demanded. The return further alleges that, if said act be interpreted as requiring the city to pay such fee, it could not apply to appellant, because at the time of its passage he was holding office and could not claim the benefits thereof because of section 8, art. 14, of the state Constitution. Upon the filing of this return, appellant filed a motion to strike out same and have judgment on the pleadings. His motion being overruled, he refused to further plead, and judgment was entered for respondent.

The first question presented is the construction and validity of the act of the Legislature (Laws 1913, p. 110), which is as follows:

"That the prosecuting or circuit attorney of cities that now have or may hereafter have 500,000 inhabitants or more is hereby required to attend inquests held by coroners in cases of death occurring by violence, and which may result in a charge of felony; and said prosecuting or circuit attorney shall make an investigation concerning said death and cause to be brought before the coroner any witnesses he may desire, and shall be permitted by the coroner to assist in the interrogation of witnesses for the full development of the circumstances leading up to and resulting in said death, and for his information concerning any possible criminal charge that may grow out of same, and for the aforesaid services there shall be taxed as costs a fee in favor of said prosecuting or circuit attorney of ten dollars for each aforesaid inquest, to be paid as other costs by the respective counties. It shall be the duty of each coroner to promptly notify the prosecuting attorney of his county or city of the time and place of inquisition concerning any death of the aforesaid character."

[1, 2] Respondent contends that the act quoted is void because meaningless and uncertain as to the things to which applicable and because local and special, if so construed as to make the word "counties," found in the latter provision of the act, include the city of St. Louis. The act is not skillfully drawn, and might, in the absence of recognized rules

of construction, be so interpreted as to subject it to the charges made; but, in dealing with subjects of this character, we are constantly reminded, by both our own holdings and certain principles uniformly accepted as sound, that it is our duty to resolve all doubts in favor of the validity of a legislative act, we always being reluctant to declare statutes unconstitutional. We indulge the presumption that the Legislature did not intend to violate the organic law of the state, and we place the burden upon him who asserts the contrary to so convince us. Acts of the Legislature and provisions of the Constitution must be read together, and so harmonized as to give effect to both when this can be reasonably and consistently done. *Straughan v. Meyers*, 187 S. W. 1159. We have frequently said that doubtful words of a statute will be enlarged, restricted, supplied, or even stricken out in order to make them conform to the true intent of the lawmakers, when such intent is manifested by the aid of sound principles of interpretation. *State ex rel. Aull v. Field*, 112 Mo. 554, 20 S. W. 672; *Glaser v. Rothschild*, 224 Mo. loc. cit. 211, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *Bingham v. Birmingham*, 103 Mo. 345, 15 S. W. 533; *State ex rel. v. King*, 44 Mo. 238; *Perry v. Strawbridge*, 209 Mo. loc. cit. 645, 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510, 14 Ann. Cas. 92.

[3] We have no doubt that under the nineteenth subdivision of section 8057, R. S. 1909, section 3508, R. S. 1909, and section 23, art. 9, of the Constitution, the term "counties," found in connection with the provision of the act under review and which prescribes liability for the fee mentioned, should be construed as including the city of St. Louis. With such construction, the complaint that the act is meaningless becomes of no avail, as was held in the divisional opinion, and with which on that point we agree.

[4] The question then becomes whether the act is special and local and therefore violative of paragraphs 2, 15, and 32 of section 53, art. 4, and section 8, art. 14, of the state Constitution.

A careful consideration of the act in question, giving effect to both its letter and apparent spirit, leads us to believe that it was not intended to apply solely to the city of St. Louis. It expressly provides in its latter provisions for the payment of the prescribed fees by counties which have a prosecuting or circuit attorney, and by its first provision is limited to subdivisions which have a population of 500,000 or more inhabitants.

[5] We take judicial notice of the fact that the city of St. Louis is the only city or county (and for these purposes it is regarded as a county) that has a circuit attorney. The counties having what is styled a "prosecuting attorney." The circuit attorney in the city of St. Louis performs the same functions as prosecuting attorneys in the counties, saving and excepting in particular respects for

which other provision is made. For general purposes he is to the city of St. Louis what the prosecuting attorney is to a county.

Unless we disregard recognized canons of construction, we must hold the act in question to be merely ambiguous, and then so construe same as to make it applicable to all counties which have a population of 500,000 or more inhabitants and all cities which by law are permitted or required to perform the same functions in relation to the state as are counties. Giving the act in question this construction, it obviates all charges of offensiveness to the Constitution and but gives effect to the apparent intention of the Legislature.

[6] Another contention made is that, since the appellant was an officer at the time of the passage of the act, it is inapplicable to him, because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound, because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. *Cunningham v. Current River Co.*, 165 Mo. 270, 85 S. W. 558; *State ex rel. v. Walker*, 97 Mo. 162, 10 S. W. 473; *State ex rel. v. Ransom*, 73 Mo. 89; *State ex rel. v. McGovney*, 92 Mo. 428, 3 S. W. 867; *County v. Felts*, 104 Cal. 60, 37 Pac. 780; *State ex rel. v. Board of Commissioners*, 23 Mont. 250, 58 Pac. 439; *State ex rel. v. Carson*, 6 Wash. 250, 33 Pac. 428; *Love, Attorney General, v. Baehr, Treasurer*, 47 Cal. 864; *Purnell v. Mann*, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 284; *Lewis v. State*, 21 Ohio Cir. Ct. R. 410.

It is our opinion that the act is valid, and that the appellant is entitled to the fees demanded, and that the respondent was not justified in refusing to audit the account and draw a warrant therefor on the city treasury.

The judgment is therefore reversed, with directions that the writ of mandamus prayed for by relator be made peremptory. All concur, except WALKER and FARIS, JJ., who dissent.

STATE v. STEVENS. (No. 19687.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916. Motion for Rehearing Denied
Dec. 30, 1916.)

1. CRIMINAL LAW §1081(3) — APPEAL — INDICTMENT — PLEA IN ABATEMENT.

One who did not attack the indictment by motion to quash or plea in abatement before verdict cannot complain on appeal that the record does not show that the grand jury was composed of 12 men, or that it was impaneled and sworn.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2625; Dec. Dig. §1081(3).]

2. CRIMINAL LAW §1064(7) — APPEAL — QUESTIONS PRESENTED — INSTRUCTIONS — MOTION FOR NEW TRIAL.

Where the motion for new trial was grounded, so far as the instructions were concerned, only on those given at the instance of the state, accused cannot object on appeal to instructions given by the court of its own motion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2683; Dec. Dig. §1064(7).]

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

B. C. Stevens was convicted of forgery, and he appeals. Affirmed.

Defendant has appealed from a conviction of forgery under which he was sentenced to three years in the penitentiary. He was charged by indictment with forging the names of Charles E. Kelpe and Lizzie Kelpe to a note for \$2,500, dated May 23, 1914, payable to the order of himself.

The only record entry before us in regard to the impaneling of the grand jury is under date of November 5, 1914, thus:

"Now come the grand jurors heretofore impaneled and sworn, and through their foreman present the following indictment indorsed 'A true bill'"—followed by a copy of the indictment in this case.

There was no motion to quash the indictment, nor was there a plea in abatement. There was sufficient evidence to support the verdict.

The court of its own motion gave several instructions to the jury, including one on the presumption of innocence and reasonable doubt, in which the following language is found:

"But a doubt such as will justify an acquittal must be a substantial doubt growing out of and consistent with the evidence in the case."

The court then, on motion of the state, gave several instructions. The only fault found with the given instructions in the motion for a new trial is in the following language:

"Because the court erred in giving the instructions given at the instance of the state over defendant's objection and exception."

Fauntleroy, Cullen & Hay, of St. Louis, for appellant. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for the State.

ROY, C. (after stating the facts as above).

[1] I. Appellant is in no position to complain of the failure of the record to show that the grand jury was composed of 12 men and that it was impaneled and sworn. Such matters must be called to the attention of the trial court before verdict by plea in abatement or proper motion. *State v. Clifton*, 73 Mo. 430; *State v. Glasscock*, 232 Mo. 278, 134 S. W. 549; *State v. Mitchell*, 237 Mo. loc. cit. 215, 140 S. W. 887.

[2] II. The only instruction of which complaint is here made was given by the court of its own motion. The objection made by the motion for a new trial to the instruc-

tions given is limited to those given on the motion of the state. That motion clearly did not include the instruction here complained of. No question of that kind can be presented here which was not presented to the trial court in such motion. *State v. Bostwick*, 245 Mo. 483, 150 S. W. 1063.

No other point is called to our attention by counsel. On examination we find no error in the record that is subject to review here.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

CITY OF ST. LOUIS v. MOORE et al. (No. 18785.)

(Supreme Court of Missouri. In Banc. Dec. 4, 1916. Rehearing Denied Dec. 21, 1916.)

EMINENT DOMAIN §47(5) — APPROPRIATING SCHOOL PROPERTY FOR STREETS.

A city has no power to condemn for street purposes land actually in use for school purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 108-110, 116-120; Dec. Dig. §47(5).]

Bond, J., dissenting.

Appeal from St. Louis City Circuit Court; George C. Hitchcock, Judge.

Condemnation proceedings by City of St. Louis against William R. Moore and others. Judgment for defendants, and City appeals. Affirmed.

This is a proceeding instituted in the circuit court of the city of St. Louis, under authority of Ordinance No. 27024, in condemnation for the establishment and opening of Slattery street from Montgomery street to St. Louis avenue. The facts are these: As will appear from plaintiff's Exhibit A (which will follow the statement of the case), the physical block, bearing, however, separate city block numbers for the eastern and western portions, is somewhat irregular, bounded on the north by St. Louis avenue (100 feet wide), on the south by Montgomery street, east by Glasgow avenue, and west by Garrison avenue, respectively, each 60 feet wide; Slattery street (60 feet wide) was laid out in 1885 northwardly from Montgomery street, approximately halfway through the block. In 1894 the board of education of the city of St. Louis acquired in the block the site having a front of 169 feet 8½ inches (less 7 feet 6 inches, the one-half of a private alley), by a depth eastwardly of 185 feet 6 inches on its south line; in the year 1895 to 1897 the Columbia School was erected on this site. Until June, 1905, the property immediately east of the school site, and having a front on St. Louis avenue, was owned by Wil-

liam F. Hull et al.; on the western portion of the Hull property (appearing on the exhibit in the name of board of education of the city of St. Louis) was the Hull residence, and on the eastern portion of the Hull property (on the two lots appearing on the exhibit in the names, respectively, of William R. Moore and Christian Bockelbrink), were two residences, both fronting west, the front walls of such residences being 55 feet east of the present east line of the board of education lot (said east line being the center of Slattery street as proposed by the aforesaid ordinance). In June, 1905, the board of education acquired the lot of 94 feet 11 inches front on St. Louis avenue, by a depth southwardly of 296 feet 4½ inches on its west line, by deed from said William F. Hull et al., in which the description of the property conveyed contains the following:

" * * * Thence eastwardly along the north line of said Lewis' subdivision to a point where the center line of Slattery street, as laid out between blocks 1905 and 1896 of the city of St. Louis intersects the same; thence northwardly, parallel with the east line of said property of the board of education of the city of St. Louis, and P. C. Cozzens, and along the center line of proposed Slattery street to a point in the south line of St. Louis avenue. * * * "

Before the Hull conveyance, and in, to wit, 1902, the board of education had acquired a triangular parcel, abutting its first site and the Hull tract on the south thereof, having an area of about 2,500 square feet. In January, 1906, William F. Hull et al., conveyed to William R. Moore the lot, appearing on the exhibit in that name, and abutting on the east of the property previously conveyed to the board of education of the city of St. Louis, by deed in which is contained the following language:

" * * * The western 30 feet of this property herein conveyed is at all times to remain open for street purposes with easement, for free ingress and egress for the property lying north and adjacent to the property herein described and owned by Leon L. Hull, et al."

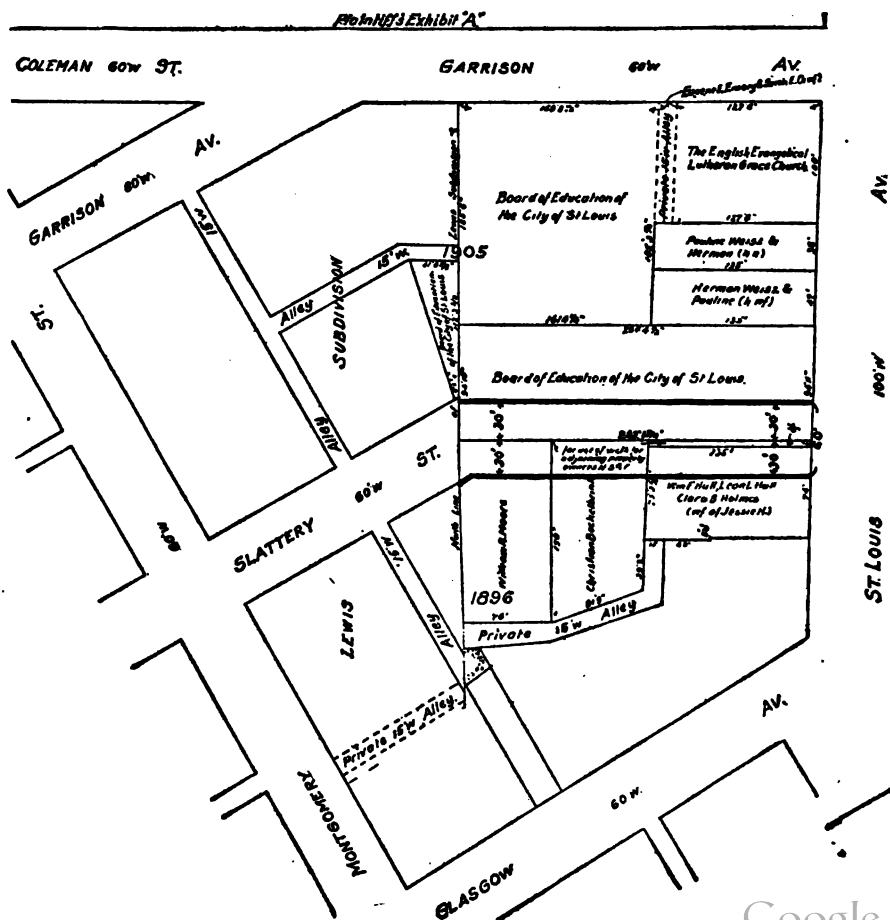
In September, 1910, William F. Hull et al. conveyed to Christian Bockelbrink the lot, appearing on the exhibit in that name, and abutting on the east of the property previously conveyed to the board of education, by deed, in which is contained the following language:

"The western 30 feet of the southern 79 feet 7¼ inches herein conveyed, also the 4 feet fronting on St. Louis avenue, by a depth of 135 feet is at all times to remain open for street and sidewalk purposes with easements for free ingress and egress for the property lying on the south, north and adjacent to the property herein described."

By Ordinance of the City of St. Louis No. 27024, Slattery street from Montgomery street to St. Louis avenue was established 60 feet wide, the center line thereof to run as follows, to wit: From Montgomery street northwardly to the northern line of "Lewis' subdivision," the said line to be coincident with the center line of Slattery street as now

laid out; from the northern line of said subdivision to St. Louis avenue, the said line to be coincident with the eastern line of property now or formerly owned by the board of education of the city of St. Louis, said property line being located about 280 feet eastwardly of the eastern line of Garrison avenue, measured along the southern line of St. Louis avenue. The original site of the board of education (excluding the private alley area) approximated 30,000 square feet, of which 12,000 square feet were occupied by the school building, leaving approximately 18,000 square feet of adjacent playground. This condition continued from the time of establishment of the school down to the time of the purchase of the triangular parcel of 2,500 square feet in 1902. In 1905 the area added to the school site by the purchase of the Hull property was approximately 28,000 square feet, thus increasing the area of the school site (outside of the part thereof occupied by the building) to approximately 48,500 square feet; the area of the eastern 30 feet of the present school site included in the proposed Slattery street, as established by said ordinance, approximates 8,800 square feet, deducting which from the previous figures would leave a free area in the school

site of approximately 39,700 square feet. The area of the Weisz property, having 85 feet front on St. Louis avenue and lying in the elbow of the school site, approximates 11,475 square feet, of which the eastern part and area (55 foot street front) of 7,425 square feet is unimproved; the last-mentioned area is 84 per cent. of the area of the eastern 30 feet of the school site covered by the proposed street. The proposed street as established by said ordinance would make Slattery street, now a cul-de-sac, a street through the block to St. Louis avenue. Slattery street exists, also, southwardly from Montgomery street. As appears from defendant's Exhibit No. 1, there are properties fronting on the cul-de-sac immediately south of the school property and of the property of William R. Moore. The question raised is whether the city of St. Louis in the establishment and extension of a street is unqualifiedly prohibited from including in such proposed street any part of school lands. The property which is sought to be condemned is the east half of the lot embraced within the red lines shown on said Exhibit A [shown on plat below by heavy black lines]. The trial resulted in favor of the defendant, and the city duly appealed the cause to this court.



Charles H. Daues, Truman P. Young, and G. Wm. Senn, all of St. Louis, for appellant. Robert Burkham, of St. Louis, for respondents.

WOODSON, J. (after stating the facts as above). Counsel for appellant state their ground for a reversal of the judgment of the circuit court in this language:

"(a) Power to condemn for a second public use, property previously devoted to public use, must be expressly granted or proceed from necessary inference of such a grant; (b) this rule proceeds, however, upon the assumption that the later intended public use would destroy or greatly impair the prior use and its object, and is subject to the qualification that when such later use presents a further need of the public and will not essentially interfere with the exercise of the prior use and the accomplishment of its objects, then the power to condemn such property for a second public use will be inferred from a general grant of the power of eminent domain."

Upon the other hand, if I correctly understand counsel for appellant, they concede that if such taking would so damage the property as to destroy its usefulness for school purposes, then the city would have no power, in the absence of express statutory authority, to condemn the same for street purposes. In support of their contention we are cited to the following authorities: *Hannibal v. Railroad Co.*, 49 Mo. 480, 481, 482; *St. L. H. & K. C. Ry. Co. v. Depot Co.*, 125 Mo. 82, 91, 92, 94, 28 S. W. 483; *Suburban Ry. Co. v. Lindell Ry. Co.*, 190 Mo. 246, 254, 88 S. W. 634; *Pottsgrove Co. Rd.*, 5 Pa. Co. Ct. 361; *Rominger v. Simmons*, 88 Ind. 452, 456, 457; *B. & O. & C. R. Ry. Co. v. North*, 103 Ind. 486, 496, 3 N. E. 144; *Steele v. Empsom*, 142 Ind. 397, 405, 406, 41 N. E. 822; *Easthampton v. County Com'rs*, 154 Mass. 424, 425, 426, 28 N. E. 298, 13 L. R. A. 157; *Boston v. Brookline*, 156 Mass. 172, 175, 177, 30 N. E. 611; *In re City of Buffalo*, 68 N. Y. 167, 175; *L. & N. R. R. Co. v. Louisville*, 131 Ky. 108, 115, 116, 114 S. W. 743, 24 L. R. A. (N. S.) 1213; *C. & M. & St. P. Ry. Co. v. Starkweather*, 97 Iowa, 159, 161, 162, 164, 165, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. Rep. 404; *Northwestern T. E. Co. v. C. & M. & St. P. Ry. Co.*, 76 Minn. 334, 346, et seq., 77 N. W. 989; *Mobile & G. R. R. Co. v. Ala. M. R. R. Co.*, 87 Ala. 501, 6 South. 404; *Mobile & G. R. R. Co. v. Ala. M. R. R. Co.*, 87 Ala. 520, 6 South. 407; *State ex rel. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *Dillon on Municipal Corporations* (5th Ed.) §§ 1020, 1022 (and note), 1023; *Lewis on Eminent Domain*, §§ 435, 436, 439, 440, 441. These authorities sustain the general principle contended for by counsel, especial-

ly *do Rominger v. Simmons*, 88 Ind. 453, *Easthampton v. County Com'rs*, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157, *Boston v. Brookline*, 156 Mass. 172, 30 N. E. 611, and *In Matter of City of Buffalo*, 68 N. Y. 167.

The foregoing contention of appellant is strenuously denied by counsel for the respondent. In his own language, he insists:

"The city of St. Louis has no power to condemn land owned by the board of education of the city of St. Louis actually in use for school purposes. This is true on principle, and regardless of the area of the property sought to be taken for:

"(a) Property owned by an instrumentality of the state and devoted to a public use is not subject, in any degree, to the exercise of the right of condemnation for another and inconsistent purpose, in the absence of express legislation so authorizing.

"(b) The doctrine of the law which sometimes, and by way of exception, permits a condemnation of property devoted to public use, but owned by a private corporation, has no application to such a case as this."

A decision of the latter proposition is not necessary to reach a proper disposition of this case, and for that reason we pass it by without further comment.

As regards the first, Can property devoted to a public use, that is, more strictly speaking, for state purposes, be condemned for other public use, exercised by a municipal corporation? In support of the negative of that question we are cited to the following authorities: *Elliott, Roads and Streets*, §§ 238, 245; *St. L. H. & K. C. Ry. Co. v. Hannibal Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Edwardsville v. County of Madison*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101; *Moline v. Greene*, 252 Ill. 475, 96 N. E. 911, 37 L. R. A. (N. S.) 104; *In the Matter of Utica*, 73 Hun, 256, 26 N. Y. Supp. 564; *In re Rosebank Ave.*, 162 App. Div. (N. Y.) 332, 147 N. Y. Supp. 638; *McCullough v. Board of Education*, 51 Cal. 418; *In re Milwaukee Southern R. R.*, 124 Wis. 490, 102 N. W. 401. Those authorities, in effect, hold that the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the state or property held by a subordinate agency of the state, for the state, as distinguished from other corporations. In our opinion these authorities announce the correct doctrine; and, if public policy demands a different rule, the remedy is with the Legislature and not the courts.

We are therefore of the opinion that the judgment should be affirmed. It is so ordered. All concur (REVELLE, J., in result), except BOND, J., who dissents.

BONSLITT v. NEW YORK LIFE INS. CO.
(No. 17586.)

(Supreme Court of Missouri, Division No. 1.
Dec. 1, 1916. Motion for Rehearing
Overruled Dec. 20, 1916.)

1. INSURANCE — 668(11) — QUESTION FOR JURY — IDENTITY OF WITNESS CLAIMING TO BE ASSURED.

In action on life policies, a conflict of evidence on question of identity of defendant's witness claiming to be the insured makes the question one for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1745, 1763, 1764; Dec. Dig. — 668(11).]

2. DEATH — 2(1) — CIRCUMSTANCES RAISING PRESUMPTION OF DEATH FROM ABSENCE.

Whether circumstances surrounding assured's disappearance were such as to raise presumption of death after seven years was a question for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. — 2(1).]

3. DEATH — 2(2) — PRESUMPTION OF DEATH FROM ABSENCE — PARTICULAR TIME.

Death is not presumed at any particular time within the seven years' absence necessary to raise that presumption, but a definite date may be circumstantially shown.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. — 2(2).]

4. INSURANCE — 622(3) — ACCRUAL OF CAUSE OF ACTION — INSURANCE POLICY.

Where a policy provided for payment upon "receipt and approval of proofs of death," statute of limitations did not commence running until refusal of company to concede death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1546; Dec. Dig. — 622(3).]

5. INSURANCE — 622(3) — ACCRUAL OF CAUSE OF ACTION — INSURANCE POLICY.

The fact that beneficiary could have treated the company's delay in paying claim as rejection and brought suit will not make statute of limitations run from date of death, where policy provides that payments are not to begin until action upon proofs of death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1546; Dec. Dig. — 622(3).]

6. LIMITATION OF ACTIONS — 199(1) — QUESTION FOR JURY — REASONABLE TIME TO REJECT PROOF OF DEATH.

Where assured disappeared and negotiations were pending between beneficiary and company, the question of a reasonable time for company to accept or reject proof of death is for the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 727; Dec. Dig. — 199(1).]

7. EVIDENCE — 213(2) — ADMISSIBILITY — NEGOTIATIONS FOR COMPROMISE.

The admission of letters between company and beneficiary merely showing negotiations without mention of compromise did not violate rule against proof of negotiations for compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 746; Dec. Dig. — 213(2).]

8. TRIAL — 67 — REOPENING CASE FOR FURTHER EVIDENCE.

Where a witness for defendant, not subpoenaed, failed to appear for redirect examination, and defendant elected to proceed, suggesting a desire to re-examine if witness appeared, to which suggestion the court made no ruling, the court's refusal to allow examination upon witness' appearance some days later, and after defendant had closed his case was not error,

where defendant failed to point out either in the trial court or in his brief on appeal any material matter intended to be brought out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 157; Dec. Dig. — 67.]

9. WITNESSES — 406 — CONTRADICTION OF OWN WITNESS BY HIS DEPOSITIONS.

The rejection of defendant's offer of deposition of his own witness who was present and testified to contradict his testimony on cross-examination, where part of deposition did not concern matter referred to in cross-examination, and defendant does not point out anything specifically material in the deposition, which was excluded, was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. — 406.]

10. WITNESSES — 237(3) — QUESTION ASSUMING FACTS NOT PROVEN.

Where questions propounded to witness assumed a damaging state of facts not proven, they were properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 831; Dec. Dig. — 237(3).]

11. EVIDENCE — 317(1) — HEARSAY — CONVERSATION BETWEEN WITNESS AND THIRD PARTY.

Details of conversation between witness and persons not parties or other witnesses, being hearsay, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1174; Dec. Dig. — 317(1).]

12. DEATH — 2(3) — EVIDENCE TO REBUT PRESUMPTION OF.

Evidence showing a motive for assured's disappearance, to rebut the presumption of death, was proper.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. — 2(3).]

13. DEATH — 2(3) — EVIDENCE TO REBUT PRESUMPTION OF.

Statutes of another state regarding crimes, where there was no substantial evidence showing insured guilty of such crimes, were inadmissible, to show motive for his disappearance and to rebut presumption of death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. — 2(3).]

14. PLEADING — 369(2) — JOINDER OF COUNTS — ELECTION.

In action on insurance policy, one count alleging death of insured and another inferring death from circumstances of disappearance at a different date, there was no inconsistency warranting an election.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1199; Dec. Dig. — 369(2).]

15. INSURANCE — 666 — AMOUNT OF RECOVERY.

Where installments of insurance were due upon acceptance of proofs of death and annually thereafter, a verdict should have included only installments falling due prior to bringing the action, with interest until time of trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. — 666.]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Edna K. Bonslett against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Judson, Green & Henry, of St. Louis (James H. McIntosh, of New York City, of counsel), for appellant. Frederick H. Bacon, of St. Louis, for respondent.

BLAIR, J. This is an appeal from a judgment for respondent on two \$10,000 policies of insurance on the life of George A. Kimmel. The policies were payable in \$500 installments, and each provided that the first installment under it was to be paid immediately upon the receipt and approval by appellant of proofs of Kimmel's death, and that the subsequent installments should be paid annually thereafter.

July 31, 1898, George A. Kimmel disappeared. At the trial the principal question of fact was whether he was dead. Appellant produced a witness who testified he was George A. Kimmel. Upon this question of identity the evidence need not be detailed. It is conflicting. Several of the nearest relatives of Kimmel, including his mother, and some of his former friends, acquaintances, and business associates testified the witness was not Kimmel. Several relatives and former friends and acquaintances of Kimmel supported the witness' claim. The witness displayed a knowledge of things it seems difficult to understand how he could have known unless he was George A. Kimmel, and was ignorant of things it seems George A. Kimmel must have known. Photographs of Kimmel and the witness bear some resemblance and disclose some striking differences. With respect to the circumstances surrounding Kimmel's disappearance, there is evidence both for and against respondent's position that he was a strong, healthy, young man, successful and prosperous in his business and in good financial condition, and that there was apparently no reason for his leaving his business and property. His relations with his mother and sister and other relatives were affectionate, and those with his business associates were cordial and pleasant.

After his disappearance, the Pinkerton Detective Agency made a most thorough search for him throughout the whole of the United States and many foreign countries. Circulars offering \$500 reward and containing a description and picture of Kimmel were scattered broadcast, being sent to the chiefs of police and marshals of every town in the Union having a postal money order office and to many others. No results of any kind were obtained. The circulars mentioned stated the search was being prosecuted by friends and relatives, and that Kimmel was not wanted for any offense against the law. In August, 1900, proofs of death were submitted to appellant in which the fact of Kimmel's disappearance was stated as well as the circumstances of the trip to Winfield, Topeka, and Kansas City which he undertook the day before he disappeared from Kansas City. Numerous affidavits accompanied these proofs, and the facts stated therein made out the facts surrounding the disappearance in close conformity with respondent's contention upon that phase of the case at the trial. Letters from the company to respondent

tend to show the matter was under consideration until March, 1904, when appellant refused to pay unless bond was given. This action was commenced in less than five years thereafter.

[1, 2] I. The conflict of evidence on the question of the identity of appellant's principal witness made that question one for the jury. This is also true of the question whether the circumstances surrounding Kimmel's disappearance were such as to raise a presumption of death on the lapse of seven years.

[3] II. While, under the rule in this state (Hancock, Adm'r, v. Am. L. Ins. Co., 62 Mo. 26), the presumption of death from disappearance and absence is not a presumption of death at any particular point of time within the seven years whose lapse is requisite to raise the presumption, yet there was evidence tending to prove circumstances justifying a finding that Kimmel died at or reasonably near the time of his disappearance. In this respect the evidence tends to prove facts very like those in Hancock, Adm'r, v. Am. L. Ins. Co., supra.

[4] III. Proofs of death were submitted August 15, 1900, and were retained by appellant, and negotiations between appellant and respondent continued until March, 1904, when appellant refused to pay unless a bond was given. This action was brought less than five years after such refusal, but more than ten years after Kimmel's disappearance and more than ten years after October 31, 1898, the date on which the jury found Kimmel died, and more than eight years after the proofs of death were submitted. There is no evidence appellant objected to the form or substance of the proofs of death. It did refuse to concede Kimmel's death. This was prior to the lapse of the seven years necessary to raise a presumption of death.

Appellant contends the cause of action is one under the laws of Kansas and was barred thereby in five years, and that under our statute (section 1895, R. S. 1909) the same period barred the action in this state. Respondent contends our statute does not apply to this action, since, she insists, merely the action was barred by the Kansas statute, and the cause of action was not barred. We shall not discuss this question. Let it be assumed the Kansas five-year statute applies and that the case falls within section 1895, R. S. 1909. The question then presented is: When did the right of action accrue?

Each of the policies sued on is for \$10,000, payable in 20 annual installments of \$500 each, and each policy makes express provision for "the first installment to be paid immediately upon receipt and approval of proofs of the death of George A. Kimmel * * * and the subsequent installments to be paid annually thereafter."

Respondent takes the position that, under the terms of the policies, the right to sue did not accrue until the company, in March,

1904, finally refused to pay, and that the limitation did not begin to run until that time. The statute did not begin to run until the right of action accrued, i. e., until the first installments under the policies became due and payable. The policies themselves provided this should not happen until proofs of death were submitted and approved.

Appellant contends, despite the policy provision, the statute commenced to run at the time of Kimmel's death, which the jury found occurred October 31, 1893; that the action was commenced in 1904, and was therefore barred. Three of the cases cited (*Glass v. Walker*, 66 Mo. 32; *Bradley v. Insurance Co.*, 28 Mo. App. 7; *Grigsby v. Insurance Co.*, 40 Mo. App. 276) arose under provisions in fire insurance policies limiting the time within which suit must be brought. This was before the statute invalidated such agreements and the court enforced the contractual limitation. In each policy it was provided suit should not be brought within sixty days after proof of loss, but within six months after the loss. The court held the provision for sixty days' immunity from suit after proof of loss did not extend the time, and the policies meant that suit must be brought within six months from the date of loss, and not six months from the ascertainment of loss by the company. These decisions dealt with policies making specific provision as to the time after which actions thereon must be brought. The policy in the instant case contains no like provision which has any validity, but does make provision as to the time before which an action cannot be brought.

In *Kauz v. Redmen*, 13 Mo. App. 341, the insured disappeared July 7, 1874. No further payments on his policy were made, and Kauz was suspended in 1875. In 1881 his widow applied for payment of the policy. It was held the statute began to run from the date of Kauz's death; that if he died in 1874, when he disappeared, the statute barred the action; and that if he did not die until in 1881, at the end of the lapse of seven years after his disappearance, the failure to keep up payments defeated plaintiff. In the instant case, by the plain words of the policy, the statute could not have commenced to run upon the instant of Kimmel's death; nothing became due upon the happening of that event alone; proof of death and something more was necessary; further, payments were made and accepted by appellant until and including that due in 1903, long after the date the jury found Kimmel died and after proofs of loss were made. The Kauz Case is not in point.

In *Harrison v. Masonic Mut. Ben. Soc.*, 59 Kan. 29, 51 Pac. 893, plaintiff alleged and proved the insured died in 1883. No payments were made after that time. Proof of death was not made until 1894. It was held it was incumbent upon plaintiff to make proof of death in a reasonable time after

the event, and that even in a disappearance case such reasonable time could not exceed the period of the statute of limitation. That decision cannot aid us in this case. In that case the statute began, as in the Kauz Case, to run upon the death of the insured. In this it could not begin to do so until an installment fell due, and the time it did fall due is the real question before us.

In *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953, the question discussed was whether certain things suspended the running of the statute of limitation. That question is not involved in the case at bar. That case dealt with the exceptional circumstances which would prevent the running of the statute despite the fact a right of action had accrued.

Appellant cites several cases holding that, where the right to sue depends upon some act of plaintiff, plaintiff cannot postpone the running of the statute by delaying the act to be performed by him, and the statute runs despite that condition. Without analyzing these decisions or considering them separately, let it be conceded they state the correct rule. The facts of this case do not bring it within that rule. The question here is not whether any delay of respondent in submitting proofs of death suspended the statute or postponed the accrual of the right of action. It is whether the agreement that the first installment should not be due until such proof was submitted and approved had the effect of delaying the accrual of that right.

The policy did not prescribe the time within which proofs of death should be submitted. It is not contended they were not submitted to the company within a reasonable time after Kimmel's disappearance. Even after they were submitted premiums were regularly paid and accepted, including those for 1903. Meanwhile negotiations between respondent and appellant were in progress, as letters of the company show. The evidence tends to show the sole question debated was whether Kimmel was dead. Not until March 15, 1904, did the company, if it ever did so, as far as the record shows, refuse to pay. What it did in March, 1904, was to impose a condition that a bond must be given if any payment was made. Had the company at any time approved or positively rejected the proofs of death, a different question would be presented. Respondent contends the failure to approve or reject the proofs of death left in force the policy provision that no installment should become due until such proofs were submitted and approved, and that no right of action could accrue until compliance was made with this provision.

Appellant insists respondent might have treated the delay as a rejection and could have sued on that theory, and therefore that statute did begin to run despite the policy provision mentioned. Appellant cites in support of its position authorities to the effect

that, if an insurance company receives proofs of loss and retains them without objection and in silence until the expiration of the time within which proofs of loss can be made under the policy, the company will be held to have accepted the proofs and to have waived the objections thereto. These cases merely hold that, if an insurance company furnished defective proofs of loss does not make its objections thereto until the time for making such proofs has lapsed, or where there is no such limitation, within a reasonable time, it will not be permitted to base a defense on defects in such proofs which it might have pointed out and did not. In those cases the plaintiffs were permitted to rely upon the theory of a waiver of the objections not made.

[5, 6] In this case the company attempts to invoke for its own benefit a rule that respondent might have dealt with delay as a rejection of the proofs of death and have proceeded to sue. In the first place, it is a novel suggestion that appellant can invoke its own misconduct to the disadvantage of respondent, and, second, in a disappearance case, under such facts as we have here, with the negotiations proceeding as they did, it would be a question of fact for the jury as to what was a reasonable time within which the appellant must decide whether it would approve or reject the proof of loss. The cases cited do not lay down any rule which appellant can use to defeat this action. The reason for the rule that the statute of limitation runs from the date of occurrence of death or loss under policies providing that proof thereof shall be made within a designated period and suit shall not be brought until a fixed time thereafter shall elapse is that the control of the matter is largely in the hands of the beneficiary, and he ought not, by his delay, be permitted to postpone the running of the statute. In this case exactly the contrary is true. The matter of approving or rejecting the proofs of loss is by the contract placed in the hands of appellant. There is no reason for punishing respondent for appellant's delay nor ought appellant be permitted to turn against respondent, as a right, and a defense, a principle which is put in the hands of claimants against insurance companies as a defense to be used by them to protect themselves against the malfeasance or non-feasance of such companies. This rule is not available as a sword appellant may turn against respondent. It is rather a shield respondent might employ against appellant in proper circumstances.

[7] IV. Certain letters of the company were admitted, and complaint is made that this was in violation of the rules against permitting proof of negotiations for compromise. For two reasons the contention is untenable. The letters were competent to show negotiations between appellant and respondent

extended until March, 1904; second, the letters do not mention any efforts at compromise. They do not require the construction that they refer to compromise negotiations. Had appellant desired further limitation of their effect as evidence, it might have asked instructions, but no complaint of any failure so to instruct appears in the brief.

[8] V. Appellant's witness who claimed to be George A. Kimmel testified in chief, and was then cross-examined for a time, his testimony, reduced to narrative form, covering nearly 50 printed pages. After considerable cross-examination, respondent's counsel stated they had two or three matters concerning which they desired to interrogate the witness further. The witness was then charged by appellant's counsel to return, and the court adjourned until the following day. On that day witness did not reappear, and appellant proceeded with its defense. Witness could not be found, and the court subsequently tendered respondent a mistrial and continuance if she did not desire to proceed without an opportunity to complete her cross-examination. Respondent elected to proceed without the witness. Defendant closed its evidence, suggesting it would desire to re-examine witness in case he returned. There was no ruling on the matter. Respondent put in evidence in rebuttal, and subsequently the witness reappeared. No attachment for him was asked. It is a fair conclusion he was not attending under subpoena, but had been brought from the state of Washington by appellant, and his expenses were being paid by it. No further tender of proof by this witness was made. The witness was not under respondent's control, was not her witness. He was not under the court's control, because not subpoenaed. He was apparently not under entire control by appellant. In the circumstances we do not think the court abused its discretion in the premises. It is said the court had no discretion to deprive appellant of the right to re-examine the witness. That is true in a proper sense. What the court did, however, was to refuse to reopen the case in chief after some days and permit the re-examination of appellant's witness whose absence was due to appellant's neglect to subpoena him. Again, neither on the trial nor in the briefs here did appellant point out any particular material matter it desired to develop on the re-examination.

[9] VI. In cross-examining the witness who claimed to be George A. Kimmel, counsel for respondent examined him at length as to the correctness of statements in certain depositions witness had given. Subsequently appellant offered portions of these depositions. The offer was rejected, and the ruling is assigned for error. In part, the matter offered contradicts the testimony of the witness on the trial. This was not competent. At any rate the ruling excluding it did not prejudice appellant. In other respects the offer in-

cluded matter concerning which the witness was not cross-examined. This was not competent. Neither does the record disclose whether that portion of the deposition offered fairly presents the matters to which it refers; the whole deposition being considered. There is a little in the portion offered which bears any material relation to the cross-examination. A comparison of the cross-examination with the part of the deposition offered fails to disclose the offer included any competent matter the exclusion of which could have injured appellant. It is necessary to be content with stating the result of such comparison. Obviously 25 or 30 pages of the record cannot well be set out in this opinion. Appellant does not point out specifically anything material which was excluded, and neither shall we discuss it in detail.

[10] VII. There was no error in excluding the portion of the cross-examination of the witness Tillotson. He was a Pinkerton detective, and his deposition was read in the case. The cross-examination was excluded in this case as it had been on the trial of a companion case in the federal court. Of that ruling the Circuit Court of Appeals, Mr. Justice Van Devanter delivering the opinion, said:

"As bearing upon the thoroughness of the search, and the weight which should be accorded to the fact that it had been unsuccessful, the defendant sought by the questions which were excluded to show that the detective agency had not been advised of certain questionable conduct and transactions of the insured, knowledge of which might have been of material advantage to it in making the search. A reasonable cross-examination along that line would have been clearly permissible; but the questions propounded and excluded were all subject to the objection that they assumed as true a damaging state of facts which was nothing less than an inexcusable exaggeration of what the evidence produced up to that time and subsequently tended to show. In short, there was no reason to believe that there was a foundation of truth for what was so assumed. In that form the questions were rightly excluded. 8 Wigmore on Ev. p. 2344." *N. Y. L. Ins. Co. v. Rankin*, 162 Fed. loc. cit. 109, 89 C. C. A. 106.

So in this case the ruling was correct because of the assumption in the cross-examination of facts not established.

[11] VIII. A part of the deposition of one Chapin was excluded. The portion excluded consists of details of conversations Chapin says he had with persons not parties, or even witnesses, in the case. It was all hearsay, and the ruling was correct.

[12, 13] IX. Appellant offered in evidence certain sections of the statute of Kansas. These denounced the crimes of willfully and knowingly making false entries in books of banks and moneyed corporations, embezzlement, and the buying or receiving stolen or embezzled property. Evidence tending to show a motive for Kimmel's disappearance was competent to rebut the presumption of death from lapse of seven years. The offer

of the Kansas statutes was not within this principle in any event unless there was substantial evidence to show Kimmel guilty of the crimes they defined, or some of them. One thing relied upon to meet this suggestion is the fact that a draft drawn to Kimmel's order on a correspondent bank was charged by that bank as \$1,100 and credited in the bank of which Kimmel was cashier in the sum of \$100. Whether the false entry was made in the correspondent bank or the other does not appear. Neither does it appear Kimmel got the money. Whether he made the entry in the books of his own bank is not shown. After his disappearance his uncle did pay this \$1,000 difference, but this adds nothing to the case. This is the only incident advanced in support of the offer of the statutes which contains any sort of substance, and it falls short of making a substantial showing of facts indicating the commission of crime by Kimmel. In such circumstances the court's ruling must be held correct.

[14] X. On each policy the cause of action was stated in separate counts to meet the possible variances in the proof. A motion to elect was filed and overruled. In one count it was alleged Kimmel died prior to October 1, 1903; in the other that he died about August 1, 1905. Appellant argues a man can die but once, and therefore these allegations are so inconsistent that they cannot stand together. One count states facts which under the rule in *Hancock, Adm'r, v. Am. L. Ins. Co.*, 62 Mo. 26, would, if proved, justify a finding that Kimmel died within the seven-year period following his disappearance. They would present that question to the jury. The other simply states the fact of Kimmel's disappearance August 1, 1898, and omits the other allegations necessary to bring the case within the rule mentioned. In the one the allegations as to the time of Kimmel's death is clearly put on inferences the pleader draws from the facts elsewhere stated in the count. In the other the date mentioned is that on which the law, on the facts stated, would presume Kimmel's death. In this situation we discover no such inconsistency as would warrant sustaining a motion to elect on the rule appellant invokes.

[15] XI. The jury included in their verdict on each of the counts installments, beginning October 31, 1898, and ending October 31, 1912, 14 in all, with interest. The verdict contains a specific finding that the proofs of death were not finally acted upon until March, 1904. The first installment under each policy therefore fell due in March, 1904. This was the trial theory, and the court so instructed at respondent's request. This instruction the jury disregarded. The action was commenced in February, 1908. The petition did not pray judgment for any installments falling due thereafter. The reply set up that certain installments had fail-

en due after the petition was filed and prior to the date of the verdict, October 31, 1912. The inclusion of installments falling due after the beginning of the action was error. 1 C. J. 1148; Puckett v. Nat. Ann. Ass'n, 134 Mo. App. 501, 114 S. W. 1039. In U. D. Co. v. Railway, 131 Mo. 291, 31 S. W. 908, the question was not presented, as the court specifically stated, and in Ward v. Davidson, 89 Mo. 445, 1 S. W. 846, the petition was amended to include allegations of additional breaches of trust by the defendant officials from whom an accounting was sought. That case is unlike this. The verdict should have included only the installments which fell due on each policy March 15, 1904, and annually thereafter to and including March 15, 1908, with interest until October 31, 1912. That amount is \$6,985.67. Actions for other installments became maintainable as they fell due.

In case respondent enters a remittitur reducing the judgment to \$6,985.67 as of October 31, 1912, the judgment will be affirmed for that sum as of that date; otherwise it will be reversed, and the cause remanded. All concur.

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FLEMING v. WENGLER, Constable.
(No. 19068.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

1. CRIMINAL LAW §27—FELONY OR MISDEMEANOR—BETTING.

The act of two persons betting privately with each other on the result of a horse race is gambling, and punishable as a misdemeanor, but not as a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29-31; Dec. Dig. §27.]

2. CONSTITUTIONAL LAW §70(3)—POLICY OF ENACTMENT.

The courts will not question the wisdom of the Legislature in enacting a law, unless the law violates either the state or federal constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. §70(3).]

3. GAMING §72½, New, vol. 8 Key-No. Series—STAKEHOLDING—STATUTE.

Rev. St. 1909, § 4749, penalizing stakeholding, makes it a felony to act as stakeholder for bettors, even though the bettors are private.

4. STATUTES §118(3) — TITLE—GAMING—STAKEHOLDING.

Such statute, being entitled: "Crimes and Punishment: Bookmaking and Pool Selling. An act prohibiting bookmaking, pool selling, registration of bets, or the receiving as custodian of money wagered upon contests of skill, speed or power of endurance of man or beast, and prescribing a penalty therefor, with an emergency clause" (Laws 1907, p. 232)—is not unconstitutional as failing to point out in its title the definite subjects of legislation contained in the body of the bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 158; Dec. Dig. §118(3).]

5. STATUTES §5—ENACTMENT—SPECIAL SESSION.

Such statute held within the purposes specified in the call made by the Governor for the reassembling of the Legislature, after the adjournment of its regular term, such purpose being to suppress instantly the evil of race track gambling without waiting until the measure passed by the Legislature at its regular term should take effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. §5.]

6. COMMERCE §59—GAMBLING STATUTE.

Nor is such statute invalid as an attempt by the Legislature to control interstate commerce, notwithstanding it may apply to transactions which involve the use of a telephone.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 87, 100; Dec. Dig. §59.]

Habeas corpus by Edward J. Fleming against J. J. Wengler, Constable of Central Township of St. Louis. Petitioner remanded, and application for writ dismissed.

T. J. Rowe and Thos. J. Rowe, Jr., both of St. Louis, for petitioner. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for respondent.

BOND, J. I. The petitioner, who is in custody under a warrant issued by a justice of the peace upon a charge of violating section 4749 of the Revised Statutes of 1909, sued out a habeas corpus in this court praying for his discharge. The statute under which the petitioner was arrested, so far as it need be quoted, is, to wit:

"Or any person who becomes the custodian or depository of any money, bet or wager or to be bet or wagered, upon any trial or contest of skill, speed or power of endurance of man or beast which is to be made or take place within or without this state * * * shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than six months or more than one year, or by a fine of not less than \$500, or by both such fine and imprisonment." Laws 1907, p. 232, now R. S. 1909, § 4749.

[1] It was stated in the affidavit for the warrant that two persons made a bet with each other of \$5 apiece on the result of a horse race in St. Louis county, and that petitioner knowingly became custodian of the \$10 so wagered, thereby committing a felony. The mere act of two persons betting privately with each other on the result of a horse race is gambling, but the offense is only a misdemeanor, and not a felony. Ullman v. St. L. Fair Ass'n, 167 Mo. loc. cit. 283, et cases cited, 66 S. W. 949, 56 L. R. A. 606.

[2, 3] The section under review was presented to this court in State v. Cummings, 248 Mo. 509, 154 S. W. 725, where it was held that the term "custodian" embraced all persons who received and held money as the stakeholder of bets laid upon the result of a horse race, as the affidavit shows was done by petitioner. Unless, therefore, the act

under review was illegally enacted, the petitioner must be remanded to the custody of the officer who held him in charge under the process issued by the justice of the peace, although to do so presents the singular incongruity of an intention on the part of the Legislature to make the stakeholder of two bettors guilty of a felony in so doing, whereas the principals who made the bet were only guilty of a misdemeanor; for it has been distinctly held by Judge Gantt, in *State v. Oldham*, that when the Legislature enacted an anti-bookmaking law similar to this, it had no intention to prohibit "even betting on horse races, but intended to prohibit" the evils of pool selling and bookmaking and the maintenance of gambling houses, with books, devices, and paraphernalia to accomplish those purposes. *State v. Oldham*, 200 Mo. loc. cit. 555, 556, 98 S. W. 497. It is not for us, however, to question the wisdom of the Legislature in so doing, unless the enactment in question is prohibited either by the Constitution of the state or the Constitution of the United States. The lawmaking body is one of the three co-ordinate heads of our government, and, unless restricted by constitutional provisions, state or national, may enact any laws which seem good to it.

Under the authority of *State v. Cummings*, 248 Mo. 509, 154 S. W. 725, we must conclude that the Legislature, in prohibiting any one to be the stakeholder of two private bettors, intended to create a new and distinct offense punishable as stated in the concluding paragraph of the above statute.

[4] III. It is insisted also that the act in question is violative of the provision of the Constitution relative to its title, in that it failed to point out therein the definite subjects of legislation contained in the body of the bill. We are unable to assent to that view. The title of the act in question is, to wit:

"Crimes and Punishments: Bookmaking and Pool Selling. An act prohibiting bookmaking, pool selling, registration of bets, or the receiving as custodian of money wagered upon contests of

skill, speed or power of endurance of man or beast, and prescribing a penalty therefor, with an emergency clause." Laws 1907, p. 232.

The contents of the bill are, in substance, a re-enactment of the previous bill forbidding bookmaking and pool selling, adopted at the general session of the Legislature with slight changes, all of which are within the general forecast afforded by the title. We therefore hold that it was not passed in violation of this constitutional provision.

[5] IV. It is insisted by the learned counsel for petitioner that the act in question is not within the purposes specified in the call made by the Governor for the reassembling of the Legislature after the adjournment of its regular term. A careful consideration of the terms of his proclamation and the purpose had in view, to suppress instantly the evil of race track gambling without waiting until the measure passed by the Legislature at its regular term should take effect, satisfies us that the bill passed at the called session was within the general intentment of the subject of legislation submitted by the proclamation of the Governor.

[6] V. Neither do we think that the act in question was an attempted exercise by the Legislature of the control of interstate commerce. The only argument adduced in support of that view is that telephone communications have been held to be transactions in interstate commerce. Without passing on that point it is enough to say that the particular clause of the act in question presented by this application for habeas corpus does not relate in any way to the matter of telephonic communications, but is confined solely to the question of whether or not the petitioner was the custodian of a sum of money agreed by two bettors to be wagered upon a forthcoming horse race.

It results that the petitioner in this cause is remanded to the custody of the officer, and the application for habeas corpus is dismissed. All concur, except GRAVES, C. J., not sitting.

STATE ex rel. CHICAGO, B. & Q. R. CO. v. WOOLFOLK, Judge, et al. (No. 19675.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

1. INJUNCTION \Leftrightarrow 108 — NUISANCE \Leftrightarrow 77 — POWER OF EQUITY.

The power of equity to enjoin the doing of acts threatening irreparable injury to property rights, or which would constitute a public nuisance, is inherent, and cannot be divested because the performance of such acts may be a violation of the criminal law, though a court of equity cannot enjoin the commission of any crime not violative of property rights nor involving the creation of a public nuisance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 176, 177; Dec. Dig. \Leftrightarrow 108; Nuisance, Cent. Dig. §§ 189, 190; Dec. Dig. \Leftrightarrow 77.]

2. PLEADING \Leftrightarrow 8(3)—CONCLUSION.

In the state's suit by a prosecuting attorney to enjoin a railroad from receiving for transportation or delivery at certain towns shipments of intoxicants, the allegation that the road's acts constituted a "public nuisance" was not sufficient to present a case invoking the power of equity to enjoin, since the term was only expressive of a legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 13, 19; Dec. Dig. \Leftrightarrow 8(3).]

3. INTOXICATING LIQUORS \Leftrightarrow 274—NUISANCE—INJUNCTION—PLEADING.

Allegations of the petition substantially averring the violation of three sections of the criminal law which forbade the receiving, storing, keeping, or delivering of intoxicating liquors without a license as a dramshop keeper or a wholesaler, the petition wholly failing to set forth any facts showing that the things done by the road were the proximate and efficient cause of the creation of a public nuisance, were insufficient to give the equity court jurisdiction, since, to connect the railroad with the public nuisance alleged to have resulted from the drunkenness and disorder consequent upon the illicit sale of liquor, it was indispensable that plaintiff show that such drunkenness and disorder were caused directly by the mere act of the road in transporting and delivering liquor in the county, or that such act participated in bringing about the condition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 410; Dec. Dig. \Leftrightarrow 274.]

Petition for writ of prohibition by the State, on the relation of the Chicago, Burlington & Quincy Railroad Company, against Edgar B. Woolfolk, Judge, etc., and Tom B. McGinnis, Prosecuting Attorney of Pike County. A provisional writ was awarded, whereupon respondents demurred, and the parties stipulated that the proceeding be considered at issue on the demurrer to the petition, and that if it should be sustained the provisional writ should be quashed, and if the demurrer should be overruled final judgment should go against respondents without further leave. Writ made permanent.

M. G. Roberts, of St. Joseph, and Hays, Heather & Henwood, of Hannibal, for relator. T. B. McGinnis, of Bowling Green, for respondents.

BOND, J. I. Upon the presentation of its petition for a writ of prohibition, a provi-

sional writ was awarded to relator by this court, whereupon the respondents, the judge and prosecuting attorney of Pike county, Mo., filed a demurrer on the grounds: First, that the petition for prohibition included an allegation that other prosecuting attorneys had instituted like suits to the one sought to be prohibited in this case; second, that the petition itself stated no facts to warrant the issuance of the writ. Thereupon the parties entered into a stipulation that this proceeding should be considered at issue upon the demurrer to the petition, and that, if the demurrer should be sustained, then the provisional writ should be quashed, and, if the demurrer should be overruled, that final judgment should go against respondents without further leave.

The object of this proceeding is to prevent the circuit court of Pike county from considering, on its chancery side, the causes of action alleged in a petition, filed therein by the respondent prosecuting attorney, stating, in substance, his official position and that the defendant corporation is a railroad carrier in that county maintaining offices where it has heretofore delivered commodities, including intoxicating liquors, to persons to whom they were consigned; that on the 23d of November, 1911, Pike county, outside the corporate limits of the city of Louisiana therein, adopted the local option law of this state; that for many years divers persons in said county have been and are engaged in the illegal selling, storing, and delivering of intoxicating liquors, including beer and whisky, in violation of said local option law and without any authority so to do; that some of said persons maintain places of business nominally as drug stores and other places of business, when in truth they are not engaged in any legitimate business whatever; that other persons are engaged in the illegal sale and delivery of such intoxicating liquors without having or maintaining any places of business and are commonly designated as "bootleggers"; that by reason of such illegal sales and delivery of liquors, including beer and whisky, divers persons have become and continue so to become intoxicated, and in such condition disturb and destroy the peace and endanger the persons and the property of the good people of said county at the places of Ashburn, Annada, and Clarksville, and that to the extent that the same has become a menace to society and to property and a great nuisance, and all greatly to the annoyance and inconvenience of the good people of said Ashburn, Annada, and Clarksville and their respective communities. Plaintiff further states that the defendant, knowing that such persons are and have been engaged in such illegal selling and delivering of such intoxicating liquors, and in such lawless and disorderly conduct, has transported and continues to transport and deliver to said persons large quantities of intoxicating liquors,

including beer and whisky, at its stations at the said Ashburn, Annada, and Clarksville, and its offices at said places in Pike county, Mo., and will continue to so transport and deliver to such persons such intoxicating liquors, including beer and whisky, in violation of the law, and that by so doing defendant aids and abets said parties in the illegal sale and delivery of and traffic in said intoxicating liquors, including beer and whisky, and in encouraging and promoting illegal sales and deliveries of such intoxicating liquors in said county, to the great scandal, inconvenience, annoyance, and disturbance of the people of said county.

"Plaintiff further states that it has no adequate remedy at law in the premises. Wherefore plaintiff prays that the defendant be perpetually enjoined from receiving and transporting and delivering intoxicating liquors including beer and whisky to persons at such places aforesaid, to wit, Ashburn, Clarksville, and Annada, in said Pike county, Mo., and that in the meantime, until a hearing of this cause can be had, that the defendant be temporarily restrained from so doing, and for other and proper relief."

In the absence of the circuit judge, a temporary restraining order was awarded upon the foregoing petition by two judges of the county court. Thereafter the petition was filed in the office of the circuit clerk and presented to respondent Edgar B. Woolfolk, the judge of said court, in chambers, at the instance of relator, who then moved the circuit court to dissolve the injunction for specified reasons; one being that the petition was without equity on its face. This motion was overruled, and thereupon the judge of said circuit court awarded a modified restraining order, enjoining the defendant railroad from receiving for transportation or delivery "at the towns of Clarksville, Annada, and Ashburn in Pike county, Mo., or either of said towns, any intoxicating liquors, including beer and whisky, at any of the station buildings or offices of the said company, defendant herein, intended by any person interested in such intoxicating liquors, including beer and whisky, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state of Missouri, respecting the handling, selling, storing, and dispensing of intoxicating liquors; and that said defendant is further enjoined and restrained from receiving for transportation or delivery at either of said towns any of said intoxicating liquors, consigned to any person who bears the reputation of and is commonly known as a 'bootlegger,' or to the manager or proprietor of any 'blind tiger,' or to the manager or proprietor or any other person or copartnership engaged in the unlawful storage, dispensing, or selling of intoxicating liquors in any of said towns," etc., until the further order of said court. Upon the award of this temporary injunction, the relator, the defendant in said suit, entered its appearance in said

cause, which was placed on the calendar of said circuit court for trial at the next term thereof, and thereupon said defendant in said cause filed its application in this court for a writ of prohibition against the further entertainment of jurisdiction thereof by the circuit court of Pike county. The issues were joined by the demurrer and stipulation above referred to.

II. The action sought to be restrained by our writ of prohibition is a suit brought by the state through one of its prosecuting attorneys to enjoin the relator here, the defendant there, from doing certain acts in violation of the sections of the statutes governing the conduct of persons, other than licensed dramshop keepers, or authorized wholesalers of liquor residing in any county which has adopted the local option law (R. S. 1909, §§ 7227, 7229), upon the theory that the acts in question constitute a public nuisance.

[1] The power of equity to enjoin the doing of acts threatening irreparable injury to property rights or which would constitute a public nuisance is inherent and has been exercised, both in England and America, by courts of chancery since their evolution as a distinct tribunal, nor can this power be divested because the performance of such acts may be a violation of the criminal law. On the other hand, a court of equity is powerless to enjoin the commission of any crime not violative of property rights nor involving the creation of a public nuisance, for the reason that it has no jurisdiction to enforce the criminal law nor to prevent the performance of any act of a criminal nature which does not necessarily prejudice private or public rights subject to its jurisdiction and control. 1 Joyce on Injunctions, § 60a; 14 R. C. L. p. 379, § 80; Shoe Co. v. Saxey, 131 Mo. loc. cit. 221, 32 S. W. 1106, 52 Am. St. Rep. 622; Kansas City Gunning Co. v. Kansas City, 240 Mo. loc. cit. 675, 144 S. W. 1099; State ex rel. v. Lamb, 237 Mo. loc. cit. 457, 141 S. W. 665; In re Debs, 158 U. S. loc. cit. 593, 15 Sup. Ct. 900, 39 L. Ed. 1092; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

It is clear, at a glance, that the petition on behalf of the state was framed, not to prevent any irreparable injury to property rights, but to prevent the doing of certain acts relating to the storing, delivery, and transportation of intoxicating liquors (referred to in the statutes above cited), upon the theory that the sequence of such violations of the statute would be a public nuisance. It is therefore only necessary to consider whether the allegations of the petition for injunction present a case invoking the powers of equity to enjoin such a nuisance.

[2] Obviously, the use of the terms "public nuisance" is not sufficient for that purpose, for these are only expressive of a legal conclusion, and, unless the allegations of the petition make a case to which these

terms are legally applicable, the pleading is not helped by their insertion in it. We have set out that portion of the petition filed in the lower court which refers to and describes the acts and doings of the defendant there (relator here). It will be seen from this language of the petition that the petitioner wholly fails to set forth any facts showing that the things done by relator were the proximate and efficient cause of the creation of a public nuisance. No court of equity can enjoin any transaction, however violative of the criminal law on the part of the defendant, which does not bear such a causal relation to the public nuisance averred in the petition. None of the acts alleged to have been done by relator—I. e., the transportation of intoxicating liquors to certain stations in a specified portion of Pike county and the delivery thereof to the consignees—in and of themselves necessarily produced such a degree of popular intoxication as to create the public nuisance alleged in the petition to have followed the deliveries by relator of "Intoxicating Liquors, including beer and whisky," in Pike county. As far as the allegations of the petition are concerned, they amount to nothing more than an allegation of the sequence of such a condition, not its necessary result. In this respect the petition is a type of the fallacious logic expressed by post hoc, ergo propter hoc. In order to connect the relator with the public nuisance, alleged in the petition to have resulted from the drunkenness and disorder referred to, it was indispensable that the plaintiff should show that these were caused directly by the mere act of the defendant in transporting and delivering such commodities in Pike county, or that it participated in bringing about this condition. The subsequent happening of such a state of intoxication did not establish that it was caused by the act of the relator, there being no allegations that it was concerned either in the sale or distribution of intoxicating liquors to or among the people of this portion of Pike county, or that it did any act which necessarily created a state of general drunkenness and disorder at the places referred to in the petition.

[3] It necessarily results from a consideration of the allegations in the injunction suit filed in the court below that their sum and substance was an averment of the violation of the three sections of the criminal law supra, which forbade, under penalties, the receiving, storing, keeping, or delivering, as the agent or otherwise, of intoxicating liquors, without a license as a dramshop keeper or wholesaler, or in any county that had adopted the local option law. It follows, under the principles above stated and in view of the restricted allegations contained in the petition for injunction, that a court of equity is possessed of no power to enjoin the

mere violation of the provisions of these criminal statutes, R. S. 1909, §§ 7227, 7229. Neither does it appear from its tenor that the defective petition could be so amended as to state a case within the jurisdiction of a court of equity, nor has the respondent favored us with any suggestions as to its amendment.

III. While we cannot escape the conclusion that the trial court acted without jurisdiction of the subject-matter in awarding the temporary injunction, it does not follow that either the relator or any other persons will be permitted to disobey with impunity the statutes governing the storing and delivery of intoxicating liquors (except section 7226 held unconstitutional in *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530); for those statutes are a part of the criminal law and should be enforced through the process of the criminal courts against all violators, and it is the duty of the prosecuting attorney to see that this is done.

It results from what has been said that our writ of prohibition against further action in the injunction suit filed in the trial court against relator shall be and is made permanent. All concur.

STATE ex rel. AMERICAN FIRE INS. CO. v. ELLISON et al., Judges. (No. 19688.)

(Supreme Court of Missouri, In Banc. Dec. 21, 1916.)

1. COURTS \S 91(1)—RULES OF DECISION—APPELLATE COURTS—DECISION OF THE SUPREME COURT.

A decision by the Court of Appeals that a clause avoiding a fire insurance policy when proceedings to foreclose a mortgage or trust deed were commenced, did not apply where the proceedings were only for the purpose of clearing the title so as to carry out a contract for sale, because such proceedings did not increase the hazard, is contrary to a prior decision of the Supreme Court that such a clause was valid and must be enforced in an action at law between the parties, though in rendering that decision the Supreme Court quoted from another case holding that the reason for inserting that clause was to protect the company against an increased hazard due to the institution of foreclosure proceedings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 318, 325; Dec. Dig. \S 91(1).]

2. INSURANCE \S 146(1)—CONSTRUCTION OF POLICY—GENERAL RULES.

A contract of insurance is to be construed by the same rules as other contracts, aside from the phases of equitable jurisdiction and a waiver, strict construction against the writer and abhorrence of forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 296, 297; Dec. Dig. \S 146(1).]

Original proceedings by certiorari by the State, on the relation of the American Fire Insurance Company, against James Ellison and others, Judges of the Kansas City Court of Appeals. Judgment rendered by the Court

of Appeals quashed, and record remanded for further proceedings.

Fyke & Snider, of Kansas City, for relator. Lathrop, Morrow, Fox & Moore, Charles M. Howell, and Joseph S. Brooks, all of Kansas City, for respondents.

FARIS, P. J. This is an original proceeding by certiorari, whereby it is sought to quash the judgment heretofore rendered by the Kansas City Court of Appeals in the case of Terminal Ice & Power Co., Appellant, v. American Fire Insurance Co., Respondent, 187 S. W. 564, on the ground that the opinion therein is contrary to the opinion of this court in the case of Springfield Steam Laundry Co. v. Traders' Insurance Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521.

For convenience and brevity in designating the parties to that action and the parties to this one, we shall refer to the Terminal Ice & Power Company as "plaintiff," to the American Fire Insurance Company as "defendant," and to the parties in the instant case as "relator" and "respondents," respectively.

The original action (the judgment wherein relator by this proceeding seeks to quash) was brought by plaintiff upon a policy of insurance issued by defendant, who is the relator herein. This policy of insurance provided, among other things not here pertinent, as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if * * * with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed, or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance whether by legal process or judgment, or voluntary act of the insured."

Other facts in the case extrinsic to the clause above quoted from the policy of insurance, and which were considered by the learned Kansas City Court of Appeals as warranting the views held and the judgment entered by them, are thus clearly and succinctly stated by that learned court:

"The property insured was a part of a manufactory owned by W. F. Lyons, who in 1908 transferred it to a corporation known as the W. F. Lyons Ice & Power Company, of which he was the principal stockholder and moving spirit. The corporation began its business career (which was shortlived and disastrous) by issuing and selling bonds for \$100,000, which it secured by a first mortgage on all its property. Afterwards on November 5, 1909, it further incumbered the property with a second mortgage or trust deed executed and delivered to John H. Lynds, trustee, to secure notes for \$20,000 for money borrowed for the use of the company. These notes were owned by Howard Vanderslice, J. S. Chick, John H. Lynds and Fred Wolferman, and in December, 1909, the control of the corporation and its property and affairs was surrendered to these four holders of the second mortgage notes, whose number was reduced to three by the withdrawal of Wolferman, who sold his interest to the others. In 1910 suit was brought to foreclose the first mortgage, and that suit was pending when the policy in question

was issued. To protect their interests as second mortgagees, Vanderslice, Chick and Lynds bought and became the owners of a large part of the bonded indebtedness, and thereby obtained control of the foreclosure suit. They also became the owners of all of the capital stock of the W. F. Lyons Ice & Power Company, and Lyons retired from the corporation and its affairs. At that time the corporation was on the verge of bankruptcy, had lost its credit, and had a bad reputation in the business world. Vanderslice, Chick and Lynds, in an obvious effort to ward off attacks of creditors as well as to escape other consequences of such bad reputation, had the name of the corporation changed to the Terminal Ice & Power Company, early in 1911, and incorporated another company under the name of the Sheffield Ice Company, which operated the factory under a lease from the Terminal Company for a term of two years. Both of these companies were controlled by Vanderslice, Chick and Lynds, who owned all the stock of both; the stock of the Sheffield Company being paid by the transfer to that company of the second mortgage notes.

"On April 2, 1913, while the factory was being operated by the Sheffield Company, plaintiff gave a written option to another corporation, the City Ice Company, to purchase the plant, and in February, 1913, executed a lease to the City Ice Company under which that company as lessee took possession of the property about June 1, 1913, and proceeded to operate the factory. The fire occurred June 17th, and on June 30th the City Ice Company formally notified plaintiff in writing of its decision to exercise the option, and afterwards the sale was consummated.

"At about the time the City Ice Company took charge of the plant under the lease and shortly before the fire, Vanderslice, Chick and Lynds, acting in the name of the Sheffield Company, the bookholder of the second mortgage notes which then amounted to about \$30,000, had the trustee in the deed of trust securing the notes advertise the plant for sale under the terms of that trust deed.

"This sale was made about two weeks after the fire, and the property was sold to Vanderslice, who bid \$2,000, and a trustee's deed was executed and delivered to him by Lynds, the trustee. The attorney for Vanderslice, Chick and Lynds testified that the advertisement and sale of the property under the second trust deed was pursuant to the request of all the parties in interest, viz., his clients and the City Ice Company, who desired 'this title straightened out.' We understand him to mean that the purpose of the sale was to secure the plant against the attacks of the general creditors of the Old Lyons Company in order that the property might be sold and conveyed, clear of all incumbrances, to the City Ice Company."

The policy of insurance on which the action was instituted out of which this proceeding grew was issued on September 20, 1912. The fire which destroyed the property occurred on the 17th day of June, 1913. Under these facts it is plain that neither the antecedent nor the subsequent acts of the owners of the property, or the facts touching the title thereto, can be of any help in the case, except upon the theory that we are to read into the insurance contract between the parties a provision that the clause therein against a foreclosure, or a sale, or advertisement for sale, under a deed of trust shall render the policy void only when a violation of it shall actually serve in the opinion of the trial court or jury, to increase the hazard. For clearly the sole reason for the offering

of proof of these facts was to show that the hazard was not in fact increased.

The facts of the case and the condition of the ownership at and after the making of the contract of insurance (till the fire happened) run thus: The plaintiff in the suit below owned the insured property. On this property there was a first deed of trust to secure bonds in the sum of \$100,000. Vanderslice, Chick, and Lynds owned "a large part of the bonded indebtedness" above mentioned. There was also on the property of plaintiff Terminal Ice & Power Company a second mortgage (the one now here vexing us) securing notes amounting, principal and interest, to \$30,000. These notes formerly held by Vanderslice, Chick, and Lynds had been by them transferred to the said Sheffield Ice & Power Company in payment, as stated, of their stock in the latter company, and were at the time of the fire owned by this company. From (and probably before, but that does not here concern us) the time the property was insured on the 20th day of September, 1912, till the 1st day of June, 1913, the Sheffield Ice & Power Company, the holder of the second mortgage, was in possession, operating the property under a lease. But on the last-mentioned date the City Ice Company went into possession under a lease of the property and was operating it when the fire happened. In February, 1913, said City Ice Company took an option to purchase this property, and after the fire and the foreclosure sale did so purchase it. The Sheffield Ice & Power Company, in order to "straighten the title out," began proceedings to foreclose the second mortgage and sell the property, and while these proceedings for a sale were going forward, but prior to the sale, the part of the property here in controversy burned.

The learned Court of Appeals finds that this "straightening out of the title" was for the purpose of effectually putting it out of the power of creditors of Lyons and of the W. F. Lyons Ice & Power Company, to harass the proposed new purchasers by efforts to collect their claims against the last-named person and corporation out of the property sold. But it also finds that while the concern's secured debts were \$120,000, the entire property was worth only \$110,000, so that there was in fact no equity out of which the unsecured creditors could be paid. From this and other facts which they state and we quote, it is argued that no increase in hazard occurred, and that no forfeiture therefor should be adjudged.

[1] It is urged that such a holding is directly contrary to our opinion in the case of Springfield Laundry Co. v. Traders' Insurance Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521, which question is therefore the only point up for our ruling here.

The learned Court of Appeals in their able and exhaustive opinion discuss the Springfield Laundry Case and find themselves able

to distinguish it from the facts in the case upon which the instant proceedings is bot-tomed. Upon this point and upon the man-ner in which the case is thus sought to be distinguished, the Court of Appeals said:

"The last defense we shall consider is that predicated on an alleged violation of the provision that the policy shall be void 'if with the knowledge of the insured foreclosure proceed-ings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed.' The validity of such a stipulation was sustained by the Supreme Court in *Springfield S. L. Co. v. Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521, on the ground that the defendant might have been willing for the premium charged to insure mort-gaged property, but not to continue the insur-ance if the risk were enhanced by proceedings to foreclose the mortgage, and that the parties had the right to contract against the assumption by the insurer of the greater risk."

In the Springfield Laundry Case the facts are stated by us thus:

"The facts agreed upon are substantially as follows: The property was owned by the Spring-field Steam Laundry Company. The insurance was taken out by it, and by the terms of the policy the loss, in case of the destruction of the property, was to be paid to the mortgagee as his interest might appear. After the loss the claim was assigned by the mortgagee to the plaintiff Heffernan. The mortgage by its terms was sub-ject to foreclosure if the taxes on the mortgaged property were permitted to become delinquent. This condition of the mortgage was broken, and by reason of it the trustee advertised the prop-erty for sale as provided by the terms of the mor-tgage. The sale was enjoined. Subsequently the taxes were paid and the injunction proceed-ings dismissed. A short time thereafter the fire occurred. The policy contained this provision, to wit: 'If the property be sold, transferred, or is or becomes incumbered by mortgage or trust deed, or by judgment, tax or mechanics' lien, or upon the commencement of proceedings for its foreclosure or sale, or levy thereon by a law officer, or upon its passing into the hands of a receiver or trustee, or if this policy be assigned before a loss, then, and in every such case, this policy shall, without the written consent of this company thereto be indorsed hereon, become ab-solutely void.'"

Stating the precise point up for judgment therein, we said in the Springfield Laundry Case this:

"The first question for consideration is as to whether or not the advertisement of the property for sale under the deed of trust was the com-mencement of foreclosure proceedings within the meaning of the terms of the policy; if so, by one of its express provisions the policy became void and of no effect."

Passing upon this point we said in that case:

"While we are fully satisfied that the rule announced in that case, as we understand it, and which is applicable to this, that is, that the ad-vertisement of the property for sale under the mortgage was a commencement of proceedings for its foreclosure, or sale of the mortgaged prop-erty within the meaning of the policy, was a breach of its conditions and rendered it invalid unless the breach was waived, yet when the facts that the amount of taxes due upon the property was so small as compared with its value, that the sale was enjoined and the taxes paid, and the proceedings to sell finally abandoned, are considered, we should not be inclined to hold the policy forfeited, because it would be most un-reasonable and unjust to do so, if it were not for the fact that it was expressly provided in

the policy that it should become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage. The proceedings were commenced in consequence of the failure of the assured to pay the taxes on the property according to the terms of the agreement, and this court has no power in the absence of fraud or mistake to relieve plaintiff from the obligations of its contract. If parties will make such contracts they have no right to expect courts to disregard the law in construing them. Such provisions are not, however, infrequent."

This ruling is in strict accord with the rule in practically all other jurisdictions. *Findlay v. Union Mutual Fire Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885; *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765; *Schroeder v. Imperial Ins. Co.*, 132 Cal. 18; *Horton v. Home Fire Ins. Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Dela-ware Ins. Co. v. Greer*, 120 Fed. 916, 57 O. C. A. 186, 61 L. R. A. 137; *Hartford Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. 919; *Gibson Electric Co. v. Insurance Co.*, 159 N. Y. 418, 54 N. E. 23; *McKinney v. Western Assur. Co.*, 97 Ky. 474, 30 S. W. 1004; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387, 17 N. W. 600; *McIntire v. Insurance Co.*, 102 Mass. 230, 3 Am. Rep. 458; *German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Girard Ins. Co. v. Hebard*, 95 Pa. 45; *Algase Co. v. Royal Exchange Assur. Co.*, 68 Wash. 173, 122 Pac. 986; *Medley v. German-Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; *Kelly Co. v. St. Paul Ins. Co.*, 56 Fla. 456, 47 South. 742, 16 Ann. Cas. 654; *Woodard v. German-American Ins. Co.*, 128 Wis. 1, 106 N. W. 681, 116 Am. St. Rep. 17.

Some of the courts, arguendo we must assume, in upholding the validity of a clause like that here under review, discuss the reasons which move the insurer to insert such a clause in an insurance policy. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. But actions to recover upon a contract of insurance in case of loss are ordinarily cases at law, and do not sound in equity, at any rate that was the kind of case now here engaging our attention; so absent some phase of equitable jurisdiction, it is clear that antecedent reasons for making a contract cannot aid us in construing such contract when it is clear and free from ambiguity.

The forfeiture clause here in question is part of a solemn contract made between corporations, both of which are competent to make contracts; there is no phase of equitable jurisdiction involved or invoked. We are here merely to say what that clause means; not to write into it terms or conditions which it does not contain, for we may assume, since the parties to this contract were sui juris, since they were not overreached, since neither fraud, nor mistake, nor misrepresentation had aught to do with

the making of this contract in the terms in which it was made, that had it been intended to make the actual increase of the hazard assumed a part of the contract, and a condition precedent to the forfeiture, they would have said so. We seek in vain for any such reason in the language of the clause in question. It is undisputed that the property destroyed was being advertised for sale under a deed of trust when the fire occurred, and that the remainder of the property was so sold pursuant to such advertisement shortly after the fire. So the facts are undisputed; the clause under construction is clear and unambiguous. But the learned Court of Appeals considered that a quotation in the *Springfield Laundry Case* by this court from the case of *Titus v. Glens Falls Ins. Co.*, supra, wherein the New York Court of Appeals arguendo suggested the probable reasons moving the insurer to write such forfeiture clause into a contract of insurance, was the adoption by this court of the argumentative matter in that quotation as the basis of the rule of law, instead of that which it was, to wit, a mere reason for the making of the contract by the parties contracting.

We cannot so construe our ruling. For this court just prior to the adoption of the quotation from the *Titus Case* said:

"If parties will make such contracts they have no right to expect courts to disregard the law in construing them. Such provisions are not, however, infrequent."

Illustrating this fact of frequency largely, the *Titus Case* is cited and quoted from. This state of the facts might well have misled our learned brethren of the Court of Appeals in holding as they did that the enforcement of such a clause by courts depends wholly on the question whether the violation of it increases the hazard or decreases it; and so having found that under the facts presented the risk assumed was minimized rather than maximized, the forfeiture ought not to be enforced.

[2] We do not think (aside from the several phases of equitable jurisdiction and of waiver and of construing a contract more strictly against the writer of it, and of the rule that a forfeiture is abhorrent, none of which is involved herein by reason of the absence of doubt as to the facts and of the lack of ambiguity in the clause before us for construction) there is any warrant in law to construe a contract of insurance by any other rule than that used to construe other contracts made by persons competent to enter into them. If there be any difference it rests, or ought to rest, merely in the rule as to the quantum of the evidence which we will require to prove an allegation of waiver, or fraud, or misrepresentation, or mutual mistake, growing out of an insurance contract, and which is bottomed upon a consideration of the advantage, which for the most part the insurer has over the assured, in pitting technically trained mentalities against

untrained minds. Nor do we think we so held in the Springfield Laundry Case, but on the contrary we therein emphasized the rule that in construing a contract of insurance made by persons competent to contract, this court must follow the law by which contracts are construed.

For failure to follow the rule laid down by us in the case of Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521, the judgment of the Kansas City Court of Appeals, reversing the case of Terminal Ice & Power Co., Appellant, v. American Fire Insurance Co., Respondent, is quashed and for naught held, and the record therein remanded to that court for further proceedings not inconsistent with this opinion.

Let this be done. All concur, except BOND, J., who dissents.

BARNES et al. v. PIKEY et al. (No. 19561.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

1. STATUTES \S 123(5)—SUBJECT AND TITLE.

Act March 27, 1913 (Laws 1913, p. 271), entitled "An act to repeal" enumerated sections of Rev. St. 1909, c. 41, art. 4, relating to construction and improvement of ditches, water courses, and levees on petition of one or more landowners, and to enact in lieu thereof and in addition thereto new sections with stated numbers, does not contravene Const. art. 4, \S 28, requiring every bill to contain but one subject, clearly expressed in its title, because of new sections 5611a and 5611b, providing for annual appointment of a competent ditch overseer and for levy of a maintenance tax; they being germane to the general subject of constructing and improving ditches.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 180, 181; Dec. Dig. \S 123(5).]

2. CONSTITUTIONAL LAW \S 289—DRAINS \S 2(1)—DUE PROCESS—ASSESSMENTS FOR DITCHES.

Const. art. 2, \S 80, the due process clause, is not violated by Act March 27, 1913 (Laws 1913, p. 271), as to constructing and improving ditches, parties having their day in court when attempt is made to collect assessments for benefits.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 870; Dec. Dig. \S 289; Drains, Cent. Dig. \S 17; Dec. Dig. \S 2(1).]

3. CONSTITUTIONAL LAW \S 188—MAINTENANCE TAX—RETROSPECTIVE LAW.

Act March 27, 1913 (Laws 1913, p. 271) amending the act as to construction and improvement of ditches, is not retrospective, in contravention of Const. art. 2, \S 15, because of the provision for a maintenance tax.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 530; Dec. Dig. \S 188.]

4. DRAINS \S 79—MAINTENANCE TAX—APPORTIONMENT—"BENEFITS ASSESSED FOR ORIGINAL CONSTRUCTION."

Act March 27, 1913 (Laws 1913, p. 271) as to ditches, requiring (section 5611b) apportionment of the maintenance tax on the basis of "benefits assessed for original construction," means the same as "estimated cost of construction and incidental expenses as shown by the report of the viewers and as amended by the court," the terminology used in an apportion-

ment order; such incidental expenses for organizing the district being, by Rev. St. 1909, \S 5589, 5591, made part of the original construction cost to be included in the assessment therefor.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 76; Dec. Dig. \S 79.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by Seth S. Barnes and others against Benjamin F. Pikey and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Oliver & Oliver, of Cape Girardeau, E. F. Sharp, of Marston, and Thos. Gallivan, of New Madrid, for appellants. S. J. Smalley, of New Madrid, for respondents.

GRAVES, C. J. This is an equitable action, instituted by three taxpayers and landowners in drainage district No. 18 of New Madrid county, the purpose of which is to enjoin the collection of a certain maintenance tax, which has been levied in said drainage district. To this petition the defendants demurred, for a great number of reasons, and the court sustained the same. Plaintiffs refusing to plead further, judgment went against them, and they have appealed. Constitutional questions bring the case here. Counsel for appellants thus state their petition and case:

"This is a proceeding instituted in the circuit court of New Madrid county, Mo., seeking to restrain the collection of a tax levied under the authority of an act approved March 27, 1913, and entitled 'An act to repeal sections 5580, 5583, 5584, 5586, 5588, 5595, 5596, 5603, 5605, 5608, 5614, 5618, 5634 and 5635 of article 4, chapter 41 of the Revised Statutes of Missouri, 1909, relating to the construction and improvement of ditches, water courses and levees upon the petition of one or more landowners, and to enact new sections in lieu thereof and in addition thereto, to be known as follows: 5580, 5583, 5584, 5586, 5588, 5588a, 5595, 5596, 5603, 5605, 5608, 5611a, 5611b, 5614, 5618 and 5618a, with an emergency clause,' and found upon page 271 of the Laws of 1913."

The petition in brief sets up three different and distinct reasons why this tax should be enjoined and restrained: (1) It avers that the act of the General Assembly, approved March 27, 1913, is unconstitutional: (a) Because the act is in contravention of section 28 of article 4, providing that no bill shall contain more than one subject which shall be clearly expressed in its title; (b) because the act is in contravention of section 30 of article 2 of the Constitution of Missouri, providing that no person shall be deprived of life, liberty, or property without due process of law; (c) because the act is in contravention of section 15 of article 2, of the Constitution of Missouri, prohibiting the enactment of laws retrospective in its operation. (2) The petition avers that, notwithstanding the law is deemed to be unconstitutional, yet, even conceding that it was, the county court of New Madrid county, in making the

levy of the tax complained of, did not even follow the law as passed by the Legislature in this, that the law says that the so-called maintenance tax shall be assessed upon the basis of "benefits assessed" for original construction, while the levy as made by the county court is a certain percentage on the estimated "cost of construction and incidental expenses" as shown by the report of the viewers. (3) The petition further charges that the "ditch overseer," in having the work done for which the tax was assessed, did not follow the law, in this, that while the act provides that the ditch overseer shall "hire laborers" and do the work of clearing the right of way in truth and in fact, the ditch overseer let the same at private contracts without competition to friends at exorbitant prices, in many instances three or four times the actual cost of doing the work, thus creating large and uncalled for liabilities.

The divers grounds of demurrer, in so far as necessary, will be noted in course of the opinion. The vital questions are really raised by a general ground in the demurrer, to the effect that the petition fails to allege facts sufficient to state a cause of action.

[1] I. The first instance is that, sections 5611a and 5611b of the act of 1913 (Laws 1913, pp. 278, 279) are beyond the purview of the title, and are therefore unconstitutional and void. The title of the act reads:

"An act to repeal sections 5580, 5583, 5584, 5586, 5588, 5595, 5596, 5603, 5605, 5608, 5614, 5618, 5634 and 5635 of article 4, chapter 41 of the Revised Statutes of Missouri, 1909, relating to the construction and improvement of ditches, water courses and levees upon the petition of one or more landowners, and to enact new sections in lieu thereof and in addition thereto, to be known as follows: 5580, 5583, 5584, 5586, 5588, 5588a, 5593, 5596, 5603, 5605, 5608, 5611a, 5611b, 5614, 5618 and 5619a, with an emergency clause."

Section 5611a first provides for the appointment by the county court "of a competent ditch overseer" annually. It then provides his duties and work to be done and wages, and then concludes thus:

"All the expenses, of said maintenance and repair work, to be done by the overseer, as provided for in this section shall be charged to the district for which the work is done, and shall be paid by the county court in warrants on said district, to be paid out of the levy and assessments made for maintenance purposes."

Section 5611b is the section which provides for the levy of a maintenance tax, and reads:

"The county court shall have power at the May term of court of each year to levy an assessment of tax upon each tract or parcel of land or corporate property within the district to be used in maintaining, preserving, restoring, repairing, strengthening and replacing the drains, ditches, levees and other works of the district. Said tax shall be known as a 'maintenance tax' and shall be apportioned upon the basis of benefits assessed for original construction, and shall be limited in any one year to ten per cent. of the original cost of construction. It shall be entered in a separate column in the ditch tax book opposite each tract or parcel of

land and corporate property in the district, by the county clerk, and it shall be certified to the county collector and by him collected in the same manner and subject to the same penalties for delinquency as the annual installment of tax: Provided, that where a levee of any district organized under the provisions of this law has been impaired or destroyed and conditions, in the judgment of the court, require the same to be repaired or restored immediately in order to prevent the land and other property in the district from being damaged by water, the county court may order the engineer of the district, without giving public notice, to employ teams, men, and machinery either by the day or by the job to repair or restore such levee, and the cost of such work shall be paid for out of the funds of the district derived from the maintenance tax levied under the provisions of this section."

The question is, Do these sections fall fairly within the purview of the title, or are they germane to matters fairly within the purview of the title? Article 4, c. 41, R. S. 1909, is the county court law for the formation of drainage districts. It began with section 5578 and ended with section 5635. The act of 1913 repealed 14 sections of this old law, and enacted in lieu thereof and in addition thereto 16 sections. The headnote of article 4, c. 41, R. S. 1909, was:

"Construction and improvement of ditches, water courses and levees upon petition of one or more landowners."

The old law, sections 5613 and 5614, R. S. 1909, provided for assessments for cleaning ditches, but the method of procuring the assessment is different. There is added, however, in the new law the "ditch overseer, whose duty it shall be to personally supervise and inspect all ditches in the county constructed under this article." He is required to report their condition once per year to the county court, and report the amount required to maintain the ditches for the ensuing year. He is to file complaints with the prosecuting attorney when persons unlawfully obstruct the ditches. In addition this new section further says of the ditch overseer:

"He shall have the power and authority, and it shall be his duty at the expense of the district, to remove all obstructions from all ditches, however caused, and maintain said ditches and keep the banks and rights of way thereof free from debris, buildings, fences, floodgates, briars, bushes or trees within thirty feet of the bank, objects and conditions which are likely to injure or obstruct said ditches, and in the month of August of each year he shall employ laborers and cut all bushes, briars, trees and weeds from the rights of way of such ditches, not exceeding thirty feet from the edge of the ditches."

Do these matters fall fairly within the purview of the title, or are they germane to things fairly within the title? We think so. The title by its reference takes in the title to article 4 of c. 41. That broad title was "Construction and Improvement of Ditches." The title of the act of 1913 included this, and further stated that certain sections of the old chapter were repealed, and that new and additional sections were to be adopted. The legislators could not be misled. There was

fair notice that new sections were to replace old sections, and that additional sections were to be added. If these new sections are germane to the general subject of "constructing and improving ditches," they are within constitutional limitations. The work which this overseer was to do was clearly within the line of improving the ditches. The subject-matter was therefore clearly germane to the subject-matter clearly stated in the title. Much is said in the briefs about creating an office. The fact is the county court was permitted to employ a man by the year at the rate of \$3.50 per day for time required in performing this work. Under very recent cases the title is sufficient to cover these sections. *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *O'Connor v. Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 496, 8 Ann. Cas. 703, and cases cited. In the *Doerring* case we have a title very similar to the one at bar. We also had quite broad additions to the old law.

It is urged that these sections have been repealed by act of 1915 (Laws 1915, p. 209). So it may be, but this does not affect their constitutionality while they stood. We do not think the act of 1913 does violence to section 28, art. 4, of our Constitution, and we so rule.

[2] II. Nor is section 30, art. 2 (due process clause), of our Constitution violated by this law. The parties have their day in court when attempt is made to enforce these assessments. This question was fully reviewed by Woodson, J., in *Embree v. Road Dist.*, 257 Mo. 593, 166 S. W. 286, 287. The authorities are there all reviewed. The case was one of assessments for benefits, and the conclusions there are final here. No good purpose would be subserved in a further review of the cases upon the question. The exact point was at issue there, and we refer the curious to the discussion in that case.

[3] III. Far less substance is found in the contention that the law violates section 15, art. 2, of the Constitution, which prohibits retrospective laws. The proposition is thus uniquely stated by learned counsel:

"In the case at bar it is alleged in the petition as one of the grounds for an injunction that these petitioners in pursuance of the provisions of section 5612, R. S. Mo. 1909, did keep the said ditch open and free of obstructions on their respective lands, and did keep the banks thereof free from willows and other vegetation which had a tendency to grow in the water of said ditch, and, having done this, we respectfully submit that any act, attempting to tax these petitioners for the doing of something which they had already done, was as to them retrospective in its operation."

The statement of the proposition is its own answer. When the things required by section 5612 are compared with the things required by the amendments, here challenged, it will be seen that other and additional things are mentioned. But aside from this, the statement quoted from, counsel above does not make a retrospective law. The cases cited are not in point.

[4] IV. The next contention is thus stated:

"Section 5611b of this act the county court was required to apportion said maintenance tax upon the basis of 'benefits assessed' for original construction, but that the county court of New Madrid county specifically provided that a levy of 4 per cent. should be based 'upon the estimated cost of construction and incidental expenses as shown by the report of the viewers and as amended by this court,' at the time of the organization of the said several drainage districts."

The purpose of this provision was to get at a relative uniformity for the maintenance tax. It should be recollected that when these districts are organized, the assessment for benefits, against the several tracts of lands, included an estimate for location expenses, as well as actual construction expenses. Sections 5589 and 5591, R. S. 1909. So that, when the law is critically examined, the term "benefits assessed" for original construction is the same as the "estimated cost of construction and incidental expenses as shown by the report of the viewers and as amended by this court," contained in the order of the county court. This for the reason that the law makes these incidental expenses for organizing the district a part of the original construction cost. The new section says that this maintenance tax "shall be apportioned upon the basis of benefits assessed for original construction," and original construction includes both actual cost of construction and the incidental expenses for the organization of the district, mentioned by the order of the county court. There is nothing in the point.

V. Other points made have been examined, but we do not think they are such as require further elaboration in this opinion. If the law is constitutional, as we think, all other matters are but minor things, which, if vital to the tax, could be invoked in the legal proceeding to enforce the collection. However, we note nothing that would defeat these taxes, in so far as the allegations of this bill are concerned. The demurrer was well sustained on the general ground, and we will omit the discussion of specific grounds. The judgment of the circuit court is affirmed. All concur.

MERCANTILE TRUST CO. v. SCHRAMM,
City Assessor, et al. (No. 19628.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916. Motion for Rehearing Denied Dec. 30, 1916.)

MUNICIPAL CORPORATIONS §974(1)—**VALUATION OF BANK STOCK—CONCLUSIVE EFFECT OF ACTION OF STATE BOARD OF EQUALIZATION—STATUTES.**

Rev. St. 1909, § 11412, provides that State Board of Equalization shall equalize valuation of each class of taxable property among counties of state by adding to or deducting from valuation of each class. Section 11408, after providing that county boards shall equalize valuation of all taxable property within their respective counties so that same may be entered on the tax books at its true value, provides that such board shall not reduce the valuation below that fixed by the state board of equalization. Section 11414 provides that it shall be the duty of the state auditor to require clerks of county courts to keep up aggregate valuation of real and personal property in their respective counties for those years in which no state board of equalization is held to the aggregate amount fixed by the last state board. Section 11408 provides that when the report of the state board is not received at or during the session of the county board, the county clerk shall adjust the tax books according to such report when the same is received. *Held*, that the St. Louis board of equalization, having the same general power of reviewing local assessments in the city of St. Louis as the county boards of equalization in their respective counties, had no authority to increase or change the value and amount of corporate company's bank stock in the city of St. Louis certified to them by the state board of equalization.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083, 2084; Dec. Dig. §974(1).]

Bond, J., dissenting.

Certiorari by the Mercantile Trust Company against Frank W. Schramm, Assessor of the City of St. Louis and President of the Board of Equalization, Charles W. Bates, Charles O. A. Brunk, Frederick C. Lake, and Charles Miller, members of the Board of Equalization of the City of St. Louis. Respondents' record quashed.

Judson, Green & Henry, of St. Louis, for petitioner. Chas. H. Daues and T. P. Young, both of St. Louis, for respondents.

REVELLE, J. Respondents are members of the St. Louis Board of Equalization, and as such have the same general power of reviewing local assessments in the city of St. Louis as has county boards of equalization in their respective counties.

It appears from the record that the assessor of the city of St. Louis, as required by section 11357, submitted to the state board of equalization an abstract of the taxable property in the city of St. Louis and its valuation, including, among other things, "corporate company's bank stock," at a total valuation of that class of property in the city of St. Louis of \$65,738,690. The state board, having received such abstracts and reports, proceeded to equalize the assess-

ments of banks throughout the state, and fixed such valuation at 50 per cent. of the aggregate returned by the various assessors, including that of the city of St. Louis. This assessment was certified by the state auditor to the city assessor of St. Louis and the assessor of the counties, being dated April 1, 1916, and shows that the aggregate valuation of the stock in banks in the city of St. Louis was placed at \$32,688,450, or 50 per cent. of the aggregate returned by the city assessor. This was the uniform per cent. of the returned aggregates made by the various assessors of the state. Thereafter respondents, as members of the city board of equalization, placed the aggregate assessment against such banks at \$46,017,063, which was exactly 70 per cent. of the original valuation certified to the state board by the city assessor, or 20 per cent. more than the valuation fixed by the state board.

Several cases involving the question here presented are pending, but by stipulation they are submitted on one record, all involving the same question. There is no dispute as to the controlling facts.

Our law provides a complete plan and scheme for the assessment and collection of taxes, an adequate means by which the burden primarily borne by the state and its subdivisions is transferred to the citizen. The prime and dominant idea of the scheme is furnished by the Constitution, and is that all property of the same class and value shall bear the same burden. While it is a matter of common experience that absolute equality in the imposition of taxes is not attainable, we nevertheless find an aim and intention on the part of our lawmakers to approximate to the idea of absolute equality as closely as the nature of the subject and the necessities of practical administration will permit. It is the uniformity of burden that the principle of uniformity in taxation is intended to accomplish, and whatever tends to foil this incurs the law's wrath. Discrimination, by whatever means induced, whether by different rates on the same values or the same rates on different values, seems within the inhibition. The state being subdivided, practical administration and the necessities of the case require that different rates be charged in different subdivisions in order to meet different local needs and conditions, and constitutional and statutory provisions for such different local rates are made. The principle of uniformity, however, requires that all property of the same class within the territorial limits of the authority levying the tax be taxed at the same rate. A state tax must be apportioned uniformly throughout the state; a county tax throughout the county; and a municipal tax throughout the municipality. While provisions are made for different rates in different subdivisions and for local purposes,

no provisions are to be found anywhere which authorize different standards or bases of valuation. It is evidently intended that the difference in the various local conditions shall be cared for by a difference in the rate and not otherwise.

The law clearly and expressly requires that for the purpose of valuation all property in the state, regardless of where situate, shall be dealt with in the same manner. For this purpose of valuation, the law decrees uniformity and one standard throughout the state, and this without any regard whatever to local needs or differences in local conditions, for it ordains that all property, wherever situate, shall be assessed at its true value. In order to effectuate this command a state board of equalization has been provided, and its arm of authority extended to all parts of the state. It is a creature of the Constitution (Const. art. 10, § 18), and by that instrument enjoined to adjust and equalize the value of property among the several counties of the state, and perform such other duties as may be prescribed by law. The law has prescribed, among other things, that this board shall equalize the valuation of each class of property among the respective counties in the following manner:

"First—It shall add to the valuation of each class of * * * property, real or personal, of each county which it believes to be valued below its real value in money such percentum as will increase the same in each case to its true value.

"Second—It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such percentum as will reduce the same in each case to its true value."

Rev. St. 1909, § 11412.

It is these provisions, in the light of those in pari materia, that we are called upon to construe. It is not questioned that, under the provisions of this section not quoted, the state board of equalization can equalize according to classes as it did in the instant matter. This power was expressly confirmed by the amendment of 1899 (Laws 1899, p. 323), prior to which time its power was limited to equalizing among the different counties and not between classes. *State ex rel. v. Valle*, 122 Mo. 33, 26 S. W. 672. Respondents concede that under this section the state board has the exclusive power to determine the minimum taxable value, and that no county or city board can reduce such minimum, but urge that such local boards can increase the same and make the aggregate value of any class greater, if they deem proper. In this they plant themselves on what is contained in sections 11403 and 11414, R. S. 1909. Section 11403, after providing that county boards shall equalize the valuation of all taxable property within their respective counties so that the same may be entered on the tax books at its true value, contains the following:

"Provided, that said board shall not reduce the valuation of the real or personal property of the

county below the value thereof as fixed by said state board of equalization."

Section 11414 provides:

"And it shall be the duty of the state auditor to require of clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties, for those years in which no state board of equalization is held, to the aggregate amount fixed by the last state board of equalization."

Recognizing that the object to be accomplished by a statute is of prime consideration in its construction, respondents say that the chief purpose of the creation and maintenance of the state board of equalization was and is to enable the state to make sure of the collection of at least as much from each county as it deems just. This argument, when analyzed, minimizes the citizen and maximizes the government, and this is antagonistic to our governmental system in which the people are the sovereigns and the government but their servant. The state is more concerned with the welfare and equality of its citizens and in the promotion thereof than with the mere incidents to their accomplishment, such as is public money.

It must be borne in mind that state, county, and municipal taxes are all based upon the same assessment and upon one and the same valuation. This is one reason for demanding equality and uniformity throughout the state in the matter of valuation. If property of the same class is assessed in one county at 50 per cent. of its value and in another at 70 per cent. thereof, the state collects for its own use, as distinguished from what is collected for local purposes, a greater amount from a citizen in one of its parts than from another in a different part, although their property is of the same class and value and is receiving the same public benefits and protection. This produces favoritism and destroys the cherished principle of equality. Instead of the state board being primarily created for the purpose of exacting the state's pound of flesh, we are inclined toward the more beneficent view that it was to secure and guarantee uniformity and equality in the burdens which the maintenance of a state render necessary and which society imposes.

The construction contended for by respondents would break down this principle and destroy its benign purpose. It would place the state in the unenviable position of having to exact and receive from certain of its people more than its authorized representatives had found and solemnly declared to be just, right, and necessary, this because a state tax on the valuation in excess of that found by the state board to be true and just would be collected, and to this extent the tax would be not only unjust and unequal, but also, under the law, would be deemed unnecessary for public purposes.

The power of taxation has been jealously hedged about and limited to the public needs; it rests upon necessity, and is accord-

ingly restricted. In the absence of clear and express provisions we would not hold that any scheme of taxation was intended or permitted to collect more than was necessary for the public good. The rate fixed by the people and the valuation determined by the state board on the property designated in section 11357 decide the question of what is necessary. This much is practically admitted by respondents through their concession that the state board alone can fix the minimum taxable value. Section 11414, *supra*, is of no aid to respondents, since the mere reading thereof discloses that it is applicable only to cases and times when the state board failed to act; nor do we think that the proviso contained in section 11403, *supra*, can be consistently construed so as to authorize the local board to change and increase the valuation fixed by the state board on banking corporations. This proviso was enacted at the same time that the original statute, authorizing the state board to equalize property among the several counties, was passed. At that time, as heretofore stated, the state board dealt only with one county's assessment as compared with another county's, and not with classes as it has since 1899. The county boards under the original and present acts are authorized to equalize the value of each piece of property in their respective counties with other property so located.

When the proviso in question is considered in the light of all the laws relating to the subject and the purpose which they were intended to accomplish, we are of the opinion that it was but an admonition to the local boards that in equalizing one piece of property with another they should so proceed that the county's aggregate would not fall below the value fixed by the state board of equalization, and that it was not intended to apply to the relations between the state and local boards.

As clearly indicating that the functions of the local board are purely ministerial after the state board has acted, we find section 11408, which provides that when the report of the state board is not received at or during the session of the county board, the county clerk shall adjust the tax books according to such report when the same is received. It could not be contended that the county clerk in such a case would have any authority to change the valuation fixed by the state board, and it is hardly reasonable to assume that the Legislature intended that the conclusiveness of the state board's action should depend upon whether its report was received at a particular time.

Section 11412, *supra*, expressly authorizes the state board to not only increase the assessments made by the local authorities, but also empowers it in similar language to reduce the same to its true value. If its action in this respect were not held to be conclu-

sive, clashes and conflicts would be inevitable, and confusion and chaos would come out of what was intended for order.

Cases from other jurisdictions are cited, but they are of little value here, other than as tending to show that when a constitution provides for uniformity in taxation, it is the general public policy, where the property located in different sections is assessed by different boards, to provide a superior board for equalization between them, and that the decision of such board is made final. In fact it has been said that under such circumstances the constitutional requirements of uniformity impose on the state the duty of adequately providing for such equalization. *Railroad & Telephone Company v. Board of Equalizers* (C. C.) 85 Fed. 302. We have no doubt that, had the Legislature in terms undertaken to provide that the property of banking corporations in the city of St. Louis should be assessed at a value different from the property of banking corporations in other parts of the state, its action could not be sustained. We are equally well-satisfied that had the state board of equalization undertaken to assess the property of banking corporations in the city of St. Louis at a value different from that placed on the banking corporations in other parts of the state, its action would likewise be invalid. That which cannot be done directly cannot be done through indirection, and if a method is provided which results in unjust discrimination, the result cannot be upheld. In *Railroad & Telephone Company v. Board of Equalizers*, *supra*, it is said:

"This is equally so whether such a result is due to erroneous action by the board, or to defect in the legislation, in not requiring equalization, and furnishing the means whereby this might be made real and effective."

In that case the court further said:

"It may be as well to say, in this connection, that it is now established that the constitutional requirement of uniformity in taxation applies to the mode of assessment, as well as to the rate of levy, and the Constitution may be violated in a lack of just proportion in * * * which the property is assessed * * * quite as much as in the rate or percentage at which the tax is actually laid on the assessed value."

These observations are indulged in, not for the purpose of declaring any of the sections heretofore cited unconstitutional, but as throwing light upon the construction which should be given them. It is our opinion that the Legislature has attempted to provide a method calculated to secure constitutional uniformity, and that our decisions should be toward upholding that method and end.

We are therefore of the opinion that the respondents have no authority to increase or change the value and amount certified to them by the state board, and that their record should be quashed. It is so ordered. All concur, except BOND, J., who dissents, and FARIS, J., not sitting.

MERCHANTS' LACLEDE NAT. BANK v. SCHRAMM, City Assessor, et al.
(No. 19629.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916. Motion for Rehearing Denied Dec. 30, 1916.)

Certiorari by the Merchants' Laclede National Bank against Frank W. Schramm, Assessor of the City of St. Louis and President of the Board of Equalization, Charles W. Bates, Charles O. A. Brunk, Frederick C. Lake, and Charles Miller, members of the Board of Equalization of the City of St. Louis. Respondents' record quashed.

Judson, Green & Henry, of St. Louis, for petitioner. Chas. H. Daves and T. P. Young, both of St. Louis, for respondents.

REVELLE, J. This cause and Mercantile Trust Company v. Frank W. Schramm, Assessor of the City of St. Louis and President of the Board of Equalization, Charles W. Bates, Charles O. A. Brunk, Frederick C. Lake, and Charles Miller, members of the Board of Equalization of the City of St. Louis, 190 S. W. 886, are companion cases, involving the same question, and the decision in the latter case is controlling here.

Respondents' record is, for the reason stated in that case, quashed. All concur, except BOND, J., who dissents, and FARIS, J., not sitting.

INTERNATIONAL BANK v. SCHRAMM, City Assessor, et al. (No. 19630.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916. Motion for Rehearing Denied Dec. 30, 1916.)

Certiorari by the International Bank against Frank W. Schramm, Assessor of the City of St. Louis and President of the Board of Equalization, Charles W. Bates, Charles O. A. Brunk, Frederick C. Lake, and Charles Miller, members of the Board of Equalization of the City of St. Louis. Respondents' record quashed.

Judson, Green & Henry, of St. Louis, for petitioner. Chas. H. Daves and T. P. Young, both of St. Louis, for respondents.

REVELLE, J. This cause and Mercantile Trust Co. v. Frank W. Schramm, Assessor of the City of St. Louis and President of the Board of Equalization, Charles W. Bates, Charles O. A. Brunk, Frederick C. Lake, and Charles Miller, members of the Board of Equalization of the City of St. Louis, 190 S. W. 886, are companion cases, involving the same question, and the decision in the latter case is controlling here.

Respondents' record is, for the reason stated in that case, quashed. All concur, except BOND, J., who dissents, and FARIS, J., not sitting.

STATE, on Inf. of BARKER, Atty. Gen., v. CRANDALL. (No. 19715.)

(Supreme Court of Missouri. In Banc. Oct. 21, 1916.)

1. MUNICIPAL CORPORATIONS — 181 — POLICE COMMISSIONER — REMOVAL — NOTICE AND HEARING.

Rev. St. 1909, § 8770, providing that members of the board of police commissioners of a city of the first class shall, except as thereafter specified, hold office for a term of three years, and that for official misconduct any com-

missioner may be removed by the Governor upon his being fully satisfied that the commissioner was guilty of official misconduct, when contrasted with section 8773, providing that the police commissioner may remove members of the police force only for cause after hearing by the board, does not require the Governor to give a commissioner notice of the charges and opportunity to be heard before removing him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 458-465; Dec. Dig. —181.]

2. OFFICERS — 70 — REMOVAL — HEARING.

Where power is given to remove an appointive officer for cause notice and a reasonable opportunity to be heard are indispensable, but where the officer is removable at will no question can arise except as to the fact of removal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 98; Dec. Dig. —70.]

3. MUNICIPAL CORPORATIONS — 181 — OFFICERS — TENURE — "OFFICIAL MISCONDUCT."

Rev. St. 1909, § 8770, providing that police commissioners shall, except as thereafter specified, hold office for three years, but that the Governor may remove them when fully satisfied they are guilty of official misconduct, does not give the police commissioner a fixed term, but merely provides the maximum term conditioned on nonexercise by the Governor of the power to remove for official misconduct, which must be some improper conduct relating to his duty in the maintenance of peace, suppression of disorder, and prevention of crime.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 458-465; Dec. Dig. —181.]

For other definitions, see Words and Phrases, First and Second Series, Official Misconduct.]

4. OFFICERS — 72(1) — REMOVAL — HEARING — "FIND."

Under a statute giving a board power to remove appointees if they are found not to possess the statutory qualifications or to be guilty of neglect of duty or of any misconduct, the board must conduct a semi-judicial inquiry, including notice of charges and an opportunity to be heard, since "find" means to ascertain by judicial inquiry, to determine and declare an issue of fact by a verdict or decision as a court or jury.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101-103; Dec. Dig. —72(1).]

For other definitions, see Words and Phrases, First and Second Series, Find.]

Graves and Revelle, JJ., dissenting.

Error from Circuit Court, Buchanan County; Nat. M. Shelton, Judge.

Information in the nature of quo warranto by the State, on the information of John T. Barker, Attorney General, against U. G. Crandall, to oust respondent from the office of Police Commissioner of the City of St. Joseph. Judgment of ouster, and defendant brings error. Affirmed.

Lucian J. Eastin, William Reiter, and Vinton Pike, all of St. Joseph, for plaintiff in error. John T. Barker, Atty. Gen. (Kenneth C. Sears, Asst. Atty. Gen., of counsel), for defendant in error.

BOND, J. I. On the — day of August, 1916, the Lieutenant Governor, William R. Painter, being then vested with all the authority of the absent Governor, filed in

the office of the secretary of state an order removing U. G. Crandall from the office of police commissioner of the city of St. Joseph, setting forth in the order of removal as his reason that he was fully satisfied of the "official misconduct" of the deposed commissioner. Prior to this motion the Lieutenant Governor telegraphed the commissioner to resign and received no response. Upon the failure of the commissioner to yield his office, the Attorney General filed an information in the nature of a quo warranto praying for a judgment of ouster against him. The circuit court awarded the judgment prayed, from which the defendant sued out a writ of error to this court.

"II. The board of police commissioners is a statutory body lying in the appointment and removal of the Governor upon statutory conditions and for statutory reasons. It is charged with the preservation of peace, prevention of crime, the protection of the rights of person and property, and the preservation of the health of the inhabitants of the cities of the state, and to these ends is given full control of municipal policemen. R. S. 1909, §§ 8772, 8773, 8774, 8778, 8779. The tenure of office of the appointees to the board and the authority of the governor to remove them is contained in certain portions of the statute providing for their qualification, to wit:

"And they shall, except as hereinafter provided, hold their offices for three years. * * * For official misconduct, any of said commissioners may be removed by the Governor of the state of Missouri, upon his being fully satisfied that the commissioner or commissioners charged is or are guilty of the alleged official misconduct." Rev. St. 1909, § 8770.

The only question presented by this writ of error is whether or not this statutory power of removal is one resting, to the extent given, in the discretion of the Governor, or is only exercisable after formal and specific charges, a trial thereof giving an opportunity for the hearing of witnesses and evidence, and a finding of the guilt or innocence of the accused. In brief, whether a police commissioner can be removed by the Governor with or without a trial, provided the Governor is fully satisfied in his own mind of the official misconduct of such officer.

[1] It is of the very essence of the duties of the Governor of the state, as the personal representative and head of the executive department, to provide by fitting agents for the enforcement of its laws, the security of the persons of its citizens, and the protection of their property. No greater responsibility could be imposed under a free form of government than is involved in the performance of these duties; for, unless its laws are respected and obeyed and the property and rights of its people preserved and upheld by its chief executive with all the power given to him under its Constitution and laws, the ends for which the state was organized by the people would cease to exist. Realizing the high responsibility and the correlative

duties imposed thereby, the Legislature put in the hands of the Governor the power to maintain peace, enforce the law, prevent crime, and protect property by the appointment of boards of police commissioners, which are given power to create, control, regulate, and remove the members of the police forces in the large cities of the state. The statute clothing the Governor with power to appoint this board of control limits the tenure of office of its members (in the city of St. Joseph) to three years, "except" the Governor shall remove any such appointee upon being fully satisfied of his official misconduct. The Legislature in express terms gave the Governor full power and made it his duty, whenever he was fully satisfied of the "alleged official misconduct" of any police commissioner, to remove him instantly from office, irrespective of his otherwise possible term. The Legislature made a wholly different provision in dealing with the power of the police commissioners to remove members of the police force and permitted that to be exercised only "for cause after a hearing by the board." R. S. 1909, § 8773. The Legislature exhibited great wisdom in thus restricting the power of motion given to the subordinate board and thereby guarding against abuse or misuse of its functions as might happen if the entire body of the police were subject to arbitrary removal, and, on the other hand, in freeing the hand of the Governor from any other restraint in the management and direction of the board of commissioners appointed by him than his own judgment of their official misconduct formed to "his full satisfaction" by any method sufficient to enlighten a chief executive anxious to discharge with promptness his duty of enforcing the law through the men appointed by him to direct and regulate the entire police force, whose duty it is to suppress disorder, prevent crime, and arrest offenders against the law. The supervisory control of the police force lodged in the Governor in virtue of his power to appoint and remove the board which directs the police has its root in the organic law charging him "to take care that the laws are * * * faithfully executed," which is the first duty imposed upon him as the chief of the executive department of the state. Const. art. 5, §§ 4, 6. The importance of this task and the exigency of the public welfare that its faithful performance should not be delayed or hindered must not be overlooked when considering the application to the exercise of the power of motion by a Governor of similar principles of law controlling lesser functionaries and boards engaged in the performance of duties not so vitally and immediately essential to the welfare of the state.

[2] III. It needs only to be stated that, where power is given to remove an appointive officer, it must be one which is exercisable either for cause, in which case notice and a

reasonable opportunity to be heard are indispensable, or at will, that is, without any other formality than the exertion of discretionary power. And it necessarily follows that, where the statute giving the power expressly authorizes the donee to act at will or discretion, no question can ever arise except as to the fact of the removal. But where the enabling act does not, in terms or by necessary implication grant discretionary power of removal, then recourse must be had to all the sources of statutory interpretation and construction which will render the meaning of the lawmakers clear and enable the court to determine the exact nature of the power given in the particular case.

IV. In this state the rules governing the removal of appointive officers have been discussed by the appellate courts in a series of cases in all of which, by the terms or implications of the statutory power given, the removal could only be for cause after notice and trial. One of the earliest is that of *State ex rel. Dennison v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757, and related to the removal of a police justice of the city of St. Louis. The charter of that city provided for the appointment of such officers by the mayor, and with reference to their removal provided, in so many words, that it should only be for cause. The court decided that this provision of the charter must be observed before a police justice could be removed. And in a succeeding case, *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663, this court refused to prohibit the mayor of the city of St. Louis from trying certain charges upon which it was sought to remove the president of the board of public improvements, holding that the proceedings in question were in all respects reasonable and in conformity to the provisions of the charter, which specifically conferred the power to remove said officer for cause. 119 Mo. 383, 124 S. W. 457, 41 Am. St. Rep. 663.

The question was also presented to the St. Louis Court of Appeals upon an issue as to the validity of a removal of the superintendent of the poorhouse by the commissioners on charitable institutions of that city, under an authority conferred upon that body by the charter to remove any appointed officer of that institution by unanimous vote and in pursuance of an ordinance reaffirming such charter power and providing "that, before any such removal shall be made, the person accused shall have a full, open and impartial hearing before the Commissioners." It was held the power thus given to the commissioners was one to remove for cause. In discussing the interpretation of the grants of power to remove appointive officers, it was said in that case, in consonance with the preceding decisions in this state and elsewhere, that:

"It is fixity of tenure that destroys the power of removal at pleasure otherwise incident to the appointing power. The reason of this

rule is the evident repugnance between the fixed term and the power of arbitrary removal. The effect of this rule is that the right to hold during a fixed term can only be overcome by an express grant of power to remove at pleasure. An inferential authority to remove at pleasure cannot be deduced, since the existence of a defined term, *ipso facto* negatives such an inference, and implies a contrary presumption, i. e., that the incumbent shall hold to the end of his term, subject to removal for cause."

The foregoing language was expressly adopted by this court in *State ex rel. v. Maroney*, 191 Mo. loc. cit. 548, 90 S. W. 141, and is only quoted again in order to set forth its logical converse, to wit, that where the power to remove is given, expressly or by necessary implication, in the Enabling Act, by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is *ex hypothesi*, one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested. In the case at bar the statute in express terms tells the Governor to remove any commissioner "upon his being fully satisfied" of "the alleged official misconduct" of such commissioner. It therefore falls within the exact terms of the proposition last stated and was necessarily included in the doctrine established when the foregoing decisions announced the rule of which that proposition is the logical converse.

V. Although the present case is the first time that this court has been required to pass upon a statute including within its terms language authorizing a removal by the Governor of one of his appointees whenever "fully satisfied" that a specified reason exists, or the power to remove at will for that reason, yet it was involved in all the cases in this state where the removals for cause were in judgment and which stated the exceptions to the doctrine of removal on that ground, and it has been directly adjudicated in other states and is the general consensus of the text-writers. A few cases will be cited.

In the case of *People ex rel. v. Draper*, 67 Misc. Rep. 460, 124 N. Y. Supp. 758, the court was called upon to construe the terms of a statute permitting the state commissioner of education "whenever it shall be proved to his satisfaction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty," etc., to remove such official. The court held that these terms necessarily implied a power of removal in the state commissioner of education without "notice" or "opportunity of defense," saying that it had no difficulty in arriving at this legislative intent from a consideration of the policy of that state and the further fact that when dealing with the "board of education" it was expressly provided in that state that its members could only be removed "for cause

shown after giving notice of the charge and opportunity of defense." The facts of the New York case are strikingly similar to the facts of the instant case and the legislative action in this state, which provides for a similar distinction, as has been shown, when referred to the power of removal of a member of the police force.

In the case of *State ex rel. v. Burke*, 8 Wash. 412, 36 Pac. 281, the statute authorized the Governor to remove the members of the capitol commission board appointed until the completion and acceptance of the state building, unless sooner removed for cause by the Governor. It was said:

"It seems to be well settled that the Legislature in creating an office may limit the duration of the term in any way it deems fit, if there is no constitutional provision which would fix the term. It might make it determinable at the pleasure of the Governor or any other person. In this case the power was intrusted to the Governor—to act, it is true, upon certain grounds—yet his action * * * would be purely discretionary."

It was accordingly ruled the Governor might remove such officers without charges, notice or a trial, and that his power in this respect rendered an otherwise definite term an indefinite one, and that the use of the words "for cause" did not alter the nature of the power vested in the Governor since the act specified no particular misconduct or wrongdoing, "nor any manner of removal other than it shall be by the Governor."

In the case of *Hertel v. Boismenu*, 229 Ill. 474, 82 N. E. 298, a statute almost identical in language with the one passed on by the Supreme Court of Washington was presented for review. The Illinois statute provided for the removal by the trustees of schools of a township treasurer appointed for a term of two years, for good and sufficient cause. The court held that this statutory provision was a mere generality uncoupled with any requirement of a formal charge or notice to the incumbent, and that it might be exercised at will.

In the case of *Ayres v. Hatch*, 175 Mass. loc. cit. 491, 56 N. E. 612, provision was made in the city charter for the removal by the mayor of any officer appointed by him for such cause as the mayor might deem sufficient. In that case the mayor exercised the authority thus given to him without preferring charges or giving notice and holding a trial, stating as his only reason that the removal was for "the good of the service." The court held that this statute gave him a discretionary power for that reason to remove his appointee. To the same effect are *O'Dowd v. Boston*, 149 Mass. loc. cit. 444, 21 N. E. 949; *Atty. Gen. v. Brown*, 1 Wis. 514; *State v. McGarry*, 21 Wis. 502; *State ex rel. v. Grant*, 14 Wyo. loc. cit. 57, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982; *People v. Welty*, 75 Ill. App. loc. cit. 522; *Trimble v. People*, 19 Colo. loc. cit. 197, 34 Pac. 981, 41 Am. St. Rep. 236; Wil-

cox v. *People*, 90 Ill. 186; *State ex rel. Atty. Gen. v. Doherty*, 25 La. Ann. 120, 13 Am. Rep. 131.

VI. It is unnecessary to apply the full strength of the doctrine announced in the foregoing persuasive rulings in other states. It is sufficient in order to determine the extent of the power of motion vested in the Governor by the statutes under review to ascertain the meaning of the language employed by applying to it the principles governing the removal of officers as declared by repeated decisions of this court and the most rigid rules elsewhere.

[3] It will be seen at a glance that the statute (section 8770, supra) does not give a definite term to the appointee; for, while it mentions three years as the possible limit of the appointment, yet it prefaces that statement with the words "except as hereinafter provided." By this conjunction of language no definite term of office could arise except the provision thereafter for ending it should not happen. This language evidently creates, by the greatest stretch of construction, only a conditional term of office whose existence depended wholly upon the exercise by the Governor of the power to remove "thereinafter" specified in the statute.

As has been seen, the words granting this power vested it wholly in the Governor of this state with authority to exercise it "upon his being fully satisfied" of the "official misconduct" of any commissioner. It will be noted that this language provides no method of inquiry on the part of the Governor before arriving at the mental state of satisfaction as to the official misconduct upon the existence of which his power to order a removal arises under the statute; the sole requirement being a state of personal satisfaction on his part that a member of the board of police commissioners has been guilty of some official misconduct. The statute wholly refrains from specifying or defining this ground of removal by any terms of specification or definition. It simply made it the duty of the Governor to satisfy himself that the party to be removed was guilty of some or any misbehavior or neglect of duty falling within the meaning of the general terms "official misconduct." These are terms of the broadest generality and comprehensiveness, and were designed by the lawmakers to enable the Governor to conduct a correspondingly wide inquiry with authority to act the moment he was "fully satisfied" that any such appointee was guilty of any dereliction of official duty. Discretionary power thus invested in the Governor was uncontrolled except that it could only be exercised with reference to improper conduct on the part of a police commissioner in discharging his duty as the direct representative of the chief executive in the maintenance of peace, suppression of disorder, and the prevention of crime. The Governor was not authorized to

remove such official for any other reason. But, once he was fully satisfied in his own mind of the existence of any act or omission falling within the broad language of the statute, his power to remove was subject to no restraint or limitation whatever. Since the statute under review gives him full discretion to act by express authority therein contained, it does not fall within the purview of any of the rulings in this state or elsewhere denying the existence of the right to remove an officer at will where he was appointed for a definite term and where the statute authorizing his removal does not expressly or by necessary implication give that power. In the instant case the Acting Governor of this state filed in the office of the secretary of state his order removing the respondent, expressly stating in such order the statutory reason for his action. Both in reason and under the standards fixed by the decisions in this state this action of the Governor was the performance of the duty imposed upon him by statute, and he would have been unfaithful to his obligations to the people of this state if he had permitted a member of the board of police commissioners to remain in office after being fully satisfied that he was abusing the trust imposed upon him by his appointment and by the law defining the duties of such office.

[4] Respondent calls our attention to the ruling in the case of *State ex rel. v. Maroney*, *supra*. There is nothing in the discussion of the law in that case at variance with the legal principles applied in the case under review; for it quotes and affirms the previous decisions of this court from which the conclusions reached in the present case are deduced. In the *Maroney* Case the court was considering the power of a board of election commissioners to remove, for causes specified in the statute giving them that power, certain judges and clerks appointed to conduct an election. Such officers were appointed for a term of 90 days and the board of election commissioners given power to remove if any such appointee was "found not to possess the statutory qualifications or to be guilty of neglect of duty or of any official misconduct." The term "find" is thus defined in law: "To ascertain by judicial inquiry." 19 Cyc. p. 534, par. 3. Also: "To determine and declare an issue of fact by its verdict or decision as a court or jury." Webster's New Internat. Dict., word "find," v. i., Law. According to this meaning of the term "found," the statute in question, which included that word, required the board of election commissioners to make a semijudicial inquiry, the necessary incidents of which were notice of charges and an opportunity to be heard before removing the judges and clerks appointed by it. So regarded, the statute in question by its terms limited the power to remove such officers for cause and the necessary incidents of such removals. It is

clear, therefore, that the *Maroney* Case is no authority for a similar ruling in the one at bar. Here, as has been shown, the power to remove was inserted in the statute and rests in the discretion of the Governor upon prescribed grounds, the existence of which he is allowed to determine to his own satisfaction. The return shows that the reasons given for his action were in strict conformity to the statutory power. He was thus possessed of jurisdiction to act, and his exercise of that jurisdiction was the discharge of an executive duty imposed on him as the Governor of the state, which is not reviewable by the courts. *State ex rel. v. Stone*, 120 Mo. loc. cit. 433, 434, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705.

Of the *Maroney* Case it is enough to say that, while not amiss in its statements of legal principles, it goes to the verge of the law in applying them to the facts in judgment, and can only be supported on the ground of the technical meaning given to the word "find," of which the word "found" in the act is the past participle.

Our conclusion is that the judgment of the trial court should be, and is, affirmed.

FARIS, WALKER, and BLAIR, JJ., concur. WOODSON, C. J., not sitting. GRAVES and REVELLE, JJ., dissent.

BLAIR, J. (concurring). In this case the statute expressly provides neither a hearing nor removal at pleasure. It is sometimes said that, unless removal at pleasure is expressly provided, notice and hearing will be implied. This is well enough in case the right to remove is conditioned upon the actual existence of a disqualifying fact, official misconduct, guilt of some criminal offense, etc. On the other hand, in case there arises out of the statute a necessary implication that notice and hearing are not required, such notice and hearing cannot be required. What is necessarily implied is as much a part of the statute as what is expressly enacted. The statute here applicable empowers the Governor to remove in case he is "fully satisfied" of the commissioner's official misconduct. Had the statute provided merely that the Governor might remove "for official misconduct," it would have been well enough to imply notice and hearing before removal. Such a provision reasonably could be held to condition the right to remove upon the existence in fact of official misconduct on the part of the officer. When notice and hearing are implied, they must be implied for the purpose of trying the question whether the condition has arisen upon which the statute authorizes the removing power to act. Obviously no other matter could be tried. Under the statute involved in this case the condition precedent to the exercise of the power to remove is that the Governor shall be "fully satisfied" that the commissioner has been guilty of official misconduct,

not that the commissioner shall have been so guilty. It is plain nothing could be tried in a hearing under this statute save the question whether the Governor was "fully satisfied," and it is equally plain that question is not triable at all. The idea of a trial before the Governor to determine what the Governor thinks is a novel suggestion. The Governor might conceivably permit an official to be heard in order to reach a correct conclusion, but in this case the Governor has declared himself fully satisfied and has acted, and courts cannot add to the statute conditions the Legislature did not include.

STATE, on Inf. of BARKER, Atty. Gen., v. McDONALD. (No. 19716.)

(Supreme Court of Missouri. In Banc. Oct. 21, 1916.)

Error from Circuit Court, Buchanan County; Nat. M. Shelton, Judge.

Information in the nature of quo warranto by the State, on the information of John T. Barker, Attorney General, against Joseph I. McDonald, to oust respondent from the office of Police Commissioner of the City of St. Joseph. Judgment of ouster, and defendant brings error. Affirmed.

Lucian J. Eastin, William Reiter, and Vinton Pike, all of St. Joseph, for plaintiff in error. John T. Barker, Atty. Gen. (Kenneth O. Sears, Asst. Atty. Gen., of counsel), for defendant in error.

BOND, J. This cause involves the same questions of law which are decided in State ex rel. Barker v. U. G. Crandall (No. 19715) 180 S. W. 889, and for the reasons given in that opinion the judgment of the circuit court in this case is also affirmed.

FARIS, WALKER, and BLAIR, JJ., concur. REVELLE and GRAVES, JJ., dissent. WOODSON, C. J., not sitting.

STATE, on Inf. of ATTORNEY GENERAL, v. ARKANSAS LUMBER CO. et al. (No. 16146.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

COURTS \S 207(1)—SUPREME COURT OF MISSOURI—POWERS INCIDENTAL AND ANCILLARY TO ISSUANCE OF ORIGINAL WRITS—GARNISHMENT.

Under Const. art. 6, \S 3, giving the Supreme Court power to issue writs of quo warranto and other original remedial writs and to hear and determine the same, such court has jurisdiction of a garnishment proceeding incidental to the enforcement of judgment for a fine in quo warranto proceedings, although the garnishees are not entitled to a jury trial upon the hearing of the case in Supreme Court, and would be entitled to jury trial if tried in the circuit court, and although the garnishees are not parties to the original suit; for the constitutional grant of jurisdiction to issue original writs carries with it the necessary and incidental powers to enforce judgments and decrees thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 646; Dec. Dig. \S 207(1).]

Original proceeding in quo warranto by the State, on the information of the Attorney General, against the Arkansas Lumber Company and others. Garnishment proceedings to enforce the judgment for a fine were instituted and the garnishees move to dismiss. Motion overruled.

The facts of this case are few, and may be tersely stated in the following language:

"The state, upon information of the Attorney General, instituted her proceeding quo warranto in this court several years since, against various incorporated companies, foreign and domestic, charging sundry violations of her anti-trust statutes, and seeking the forfeiture of the corporate franchises of the alleged defenders (i. e., the forfeiture of corporate existence as to domestic companies and of the right to continue in business in the state as to the strangers). After much travail by litigants, counsel, commissioner, and court, this proceeding culminated, so far as concerns the Bradley Lumber Company, in the assessment here of a fine of \$50,000, to be levied on its possessions, as well as of a judgment of ouster from its corporate franchise. Vide 280 Mo. 317, 169 S. W. 145. The fine thus levied was not paid. An execution was issued out of this court, and returned unsatisfied. Thereupon the plaintiff applied to this court by proper proceeding for a citation against the defendant Bradley Lumber Company to discover assets. Upon a hearing of this matter before a commissioner, information was obtained which led the state to believe that the garnishees herein are indebted to said defendant. Thereupon an alias execution was issued upon request of plaintiff, and the marshal of this court was directed to garnish the garnishees herein upon said execution. This was accordingly done. The garnishees appear before this court and move the court to dismiss the garnishment proceedings, for the reasons: First, that this court is without jurisdiction to hear, try, or determine an original proceeding in garnishment; second, because garnishees are entitled to a trial by jury upon issues of fact which may arise in the cause; third, because there is no valid judgment against the defendant Bradley Lumber Company."

John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen., for plaintiff. Jones, Hocker, Sullivan & Angert, of St. Louis, for defendants.

WOODSON, J. (after stating the facts as above). I. Counsel for the garnishees first insist that this court has no original jurisdiction of a garnishment proceeding, and assign as their reason therefor that its jurisdiction is appellate only, except as otherwise provided by the Constitution, and cite in support thereof sections 2 and 3 of article 6 of the Constitution.

"Sec. 2. *Supreme Court, Jurisdiction of.*—The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, under the restrictions and limitations in this Constitution provided."

"Sec. 3. *Supreme Court, Superintending Control of—Power to Issue Original Writs.*—The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same."

In the sense in which counsel for the garnishees speak, they are correct in saying that the jurisdiction of this court is appellate only, except to issue the original writs named in said third clause of the Constitution, and that a garnishment proceeding is statutory, and not one of the original writs mentioned in said constitutional provision is equally true as shown by all of the authorities. It is also true in the sense in which counsel contend that the Legislature has no power to confer original jurisdiction upon this court to try garnishment proceedings; but that is not the legal proposition the Attorney General here presents for determination. The Attorney General's position is that this court, by express authority of said section 3 of the Constitution, has jurisdiction to issue writs of quo warranto, and to try and enforce the judgments it may render in any such case, and that such grant of jurisdiction to this court carries with it the necessary and incidental powers necessary to enforce its judgments and decrees. That is the well-settled law of this state and others, as decided in the following cases: *State ex rel. v. Assurance Co.*, 251 Mo. loc. cit. 296-302, 158 S. W. 640, 46 L. R. A. (N. S.) 955, Ann. Cas. 1915A, 1247; *Shull v. Boyd*, 251 Mo. loc. cit. 476-477, 158 S. W. 313; *In re Sanford*, 286 Mo. loc. cit. 692, 139 S. W. 376; *Phelps v. Mutual Reserve Fund L. Ass'n*, 112 Fed. 453, 50 C. C. A. 339, 6 L. R. A. 717; *Riggs v. Johnson County*, 6 Wall. loc. cit. 187, 197, 18 L. Ed. 768; *Goodrich v. Staples*, 2 Cush. (Mass.) 258; *McGinty v. Richmond*, 27 La. Ann. 606; 11 Cyc. 677, 678.

It cannot be logically contended, in the absence of a statute to the contrary, that the application of a common-law, equitable, or statutory remedy to enforce the judgment or decree of a court having jurisdiction to render the same is an assumption of additional powers. The power of a court to render a judgment is quite different from adopting an existing remedy to enforce the same after its rendition. Even a statute affecting a remedy may be perfectly valid, while, if it affects the rights of the parties in the matter to which the remedy is designed to accomplish, it might be void for constitutional reasons. Such statutes are numerous, and the books are full of cases drawing this distinction.

The case of *State ex inf. Attorney General v. Arkansas Lumber Co. et al.*, supra, out of which this proceeding grew, was an original proceeding brought in this court by quo warranto, to oust the defendants from doing business in this state. This court unquestionably had jurisdiction to hear and determine that case, and, as it has repeatedly held, had the power to pronounce the judgment or decree therein rendered. Therefore if it be true, as previously stated, that a grant of jurisdiction to a court carries with it the necessary and incidental powers essential to effectuate it, then the form of the

remedy resorted to in order to enforce that judgment, in so far as the judgment debtor is concerned, is wholly immaterial, and the mere fact that an auxiliary proceeding in the nature of a garnishment proceeding, as this is, is resorted to in this court in order to reach money or property of the judgment debtor in the hands of these third persons, no more concerns them than if a similar proceeding had been brought against them in the circuit court to enforce said judgment of this court, just so long as the proceedings do not deprive them of any of their individual property, and is confined to that of the judgment debtor found in their possession.

But counsel for the garnishees insist that the form in which this proceeding is to be tried is of great importance to them, in that, if tried in the circuit court, they would be entitled to a jury, but not so if tried in this court. Both of those propositions might well be conceded, but it would not, from that fact, necessarily follow that this court has no jurisdiction to hear this ancillary proceeding; but, upon the contrary, the law seems to be well settled that whenever a court has jurisdiction of the main subject-matter of a cause, that fact gives it jurisdiction over all of the incidents thereof. See cases before cited.

Practically the same contention was made by counsel for defendants in the case of *State ex inf. v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902. There it was contended that because the anti-trust laws of the state made the formation of pools, trusts, combinations, etc., of commodities a crime, the defendants were entitled to a trial by a jury. Under those facts this court held that while it had no original jurisdiction over criminal prosecutions, but in a proceeding upon a proceeding upon information in the nature of a quo warranto to forfeit their franchises for a violation of the law, and to impose penalties for that violation, was a civil suit, and that this court had jurisdiction to hear the cause, and that it was immaterial whether or not the defendants were also guilty of a crime which would subject them to criminal prosecution upon an indictment before the circuit court and a jury. That case followed previous rulings of this court, and it has been followed in subsequent cases. Consequently it must be considered as settled that because there are involved in this class of cases certain issues of fact which, if tried in the circuit court, would entitle a defendant to a trial by a jury is no reason or authority for holding they are entitled to a jury trial in this court, involving similar facts. Both courts are created by the Constitution, and to the extent mentioned they have co-ordinate jurisdiction over the matters mentioned; and, if the case is tried in the circuit court, they might be entitled to a trial by a jury, but not so if the trial takes place in this court.

Moreover, it seems illogical to me to say that a court has jurisdiction over the main subject-matter of an action, but has no jurisdiction over the matters that are merely incidental thereto. This proceeding being in the nature of an equitable garnishment, seeking to follow and subject the assets of the Bradley Lumber Company, a trust fund for the payment of its debts, alleged to have been transferred by it to the garnishees in order to evade the payment of the judgment of this court, pronounced against it in the case of *State ex inf. Attorney General v. Arkansas Lumber Co. et al.*, supra, falls squarely within the ruling of the Supreme Court of the United States in the cases of *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, *Morgan et al. v. Texas C. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, and *Rouse v. Hornsby*, 161 U. S. 588, 16 Sup. Ct. 610, 40 L. Ed. 817. In the first case cited the facts thereof were substantially as follows:

"The Cardiff Coal & Iron Company, a corporation of Tennessee, becoming insolvent, a creditors' bill was filed in the Circuit Court for the Eastern District of Tennessee by George F. Bosworth, a citizen of Massachusetts, and a judgment creditor of the company, setting forth the insolvency of the company, the wasting of its assets, etc., and praying for a sale of the property, the collection of its choses in action, the appointment of a receiver, and for an injunction. In pursuance of the prayer of this bill the appellee, Ewing, was appointed receiver of the company, ordered to take possession of its assets, and to manage and protect the same for the benefit of the creditors under orders from the court. All creditors were ordered to file their claims."

After the receiver qualified, said court ordered him to bring suit in the same court against certain debtors of the company, one of whom was White, the plaintiff in error, he having been in debt to the company for a sum less than \$2,000. The point was made that the United States Court had no jurisdiction

of the subject-matter of the suit, for the reason that it was for a sum less than \$2,000. In overruling the objection to the jurisdiction of the court, the Supreme Court of the United States said:

"The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit; and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy. *Freeman v. Howe*, 23 How. 450, 460, 16 L. Ed. 479; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179; *In re Tyler*, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; *Root v. Woolworth*, 150 U. S. 401, 413, 4 Sup. Ct. 136, 37 L. Ed. 1123; *Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 266, 39 L. Ed. 341."

The other two cases announce the same rule.

As previously stated, the case at bar is an ancillary proceeding to the original cause of the *State ex inf. v. Arkansas Lumber Co. et al.*, supra, and this court having had jurisdiction of the parties to and subject-matter of that suit, one of which was the Bradley Lumber Company, it necessarily follows that this court has jurisdiction of the subject-matter of and parties to this ancillary proceeding, although the garnishees were not parties to the original suit; neither was White a party to the original suit of *Bosworth v. Cardiff Coal & Iron Co.*, in which Ewing was appointed receiver.

There are other propositions discussed by counsel, but the views stated render it unnecessary for us to discuss them.

For the reason stated, the motion to dismiss the garnishment proceeding is overruled. All concur, except BLAIR, J., not sitting.

STATE ex rel. McWILLIAMS, Pros. Att., v.
LITTLE RIVER DRAINAGE DIST.
et al. (No. 19879.)

(Supreme Court of Missouri. In Banc. Dec.
21, 1916.)

1. JUDGMENT \S 252(5)—RELIEF—CONFORMITY TO PLEADINGS—GENERAL PRAYER.

The court, sitting as chancellor, is not bound by plaintiff's prayer for specific relief, if plaintiff's pleadings and proof show him entitled to general relief or other and different relief, where plaintiff prays generally "for such other and further relief as to the court shall seem just and proper."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 442; Dec. Dig. \S 252(5).]

2. APPEAL AND ERROR \S 719(1), 1078(1) — ASSIGNMENT OF ERROR—BRIEFS—WAIVER.

Constitutional questions neither assigned as error nor specifically referred to in appellant's brief will be assumed to be waived or abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2968, 2972, 2980, 2981, 3490, 4256; Dec. Dig. \S 719(1), 1078(1).]

3. APPEAL AND ERROR \S 1078(1)—WAIVER OF APPEAL—IMPORTANCE OF QUESTIONS.

Where questions raised in a case are important and involve numerous counties in the state, the court may consider them, although it is warranted under the rules in treating them as waived, where respondent's counsel does not urge such waiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4256; Dec. Dig. \S 1078(1).]

4. DRAINS \S 45—RIGHT TO CROSS — HIGHWAYS.

In view of Const. art. 3, \S 12, as to jurisdiction of county courts, and article 9, \S 1, recognizing counties as legal subdivisions of the state, the Legislature may grant drainage districts the right to cross public highways without requiring, as condition precedent, the obtaining of the consent thereto of the several counties wherein a highway lies or of the county courts of such counties.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 56; Dec. Dig. \S 45.]

5. HIGHWAYS \S 80—JURISDICTION OF STATE AND COUNTIES.

In opening, vacating, improving, repairing, and dealing with the public highways, the several counties and the county courts thereof are but agencies or agents of the state, acting by delegated authority, and holding title to the fee or easements in the public highways merely as legal subdivisions of the state.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 288, 290; Dec. Dig. \S 80.]

6. HIGHWAYS \S 165 — JURISDICTION OF STATE AND COUNTIES.

That the state has delegated power over its highways to the counties and its agents, the county courts, does not prevent the state from assuming control of its public highways whenever and in whatever manner it shall see fit.

[Ed. Note.—For other cases, see Highways, Dec. Dig. \S 165.]

7. HIGHWAYS \S 88—POWER OF STATE.

In exercising its power over public highways, the state may not, through its Legislature, either trench upon private rights, or devote such highways to a wholly incompatible use, or to a use which is not a public one.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 298; Dec. Dig. \S 88.]

8. DRAINS \S 18—DRAINAGE DISTRICTS—PUBLIC USE.

Drainage districts are public corporations, and their canals and ditches are devoted to, and therefore are, public uses.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 4; Dec. Dig. \S 18.]

9. DRAINS \S 55—CONSTRUCTION OF BRIDGES—LIABILITY—"PUBLIC HIGHWAY."

Under the Circuit Court Act as to drainage districts, now found, with amendments, as sections 5496-5541, inclusive, Rev. St. 1909, where a drainage canal crosses the public highway, the duty of constructing, or paying for the construction of, a bridge across the canal rests on the county and not on the drainage district, irrespective of whether the bridge and approaches made necessary by the canal are over a natural water course or span a cut in a public highway where but for the artificial canal no bridge would have been necessary, in view of section 5513 that if a bridge be needed over a "public highway" or right of way of any corporation, the secretary of the board of supervisors shall give such corporation notice requiring the construction of such bridge, and, upon failure of the corporation to construct it, the district may do so and recover the cost thereof from the corporation; the term "public highway" being used as designating a public road on which pedestrians walk and over which ordinary wheeled vehicles are drawn, and which is free to be used by all of the public without a fee.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 61; Dec. Dig. \S 55.]

For other definitions, see Words and Phrases, First and Second Series, Highway.]

Revelle, J., dissents.

Appeal from Circuit Court, Scott County; Frank Kelly, Judge.

Injunction by the State, on the relation of John McWilliams, Prosecuting Attorney, against the Little River Drainage District and others. From judgment for defendants, plaintiff appeals. Affirmed.

This is a proceeding by injunction brought at the relation of the prosecuting attorney of Scott county, and for the benefit of that county, against the Little River drainage district and the several individuals composing the board of supervisors and secretary of said district. The county (which we shall hereafter refer to as the plaintiff, for convenience) was cast below and after taking the proper steps has appealed to this court.

The petition is exceedingly lengthy, as is likewise the answer of respondents; together these pleadings cover the first 27 pages of a closely printed record in this cause. For the sake of brevity and to conserve space we shall content ourselves with a résumé of these pleadings, which we apprehend will suffice to make clear the discussion we find ourselves compelled to make.

Defendant Little River Drainage District was organized on the 30th day of November, 1907, under that one of our several drainage statutes designated, to distinguish it from the others, as the "Circuit Court Act," and now to be found (with numerous amendments made since defendant district was organized) in the Revised Statutes of 1909 as sections

5496 to 5541, both inclusive. Many of the above-mentioned sections of this circuit court act have been repealed and others enacted in lieu thereof; in fact, in 1913 the entire article was repealed and a new article enacted in lieu thereof; but with this condition of these statutes we have nothing to do in this case, for reasons which will hereafter more clearly appear.

The petition, after alleging the organization of this drainage district and the official character as supervisors and secretary thereof respectively of the several individual defendants, avers that defendant drainage district (whom we shall hereafter for brevity refer to simply as defendant) filed on the 15th day of November, 1909, its "plan for reclamation," which said plan, among numerous other details not pertinent to the questions here vexing us, provided for the construction of a ditch or canal to be known (and in said plan of reclamation designated) as the "Ramsey Creek Diversion Channel," which it was intended and contemplated should cross a public highway in plaintiff county known as the Rock Levee road, which highway runs from the town of Kelso in Scott county, to the town of Cape Girardeau in Cape Girardeau county. This Rock Levee road was originally a toll road owned and operated by a private corporation, but upon the expiration by limitation of such private corporation, that part of the Rock Levee road here involved became (it is averred) the property of Scott county. It is alleged in the petition and admitted in the answer that defendant will at a point in plaintiff county cut said Rock Levee road in order to permit the passage of said diversion channel, and that the passage through said road of this diversion channel will necessitate the erection of an expensive bridge and expensive approaches thereto, which it is estimated will cost \$10,000.

It is further charged as a conclusion of law that it is the duty of defendant district to construct at its own expense the necessary bridge and approaches thereto, since it is averred there is now no creek, or river, or other natural water course traversing said Rock Levee road at the point where it is proposed to cut said road to form a passageway for its said diversion channel; but on the contrary it is averred that the waters of said Ramsey creek flow westward and southward and away from the Rock Levee road and not eastward, or toward and across the same.

It is further averred that no consent to so cut said Rock Levee road has been obtained, and that no steps have been taken to obtain from the county court of plaintiff county any consent to the cutting thereof, and that no agreement has been entered into by defendant district to save harmless the plaintiff county and the citizens thereof from the expense of building a bridge and approaches thereto, which are made necessary solely on account of the cutting of said public high-

way by defendant. It is further alleged that while there are 206 thousand acres of land in plaintiff county, only some 15 per cent. of such acreage will receive any benefit from the said Ramsey Creek diversion channel or any other of the public drains, ditches, canals, and levees constructed and to be constructed by defendant, and that therefore, while only some 15 per cent. of the acreage of land in plaintiff county will be benefited, the whole thereof will be taxed for the building of the said required bridge and its approaches, and that therefore some 85 per cent. of the real property taxed in plaintiff county will bear a burden from which no benefits whatever accrue.

It is further alleged that the report of the commissioners appointed pursuant to statute to assess damages and benefits upon the organization of defendant district contained no reference to the fact that a bridge would be needed across the said public road in order to span the Ramsey Creek diversion channel, and that for this reason plaintiff county did not appear and except. It is further averred that the cutting of said road by defendant without the construction over said cut of a proper bridge and approaches thereto would be and constitute a public nuisance from which the general public will suffer great injury, damage, and inconvenience, and that plaintiff has no remedy at law.

The prayer is that defendant be enjoined from cutting said Rock Levee road till they shall have complied with their (alleged) legal duty in the matter of obtaining consent to that end from plaintiff and until they shall have entered into an agreement with plaintiff county court to save plaintiff and the citizens thereof free and harmless from any expense arising from bridging over and making approaches to the Ramsey Creek diversion channel, and "for such other and further relief as to the court shall seem just and proper."

The answer in substance admits all of the allegations made by plaintiff in its petition, save and except the questions (a) whether the expense of building the necessary bridge over Ramsey Creek diversion channel and the approaches thereto shall fall upon plaintiff county, or upon defendant district, and matters germane to this main question; (b) whether Ramsey creek had, till its course was blocked in 1854 by the construction of the Rock Levee road, ever flowed (wholly or in part) to the Mississippi river across the present site of said highway; and (c) whether the filed plan for reclamation showed the future necessity of a bridge over the Ramsey Creek diversion channel. The answer is long and it would but cumber the record for us to recite it here in full. But this question of law and its above-mentioned corollaries of fact with the germane constitutional questions (of which more hereafter) are left as the only questions for our determination.

The testimony taken upon the trial of the case below took a fairly wide range. But one phase of this testimony outside of the conceded questions of law left to us in the pleadings interests us here. That question is raised by the answer and is, to wit, whether there is or has ever been any flow of water from Ramsey creek under the Rock Levee road, or whether prior to the construction of the Rock Levee road there was such flow across the present situs thereof. This question is important here for the reason that it is urged upon us that the law touching the respective duties of a given county and a given district vary according as the bridge made necessary by the construction of a drainage canal is over a natural water course or is made necessary solely by the cutting of a drainage canal across a public highway at a point where before no water course existed, and therefore where before no necessity existed for the construction or maintenance of a bridge of any sort.

Ramsey creek is a small stream which has its source in the hills of plaintiff county near Benton, and flows thence in a northerly direction to the edge of certain bluffs which skirt a swamp across which the Rock Levee road is constructed. This creek reaches this swamp at a point measurably 1,000 feet west of the point at which the Rock Levee road departs from the bluffs to cross the swamp toward the town of Cape Girardeau. There was much contention shown by the proof offered as to whether Ramsey creek, after reaching the edge of the bluffs and entering the swamp in question flowed westwardly and southwardly and away from the Mississippi river, or whether it, at least prior to the construction of the Rock Levee road, flowed eastwardly and across the present site of said road and thence into the Mississippi river. Some proof came in that at least one branch of this creek had, before the Rock Levee road interfered with its course, flowed eastwardly into the Mississippi river, but that it had not so flowed since the Rock Levee road was constructed.

There was proof that there still existed a well-defined channel or depression which had been part of the creek channel for a considerable portion of the distance between the Rock Levee road and the Mississippi river.

It was contended on the part of the defendant that the Rock Levee road had anciently stopped up the eastward channel of Ramsey creek and had prevented it from debouching its waters into the Mississippi river and had caused it partially at least to pond its waters in the swamp and against the Rock Levee road. The proof both from witnesses and from divers exhibits offered in evidence tends to show that these contentions of defendant are correct; but on the other hand it appears that Ramsey creek has not to any appreciable extent (a few flood periods excepted) emptied through this old

eastern channel into the Mississippi river (crossing in its course the right of way of the old toll road, which has now become the Rock Levee road) since 1854, when this road was constructed across this ancient channel.

Upon the question of notice to plaintiff county of the future need of a bridge over Ramsey Creek diversion channel at the point in question, the proof offered shows that the location and course of this channel, its width throughout such course, its minimum depth and its right of way, were all set forth in the filed plan of reclamation in the most minute detail.

There were of course no instructions asked or given on either side, since the case is one sounding in equity. The general finding of the learned court nisi was in favor of defendants, refusing to plaintiff the relief prayed for, thus holding in effect that it is the duty of plaintiff county to construct the required bridge, together with the approaches thereto at its own proper expense, and that the several constitutional questions attempted to be raised by plaintiff are of no legal avail upon that point.

John McWilliams, of Benton, and Ralph E. Bailey, of Sikeston, for appellant. Oliver & Oliver, of Cape Girardeau, for respondents.

FARIS, J. (after stating the facts as above). [1] I. Some slight question seems to be raised by counsel for defendant in the learned brief filed with us upon the point whether injunction is the proper remedy to prevent defendant from cutting and destroying, for the time being, a public highway. The question thus insinuated seems to turn, in the view of learned counsel for defendant, more upon the nature of the prayer of plaintiff's petition herein than upon any other-wise meritorious basis. The point thus made by counsel for defendant loses sight, we think, of the fact that the court nisi, sitting as a chancellor, was not bound by the terms of plaintiff's prayer for relief, if its pleadings and proof showed it entitled to general relief, or other and different relief, a fortiori, since plaintiff prays generally "for such other and further relief as to the court shall seem just and proper." *Cox v. Esteb*, 68 Mo. 110; *Schneider v. Patton*, 175 Mo. 684, 75 S. W. 155.

Granting therefore for the sake of argument that a court of equity may not be able to afford by its decree the precise relief prayed for by plaintiff herein, yet if its petition and the proof adduced show it to be entitled to any relief in equity, it became the duty of the court nisi under the condition of the pleadings here to grant that relief. It would seem that under the facts and circumstances here if we should hold that it is the duty of defendant district to construct at its own proper expense the bridge and approaches necessitated by this cutting through a public highway in plaintiff county, then defendant

ought to be enjoined from doing this until such time at least as it shall perform the duty of constructing the bridge and approaches aforesaid, even though, as is probable, practical engineering difficulties render the expressed sequence of the doing of these acts economically impracticable. But this point is not so raised as to merit our serious discussion of it; therefore we do not squarely pass on it. First, for the reason forecast, that it is not so raised by defendant as to make it necessary for us to decide it, and second, because from the view we take of the case it should ride off upon another theory.

[2, 3] II. Certain constitutional questions are raised in the petition, but since these are neither assigned as error nor specifically referred to in the brief, we are warranted in assuming that these questions are waived or abandoned. Besides, these constitutional questions were all raised, discussed, and decided in the case of *State ex rel. v. Chariton Drainage District*, 252 Mo. 345, 158 S. W. 633, wherein the curious may read them. We would in fact be warranted under our rules in treating as waived some other of the points urged in the petition, since there are no specific assignments of error, or any particularization in the brief setting forth upon what point or points the trial court failed to follow the law. But as counsel for respondent have not raised and do not urge this question, and since important matters are involved in the case affecting, we are told, numerous counties in the state, we will on account of the interest of the public solely, consider three of them *ex gratia*.

These questions unaffected by the constitutional questions raised *nisi* will be decisive of the case, and they are, to wit: (a) Has the Legislature granted by a public statute the right of way to drainage districts for their ditches and drains through the public highways of the state? (b) If so had the Legislature power so to grant a right of way over, on, along, and across all the public highways of the state for the ditches and drains of the several drainage districts organized under the provisions of the "Circuit Court Drainage Act?" And (c) if it has this power and a public highway be cut for the passage of a ditch, upon which municipal body does the cost of bridging such cut fall?

The language used in the act of 1905 (now sections 5496 to 5541, both inclusive, of our Revised Statutes), pertinent to this point, reads thus:

"The said board of supervisors shall have power and authority to construct any of said work and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut, in or out of said district, and shall have the right and power to hold, control and acquire, by donation or purchase, and, if need be, condemn any real estate, easement, railroad right of way, sluiceway, reservoir, holding basin or franchise in or out of said district for right of way for either the main channel of said proposed ditch of said district or for a

sluiceway, reservoir, holding basin or for any of said works or improvements, or for materials used, or to be used, in constructing and maintaining said works and improvements for the drainage, reclamation, and protection of lands in said district." Section 5513, R. S. 1909.

Similar provisions, or provisions to the same end, persuasive, but not pertinent for defendant's lack of electing to proceed under them, are found in the amended act, of which apposite parts thereof read thus:

"All drainage districts shall have full authority to construct and maintain any ditch or lateral provided in its 'plan for reclamation,' across any of the public highways of this state, without proceedings for the condemnation of the same, or being liable for damages therefor." Laws 1913, § 30, p. 251.

But learned counsel, so far as we are able to understand their attitude in this behalf, concede that the Legislature has, by the part quoted of section 5513, *supra*, granted this power to the drainage districts of the state; they strenuously moot the point, however, whether such donation lies within the province and power of the Legislature. Since the first point is not denied by counsel, we will not examine it at all, but will start from counsel's concession as a premise.

[4] III. Coming then to the second question mooted, that of the power of the Legislature to grant to drainage districts the use of the public highways, we think there can exist no serious doubt that the Legislature has such power. Any other view must of necessity be bottomed upon a misconception of the legal attitude which the several counties and the county courts thereof sustain toward the public highways of the state, as also, in a measure, of the nature of the counties themselves, which are but political and legal subdivisions of the state itself. Section 12, art. 6, Const.; section 1, art. 9, Const.; *Gracey v. St. Louis*, 213 Mo. loc. cit. 387, 111 S. W. 1159.

[5-7] In opening, vacating, improving, repairing, and dealing with the public highways, the several counties and the county courts thereof are but agencies, or agents of the state, acting from the very necessities of the case by delegated authority. Such title as the several counties may have to the fee, or to the easements in the public highways which traverse them, or which are situate in them, is in a way held in trust for the whole people; that is for the state itself; or, more strictly speaking, they hold it in their character as parts of the state itself, of which the several counties are legal subdivisions, and the fact that for convenience of control in mere matters of administration, the state has delegated certain powers over its highways to the counties as subdivisions of itself, and to the latter's agents, the county courts, does not prevent the state from assuming control of its public highways whenever and in whatever manner it shall see fit. Concededly, the state may not through its Legislature either trench upon private rights, or devote its public highways to a wholly incompatible use,

or to a use which is not a public one. If it should superimpose an additional public servitude upon the easement, manifestly the private owner of the soil on which the original public highway easement is imposed would be aggrieved, but the latter question does not vex us here for reasons which are obvious.

[8] So much being premised, we come to the question whether the use of a crossing over the easement in a public highway for a drainage canal is both a public use and a use not incompatible with the use thereof as a public highway. The fact that drainage districts are public corporations and that their canals and ditches are devoted to, and therefore are public uses, is too clear for discussion and has long been settled. *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *Carder v. Fabius River Drainage Dist.*, 262 Mo. loc. cit. 556, 172 S. W. 13. Manifestly, the question of incompatibility of use, *vel non* must be approached from a point of view having due regard to the rule *ex necessitate rei*. For no practical system of drainage ditches could be devised which would not in its course repeatedly be forced to cross public highways.

In Nebraska, under a drainage statute reading thus, "Said district may dig ditches and drains under and across railroads and public highways," it was held in the case of *Douglas County v. Papillion Drainage District*, 92 Neb. 771, 139 N. W. loc. cit. 718, that:

"The public roads are not 'the property of any' person.' They are public easements under the full control of the Legislature, which may authorize them to be used by other public or quasi public agencies with or without such restrictions, as it may deem proper." *Elliott, Roads and Streets* (3d Ed.) § 509(421).

Continuing, the above case quotes with approval a prior holding of the Supreme Court of Nebraska apposite to the questions here confronting us, thus:

"The right in this litigation is one belonging exclusively to the public at large. Neither Douglas county nor its citizens have any peculiar interest in it. A county does not hold the legal title to county roads within its borders; it has no power of disposition over them; it has no proprietary interest in them; in performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public." *Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212; *Krueger v. Jenkins*, 59 Neb. 641, 81 N. W. 844.

Without pursuing the matter further, it is clear that the Legislature had plenary power to grant to the drainage districts of the state the right of way for all drainage ditches, canals, levees, and dikes over and across the public highways of this state, without requiring, as a condition precedent, the obtaining consent thereto of the several counties of the state wherein the highway lies, or of the county courts of such counties. This for the simple reason, if for no other, that the principal ordinarily does not have to consult his agent as to the manner in which the principal deals with his own property, in

which capacity of agent for the state itself, as we have seen, the several counties through their county courts, deal with the public highways of the state.

[9] IV. Which brings us to a consideration of the question whether it is the duty of the drainage district or that of Scott county to pay for the construction of a bridge over Ramsey creek at the point where the diversion canal cuts the public highway.

We cannot make it too plain that we are not here considering the act of 1913 (Laws 1913, p. 232 et seq.), or the effect of that act upon the reciprocal duties of counties and drainage districts touching the construction of bridges over drainage ditches and canals. The respondent drainage district was organized in November, 1907, under the act of 1905 (Laws 1905, p. 190 et seq.), and it has not, so far as the record before us shows, elected to proceed under the act of 1913. But as was specially provided for by section 62 of the act of 1913, it continues to operate and proceed under the original act (now sections 5496 to 5541, R. S. 1909, and the applicable amendments to said sections, made in 1911 (Laws 1911, § 2, p. 221), though said sections were, as to any new districts desiring to be formed, absolutely repealed. This is so far the reason that section 52 of the act of 1913 (Laws 1913, § 52, p. 263) provides for the reorganization of all drainage districts if they shall so elect, except such as were organized under article 1 of chapter 41 of the Revised Statutes of 1909. Since the respondent district was organized, as the record shows, in 1907, it could only come under the provisions of the act of 1913 (sections 52, 53, 54, 55, 56, and 57, Laws 1913), by electing so to do as therein provided, which it has not done.

The question whether it is the duty of the county or of the drainage district to pay the cost of the bridge here in controversy was decided by us in the case of *State ex rel. v. Charlton Drainage District*, 252 Mo. 845, 158 S. W. 633, construing section 5502, R. S. 1909 (formerly section 8253c, Laws 1905, p. 194). We have again gone carefully over this question, since learned counsel for appellant most strenuously insist that we were wrong in the case of *State ex rel. v. Charlton Drainage District*, supra, and urge that we re-examine it and overrule it. We have, however, upon a most careful examination, been confirmed in our former opinion. Concededly, however, the matter presents some difficulties, and (as the instant case makes manifest) seems sometimes to produce a situation of harsh injustice and hardship. But if this be true the Legislature controls the remedy. It lies in its power to so change the law as to put the burden upon the several drainage districts and to effectually remove it from the several counties. As so clearly pointed out in the *Charlton Drainage District Case*, supra (which construed the iden-

tical statutes here vexing us), it has not done so by the statutes now before us in this case. For trespassing again briefly upon time and space to suggest a bit of additional argument, we observe that the proviso contained in section 5513, the applicable section of the law here under construction, reads thus:

"Provided, however, that if such bridge shall belong to any corporation, or be needed over a public highway or right of way of any corporation, the secretary of said board of supervisors shall give such corporation notice by delivering to its agent or officer, in any county wherein said drainage district is situated, the order of the board of supervisors of said district declaring the necessity for the construction or enlargement of said bridge. A failure to construct or enlarge such bridge within the time specified in such order shall be taken as a refusal to do said work by said corporation, and thereupon the said board of supervisors shall proceed to let the work of constructing or enlarging the same at the expense of the corporation for the cost thereof, which costs shall be collected by said board of supervisors from said corporation by suit therefor, if necessary. But before said board of supervisors shall let such work, it shall give some agent or officer of said corporation, now authorized by the laws of the state of Missouri to accept service of summons for said corporation, at least twenty days' actual notice of the time and place of letting such work."

It will be noted that the Legislature used in this proviso the term "over a public highway," in designating the classes of bridges of the need of building which notice must be given by the district to the corporation. While railroads are in our Constitution mentioned as "public highways," and are therein declared to be such, nevertheless this term is not applied ordinarily by the statute to the track, or right of way of a common carrier. On the other hand, the term "public highway" is the usual and ordinary term used in this state and in our statutes to designate a dirt, macadamized, graveled, or improved public road on which pedestrians walk and over which ordinary wheeled vehicles are drawn and which is free to be used by all of the public without fee, and it has become by such universal use almost a technical term for such latter sort of roads. This term, as used in the Constitution with reference to railroads, conveys the thought that railroads as a whole and not their tracks and rights of way merely shall be so far "public highways" as that the right of eminent domain may be exercised by them, and that the public shall not be denied the right to use them as common carriers for hire. Not only is all this true, but this proviso, by the use therein of the expression "over a * * * right of way of any corporation," seems to have thus specifically designated bridges in railroads and toll roads, thus confirming the view that the words "public highways," as used in such proviso, can by no possibility have reference to anything except the ordinary public roads in a county.

Moreover, other parts of section 5513 provide that the drainage district shall have

power "to construct roadways over levees and embankments." It is to be noted that while this section (5513) gives drainage districts power to "construct or enlarge" bridges over public highways, this power is yet modified by the proviso that such district may construct bridges "or cause them to be constructed," so that when construed with the language used in the subsequent proviso, it is seen to be in no wise inconsistent with the latter, but on the contrary explanatory thereof. For, by the language of the proviso, the districts are empowered to cause bridges to be constructed, and on a contingency only, therein set out, to construct bridges at the expense of other corporations to which it has given a required notice. Since it would have been a simple matter to have expressly provided (if such was the legislative intent) for the construction of bridges by the district, in the same clause wherein the duty of constructing roadways over levees and embankments is specifically laid upon them, and since the whole scheme of bridge building is by divers statutes and the whole scheme of our law relegated to the several counties, and since if these several statutes are to be held to be repealed, such repeal is here had by the most shadowy and doubtful implications, we are again forced to conclude that if the intent of the Legislature had been to change the entire scheme of bridge building in this state whenever a drainage district is involved, it would have so written the law in plain and unmistakable language, instead of in terms the vaguest and most indefinite. Besides it is a very persuasive fact that there is not given anywhere in article 1 of chapter 41, or in the amendments thereto of 1911 (Laws 1911, p. 205 et seq.), any power to a drainage district to levy taxes for the construction or maintenance of bridges, or to expend the revenues of a drainage district for any such purpose (Of section 5519, R. S. 1909; Laws of Mo. 1911, § 5519, p. 213). Nor is there any provision for estimating the cost to the district of any such bridge (section 5516, R. S. 1909), although in the section last, supra, the cost of improvements is specifically required to be estimated by the commissioners as a basis, among other things, for the levying of the tax, and in order that the circuit court may be able to ascertain whether the whole cost of the work will exceed the benefits therefrom (*Carder v. Fabius River Drainage Dist.*, 262 Mo. loc. cit. 556, 172 S. W. 13). For these additional reasons there seems, when measured by our statutes, to be no difference between the rules governing whether the bridge and approaches made necessary by the construction of a drainage waterway are over a natural water course, or span a cut in a public highway where before there was no bridge and where but for the artificial waterway none would have been necessary.

While it is regrettable that a studied effort seems to have been made to render this

drainage statute vague and ambiguous upon the point of where the burden of bridge building lies, and while the view we have heretofore taken and are now again forced to take is fraught with hardships in this and in other single instances, we can only repeat that the remedy lies with the Legislature and not with us. We construe the law; we do not make it. Upon a careful re-examination of the question we are unable to find any tenable or satisfying reason to change the views held by us in the case of *State ex rel. v. Charlton Drainage District*, supra.

It results that the judgment of the court nisi should be affirmed. Let this be done. All concur, except REVELLE, J., who dissents.

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STATE ex rel. BARKER, Atty. Gen., v. MERCHANTS' EXCH. OF ST. LOUIS.
(No. 18956.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

1. QUO WARRANTO §52—FACTS IN RETURN TO INFORMATION.

In quo warranto proceedings, the facts in the return, where facts are in dispute as between the petition and the return, must, on general demurrer and motion for judgment on the pleadings, be taken as the facts in the case.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 57; Dec. Dig. §52.]

2. CONSTITUTIONAL LAW §48, 70(3)—STATUTES §4—CONSTRUCTION—PROVINCE OF COURTS AND LEGISLATURE.

There is a legal presumption of the validity of a statute; if there is doubt as to its constitutionality the doubt shall be resolved in favor of its validity; the expediency or inexpediency of the statute is not for the courts; and the Legislature's power to enact laws has no limitation except the express limitations of the state and federal Constitutions.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 46, 131; Dec. Dig. §48, 70(3); *Statutes*, Cent. Dig. §§ 8, 56; Dec. Dig. §4.]

3. MUNICIPAL CORPORATIONS §57—CHARTER POWERS—ORIGIN.

The charter powers of a municipality have their origin in the police powers of the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. §57.]

4. WEIGHTS AND MEASURES §2—WEIGHING AND GRADING GRAIN—STATUTES.

Laws 1913, p. 354, relative to the inspection of hay and grain, including the provisions relative to the weighing and grading of grain by state inspectors, and section 63 (page 372), prohibiting the issuance of weight certificates except by a bonded state weigher, etc., are valid as a proper exercise of the police powers of the state.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 2; Dec. Dig. §2.]

5. WEIGHTS AND MEASURES §8—WEIGHING GRAIN—STATUTES.

Laws 1913, p. 354, relative to the inspection of hay and grain, does not permit the weighing and certifying of weights of grain both by the

state's bonded weigher and a private warehouseman.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. §8.]

6. COMMERCE §50—INTERSTATE COMMERCE—WEIGHING GRAIN—STATUTES.

Laws 1913, p. 354, relative to weighing and grading of grain by state inspectors and the issuing of certificates therefor, does not interfere in a material sense with interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 48-53; Dec. Dig. §50.]

Quo warranto by the State, on the relation of John T. Barker, Attorney General, against the Merchants' Exchange of St. Louis. Judgment of ouster entered to the extent indicated.

John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen., for relator. Frank Hagerman, of Kansas City, for Kansas City Board of Trade. Percy Werner, of St. Louis, for respondent.

GRAVES, J. This is an original proceeding in quo warranto, at the instance of the Attorney General. The information, after formal allegations as to the incorporation of respondent, and as to certain laws of this state with reference to public inspectors and weighers of grain at all public elevators in cities having 75,000 inhabitants, charges:

"Relator further informs the court that said respondent, the Merchants' Exchange of St. Louis, has been for a great many years and is now guilty of improper uses and has unlawfully, illegally, and willfully misused and abused its corporate franchise, rights, and privileges under its charter in this, to wit: In that it is now unlawfully, wrongfully, and willfully maintaining a department, known as its weighing bureau, by and through which it is now unlawfully and wrongfully in violation of the statutes of this state weighing grain received into or discharged from public warehouses and elevators in the city of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor. That said acts of said respondent, Merchants' Exchange, are usurpations of powers, rights, and privileges not conferred upon it by its corporate charter and in excess thereof, and are in violation of the criminal statutes of this state, all to the great and permanent injury of the citizens of Missouri.

"Wherefore relator, prosecuting in this behalf for the state of Missouri, asks that this respondent be adjudged guilty of usurping privileges and authorities not granted by the state of Missouri in weighing the grain of the citizens of Missouri and charging therefor, and issuing weight certificates thereon, as aforesaid, and that such acts on the part of respondents be declared illegal and void, and said respondent be forbidden to weigh such grain as aforesaid and charge therefor, and from issuing weight certificates thereon, and that said respondent be fined in such sum as the court thinks will punish it and cause others to refrain from doing similar acts, and for all other and further orders and relief which to the court seem meet, just and proper."

[1] The return is exceedingly verbose and such portions thereof as may be required can best be noted in the opinion, in connection

tion with points raised. This return runs the gamut from a general demurrer to the invocation of the Fourteenth Amendment of the federal Constitution. Relator challenges the sufficiency of the return and moves for judgment on the pleadings. The facts, in the return, where facts may be in dispute as between the petition and return, must be taken as the facts in the case. This sufficiently outlines the case.

I. This case requires (1) a construction of our statutes, and (2) a determination of their validity. There are two vital questions met at the very threshold of the case. Section 63 of the act of 1913 reads:

"It shall be unlawful for any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars, nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment." Laws 1913, p. 372.

By the return it is admitted that the respondent has a weighing department, and that such department weighs the grain coming into public elevators and warehouses in the city of St. Louis, and further that it issues certificates of weight to the parties entitled thereto, and makes charges therefor.

With the plain letter of the law before us, and the admissions of respondent before us, it would be idle work to go into a detailed discussion of the question as to whether or not respondent is or is not violating this state statute. Its admissions of record show that it is not only violating the spirit, but also the letter, of the statute. Its reasons for such violation are immaterial, if the statute is a valid enactment. Much of the very lengthy return is taken up with statements of reasons for the admitted violation of the law, but if the law is a valid one, the imagined necessity of its violation in the alleged interest of the grain trade at St. Louis is wholly immaterial, and beyond the real issues.

Many laws seemingly work hardships upon persons and their business, but this is no excuse for the violation of the law. Not is this seeming hardship an excuse for a corporation to do things, under a charter granted by the state, which things the state has forbidden by law.

The crux of this case lies in the validity or invalidity of our inspection laws. It does

not lie in extraneous facts which might tend to show that the business of buying and selling grain in St. Louis would be benefited by a weighing and inspection thereof by respondent, rather than one by the state. To this vital question we proceed next.

[2] II. We shall not discuss the fundamentals in statutory construction, when validity of a statute is at stake. It goes without the saying that there is a legal presumption of validity; that if there is doubt as to the constitutionality of the law the doubt shall be resolved in favor of the validity of the legislative act; that the expediency or inexpediency of the act is not for the courts; that in Missouri the power of the Legislature to enact laws has no limitation, except the express limitations in the state and federal Constitutions; that the legislative power under the police powers of the state are very broad.

Of all the members of this court the writer has been most loth to extend the police powers of the state. Vide concurring opinion in *State v. Railroad*, 242 Mo. loc. cit. 376, 147 S. W. 118, and dissenting opinion in *State ex rel. v. Vandiver*, 222 Mo. loc. cit. 255, 121 S. W. 45. Yet in all that I may have written, the doctrine that private rights may be made subservient to the public welfare is thoroughly recognized. The respondent urges that its private rights are invaded by these statutes, and, if so, then the laws are invalid, unless they fall within the practically undefined field of police powers of the state. I say undefined because the field of the public peace, health, safety, and welfare is a very broad one, and there are many angles from which to view the field. Laws of the character of the ones here involved where sustained, have been sustained upon the theory of police regulations. In other words, because they were a proper exercise of the police power of the state. We shall not attempt to defend these laws otherwise.

To determine whether or not these grain inspection laws, including the weight and certificate provisions thereof, are a proper exercise of the police powers, we should have the provisions thereof clearly in mind, and then say whether or not such provisions tend toward the general welfare.

The act defines a public warehouseman and elevatorman, and public warehouses and elevators, and establishes the office of warehouse commissioner. It further provides for the grading and weighing of all grain into the public warehouses or elevators, and for the keeping of such grain in the grades so established. Expert grain inspectors are to be employed to grade the grain, and weighmen employed to weigh the grain into the warehouses and elevators. If controversy arises either as to weights or grades a disinterested committee settles the same.

These officers are bonded for the faithful performance of duty. Warehouse receipts

can only be given for grain actually weighed into the warehouse according to the grading and weighing of these public officers, and such receipts must be registered in the department of the warehouse commissioners. These receipts must be numbered consecutively, and no two receipts from one warehouse shall be of the same number during the space of any one year. When grain is delivered upon a receipt, the receipt must be given over to the proper officer of the state for cancellation. The issuance of receipts without the grain is made a crime. In fact the act undertakes to so hedge in the handling of grain in these public warehouses and elevators, as to prevent all kinds of frauds. It so hedges the warehouse receipts that frauds upon banks and other persons loaning money are protected. The whole purport of the act is for such official supervision in the principal grain markets as will protect not only the buyers, but the sellers, of grain. In other words it establishes a disinterested agency between the buyer and seller both as to weights and grades of the grain. If a wheat grower of Missouri ships a car of wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators), but he has the protection of the disinterested agency established by the state, an agency duly bonded for faithful performance of duty. If a Missouri miller desires to purchase a car of grain he has the same protection. If, after grain is stored in an elevator, a Missouri banker desires to loan money upon the property, he has the assurance that it has been fairly graded and weighed, and the further assurance that not only is the grain there, and of the quality stated, but that only one elevator receipt is out for that particular grain. To say that these laws do not tend to the public welfare would be a travesty upon the law. Thirty-five states of the Union have laws similar to these laws, although they may affect different commodities. Many of them are gray from age. Such laws are usually directed to the chief commodities of the different states. In one it may be coal, whilst in others it is cotton, lumber, tobacco, or some leading product. Section 6868, R. S. 1909, reads:

"If any person other than the inspector shall inspect any hogshead of tobacco within the city of St. Louis, or if any person occupying any store or warehouse within the city of St. Louis shall suffer or permit any person other than the inspector to inspect any hogshead of tobacco upon the premises occupied by him, such person inspecting the tobacco, and such person or persons suffering and permitting such illegal inspection, shall each be fined in the sum of one hundred dollars for every hogshead of tobacco so inspected to the use of the state, to be recovered by indictment."

This statute, which is a part of the tobacco inspection laws of this state, has remained upon our books from 1845 to now. For over 70 years it, like a great oak of the forest, has stood unchallenged and unharmed. Sim-

ilar statutes in other states date back to colonial times. The purpose of all is the general welfare.

Nor are we scant in authority upholding such police regulations. In *Coal Co. v. City of St. Louis*, 130 Mo. loc. cit. 327, 32 S. W. 650, 51 Am. St. Rep. 566, we had this ordinance under review:

"No person shall buy or sell any hay or stone coal in this city until the same has been weighed by one of the legally authorized weighers, and a certificate of the weight thereof given, as required in the provisions of this article; and any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than \$10.00 for each offense."

[3] The ordinance was upheld by this court in an able opinion by Brace, P. J. The ordinance it was held was within the charter powers, but it must be noted that such charter powers have their origin in the police powers of the state. In this case Brace, P. J., said:

"By the charter of the city of St. Louis, the mayor and assembly have power by ordinance 'to license, tax, and regulate retailers,' 'to regulate and establish the standard of weights and measures to be used in the city of St. Louis, and to provide for the inspection of the same,' 'and for the inspection and weighing or measuring hay or stone coal, charcoal, firewood, and all other kinds of fuel to be used in the city of St. Louis.' Scheme and Charter, art. 8, § 26, pp. 2097 and 2098, 2 R. S. 1889.

"The plaintiffs as retailers of coal by the wagonload in said city are amenable to all ordinances of the city within the scope of the powers thus granted. The purpose of the ordinance is plain. It is to protect the citizen from being imposed upon by false weights and measures. To accomplish this purpose, while dealers in coal may weigh the coal which they sell on their own scales, they are not permitted to sell a wagonload of coal that has not been weighed by a weigher approved by the mayor and authorized by law to weigh the same. That it may be weighed by such a weigher and no other, and the citizen have the assurance of the fact, weighers' certificates of that fact are 'furnished' to such dealers for such weighers, and such weighers are required to 'furnish' one of such certificates for each load weighed by him. Surely nothing can be found in the purpose of this municipal law, nor in the means by which it is sought to be accomplished, that is without the express power granted by the charter to the city to regulate the weighing of coal in the city, and the fact that a few cents are charged by the city for furnishing each of the certificates surely cannot be beyond the power expressly given to tax and regulate 'retailers' of that commodity. Whether the mayor and assembly have selected the best means, by these ordinances, to accomplish the purpose, is a matter with which we have nothing to do. The power exercised being within powers granted by the charter, the plaintiffs have no cause of action. The demurrer was properly sustained, and the judgment is affirmed."

In *City of St. Charles v. Elsner*, 155 Mo. 671, 56 S. W. 291, we had up a very similar ordinance. It covers, however, coal, hay, and corn, and it required both the weighing of such commodities, and an official certificate of weights. This ordinance we upheld. In *Ex parte House v. Mayes*, 227

Mo. loc. cit. 636, 127 S. W. 308, Gantt, J., said:

"That the inspection and regulation of weights and measures are within the police power of the states, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto, and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulation and not repugnant to the Constitution of the United States or of this state can no longer be doubted. *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590 [15 Sup. Ct. 459, 39 L. Ed. 544]; 30 Am. & Eng. Ency. Law (2d Ed.) 451, and cases therein cited. Legislation along these lines is found in almost every country, the underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective and uncertain weights and measures and fraudulent practices connected therewith."

[4] I thought the statute involved in the House Case entrenched upon private contracts, and dissented with all the vigor I possessed, but only succeeded in getting two of my Brothers to see the light as I saw it. The case went to the United States Supreme Court (219 U. S. 270, 31 Sup. Ct. 234, 55 L. Ed. 213), and if I recollect aright my dissent had less effect there. Authorities from other jurisdictions are along the same lines. The purpose of state weighers is to get fair weights for all parties concerned. The purpose of certificates of weights being filed with the warehouse commissioners' department is clearly apparent from the outline of the law which we have given. Such requirement protects the public from more than one angle. We have no doubt that under our rulings, to some of which we have not agreed, these statutes are valid.

III. We are cited to language used by Valiant, J., in *State ex inf. v. Goffee et al.*, 192 Mo. loc. cit. 679, 680, 91 S. W. 486. The language there used must be interpreted in accord with the facts of the case, and the law there under consideration. On page 679 of 192 Mo., page 487 of 91 S. W., that distinguished jurist did say:

"If all that the Attorney General claims as the official rights of the state weighmasters be conceded, it is still doubtful if quo warranto is the proper remedy. The members of the Board of Trade have a right on their own account to employ men to weigh their grain for them and to accept their certificates of weight, even if it is the duty of the state weighmasters also to weigh the same grain and to give certificates of the weights. And if the law gives to the certificates of the state weighmaster a legal effect as evidence, still if the person buying or selling the grain should prefer to have it weighed by some other person and to base his business transaction in reference to it on the unofficial rather than the official certificates, he would have a right to do so. Such a course would not prevent the state weighmaster from performing his official duty or deprive him of his fees."

But it must be recollected that the statutes there under discussion had no such provisions as we have in section 63 of the act of 1913, supra. He did, however, in the concluding portion of his opinion (192 Mo. App. 688, 689, 91 S. W. 490) get to the meat of the instant case. He there said:

"The amendatory act of March 9, 1893, which we are now considering does not purport to alter or amend any section of the law as it theretofore existed in reference to state grain inspection, it only adds other sections providing for weighing the grain that by the law theretofore existing was subject to inspection. It may be that the General Assembly, if it had then understood that grain inspection was by the law, as it then was, limited to public warehouse grain, would have so amended that law as to include other grain, but that is mere conjecture; we only know that, whether from misapprehension or disinclination, the General Assembly did not so amend this law, and we must take the law as we find it. *We have no doubt of the constitutional authority of the General Assembly in the exercise of the state's police power to throw around persons who ship their grain to market in this state the protection that official inspection and official weighing can give.* Without such protection the shipper is at the mercy of those who handle his grain in the great markets, and in the ordinary course of business he has no means, or at least no convenient or adequate means, of verifying the classification and weight of his grain. It is no infringement of the shipper's constitutional rights to tax his grain with reasonable charge for his official service, because whether a particular individual desires to avail himself of the service or not, such service is a wholesome control over the conduct of the business, and the state has the right to interfere for the protection of the public. And besides, there is nothing that could make the markets of this state more attractive to shippers than a reputation for intelligent and honest inspection and weighing. But *whether the police power of the state should be exercised or not in such matters, and if exercised to what extent, are questions in the first instance for the General Assembly and not for the courts. In the law governing the case before us the General Assembly has gone no farther in the exercise of this police power than to provide for state inspection and state weighing of grain going into or out of public warehouses. We rest our judgment therefore in favor of the respondents; not on the ground that the General Assembly could not, under the Constitution, pass a law requiring inspection and weighing of grain in the great markets of this state other than such as goes into or out of a public warehouse, but on the ground that the General Assembly has not done so.*" (The italics are ours.)

The law then under consideration did not specifically prohibit the giving of a weight certificate by persons other than state officials, as does the law now. The opinion therefore as to the rights of boards of trade under the then laws has but little weight in determining the questions in this case. Nor is there anything in that opinion which thwarts a holding to the effect that the present inspection laws are valid. On the contrary the concluding portion of such opinion, quoted, supra, would indicate that such exercise of the police power would be valid.

We are also cited to *Merchants' Exchange v. Knott*, 212 Mo. loc. cit. 635, 111 S. W. 565. A reading of that case, and of the case of *People v. Harper*, 91 Ill. loc. cit. 367, cited and quoted from therein, will show that the questions involved and discussed are wholly foreign to the ones here involved.

The questions here are, Should the respondent be precluded from issuing weight certificates, or any paper or ticket purporting to be the weight of any car, wagon, sack, or

other packages of grain, received at the public warehouses and elevators in St. Louis, where our inspection laws apply? Or shall respondent be permitted to make any charges for weighing or issuing weight certificates or tickets? These are the things forbidden by section 63 of the act of 1913 (Laws 1913, p. 372), and are the things the state seeks to prevent the respondent from doing. And these are the things which respondent admits it has been doing. This statute forbidding persons, other than the bonded officers of this state, from doing these things had in view the general welfare under repeated rulings of this court. Such statutes were intended for the protection of producers, shippers, and receivers of grain and hay, as well as other parties interested therein as owners, pledgors, or pledgees. We are unable to say that the statute is an improper exercise of the police powers of the state. If so the respondent should be prevented from issuing any weight certificates or any paper or ticket purporting to be the weight of any car, wagon, sack, or other packages of grain weighed at any public warehouse or elevator in the city of St. Louis, and from charging for any weighing or weight receipt for any grain at such public warehouse or public elevator, where state weighers are stationed under the laws of this state.

[5] IV. It is suggested by able counsel that the act should be so construed as to permit the weighing and certifying of weights both by the state and the respondent. The statute will not bear such a construction. It was clearly the legislative intent to make the state the weighmaster, and to exclude others from giving weight tickets or certificates. The very purpose of the law would be thwarted in the construction sought. Of course the law in no way prohibits owners of grain from weighing their grain before it is sent to or put in a public warehouse, to the end that they may know what they have, nor does it prohibit such owners from weighing it after it is withdrawn. So that the argument that no opportunity is afforded to have evidence to refute the *prima facie* showing of the state's certificate of weight is without foundation. By this we do not mean that such owners may force such previous or sub-

sequent weighing upon scales provided for by the law for the use of the state authorities. The state authorities are entitled to proceed with their work without hindrance, or interference in any respect.

[6] V. Nor do we think these laws interfere in a material sense with interstate commerce. The police powers of the state have full recognition by the federal government, and unless the laws passed in pursuance of such powers unduly interfere with the commerce clause of the federal Constitution they have been upheld of the United States Supreme Court. *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Munn v. Illinois*, 94 U. S. loc. cit. 135, 24 L. Ed. 77; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370. These laws do not purport to regulate interstate commerce. They are made applicable solely to citizens of the state, and property in the state. In the *Sherlock Case*, supra, the United States Supreme Court well said:

"And it may be said, generally, that legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

What has been said by the courts with reference to elevation of grain in transit being a part of the transportation, and therefore the rates charged, under the control of the Interstate Commerce Commission, are foreign to the questions involved here. This contention is therefore ruled against the respondent.

We are therefore forced to conclude that the respondent should be adjudged guilty of the charges of usurpation in the information contained—i. e. (1) weighing the grain of the citizens of Missouri and charging therefor, and (2) issuing certificates of weight for grain deposited in the public warehouses and public elevators in the city of St. Louis. These things the law forbids, and the respondent has no legal right to do. To this extent a judgment of ouster is entered. All concur, except WALKER, J., not sitting.

WAMPLER v. ATCHISON, T. & S. F. RY. CO. (No. 17921.)

(Supreme Court of Missouri. In Banc. Dec. 4, 1916. Motion for Rehearing Overruled Dec. 21, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 302(4)—**QUESTIONS PRESENTED—MOTION FOR NEW TRIAL—ERROB IN INSTRUCTIONS.**

A motion for new trial, stating as a ground thereof that the court erred in refusing to give the instructions requested by defendant and erred in giving those requested by plaintiff and others of the court's own motion, is sufficiently specific to raise those errors on appeal, even if Rev. St. 1909, § 1841, providing that all motions shall be accompanied by a written specification of the reasons on which they are founded, applies to motions for new trials.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1748; Dec. Dig. \Leftrightarrow 302(4).]

2. MASTER AND SERVANT \Leftrightarrow 286(30) — **INJURIES TO SERVANT—INSTRUCTIONS—EVIDENCE.**

Where a petition for injuries to a railroad employé alleged the negligence of the company to consist in suddenly starting its freight train forward with a violent and unusual jerk while plaintiff was dismounting therefrom, and plaintiff's own evidence showed that he was riding on a freight train, which he had been informed would not stop at his destination, but would only slow down, and that while he was on the steps ready to jump off the brakeman motioned him to do so, and then signaled the train to increase its speed, which it did with no more jerk or suddenness than was usual, it was proper to instruct the jury that plaintiff could not recover for negligence in suddenly starting its train with an unusual jerk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1016, 1020; Dec. Dig. \Leftrightarrow 286(30).]

3. MASTER AND SERVANT \Leftrightarrow 264(11) — **INJURIES TO SERVANT—ISSUES.**

Plaintiff having based his right to recover on that negligence, a demurrer to his evidence should have been sustained, and it was error to permit him to recover for the negligence of the brakeman in giving the signal to increase speed before plaintiff had alighted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 871; Dec. Dig. \Leftrightarrow 264(11).]

Walker, J., dissenting.

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

Action by Josiah B. Wampler against the Atchison, Topeka & Santa Fé Railway Company. Judgment for the plaintiff, and defendant appeals. Reversed.

Thos. B. Morrow, Cyrus Crane, Geo. J. Mersereau, and John H. Lathrop, all of Kansas City, for appellant. Guthrie, Gamble & Street and E. H. Gamble, all of Kansas City, for respondent. Prince & Harris, John M. Cleary, Langsdale & Howell, Atwood & Hill, Casey & Wright, John E. Westfall, Jas. H. Hunter, Glen Bruner, Strother & Campbell, Walsh, Aylward & Lee, Brewster, Kelly, Brewster & Buchholz, all of Kansas City, W. S. Jackson, of Warsaw, and A. C. Popham, Joseph S. Rust, John I. Williamson, Calvin & Rea, Yates & Goble, T. J. Mad-

den, Richard B. Kirwan, Milton J. Oldham, W. Haley Reed, Jesse E. James, Ira B. McLaughlin, Wm. G. Holt & J. B. Cubbison, Clyde Taylor, Charles A. Stratton, J. A. Harzfeld, Chas. M. Blackmar, A. F. Smith, Jacobs & Henderson, Park & Brown, Kyle & Coon, T. V. Conrad, Bird & Pope, George L. Davis, Buslek & Stinson, Clay C. Rogers, T. A. J. Mastin, John C. Nipp, James M. Rader, and John J. Hyde, all of Kansas City, amici curiæ.

GRAVES, J. This is an action for personal injuries wherein the damages are alleged to be \$25,000. The action is predicated on the relationship of master and servant, and not upon the relationship of passenger and carrier. It is also predicated upon certain Kansas statutes relating to masters and servants, which are specifically pleaded. It stands admitted in the record that defendant is an interstate carrier. After specifically pleading the Kansas statutes, and invoking them as the foundation for his right of recovery, the petition then proceeds, as follows:

"On May 2, 1912, in said town of Quenemo, while plaintiff, in defendant's service, was dismounting from one of defendant's trains, said train was suddenly started forward with a violent and unusual jerk, whereby plaintiff was thrown down and run over by said train, and his left leg destroyed, thereby causing plaintiff great suffering, loss of earnings and earning power, and putting plaintiff to an expense of not less than \$250 for surgical and medical attendance, nurse hire, and medicine in endeavoring to be cured of his injuries. Said injuries are permanent, and ever since their infliction upon plaintiff have caused him great suffering, which will continue so long as plaintiff lives. Said injuries were produced by defendant's negligence. Said negligence of defendant was in that defendant, through its agents and servants in charge of said train, carelessly and negligently caused the same to start forward with a sudden jerk, whereby the results aforesaid were produced, and in the further fact that defendant, after it could, by ordinary care, have known, and did know, of plaintiff's danger, still could and should have avoided injuring plaintiff by refraining from doing the things which it is above alleged defendant did, and by stopping said train after it knew that plaintiff had been thrown down. By reason of the facts aforesaid plaintiff has been damaged in the sum of \$25,000. Wherefore plaintiff prays judgment against the defendant in the sum of \$25,000, with costs of suit."

The divisional opinion correctly outlines the further facts, thus:

"The plaintiff at the time of his injury was employed by defendant to post signs on gates opening on defendant's right of way. He was directed to post these signs along the right of defendant's road between the towns of Quenemo and Osage City in the state of Kansas. He went to the conductor of a through freight at Ottawa and asked permission to ride thereon with his tools and material to the town of Quenemo. Permission was given, but he was informed that the train would not stop at Quenemo; but at plaintiff's request the conductor said he would slow down there to enable plaintiff to get off. A bundle of signs and a number

of tools were placed on a flat car in the train, and plaintiff was told that he could ride thereon. He did so, and while en route engaged in conversation with a brakeman, who informed him that he thought the train would stop at Quenemo to take water. When the train neared that town, it slowed down, as the conductor had informed plaintiff would be done, and the latter threw the gate signs and a bundle of wire off the flat car, and gathered up his tools and dinner bucket and proceeded to climb down the stirrup of the car so as to alight when the train stopped at the water tank, if it did so. In one hand he held a dinner bucket, and in the other a brace, bit, and claw hammer. While he was in this position the brakeman hallooed at him several times to get off, and motioned to him with his hand to the same effect. He did not do so, and the brakeman signaled the engineer to increase the speed of the train. As a result, plaintiff, in attempting to alight, fell under the wheels, and one of his legs was so injured that amputation became necessary. The testimony, which is that of plaintiff alone, is definite that he was not attempting to jump off the train, but that he fell off of same. The defendant offered no evidence on the ground that the negligence charged in the petition was not established."

The case was submitted to the jury on the following instruction for plaintiff:

"If you find and believe from the evidence that on or about the 12th day of May, 1912, the plaintiff was an employe of the defendant, and, as such, was dismounting from one of defendant's trains, and that, while so dismounting, if he was, his position was known to another of defendant's employes controlling the movements of such train by signals, and that such other employe, so knowing, if he did, plaintiff's position, negligently by a signal caused said train to be started forward with a forward jerk, and that as a direct result of such forward jerk, if any, plaintiff was thrown down and under said train, and thereby injured, then your verdict should be for plaintiff. Ordinary care is that degree and kind of care ordinarily exercised by an ordinarily prudent person under the same or similar circumstances. Negligence is the failure to exercise ordinary care. (Given.)"

It will be observed that the instruction is predicated upon the relation of master and servant.

Going back to the pleadings, it should be stated that the answer was: (1) A general denial; (2) plea of contributory negligence; and (3) assumption of risk.

Defendant offered no evidence, but offered a demurrer to the evidence, and other instructions, after the overruling of the demurrer. For the defendant the court gave the following instructions numbered 2 and 6.

"The court instructs the jury that the plaintiff cannot recover in this case on the ground that defendant was guilty of negligence, in that the brakeman ordered or directed plaintiff to get off the moving train. (Given.)"

"The court instructs the jury that there is not sufficient evidence in this case to prove that defendant, after it knew, or by exercise of ordinary care could have known, that plaintiff had fallen to the ground, could have stopped the train and avoided injuring him. (Given.)"

The court refused to give for defendant the following instructions numbered 1, 3, 4, 5, 7, and 8.

Of its own motion, the court gave instructions C-1, C-2, and C-3, the first two of which read:

"The court instructed the jury that there is not sufficient evidence to warrant the jury in finding that the jerk, following the go-ahead signal, was an unusual jerk. (Given.)"

"C-2. The court instructs the jury that, if they find and believe from the evidence in this case that the plaintiff's conduct in being in the position in which he was at the time the injury in question occurred was negligence upon his part, as negligence is defined in other instructions herein, you must consider such negligence, if any, not as a bar to plaintiff's recovery, but you shall diminish the damages to which the plaintiff otherwise would be entitled, if any, in proportion to the amount of negligence, if any, attributable to the plaintiff. (Given.)"

Instruction C-3 was a formal one, telling the jury that nine of them might find a verdict, and giving them forms for a verdict. Exceptions were duly saved in the usual form as to the giving and refusing of instructions.

The jury returned a verdict for \$12,500, which by remittitur was reduced to \$10,000, and from a judgment for said \$10,000 the defendant has appealed.

The motion for new trial is voluminous, but grounds 4, 5, 7, 10, 11, 12, 13, and 14 thereof read:

"(4) Because the court erred in overruling defendant's demurrer to the evidence interposed at the close of plaintiff's evidence.

"(5) Because the court erred in refusing to give defendant's instruction interposed at the close of plaintiff's evidence directing the jury to return a verdict for the defendant. * * *

"(7) Because the court erred in refusing to peremptorily direct the jury to return a verdict in favor of the defendant at the close of all the evidence. * * *

"(10) Because the court erred in refusing to give each and all the instructions requested by the defendant, which it did refuse to give.

"(11) Because the court erred in giving each and every instruction which it did give at the request of plaintiff and on plaintiff's behalf. Said instructions and each of them were erroneous and defective.

"(12) Because the court erred in each and all of the instructions given by the court of its own motion.

"(13) Because the court erred in refusing to give proper and legal instructions requested by the defendant.

"(14) Because the court erred in modifying proper and legal instructions requested by defendant and giving said instructions in a modified form."

Points made and other applicable facts will be noted in the course of the opinion.

I. We are met with the contention, made by counsel for plaintiff, that the motion for new trial in the court nisi is not sufficiently specific to authorize this court to review the alleged errors in the giving and refusing of instructions. We have been flooded with briefs amicus curiae upon this question. One of these numerous briefs is signed by 36 individuals and firms. The line-up would appear to be that counsel representing appellants, in cases pending here or in other appellate courts, are urging the view taken by appellant here, whilst counsel representing appellees, in cases pending here and in other appellate courts, have come to the rescue of appellee in this case. Friends of the court

are therefore upon both sides of the question, and the court is required, not only to determine the question as between the appellant and appellee in the instant case, but also to reconcile (a thing impossible) the conflicting views of its own friends. The court is left in a sorry plight so far as its friends are concerned. If we count these friends by numbers and upon that decide the case, we would perhaps, from the briefs filed, have to decide the dispute in favor of the appellee in the case at bar. But where our friends are so conflicting in their views as to the duty of the court, the safer plan is to take up the question in issue between appellant and appellee in the instant case, and decide that matter upon the law as we see it, and let the matter go. To our many friends upon both sides we are deeply grateful for suggestions made, in the briefs, and we acknowledge that such have thrown much light upon the question. We only regret that our friends, in real friendly spirit, could not have gotten more nearly together. We did not anticipate that they would, however, when we realize that each set were viewing the question through different colored optics.

With the view that we have of this case we might pass upon the question urged, by suggesting that most certainly the question of the court's refusal of a demurrer to the testimony is sufficiently raised and preserved in the motion for new trial, but to settle the practice, we deem it best to go further. Not solely to settle the practice, but further because the question is in this case, the contention being that the demurrer to the evidence, being an instruction, falls under the same ban as other instructions. The question, therefore, is, Are these instructions (including the demurrer to the evidence) before us for review, under the motion for new trial nisi? We think they are.

In the course of the several briefs we have our attention called to these statutes: In article 5, c. 21, R. S. 1909 (which article relates to "Pleadings," we find section 1841, which reads:

"All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion."

In article 15, c. 21, R. S. 1909 (which article relates to "New Trials, Arrests of Judgment and Bills of Exceptions") we find section 2025, which reads:

"All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall so long continue; and if not, then before the end of the term."

In article 16, c. 21, R. S. 1909 (which article relates to "Appeals and Writs of Error") we find section 2081, which reads:

"No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court."

Chapter 21 is our general Code of Civil Procedure. Each article is devoted to a sep-

arate and distinct subject-matter. The subject-matter of article 5, in which article appears section 1841, supra, is "Pleadings." The whole article is devoted to this subject. In our judgment section 1841, supra, must be construed in the light of its surroundings. It is a part of the article on pleadings, and evidently refers to motions of all kinds which are of themselves in the nature of a pleading, or which attack a pleading. It has always been so located in our Civil Code. We do not think that the lawmakers ever had in mind motions for new trial in the enactment of this section, when its location in our Civil Code is considered. If a motion is made to strike out an answer or a part of an answer, such motion must specify the reasons therefor, and no reason not thus specified shall be considered by the court.

If a motion strikes at the petition, it must likewise be specific, in that it must assign the reason for the motion. There are other motions in the nature of pleadings, or striking at pleadings, which might be enumerated, but the above suffice to illustrate our view, and that view is that such section has no reference whatever to motions for new trial.

That the motions contemplated by section 1841 are of the character we claim, and not motions for new trial, is further sustained by the section which follows it, i. e., section 1842, which reads:

"Motions in a cause filed in term shall be filed at least one day before they may be argued or determined."

We have construed this latter section in *Eddie v. Eddie*, 138 Mo. loc. cit. 607, 39 S. W. 451, and held that a motion for the allowance of an attorney's fee in a partition suit did not fall within the purview of this section, which required it to lay over for one day. Section 1842 evidently relates to the same motions referred to in section 1841.

When the surroundings of section 1841 are considered, we are firmly of the opinion that it has no reference to motions for new trial. The subject-matter of article 15 of chapter 21 is new trials, and the only section in that article pertaining to motions for new trial is section 2025, supra, and this says nothing about the contents of such motions. The whole controversy is disposed of by the foregoing ruling; but, inasmuch as some of our opinions indicate that this section does cover motions for new trial, we will discuss it further in the next paragraph.

II. As indicated above there are cases in which it is held that our present statute, section 1841, has application to motions for new trial. *Polski v. City of St. Louis et al.*, 264 Mo. 458, 175 S. W. 197; *Carver et al. v. Thornhill*, 53 Mo. loc. cit. 286; *Sweet v. Maupin*, 65 Mo. loc. cit. 68. The latter two cases discuss section 48, art. 5, 2 Wag. Stat. p. 1021. Sections 48, 49, 2 Wag. Stats. are the same as sections 1841 and 1842, R. S. 1909, supra. Article 5, Wag. Stats., like ar-

title 5, c. 21, R. S. 1900, relates solely to "Pleadings and the Rules of Pleadings." Motions for new trials in Wag. Stats. are treated of in article 12, 2 Wag. Stats. §§ 1 to 6, inclusive, pp. 1058, 1059. In our judgment the court, in the two cases last cited above, overlooked the fact that the section they were discussing was under the subject of pleadings, and referred solely to motions which struck at pleadings or were in the nature of pleadings. In the *Polski* Case, *supra*, Judge Brown, without an analysis of the code provisions, simply reannounced what had been said in the two previous cases. They have all overlooked the fact that when the Civil Code took up the subject-matter of new trials and motions for new trials, not a word was said as to the form or substance of such motion. But this is sufficient on this line. Respondent in the case at bar relies upon this *Polski* Case, and the cases upon which that opinion is based. We purpose a discussion of our own cases, and not those of the Courts of Appeals. We further purpose a discussion of the Civil Code, and not the Criminal Code and the cases based upon the Criminal Code. This, because the Criminal Code has a section prescribing the contents of a motion for new trial. Section 5235, R. S. 1900. In our view of the law there is an absence of such a provision in the Civil Code on this subject.

[1] III. But granting that section 1841 is applicable to motions for new trial, the cases relied upon do not cover the case. Those cases are not cases discussing the insufficiency of an assignment of error in the motion for new trial, but are cases discussing the insufficiency of the motion because of the absence of an assignment of error to cover the alleged error urged in the appellate court. In the *Polski* Case Judge Brown sets out the assignment or grounds of error in the motion for new trial, and they are just as general as they could be, but he does not condemn those assignments as being insufficient. He simply says (and rightfully so) that there was no assignment or error in the motion covering the error urged in the brief before this court. In addition to the two early cases in 53 Mo. 286, and 65 Mo. 68, *supra*, he cites the opinion of Judge Lamm, in *Maplegreen Co. v. Trust Co.*, 237 Mo. loc. cit. 363, 141 S. W. 621. In the *Maplegreen* Company Case the motion for new trial was just as general as the motion in the case now before us. Judge Lamm did not condemn this motion because the assignment of errors was insufficient, but what he did do was to say that the motion did not contain *at all* an assignment of error for the alleged error urged in this court. Here is what he says:

"Attending to the motion for a new trial, it would be a most strained and unnatural construction on its language to find therein any reference whatever to exceptions to the report of the referee or any complaint based on error in overruling those exceptions. The language of that motion fell from learned attorneys. They

must be held to use words with precision and mean what they say—not what they do not say. When they use words well known to jurisprudence and well understood as filling certain offices, we are not permitted to give those words a loose, colloquial meaning, but define them *secundum artem*. In that motion they deal with 'verdicts,' the admission and exclusion of 'evidence,' 'demurrers,' 'declarations of law,' and 'damages'—each of these terms have a well-defined meaning in law. They complain therein of the rulings of the court and referee with regard to those matters, but nowhere do they complain of the ruling of the court upon the exceptions to the referee's report. It matters not that there are no 'verdicts' or 'declarations of law' in equity suits, and there are none here that we can find. Nor are there any 'demurrers' in this record. The argument runs this way: As there is nothing to which those complaints can apply, therefore, they should be given some vitality, and held to apply to the exceptions to the referee's report and to the action of the court in overruling them. But we decline to follow the lead of that argument. It would lead to dangerous and unheard-of results, and play havoc with all certainty and precision of construction. In this condition of things, although counsel may not have intended to waive those exceptions, or waive their complaint of the court in overruling them, yet they do that very thing by premitting all reference thereto in the motion for a new trial. We have so lately been over this matter in *State ex rel. v. Woods*, 234 Mo. 16, that further exposition is out of place. Other authorities will appear in plaintiff's brief, which the inquiring mind may consult."

The case referred to by our late Brother Lamm is an opinion by the writer, and in *State ex rel. v. Woods*, 234 Mo. loc. cit. 25, 136 S. W. 339, we then said:

"We have gone thus far in outlining the law to the end that 'we might discuss the serious point in this record. The bill of exceptions in this case preserves the exceptions and the ruling thereon. It shows that the defendants excepted to the ruling upon their exceptions. We also find a motion for new trial properly preserved, and an exception to the action of the court in its ruling thereon. The trouble, however, lies in the motion itself. This motion nowhere charges the court with error in overruling the exceptions to the report of the referee. It contains some eight grounds, but not one of them mentions the action of the court upon defendants' exceptions to the report of the referee. The nearest to such a question is the second ground, which reads: 'Because the court erred in approving the report of the referee filed in said cause and rendering judgment in accordance with the report of said referee.' Nowhere is it charged in the motion that the court erred in overruling defendants' exceptions to the referee's report. What we have quoted from the motion for new trial could as well have appeared in a motion for new trial where no exceptions had been filed as in a case where exceptions had been filed. Yet, if no exceptions had been filed, the motion would be unavailing. The question, therefore, is, Can we consider the exceptions to the referee's report, where the motion for new trial fails to assign the overruling of such exceptions as error. We think not. When we consider that in referee cases the cause is heard *nisi* upon the report and the exceptions filed thereto, and further consider that the litigant must, not only except to the action of the trial court in overruling his exceptions to the referee's report, but must further, by his motion for new trial, call the court's attention to the alleged error in overruling such exception, it is clear that there is nothing for review in this case, except the record proper, and this is without error."

So that in all those cases, the question was not as to the sufficiency of the assignments in the motion for new trial, but was as to the utter absence of an assignment of error in the motions to cover the assignment of error in this court. The same is true in *Carver et al. v. Thornhill*, 53 Mo. loc. cit. 285. In that case *Vories, J.*, said:

"The defendant offered no evidence on his part. The court gave judgment for the plaintiff. The defendant filed a motion for a new trial, and set forth as the grounds upon which said motion was founded the following: First, because the said verdict and judgment were against the evidence; second, because the verdict and judgment are against the law; third, because the verdict and judgment are against the law and the evidence; fourth, because the verdict and judgment were rendered for the plaintiffs, when the same should have been for the defendant. This motion was also overruled, and the defendant again excepted, and has appealed to this court.

"The only objection made in this court to the proceedings and judgment of the Johnson court of common pleas is that the said court upon the trial of the cause received and heard improper evidence, which ought to have been excluded. It will be seen that no such ground of objection was set forth or brought to the attention of the court in the motion filed by the defendant for a new trial. The only grounds of objection set forth in the motion for a new trial are that the verdict is against the law and the evidence, and is for the wrong party. No question is made in the motion as to the admission or rejection of evidence."

The same is true as to the case of *Sweet v. Maupin*, 65 Mo. 65. And it might be said, judging from the arguments in the briefs, this case is the "Sweet" morsel upon which respondent and one branch of our friends chiefly rely. But there is no substance upon which they can place reliance. There *Sherwood, C. J.*, was not condemning the grounds of the motion as being insufficient, but, like all the other cases, he was condemning the motion for new trial because it did not contain an assignment of error, which was broad enough to cover the assignment urged in this Court. In that case he says:

"A more serious objection is made to the verdict, which was for \$1,197.16, on the ground that the finding is a general one, and not a finding on each count of the petition. For repeated decisions of this court have settled the matter that when the attention of the lower court has been called to a defect of this sort, by appropriate motion, a reversal must occur, if such motion be overruled. But on examination of the motion for new trial, in the present instance, it will be found that, although the ground referred to is distinctly set out in the assignment of errors at general term, yet that the motion does not distinctly specify the ground now urged, the nearest approach to such specification being the fourth clause, that 'the verdict of the jury is not warranted by the issues in the case, and is incorrect and informal.' Our statute expressly requires that motions shall distinctly specify the ground whereon they are based. 2 Wag. Stat. p. 1021, § 48. The object of this is to call the attention of the lower court to the point complained of. For mere matters of exception cannot be noticed here, except when 'expressly decided' by the lower court (id. p. 106. § 32; *State v. Rucker*, 59 Mo. 17; *Brady v. Connelly*, 52 Mo. 19; *Chapman v. White*, 52 Mo. 179; *Burns v. Whelan*, 52 Mo. 520; *Carver v.*

Thornhill, 53 Mo. 288. We hardly think, in the light of these statutory provisions and decisions, the motion before us specified with sufficient distinctness the ground now relied on, that the verdict did not contain a special finding on each count."

Again the italics are ours. We are also cited to *St. Joseph v. Life Ins. Co.*, 183 Mo. loc. cit. 7, 81 S. W. 1080, and *Shaw v. Goldman*, 183 Mo. loc. cit. 462, 81 S. W. 1223. These cases, and many others in this state, announce the rule that if the unconstitutionality of a law or ordinance is relied upon in a case, the provisions of the Constitution alleged to be violated must be specifically pointed out to the trial court and to this court. That rule in no wise conflicts with our views in this case.

To those of us who have grown gray in the practice and administration of the law, it has always been deemed sufficient to make a general assignment of error in a motion for new trial both as to the reception and inclusion of evidence, and the giving and refusal of instructions. In the very cases relied upon by respondents, we find the motions just as general as the motion at bar, and this court never said that the assignment of error in the motions were insufficient, but only said that the motions failed to contain an assignment of error (either general or specific) which would cover the assignment urged in the appellate court. In *Collier v. Lead Company*, 208 Mo. loc. cit. 256, 106 S. W. 972, we said:

"Considering the first objection herein above stated, the motion for a new trial is general in its terms. It is short, and we will quote it. The grounds assigned therein are as follows: 'That the findings should be for plaintiffs instead of defendants. That the finding is unsupported by the evidence. That the verdict is for the wrong party. That the court erred in admitting, over plaintiffs' objection, illegal, incompetent, and improper evidence on the part of the defendants. That under the law and the evidence the findings should have been for the plaintiffs.' It is not necessary to review the many cases cited from other jurisdictions. The practice in this state has never, of recent years, required the motion for new trial to point out specifically the evidence excluded or evidence admitted, alleged to have been erroneously excluded or admitted. Under our practice it is sufficient, if at the time of the exclusion or admission of such evidence proper objections were made and exceptions saved, and this followed by a general assignment of error in this regard in the motion for new trial. Such have been the last expressions of this court, and we see no good reason for a further review of the question. In *State v. Barrington*, 198 Mo. loc. cit. 76, 95 S. W. 252, this court, in banc, adopted the opinion of *Fox, J.*, in division, and in doing so we there said: 'Upon this complaint the attorney general insists that the ground of defendant's motion for new trial, that is, that "the court erred in admitting illegal, irrelevant, incompetent, and immaterial testimony," does not cover or exclude the point of improper cross-examination of defendant. Upon this proposition we will say that, if the objections at the trial were sufficiently specific to notify the trial court at the time of the nature and character of the objections and the reasons for them, the general assignment in the motion for new trial that the court improperly admitted illegal, incompetent,

and irrelevant testimony would properly preserve the point of improper cross-examination for review in this court." Again, in *State v. Noland*, 111 Mo. loc. cit. 492, 19 S. W. 718, this court said: "The motion for a new trial does not specify the exclusion of this particular evidence, but assigns generally as error that 'the court excluded from the jury proper, competent, and relevant testimony offered by the defendant.' This was sufficient. It has been the practice of this court from its organization. Nothing more definite has ever been required. A different ruling would unsettle the practice and work great injustice. The objections to testimony must be specific to be available in the appellate courts. These exceptions thus made are saved at the time, and the trial court's attention specifically called to its rulings, and no injustice is done the opposite side or the court by not incurring the motion for new trial with these matters a second time. We adhere strictly to the rule requiring specific objection to testimony to be made at the time it is offered, but we do not think any good would be subserved by requiring the specific objections to be again repeated in the motion for a new trial." There may be cases where the language used, taken apart from the real situation presented by the case, might indicate a different rule; but, when we read these cases thoroughly, the language indulged in by the court will find justification in the particular record, without infringing upon the rule announced in the *Noland* Case, *supra*. We announce again that if objections are made and exceptions saved to the action of the trial court in the admission or exclusion of testimony, then the general assignment in the motion is sufficient."

In *Stid v. Railway Co.*, 236 Mo. loc. cit. 397, 139 S. W. 176, this court again said:

"In a case of this moment it behooves the court to pass judgment with full consideration. The motion for new trial is on the blanket order rather than one specific in terms. This practice we have never condemned, but rather encouraged. Such motion need only be in general terms, and need not point out specifically the evidence admitted or excluded, or the instructions given or refused. If the motion recites, as does this one, that the court erred 'in giving each of the instructions given at the request of the plaintiff' the instructions of plaintiff for all points and purposes are here for review. So, too, if the motion recites that the court erred in admitting incompetent evidence for plaintiff, and also erred in refusing to admit competent evidence for the defendant, such questions are for review in the appellate court."

Nor is there any injustice to a trial court in applying this rule as to instructions as well as to evidence. The giving of an instruction is the act of the court. The court is declaring the law of the case. The parties cannot do that. They may suggest to the court what they think to be the law, but the court, with his knowledge of law, declares what the law of the case is. It is the product of the mind of the court, and when the motion for new trial charges that the court erred as to the giving or refusing of instructions, it but calls attention to the things which the court has done or has failed to do. It sufficiently advises the court that he has erred in his judgment of the law of the case, and it is not necessary to explain in such motion why the court has thus erred. Of course the motion might recite that the court erred in giving a certain instruction, because the giving of it, under

the facts of the case, was error under the law as declared in appellate opinions, citing the same, but this has never been the idea of a motion for new trial in these many years, since the adoption of the Code of Civil Procedure.

To sustain the contention of counsel for defendant would enable us to clear our docket of cases within a very short period, but the merits of the cases would be undetermined. We cannot lend our judgment to views so radical. To use the language of Gantt, P. J., in *State v. Noland*, 111 Mo. loc. cit. 492, 19 S. W. 718:

"The motion for a new trial does not specify the exclusion of this particular evidence, but assigns generally as error that 'the court excluded from the jury proper competent and relevant testimony offered by the defendant.' This was sufficient. *It has been the practice in this court from its organization. Nothing more definite has ever been required. A different ruling would unsettle the practice and work great injustice.*"

The italics are ours. We only desire to substitute "the giving and refusing of instructions" for the exclusion of evidence in the excerpt above.

Under the law of this state the motion for new trial in the case at bar is sufficient in form to bring before this court for review all the instructions given and all the instructions refused. We desire to reiterate what we said in the *Stid* Case, *supra*.

[2] IV. This brings us to the merits of this case, and to our minds it is one of easy disposition. As stated, the action is one grounded upon the relation of master and servant. The thing charged as being productive of the injury to plaintiff is that:

"Said train was suddenly started forward with a violent and unusual jerk, whereby plaintiff was thrown down and run over by said train, and his left leg destroyed," etc.

Plaintiff charges that his injury was due to a "violent and unusual jerk," and the evidence fails to show that what happened was more than usually occurs in the operation of freight trains. In other words, the negligent act charged was not proven. The trial court so declared, for by its instruction C-1 given of its own motion, it is said:

"The court instructs the jury that there is not sufficient evidence to warrant the jury in finding that the jerk, following the go-ahead signal, was an unusual jerk."

The evidence fully justifies the giving of this instruction. Plaintiff knew he was on a freight train, and he knew that it was not going to stop, but would only slacken up and start up again. Unless something more than the usual jerk occurred, there was no negligence upon the part of the defendant. In other words, if the thing which happened was not unusual in the operation of freight trains, there was no negligence. This doctrine is so fully discussed in our cases that a citation of two or three will suffice. *Wait v. Railroad Co.*, 165 Mo. 612, 65 S. W. 1028;

Hedrick v. Railroad Co., 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793.

[3] The plaintiff, having planted his right to recovery upon "a violent and unusual jerk," must show such or fail. He fails to show the act of negligence pleaded, and the demurrer to the evidence offered by defendant should have been sustained. The rule as between passenger and carrier cannot be invoked because plaintiff has not so sued. The judgment nisi is reversed.

WOODSON, FARIS and BLAIR, JJ., concur in paragraphs 3 and 4 and in result. REVELLE, J., concurs in paragraph 4 and in result, and concurs in separate concurring opinion of BOND, J. BOND, J., concurs in separate opinion. WALKER, J., dissents in separate opinion.

BOND, J. (concurring). I am unable to agree to the learned discussion in the majority opinion, to the effect that section 1841 (R. S. 1909) has no reference to the contents of a motion for new trial. This section, in express terms, is applicable to "all motions," and requires that they "shall be accompanied by a written specification of the reasons upon which they are founded," etc., and I do not think a statute so all-embracing in its language can be logically limited only to certain motions filed during the trial of a lawsuit which are addressed to pleadings. In judging the sufficiency of motions for new trial by the rule fixed by that statute, full effect should be given to it as it has been interpreted and construed in the unbroken line of precedents cited in the concluding portion of the second paragraph of the learned majority opinion. These have held, and such has been the consensus of opinion at the bar, that the "specifications of reasons" in the motion for new trial in the present case were sufficient to bring up for review the action of the court in its refusal of the instructions requested by respondent for a peremptory verdict or other instructions requested by it, and, also, in the giving of instructions at the request of plaintiff. Defendant excepted at the time in both instances to the action of the court, and the reference, shown in its motion for new trial to the adverse rulings of the court in respect of such instructions, was a sufficient compliance, under the decisions of this court, with the terms of the statute, requiring "a written specification of reasons."

Hence I concur only in the result reached in the learned majority opinion.

REVELLE, J., concurs in this opinion.

WALKER, J. (dissenting). I concur in the majority opinion in its holding that the plaintiff cannot base his cause of action upon one theory, try the issue thereon, and recover on appeal upon another and a different theory as

to the relationship existing between him and the defendant at the time of the accident.

I do not concur in the holding that section 1841, R. S. 1909, should not be construed and applied according to its unmistakable meaning. The language of this section is clear, definite, and conclusive. There has heretofore never been a question as to its being applicable to motions for a new trial. Its history amply attests the fact that it is so applicable. As originally enacted (Rev. St. Mo. 1835, p. 469) it read as follows:

"All motions for new trials, and in arrest of judgment, shall be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term; and every such motion shall be accompanied by a written specification of the reasons upon which it is founded."

In the Revision of 1845, which incidentally may be said to be one of the best revisions that has been made of our laws, in which the Code of Civil Procedure was materially amplified and the phraseology of many of the sections changed, what is now section 1841, R. S. 1909, was divided into two sections, which read as follows:

"Section 1. All motions for new trials and in arrest of judgment, shall be made within four days after the trial, if the term shall continue so long, and if not, then before the end of the term.

"Sec. 2. Every such motion shall be accompanied by a written specification of the reasons upon which it is founded."

R. S. 1845, p. 829.

In the Revision of 1855 the Code was still further amplified, and many arbitrary changes were made in the arrangement of the articles and sections. Section 1, in regard to motions for new trials, in the Revision of 1845 appears in the Revision of 1855 as section 6 of article 13 of Chapter 123 (2 R. S. 1855, p. 1286), and is in the same language as in the former revision; while section 2 of the Revision of 1845 above quoted is designated as section 27 of article 6 of chapter 128 of the Revision of 1855, which is entitled: "In Relation to Pleadings and the Rules of Pleading," and reads as follows:

"Sec. 27. All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason, not so specified, shall be urged in support of the motion." R. S. 1855, p. 1235.

It will be seen that the portion of this section following the word "founded" was added in this revision. The phraseology and setting of the section as it appears here have not been changed in subsequent revisions. That the section has reference in a general way to pleading, it is true, because a motion is none the less a part of the pleadings in the case than any other paper filed therein (Bliss Code Pl. [3d Ed.] § 135), except as to the distinguishing rule which prevents its being incorporated into the record proper in making up a transcript to perfect an appeal. The conclusion, therefore, reasonably follows that the section has reference to all motions, filed for whatever purpose in a suit. It is

only by invoking the aid of judicial legislation that the provisions of the section can be reasonably limited to motions other than those for a new trial. It must be admitted that many motions, general in their averments, of the character of the one under review, have been held sufficient by this court, but this has been due to loose construction, and without regard to the plain meaning of the statute, the purpose it was intended to effect, and in disregard of its origin. In this connection it is not improper to say that the mere arbitrary arrangement of a section of the Code does not afford a cardinal reason for its interpretation. It is at best but a matter of minor consideration. The words, the text, the subject-matter, and the purpose intended to be effected by the section should be first considered in ascertaining what it means. These having been considered, the section should be construed according to its plain terms, without extrinsic aid. The correctness of this conclusion has been attested wherever the origin and purpose of the section has received considerate attention; where it has not received this attention, the result has been to render motions for new trials mere dragnets to catch and hold general assignments of error. Under this loose construction, after the matter to be subsequently complained of has passed without emphasis beyond the purview of the trial court, the appellant is enabled; from the omnium gatherum called a motion for a new trial, to pick and choose such specific grounds of error as then seem most pregnant with possibilities of reversal, with its consequent delay and possible denial of justice. A construction of the section fraught with such results was not contemplated by the framers of our Code. I, therefore, dissent from the majority opinion in so far as it holds that a motion for a new trial should not, with brief but reasonable particularity, specify the grounds upon which it is based.

STATE ex rel. POWERS v. RASSIEUR, Circuit Judge. (No. 19372.)

(Supreme Court of Missouri. In Banc. Dec. 21, 1916.)

PROHIBITION § 23—EFFECT AS SUSPENDING PROCEEDINGS IN LOWER COURT.

In an election contest case, where contestant prevailed, and upon an application by contestee for writ prohibiting the lower court from interfering with the contestee's possession and occupancy of his office pending action upon motion for new trial filed by contestee and pending the disposition of the case on appeal, an order was issued to show cause why such writ of prohibition should not issue, together with a temporary prohibition commanding the lower court "to take no further action in the premises until the further order of the Supreme Court," the trial court had no jurisdiction to proceed to pass upon the motion for new trial until after its jurisdiction had been restored by quashing the

temporary writ, since the effect of such writ was to deprive the lower court of jurisdiction. [Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 72; Dec. Dig. § 23.]

Bond, Walker, and Faris, JJ., dissenting.

Mandamus by the State, on the relation of Anthony W. Powers, against Leo S. Rassieur, Circuit Judge. Permanent writ ordered to issue as prayed.

The only question presented for determination in this case is whether a writ of mandamus should be awarded requiring the respondent, Leo S. Rassieur, as circuit judge, to reinstate upon his docket a motion for new trial filed by one Anthony W. Powers in an election contest brought against him by Charles H. Turpin. After judgment had been rendered against him in said circuit court of the city of St. Louis and the timely filing of a motion for new trial, the said Anthony W. Powers presented an application to this honorable court for a writ of prohibition directed against said circuit judge and said Charles H. Turpin. Upon said application a writ was awarded.

In due time respondent made return to the writ, and thereafter our writ was quashed. State ex rel. Powers v. Rassieur, Judge, et al., 184 S. W. 116. After the issuance and service of our writ, Judge Rassieur proceeded with the case of Powers v. Turpin, and overruled the motion for a new trial, which was then pending in his division of the circuit court. Thereupon the relator in this case appealed to this court for a writ of mandamus against respondent, asking that the order of the circuit court overruling said motion for a new trial be set aside and for naught held, and that said motion be reinstated, and the court be directed to pass upon said motion as prescribed for by law. The ground assigned therefor was that at the time the motion for a new trial was overruled the case of State ex rel. Powers v. Rassieur et al., supra, was pending in this court, and that the jurisdiction of the circuit court over the same was completely suspended, and for that reason it had no power or authority to pass upon said motion.

In due time this court awarded a temporary writ of mandamus as prayed for, and in due time respondent made a return, the material parts of which, in substance, states that our former writ only prohibited the circuit court from executing the judgment of ouster rendered against the relator in the case of Turpin v. Powers, supra, and that the overruling of said motion was not in violation of the mandates of the previous writ.

Upon the incoming of this return, counsel for relator moved for judgment on the pleadings, which, of course, confesses the truthfulness of all matters well pleaded in the respondent's return, as well as those in the petition for the writ, not denied thereby.

Thomas A. Dwyer, Holland, Rutledge & Lashly, and Ernest A. Green, all of St. Louis, for relator. George B. Webster, of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). I. As previously stated, the only question presented by this record for adjudication is: Did the circuit court have jurisdiction to pass upon the motion for a new trial in the case of *Turpin v. Powers*, supra? This question must, upon principle and authority, be answered in the negative. The precise question was presented to this court in the case of *State ex rel. Knisely v. Board of Trustees et al.*, 186 S. W. 680. In that case, 186 S. W. on page 681, this court said:

"For the purpose of this case we shall assume that the motion to vacate the judgment is still pending in the court of the respondent herein, and that, unless prohibited, it will, as the return discloses, proceed to hear and determine the same. This we must necessarily assume, because, under our law and practice, after our preliminary writ is granted, the court to which it is directed has absolutely no authority or jurisdiction to in any manner proceed further. It cannot entertain motions to dismiss the proceedings, or take any other action in the premises. This should be better understood by the nisi courts of this state, as our records disclose that in some cases after the issuance of our preliminary rule the court nisi has proceeded to act to some extent. We take this occasion to say that after the issuance of our preliminary rule, or even after notice is served of the intended application for our preliminary rule, the trial court should proceed no further, but await the action of this court."

The principle upon which that ruling was predicated is the familiar one that two courts at the same time cannot have jurisdiction over the same cause for procedure or trial. The only exception to the rule is apparent rather than real, and that is where the inferior court may correct its record on motion for a nunc pro tunc order, etc., after a cause has been appealed or otherwise properly removed to a superior court. But this case does not fall within that exception.

The overruling of the motion is the case of *Turpin* in the case of *Turpin v. Powers*, supra, was not a mere correction of a record, but was a step taken in the regular trial of the cause. The jurisdiction of the circuit court at the time that order was made was completely suspended by reason of the fact that the cause was removed to this court by means of the writ of prohibition before mentioned, and consequently that court never reacquired jurisdiction thereof until after said writ had been quashed by this court.

The present case shows the wisdom of that rule in that after the motion for a new trial had been overruled, and before the writ of prohibition had been quashed, the time for the defendant to take his appeal in the case of *Turpin v. Powers*, supra, had expired. In other words, the dual jurisdiction mentioned would, if tolerated, have deprived the relator here of his right to appeal in the election contest case before mentioned. For the or-

derly and proper administration of justice the law, in the absence of an express statutory enactment or a constitutional provision, will not tolerate an interference of one court with the jurisdiction of another over the same cause of action at the same time. *State ex rel. v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198. This is the same general principle which excludes the state courts from interfering with the jurisdiction of the United States courts, and vice versa. *State ex rel. v. Reynolds*, supra.

For the reasons stated, a permanent writ of mandamus is ordered to issue as prayed.

REVELLE, J., concurs. GRAVES, C. J., concurs in separate opinion, in which BLAIR, J., concurs. BOND, WALKER, and FARIS, JJ., dissent.

GRAVES, C. J. (concurring). In the case of *Turpin v. Powers*, out of which the instant case of mandamus and the case of *State ex rel. Powers v. Rasseleur*, 184 S. W. 116 (a case in prohibition), grew, the said *Powers* challenged the jurisdiction of the circuit court of St. Louis by proper pleadings. Notwithstanding this pleading, the said court continued its jurisdiction to a judgment of ouster as against *Powers*, and a threatened execution of that judgment pending a motion for new trial. This challenge was to the effect that said court had no legal authority to try, hear, and determine a contest for the office of constable; that the only statute purporting to give such court jurisdiction was unconstitutional and void. I dissented in *State ex rel. Powers v. Rasseleur*, 184 S. W. 116, for the reason (among others not necessary to name) that this question of absolute want of jurisdiction was a question properly in that case; in other words, that by our preliminary rule in prohibition the jurisdiction of that court in the contest case was before us for a full determination, and not merely for a determination of some particular excess of jurisdiction. In that case we issued our preliminary rule to show cause, and it is in the construction of this rule that I disagreed to the views of my Brother BOND in the opinion which he now files as a dissent here. That rule, as is usual in such cases, contained a general clause which prohibited the respondent, *Rasseleur*, from doing anything in the *Turpin-Powers* Case until our determination of the proceeding in prohibition. The concluding clause of our rule was:

"And in the meantime you are commanded to take no further action in the premises until the further order of this court."

This rule was issued in vacation by Woodson, C. J., and Graves and Blair, JJ. The purpose of the rule was to stay the hands of Judge *Rasseleur* until this court could determine the merits of the controversy involved in the prohibition proceeding in which this

rule was entered. The word "premises," as therein used, had reference to the case of *Turpin v. Powers*. It was the usual blanket safety clause incorporated in all preliminary rules in prohibition. When Judge Rassieur violated the injunction of that rule, his act was a nullity, because, by our constitutional superintending power, we had withdrawn his right or jurisdiction to act. The contemplation of that rule was to stay his hands absolutely until we could determine the prohibition proceeding. The purpose was to keep all things (in that case of *Turpin v. Powers*) in status quo until this court had spoken, and by speaking had affirmed or denied the right of Judge Rassieur to further act. For these additional reasons, as well as for the reasons stated in the opinion of WOODSON, J., I fully concur in the said opinion of WOODSON, J.

II. There is still a further reason for my concurrence, and this, too, grows out of the language of our preliminary rule. Our preliminary rule commanded the said Rassieur on a certain day to appear in this court—

"and show cause, if any you have, why a writ of prohibition should not issue, as prayed in the petition herein, prohibiting you, the said Leo S. Rassieur, judge as aforesaid, and you, the said Charles H. Turpin, from in any manner interfering with the said relator's possession and occupancy of the office of constable of the Fourth district of the city of St. Louis, pending action upon the motion for a new trial heretofore filed by said relator in said cause, and pending the disposition of this cause on appeal, and further prohibiting each of you, the said respondent, from attempting in any wise to secure possession from the relator of the office of constable of the Fourth district within and for the city of St. Louis until final action has been taken by this court in said election contest."

Note the clause therein "and pending the disposition of this cause on appeal." This is a separate and distinct restraint from the one created by the clause preceding it. We may have gone too far, and may have acted improvidently in placing this specific restraint upon Judge Rassieur, but, if so, it was for us to so declare, when we come to make a final order in the matter, and it was not for the circuit judge to disobey the order, however improvidently it may have been made. In other words, the improvidence of our rule can never justify its disobedience by an inferior tribunal. By making this broad order, we did foreclose the right of defendant Powers to have his motion for new trial passed upon until the appeal was determined, and this was broader than the order should have been, but this concession does not justify the act of respondent Rassieur.

This court, and this court alone, had the right to change this rule when the prohibition proceeding was up for final determination. We did, in language too plain for discussion, prohibit the trial judge from doing anything more in the *Turpin-Powers* Case pending the disposition of the cause on appeal. Appeals may be taken without any ac-

tion upon a motion for new trial, or without the filing of one. Such appeals only bring up the record proper, and in cases where the jurisdiction is challenged by answer, as it was in the *Turpin-Powers* Case, the question of the jurisdiction of the circuit court would be here on the record proper. But we need not speculate. We did make this broad rule upon the circuit court, and its improvidence was for our determination, and not for the circuit court.

III. In the brief it is argued that the word "premises" used in the last clause of our rule refers to what goes before in the rule, and does not refer to the whole case of *Turpin v. Powers*. This clause is preceded by a semicolon, and to our mind is an independent restraint of a general and blanket order, and prohibited any action whatever in the case, as we have heretofore indicated. But if it be granted that this clause refers back to the matters before stated in the rule, it must refer to the prevention of any action pending appeal as well as any action pending the motion for new trial. So, giving the rule this construction we still have our improvident order, which might cut out a motion for new trial upon appeal, but it was for this court to modify its preliminary rule, at the proper time and in the proper way, and not for the circuit court to disobey it. These are additional reasons for my concurrence.

I therefore fully concur in the opinion of the majority by WOODSON, J.

BLAIR, J., concurs in these views.

BOND, J. (dissenting). This case was assigned to me and an opinion prepared which I now file as my dissent to the learned majority opinion. (Reporter will here copy, omitting caption, my original opinion attached hereto.)

I desire to add some further grounds why I am unable to agree to the learned majority opinion. A glance at the preliminary writ of prohibition set forth in full in my dissenting opinion above, but not set forth in the learned majority opinion, will disclose that there is no language therein which in any possible manner forbade the respondent circuit judge from passing on the motion for new trial in the case wherein the relator in the application for prohibition was ousted of his office by judgment of the circuit court. The language of the alternative writ of prohibition expressly shows that the circuit judge was not forbidden to overrule the motion for new trial; he was only forbidden to enforce the execution before passing on that motion. Had we made our preliminary writ absolute, he would have been prohibited only from taking any action before passing on the motion for new trial. He would not have been prohibited from ruling on the motion before taking the action complained of. The purpose of restraining him only to that extent was thereby to give the relator in the appli-

cation for prohibition an opportunity to appeal before the judgment of ouster against him was executed. This is evident from the further request in that application that the respondent should not enforce the judgment of ouster pending the appeal. Hence, when the respondent desisted from enforcing his judgment and recalled the execution, he had full authority to pass on the motion for rehearing; indeed, it was his duty to do so; for until that motion was disposed of relator could not appeal and have his case reviewed on the merits. He accordingly took up the motion for rehearing in the orderly course of business and overruled it, and if for any reason the relator's counsel omitted to except to his judicial action, that fact furnishes no ground for the present mandamus to compel respondent to set aside his ruling and reinstate the motion, for peradventure when he next passes on the motion for new trial relator's counsel might take cognizance thereof and duly except.

The authority relied on in the learned majority opinion is entirely off the point. The opinion of Judge REVELLE was rendered in a case where certain persons, held by him to have been privy to the litigation wherein this court had specially directed the circuit court to enter a judgment for a specific sum of money sought thereafter in the lower court to procure the setting aside of the judgment directed by this court, whereupon the plaintiffs in that judgment applied here for prohibition against such action. All that was decided in that case was that the prohibition should go, because the judgment sought to be attacked below was a final one specifically directed by this court. *State ex rel. Knisely v. Board of Trustees*, 186 S. W. 680. It was not held in that case that the restraint of a provisional writ of prohibition could go beyond the limiting language contained in the writ, nor has that doctrine ever been sanctioned as far as I have been able to find in any case within the range of the adjudged law, nor can it be sustained by any process of valid reasoning.

In a valuable article in 32 Cyc. 681, it is said:

"A writ of prohibition will not operate to restrain the party named therein generally, or from doing any act *save that* in a pending suit or matter which it is issued to control." (Italics ours.)

The authority for that statement of the rule is *Thomson v. Tracy*, 60 N. Y. 81, which is directly approved by the Supreme Court of this state in *State ex rel. Merriam v. Ross*, 186 Mo. 272, 41 S. W. 1041. The latter case upon different facts announces the same plain principle that the restriction of a writ of prohibition can never be carried beyond the prohibitory terms used in the writ. The same principle is decided in *People ex rel. v. Wyatt*, 186 N. Y. 394, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972, and also an-

nounced in *State ex rel. Hart, etc., Co. v. Superior Court*, 16 Wash. 347, 47 Pac. 754.

I think it is impossible to escape the force of the reasoning on which these cases are based. The prohibition here was only partial and specific. It was not full and general. It did not go to the jurisdiction, but only went to the relative order of two procedural steps to be taken in the exercise of jurisdiction. The preliminary writ of prohibition (which was subsequently discharged by this court) shows on its face that no further restriction was laid upon the respondent circuit judge than that he should not enforce his judgment of ouster before he passed on the motion for new trial which had been filed by the applicant for the writ, in order that the applicant might not be prejudiced in his appeal, and that he should not, pending such appeal, enforce the judgment of ouster.

Since the respondent has not violated, on the record before us, either of these injunctions, I am constrained to dissent to the learned majority opinion.

WALKER and FARIS, JJ., concur in this opinion.

Original Opinion.

BOND, J. I. The only question in this case is whether a mandamus should be awarded requiring the respondent, Leo S. Rassieur, as circuit judge, to reinstate upon his docket a motion for new trial filed by one Anthony W. Powers in an election contest brought against him by Charles H. Turpin. After judgment had been rendered against him in said circuit court of the city of St. Louis and the timely filing of a motion for new trial, the said Anthony W. Powers presented an application to this honorable court for a writ of prohibition directed against said circuit judge and said Charles H. Turpin. Upon said application the following preliminary writ was awarded (omitting caption):

"The State of Missouri to Honorable Leo S. Rassieur, Judge of the Circuit Court, City of St. Louis, and Charles H. Turpin—Greeting:

"Whereas, on the 9th day of August, 1915, it was represented to the undersigned A. M. Woodson, Chief Justice, and W. W. Graves and James T. Blair, Associate Justices of the Supreme Court of the state of Missouri, in chambers, on the part of A. W. Powers, in a certain petition for a writ of prohibition, a copy of which petition is hereto attached, that you, the said Leo S. Rassieur, judge of the circuit court, city of St. Louis, hold cognizance of a certain case pending before you styled and entitled, 'Charles H. Turpin, Contestant, v. A. W. Powers, Contestee,' as indicated and fully set out in the said petition for a writ of prohibition, and we being willing to maintain the rights of the state of Missouri, and the laws and customs thereof:

"Now, therefore, you, the said Leo S. Rassieur, judge of the circuit court, city of St. Louis, and you, the said Charles H. Turpin, are hereby commanded to be and appear before the said Supreme Court of Missouri on Tuesday, the 12th day of October, 1915, and show cause, if any you have, why a writ of prohibition

should not issue as prayed in the petition herein prohibiting you, the said Leo S. Rassieur, judge as aforesaid, and you, the said Charles H. Turpin, from in any manner interfering with the said relator's possession and occupancy of the office of constable of the Fourth district of the city of St. Louis, pending action upon the motion for a new trial heretofore filed by said relator in this cause, and pending the disposition of this cause on appeal, and further prohibiting each of you, the said respondents, from attempting in any wise to secure possession from the relator of the office of constable of the Fourth district within and for the city of St. Louis until final action has been taken by this court in said election contest; and in the meantime you are commanded to take no further action in the premises until the further order of this court. Herein fail not at your peril.

"Witness the Honorable A. M. Woodson, Chief Justice, and W. W. Graves and James T. Blair, Associate Justices of the Supreme Court of Missouri, in chambers, at the city of Jefferson, this 9th day of August, 1915. [Signed] A. M. Woodson, Chief Justice, W. W. Graves, James T. Blair, Associate Justices of the Supreme Court of Missouri. Attest: [Signed] J. D. Allen, Clerk."

The issue arising upon the returns to this writ was submitted to this court and disposed of in banc in *State ex rel. Powers v. Rassieur, Judge, et al.*, 184 S. W. 116, where the substance of the petition upon which the above writ was awarded is set forth, and where the prayer of said petition is also set out, and the legal effect thereof is stated by the court in the following terms:

"It will be seen that the sole matter complained of in the petition for prohibition is the alleged acts of Judge Rassieur in attempting to enforce the judgment he had rendered in the election contest proceeding, pending a motion for new trial."

Instead of raising the question of the rightfulness of such alleged action on the part of the circuit judge by apt proceeding, the respondents in that case pleaded over and submitted for consideration only controverted questions of fact, with no relevant evidence pro or con; wherefore this court dismissed the application for prohibition.

II. It is perfectly evident in the instant proceeding that the right to a permanent writ of mandamus depends solely upon whether or not the respondent circuit judge, during the pendency of our preliminary writ of prohibition, disobeyed its prohibitions when he overruled the motion for new trial before the dismissal of our preliminary writ; for if the doing of that judicial act was forbidden by the terms of the rule to show cause, then the respondent judge acted judicially in a matter whereof he was shorn of jurisdiction, and mandamus lies to compel him to set aside his overruling of the motion for new trial and to reinstate it upon his docket and to proceed to consider the grounds thereof and exercise his judicial discretion in disposing of them or ruling upon the motion. *State ex rel. Rogers v. Rombauer*, 105 Mo. 103, 16 S. W. 695; *State ex rel. McCaffery v. Aloe*, 152 Mo. 483, 54 S. W. 494, 47 L. R. A. 393; *State ex rel. v. Neville*, 157 Mo. 336, 57 S. W. 1012, 51 L. R. A. 95; *State ex rel. v. Ross*, 136 Mo. 259, 41 S. W. 1041.

The degree to which the respondent was restricted in his judicial action is determinable only by a correct interpretation of the meaning of the language employed in our preliminary writ of prohibition. That writ was necessarily, in substance, a rescript of the petition or application filed in this court upon which it was based and a copy of which accompanied the writ. The purpose of the preliminary writ was to advise the respondent specifically of the matters and things wherein it was sought to obtain from this court a permanent prohibition against further action on his part and to require him on the day stated in the notice to show cause why he should not be prohibited from further action in the specified particulars, and in the meantime, and until the further order of this court, to forbid any "further action in the premises."

An inspection of the language employed in the preliminary writ shows that the particulars to which the respondent was required to show cause why prohibition should not issue were, to wit:

"From in any manner interfering with the said relator's possession and occupancy of the office of constable * * * pending action upon the motion for a new trial heretofore filed by said relator * * * and pending the disposition of this cause on appeal and further prohibiting each of you * * * from attempting in any wise to secure possession from the relator of the office of constable * * * until final action has been taken by this court in said election contest."

After these enumerations the writ concludes:

"And in the meantime you are commanded to take no further action in the premises until the further order of this court."

At the time of the application for our preliminary writ of prohibition the exigency prompting relator to sue out the writ was the alleged fact that the respondent circuit judge was endeavoring to enforce the execution of his judgment of ouster against the contestee before overruling his motion for a new trial. In ordinary civil actions the pendency of a motion for new trial does not prevent the issuance of an execution on the judgment sought to be vacated. *Ex parte Craig*, 130 Mo. loc. cit. 595, 32 S. W. 1121; *Stid v. Railroad*, 211 Mo. 415, 109 S. W. 663. To prevent a similar execution of the judgment of ouster against him, relator applied to this court for a writ of prohibition wherein the above-quoted preliminary rule was awarded.

The application neither in terms nor intent sought to prevent the circuit judge from passing upon the motion for new trial. The contention of the applicant, as disclosed in his petition, was that the circuit judge had no right after judgment of ouster in the election contest for the office of constable to enforce his judgment prior to a ruling upon a motion for new trial or the final disposition of the case upon appeal. Without passing on the correctness of this action, it is enough to say that it was the sole ground upon which the application to this court was made,

and hence, when the preliminary writ was awarded, the respondent was admonished to show cause why he should not be prohibited from taking steps to enforce his judgment before ruling on a motion for new trial, or subsequently during the pendency of an appeal from his judgment to this court; as respondent was also admonished to show cause why he should not be prohibited from "attempting to secure possession from relator of the office of constable * * * until final action taken by this court in said election contest."

In these three particulars only was respondent advised to show cause against the award of our writ of prohibition against him. None of them in the slightest way prevented him from ruling on the motion for new trial. Indeed, the language of the writ and the petition upon which it was based necessarily contemplated that he should rule on the motion for new trial; for such a ruling was the necessary prerequisite to an appeal from his judgment, and without the obtention and prosecution of such an appeal, so much of the writ as related to a prohibition of the respondent "pending the disposition of this cause on appeal" would have been meaningless.

What the writ aimed at, in a word, was to compel the circuit judge to rule on the motion for a new trial prior to an execution of his judgment ousting the relator, to the end that the relator might perfect an appeal to this court, and to the end that, pending that appeal to this court, the circuit judge should take no action dispossessing the relator of the office being contested. Hence the preliminary writ did not require respondent to show cause why he should not be prohibited from passing on the motion for new trial, but only to show cause why he should not be prohibited from doing acts dispossessing the relator of his office, prior to his ruling on his motion for new trial, from which ruling, if adverse, relator could take an appeal and obtain a review of the case upon its merits. These being the express and specific objects of prohibition recited in our preliminary writ, the further clause was added thereto that, pending the consideration of them by this court upon respondent's return he was advised "in the meantime * * * to take no further action in the premises until the further order of this court."

This injunction could not imply any restraint upon the judicial action of respondent further than the specific instances pointed

out in the preceding language of the preliminary writ of prohibition. It would be illogical to say that it was the intent to restrain respondent from passing on the motion for new trial; for the whole purpose of the application for a prohibition was to obtain a ruling on that motion as a prerequisite to bringing up the case on its merits, and to prevent the respondent from any action before or after the ruling which should execute or enforce the judgment of ouster appealed from. Moreover, no such right could be denied him in any case whereof he was possessed of jurisdiction of the subject-matter and the person; for otherwise, if the writ prohibiting such action on his part should be made permanent, the result would follow that this court would acquire cognizance of a cause, not by the method solely provided by law for the exercise of its appellate jurisdiction, but through the medium of a prerogative right, thereby depriving the litigant of his constitutional right to obtain a full review of the judgment of a trial court after the overruling of a motion for new trial and exceptions thereto, in the manner prescribed by law for the exercise of appellate jurisdiction by courts of last resort. In other words, the Supreme Court by writ of prohibition could halt the action of the circuit court in the trial of a cause of which it was possessed of full jurisdiction, before the proceedings in such cause had reached the stage permitting an appeal which would bring up for review the grounds of the judgment below.

We conclude, therefore, that in this case (where full jurisdiction of the person and subject-matter is conceded) our writ not only, as shown by its terms, did not prevent the circuit judge from passing on the motion for new trial, but could not have gone further legally than it did, when it restrained him temporarily from executing his judgment before ruling on the motion.

III. The present case might have been brought to this court if exceptions had been taken to the action of the trial court in overruling the motion for new trial and an appeal perfected and whatever errors may have intervened in the trial below would have been open to review by this court.

Our conclusion is that the present application for a permanent mandamus requiring the respondent to reinstate such motion on his docket for future consideration should be denied, and our alternative writ of mandamus quashed.

STATE v. ANDREWS. (No. 19637.)

(Supreme Court of Missouri, Division No. 2.
Dec. 6, 1916.)

Error to St. Louis Circuit Court; J. Hugo Grimm, Judge.

Sam Andrews was convicted of an offense, and brings error. Reversed and remanded.

John A. Gernes, of St. Louis, for plaintiff in error. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen., for the State.

WALKER, J. In State v. Wade. 267 Mo. 249, 183 S. W. 598, an indictment identical in all its material allegations with the one under consideration, was by this court held insufficient. I did not concur either in the reasoning or the conclusion reached in the Wade Case, construing as I did the indictment therein as in conformity with prior rulings and hence sufficiently charging the offense named. My Associates, however, after a careful consideration, both in division and en banc, of the Wade Case, held differently, and further controversy in regard thereto is precluded.

The instant case will, as a consequence, be reversed and remanded that the state may take such further steps in the premises as may be found proper. It is so ordered. All concur.

**BUTLER et al. v. HYDRO-PNEUMATIC
SPRINKLER & MFG. CO. et al.**
(No. 14063.)

(St. Louis Court of Appeals. Missouri. Oct. 24, 1916. Rehearing Denied Dec. 30, 1916.)

**1. CORPORATIONS ⇨206(2)—SUIT BY STOCK-
HOLDER.**

A shareholder cannot sue alone to enforce corporate rights without showing that he has used all available means to secure action by the corporation itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 792; Dec. Dig. ⇨206(2).]

**2. CORPORATIONS ⇨206(2)—SUIT BY STOCK-
HOLDERS—EVIDENCE.**

In suit by stockholders of a corporation, evidence of a corporate meeting held not to show that plaintiffs made demand on the corporation to bring suit or that the corporation refused to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 792; Dec. Dig. ⇨206(2).]

**3. COMPROMISE AND SETTLEMENT ⇨15(1)—
EFFECT.**

Where property in litigation had been transferred by certain defendants to others before settlement with plaintiffs, and such transfer was ratified, settlement between plaintiffs and these defendants barred action against the transferees.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 51; Dec. Dig. ⇨15(1).]

**4. CORPORATIONS ⇨123(16)—ACTION TO RE-
COVER PLEDGED STOCK.**

Action to establish title to pledged corporate stock was barred by prior agreement by plaintiffs with pledgors that plaintiff would assume the amount of the debt to the pledgee.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(16).]

**5. CORPORATIONS ⇨123(16)—ACTION TO RE-
COVER PLEDGED STOCK—NECESSARY PARTIES.**

In such action, failure to join the pledgee barred relief.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(16).]

**6. CORPORATIONS ⇨123(16)—ACTION TO RE-
COVER PLEDGED STOCK—INNOCENT PLEDGEE.**

In such action, absence of evidence that pledgee knew, at the time of the pledge, that plaintiff claimed the pledged stock, barred recovery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 589; Dec. Dig. ⇨123(16).]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

"Not to be officially published."

Action by Ella Butler, administratrix, and another, against the Hydro-Pneumatic Sprinkler & Manufacturing Company and others. From decree for defendants, plaintiffs appeal. Affirmed.

H. D. McCorkle and Butler & Walsh, all of St. Louis, for appellants. Holland, Rutledge & Lashly, of St. Louis, for respondents.

REYNOLDS, P. J. This action was originally commenced by Edward Butler, Jr., and Henry M. Walsh, as plaintiffs, against the St. Louis Street Cleaning Company, the Hydro-Pneumatic Sprinkler & Manufacturing Company and John S. Poindexter. The only party who appeared was the defendant Poindexter, the defendant Hydro-Pneumatic Sprinkler & Manufacturing Company, not having been served with process and not appearing, and the St. Louis Street Cleaning Company making default and not appearing. Pending the cause in the circuit court Edward Butler, Jr., died and his widow having been appointed administratrix of his estate appeared and was substituted in his place as a party plaintiff. The cause being one in equity was tried to the court, the only defendant represented and appearing being the defendant Poindexter.

At the conclusion of the hearing the court found against the plaintiffs and entered judgment accordingly, dismissing the bill of plaintiffs. From this the plaintiffs, excepting and filing their motion for a new trial, which was overruled and exceptions saved, have duly perfected their appeal to this court.

The petition upon which the cause was tried, after averring the incorporation of the defendant companies under the laws of this state, sets out that in April, 1900, one Frank C. Mitchell entered into a contract with one Thomas M. Murphy, the general object and purpose of which was to employ Mitchell to promote a corporation to own and operate a certain invention known as a patent pressure tank for sprinkling wagons. This agreement, it is averred, provided that Murphy should turn over to the corporation so to be formed the invention and patent pressure tank and that Mitchell should have one-half of the stock that should be issued to Murphy in payment for his invention as compensation for his services in the event that he succeeded in promoting such corporation; that Mitchell did interest capital and substantially per-

form the agreement and that by reason of his efforts in this behalf the defendant Hydro-Pneumatic Sprinkler & Manufacturing Company was organized to exploit and promote and bring into general use the pressure tank, and that for such services Mitchell became entitled to one-fourth of the capital stock of that corporation, one-half of it having been issued to Murphy and to his son Fred Murphy at his instance and direction in payment for the invention and patent pressure tank. It is further set out that on June 1st, 1900, Thomas M. Murphy sold and assigned to the Hydro-Pneumatic Company all his right, title and interest in and to his invention and to the patents supposed to have been granted on the same and requested in writing the commissioner of patents of the United States to issue letters patent for the invention to the Hydro-Pneumatic Company and for this sale and assignment Murphy received one-half of the capital stock of the Hydro-Pneumatic Company; that immediately after the stock was issued to the Murphys, Thomas M. Murphy repudiated his agreement with Mitchell and refused to turn over to him one-half of the stock that had been issued to him and his son by the Hydro-Pneumatic Company; that soon afterwards it was discovered that the application for a patent made by Murphy had lapsed, whereupon Murphy agreed with the Hydro-Pneumatic Company to prosecute a new application for the invention with minor changes and improvements and a further understanding and agreement was had between Murphy and the Hydro-Pneumatic Company that Murphy should be employed about experimenting and using his inventive genius with the object and purpose of so changing the invention and device as to turn the Hydro-Pneumatic Sprinkler into a street washer by applying compressed air pressure to water and projecting the same upon the street with a downward movement so that it would strike the street with a cutting edge and that the Hydro-Pneumatic Company should pay to Murphy a salary for his services in this particular, pay all the expenses of the experiments, cause any improvements and inventions to be patented at its own cost and expense, and that the inventions when made and the patents when granted should be and become the property of the Hydro-Pneumatic Company; that that company paid to Murphy a salary while he was so engaged in experimenting, paid all the costs of the experiments, and at its own cost and expense prosecuted applications for patents, and that these inventions and patents were at all times prior to June 1st, 1901, recognized, treated and considered by Murphy and the Hydro-Pneumatic Company as the property of that company but that in point of fact the applications so made for patents were made by Murphy in his own name.

The inventions made during that period,

duly patented and covered by letters patent granted at different days are named.

It is further set out that at the same time the Hydro-Pneumatic Company owned a large amount of personal property, including 16 street washing wagons and a number of mules, sets of harnesses and other appliances for the operation of the wagons, and it is averred that on May 28th, 1901, Mitchell sold, assigned and transferred to plaintiff Walsh all his right, title and interest in the contract with Thomas M. Murphy and to all rights of action and claims and benefits arising therefrom and that Walsh sold and assigned an undivided half interest in the contract and rights of action to Edward Butler, Jr., Walsh and Butler holding these rights as co-partners.

It is further averred that on June 20th, 1901, plaintiffs Walsh and Butler brought suit against the Hydro-Pneumatic Company and Thomas M. Murphy and Fred Murphy, his son, and one William Ratican, the general object and purpose of which, it is averred, was to enforce specifically the transfer to the plaintiffs of the stock which Murphy had agreed to turn over to Mitchell and for an injunction pendente lite. The temporary injunction was granted on this on July 3rd, 1901, as prayed, and it is averred that after that had been granted Thomas M. Murphy devised and planned a scheme by which he might defraud and cheat plaintiffs out of any benefits, profits or interest in the invention and in collusion with the Hydro-Pneumatic Company, its officers and agents, induced that company to refrain from making claim to the letters patent issued in the name of Murphy and set up a claim by and with the collusion of the Hydro-Pneumatic Company to the ownership and beneficial interest in and to the letters patent and proceeded to treat them as his individual property in fraud of the rights of the Hydro-Pneumatic Company and of the plaintiffs; that Thomas M. Murphy further sought to appropriate the property of the Hydro-Pneumatic Company to his own use and to that end proposed to Ratican that the latter lay claim to the ownership of the wagons, mules and harness and that they would divide the property between them in such manner that Murphy would be the owner of the patents and Ratican be treated as the owner of the personal property, which disposition of the property was agreed upon between Ratican and Murphy, as it is averred, and in pursuance of this they entered into an agreement which is set out but unnecessary to here embody.

It is further averred that after July 23rd, 1901, the parties appropriated to their own use the property of the Hydro-Pneumatic Company and thereafter treated it as individual property of the parties signatory to the agreement, that is Ratican and Thomas M. Murphy. It is further averred that afterwards, in 1902, the St. Louis Street Cleaning

Company was incorporated by Ratican and Thomas M. Murphy, with the object and purpose that that company was to acquire and operate the street washing wagons and take over the entire property including mules, harness and appliances used by Ratican and Murphy in the operation of the wagons and to perform contracts made by them with the city of St. Louis; that Ratican became its president and Thomas M. Murphy its superintendent, the defendant St. Louis Street Cleaning Company, it being averred, at the time of taking over the property, being fully advised and informed of the rights of the Hydro-Pneumatic Company. It is averred that on May 1st, 1902, the Street Cleaning Company, by bill of sale, acquired from Murphy and Ratican certain mules and harness and wagons of the value of \$17,500, and acquired other property belonging to the Hydro-Pneumatic Company of the aggregate value of \$7,500, and that by reason of the facts as before stated the stock of the St. Louis Street Cleaning Company issued to Murphy and Ratican in payment for the property was then and thereafter the property of the Hydro-Pneumatic Company and its stockholders and that the holders of said stock were mere trustees holding the stock for the benefit of the Hydro-Pneumatic Company and its stockholders. It is again and further averred that the property transferred to the street cleaning company was the absolute property of the Hydro-Pneumatic Company and its appropriation and conversion by Murphy and Ratican was a fraud on the Hydro-Pneumatic Company and upon plaintiffs, and that these transfers, together with another transfer made to the street cleaning company practically deprived the Hydro-Pneumatic Company of all its property, and that the sole intention and purpose of these transfers was to defraud plaintiffs and to deprive them of any and all rights and benefits from their interests in the Hydro-Pneumatic Company, and that this whole plan or scheme was devised and carried out by Murphy, who used the fact that the patents had been applied for in his name to coerce and compel Ratican to join with him in his proposed fraud upon these plaintiffs. It is then averred that afterwards the suit of plaintiffs against Murphy, before referred to, was finally determined in favor of plaintiffs in the circuit court, the defendants in that suit being ordered to transfer the stock, being one-fourth of the capital stock of the Hydro-Pneumatic Company to plaintiffs; that this decree was affirmed by the St. Louis Court of Appeals and the transfer accordingly made, plaintiffs now holding the certificates of the stock. See *Butler et al. v. Murphy et al.*, 106 Mo. App. 287, 80 S. W. 337.

It is further averred that afterwards, in 1905, these plaintiffs instituted another suit in the circuit court of the city of St. Louis

to declare a trust in favor of plaintiffs to certain stock issued to Thomas M. Murphy and Anna L. Murphy, his wife, in the Sanitary Street Cleaning and Sprinkling Machine Manufacturing Company to whom Thomas M. Murphy had transferred the patents before mentioned, which was finally determined in favor of these plaintiffs, "and that at the trial of said cause, on the ——— day of ———, 1905, plaintiffs first fully learned the facts hereinabove stated concerning the false, fraudulent transfer of the property of the Hydro-Pneumatic Company to said Thomas M. Murphy and said William Ratican, and of the further false and fraudulent transfer of its property to defendant, said Sanitary Street Cleaning Company." That afterwards Thomas M. Murphy sold and transferred 75 shares of the 150 shares of stock of the defendant Street Cleaning Company and appropriated the proceeds to his own use so that there remained in his hands or under his control 75 shares of the stock of the Street Cleaning Company which had been issued to him in part payment for the property of the Hydro-Pneumatic Company, and that the whole of these 75 shares, so left in his hands or under his control, were the shares of stock to which plaintiffs were entitled upon the distribution of the assets of the Hydro-Pneumatic Company and which in justice and equity belonged to them. It is then averred that afterwards Thomas M. Murphy, to secure a debt of his own, pledged 31 shares of this stock in the Street Cleaning Company to the defendant Poindexter; but plaintiffs aver that Poindexter took the same with full knowledge of the rights and claims of plaintiff and well knew that Murphy had no right or title or beneficial interest in the stock and that he acquired by this pledge no right or title or interest in and to the stock as against plaintiffs. Averring the death of Thomas M. Murphy and that the defendant Anna Murphy was duly appointed administratrix of his estate, it is averred that afterwards, by a general settlement had between plaintiffs and Anna L. Murphy, administratrix, and all other members of the family of Thomas M. Murphy, the right of plaintiffs in and to these 75 shares of the stock of the Street Cleaning Company was recognized and admitted and that the Murphys then and there made assignment of and to the stock to plaintiffs, including the 31 shares of stock aforesaid and that they nor any of them now have an interest therein. (The settlement referred to was evidenced by a written agreement of date January 25th, 1906.) It is further averred:

"That the Hydro-Pneumatic Company aforesaid has wholly ceased to do any business, and has acquiesced and consented to the division of its assets among its several stockholders, and has left no debts or outstanding liabilities, and that it now recognizes and confirms plaintiffs' right, title and ownership in and to the stock aforesaid, including that held by the defendant Poindexter."

Averring that plaintiffs have no remedy at law, it is averred that the stock of the Street Cleaning Company has no fixed or marketable value but that it has a peculiar value because of the device used by it and its license from the patent-holding company, all of which, in plaintiffs' opinion, makes it of great value.

Following this is a prayer that the 81 shares of stock now held by the defendant Poindexter be decreed and adjudged to be the property of plaintiffs and that they have the title thereto; that the agreement or pledge under which these shares are held by Poindexter, be decreed to be invalid and illegal and to constitute no lien or incumbrance on the stock, and that defendant Poindexter has no right or title therein, and that the defendant Street Cleaning Company be decreed to recognize the rights of plaintiffs in and to said stock and to enter their names on the books of the company as owners thereof, and be enjoined and restrained from recognizing or entering the name of any other person on its books as the holder of said stock pending this litigation.

A temporary injunction was prayed, which was granted.

By way of return to this temporary injunction it appears that defendant Poindexter filed what is practically a demurrer, which was overruled. Thereupon Poindexter answered by general denial.

This summary of the petition is sufficient to show the issues presented. As stated above there was a decree for defendants.

[1-3] Along with his decree the learned trial judge filed a written memorandum giving the reasons for that decree which is as follows, omitting a few preliminary and other recitals not deemed here material:

"Among the many questions arising in this case, I think there are two controlling ones, and, while there has been a failure of proof of many essential allegations of the petition, no practical good would result in discussing any questions except those hereinafter mentioned.

"1st: Have the plaintiffs shown any right to bring this suit? 10th Cyc. 975, says:

"A bill by one or more shareholders in behalf of the general body cannot be maintained unless it shows that plaintiffs have exhausted the means of putting the corporation in motion." Citing *Albers v. St. Louis Merchants' Ex.*, 45 Mo. App. 206, * * * among other cases.

"In the case of *Vogeler v. Punch*, 205 Mo. 575, 103 S. W. 1005, the court says:

"It is, therefore, a settled principle of equity jurisprudence that, before a court of equity will open its doors to a single stockholder, although he comes, as he must, not only on behalf of himself but also in behalf of all the other stockholders to an inquiry into grievances of this kind, he must show that there is no other road to redress; and he does not show this unless he shows that all remedies within the corporation itself have been exhausted. * * * He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made

an honest effort to obtain an action by the stockholders as a body, in the matter of which he complains."

"Let us examine briefly some of the facts to which these rules are applicable. Plaintiffs contend that certain property in the possession of Thomas Murphy and William Ratican belonged to the defendant Hydro-Pneumatic Sprinkler & Manufacturing Company.

"The preponderance of the evidence, I think, shows that this property belonged to William Ratican individually; he sold a half interest therein to Thomas Murphy; Thomas Murphy paid therefor in part, with royalties arising out of wagons used in the sprinkling of streets in the city of St. Louis, which wagons were manufactured under certain patents of which Murphy was the inventor. These patents, plaintiffs contend, belong to the Hydro-Pneumatic Sprinkler & Mfg. Co. There is no evidence of the assignment of any patent by Murphy to the Hydro-Pneumatic Sprinkler Mfg. Company. I think, however, the evidence shows sufficient facts to justify the finding that equitably the Hydro-Pneumatic Sprinkler & Mfg. Company was entitled to those patents. I, therefore, assume for the purposes of this case, that the patents belonged to that company. The wagons, horses and mules and other paraphernalia used by Ratican in sprinkling the streets of St. Louis were, according to the preponderance of the testimony, the individual property of Ratican; then he sold a half interest therein to Murphy. It was agreed between them that the royalties from these patents, which were claimed by Murphy as his individual property, should be divided between Ratican and Murphy, and that Murphy's interest therein should be applied to the payment for the wagons, mules, etc., until the value of one-half thereof had been paid. And the evidence shows that Murphy paid part of the purchase price of this property by royalties agreed upon between him and Ratican for the use of wagons made under his patents; the amount of money so paid was not definitely proved. Plaintiffs claiming that it was some six thousand dollars and the defendants claiming that it was a less sum. The sum was not sufficient, however, to pay for the property to Ratican, and Murphy raised from outside parties sufficient money to make up the difference. Assuming that the Hydro-Pneumatic Sprinkler & Mfg. Company was the equitable owner of the patents and that Ratican and Murphy misappropriated the royalties belonging to said company, by their agreement in regard to said royalties, it is unquestionable that the Hydro-Pneumatic Sprinkler & Mfg. Company would have had the right to bring suit against Ratican and Murphy to recover such misappropriation of royalties; but not the plaintiffs in this case, unless they had demanded that that company bring the suit to recover these royalties and said demand was refused. This demand was not alleged in the petition, nor was it shown in the evidence. * * *

"If these royalties belonged to the Hydro-Pneumatic Sprinkler & Mfg. Company, it alone could have sued therefor, and it alone had power to compel Murphy and Ratican to account for whatever sums they might have illegally misappropriated to themselves.

"The only authority emanating from the Hydro-Pneumatic Sprinkler & Mfg. Company was an alleged meeting of the directors of that company, testified to by the plaintiff Walsh and by Mr. McCorkle, his attorney. This meeting was alleged to have taken place some time in 1906. * * *

"There is quite a conflict of testimony about this meeting. * * *

"There were no minutes kept of the meeting, or if they were, they were lost, and not accounted for.

"Assuming that the preponderance of the testimony was to the effect as testified to by Mr.

Walsh and Mr. McCorkle, then there were two propositions disposed of at that meeting: One was the resolution authorizing Butler and Walsh to proceed directly against Murphy for the recovery of the stock claimed in the Street Cleaning company; and the other was a resolution concerning the sale made by Thomas M. Murphy and William Ratican to the Sanitary Street Cleansing and Sprinkling Machine Company, and the Street Cleaning company; neither of which can by any possible construction be held to be an action of the Hydro-Pneumatic Sprinkler & Mfg. Company authorizing Butler to proceed against Ratican and Murphy to recover the dividends which they are alleged to have misappropriated and applied to Murphy's share thereof to the payment to Ratican for one-half of the property owned by him and used in sprinkling the St. Louis streets. It was simply a resolution authorizing Butler and Walsh to proceed against Murphy for the recovery of the stock they claimed in the Street Cleaning company. The evidence shows that subsequent to the purchase of the half interest in Ratican's property by Murphy, that Ratican and Murphy organized the Street Cleaning company and turned over to it the patents, and this personal property of which Ratican and Murphy were joint owners; and the action of the Hydro-Pneumatic Sprinkler & Mfg. Company simply authorized Butler and Walsh to sue Murphy for the interest they claimed in the Street Cleaning company, and was not an authorization to Butler and Walsh to sue the Hydro-Pneumatic Sprinkler & Mfg. Company, which they have done in this suit. There is no evidence that any demand was ever made on the Hydro-Pneumatic Sprinkler & Mfg. Company to bring the suit for the recovery of those dividends for the benefit of that company, and there is no evidence that the Hydro-Pneumatic Sprinkler & Mfg. Company ever refused to bring that suit. Neither Murphy nor Ratican is a party to this suit. Consequently I think this point must be ruled against the plaintiffs, because they have not shown that before bringing this suit they have exhausted the remedies through the corporation itself.

"In this connection it may be stated that the plaintiffs claimed that they sued herein as assignees of the claim of the Hydro-Pneumatic Sprinkler & Mfg. Company. I think this contention must also fail, because there has not been a suggestion in the testimony of either Mr. Walsh or Mr. McCorkle of any assignment of the claim of the Hydro-Pneumatic Sprinkler & Mfg. Company against Ratican and Murphy; nor is there any assignment of that claim shown in the evidence authorizing Butler and Walsh to sue the Hydro-Pneumatic Sprinkler & Mfg. Company itself. I think, therefore, the relief asked based on the theory of the assignment of the Hydro-Pneumatic Sprinkler & Mfg. Company's rights must fail.

"2nd: The second controlling proposition is this: On the 26th of January, 1906, a contract was entered into between the plaintiffs in this suit and Anna L. Murphy, administratrix of the estate of Thomas M. Murphy; Anna L. Murphy, Fred T. Murphy and Albert H. Murphy, parties of the second part, which contract recites, that whereas Butler and Walsh claim a half interest in the interest of Thomas Murphy, deceased, and the Murphy patents in the United States and foreign countries, and claim 375 shares of the stock of the Sanitary Street Cleansing and Sprinkling Machine Company, and 75 shares of the stock of the St. Louis Street Cleaning Company, to all dividends and earnings thereon.

"* * * * * together with any and all other interests growing out of the one-fourth ($\frac{1}{4}$) interest in the stock of the Hydro-Pneumatic Sprinkling and Manufacturing Company, acquired by the parties of the first part, and converted by the said Thomas M. Murphy, and all earnings or dividends on same into whatever

kind of property they may have subsequently been transformed; and

"Whereas, the parties of the first part and the parties of the second part, being all desirous of ending litigations already brought, and of avoiding further litigation in future, have agreed to compromise and make amicable settlement of their differences in the above matters.
* * *

"The contract of settlement required the Murphy heirs to assign their interest in the 375 shares of the Sanitary Street Cleansing and Sprinkling Machine Company to Messrs. Butler and Walsh; to transfer all their interests in and to all the shares of the capital stock of the St. Louis Street Cleaning Company, subject to certain pledges therein set out; to transfer one-half interest of all the interests held in the aggregate by the Murphy heirs in and to all foreign patents absolutely; to transfer to William Ratican 75 shares of the capital stock of the Sanitary Street Cleansing and Sprinkling Machine Company; to William Ratican, as trustee for Anna L. Murphy, certain shares of the stock in the Sanitary Street Cleansing and Sprinkling Company; to pay Taylor K. Young, and certain banks, other sums, cleaning off the liens against any of the said stock;" (including the 31 shares held by Poindexter and covered by the clause hereafter quoted) "that upon the delivery of the 375 shares of the Sanitary Company's stock and the 75 shares to Ratican as trustee, Butler and Walsh were to enter satisfaction of the judgment in case No. 21,313 in the St. Louis Circuit Court in Division No. 7; and the Murphy heirs agreed to dismiss their appeal in another case in Division No. 5 between the parties, and Butler and Walsh should enter full satisfaction of the judgment or decree entered in said cause by the said Circuit Court of the City of St. Louis, and the contract then proceeds as follows:

"Sixth: It is distinctly understood and agreed by and between the parties hereto that this agreement shall constitute a full, final and complete settlement of all controversies of whatsoever nature, description or kind that may now exist between the first and second parties, and a full satisfaction of all claims of whatsoever nature first parties may have against the estate of Thomas M. Murphy and the parties of the second part."

(Signature of the parties as hereafter noted.)

"Prior to signing the said contract it was submitted to the Probate Court of the City of St. Louis, with a petition requesting the Probate Court to authorize Anna L. Murphy as administratrix of the estate of Thomas M. Murphy, to sign the agreement to dismiss the appeal in the case in the Supreme Court, which order was made by the said Probate Court.

"Remembering that all of the property and the Murphy patents had been transferred by Ratican and Murphy to the Street Cleaning Company and the Sanitary Company, and that the Hydro-Pneumatic Sprinkler & Mfg. Company had also transferred all of its property and interests to the Street Cleaning Company and that at the meeting testified to by Mr. Walsh and Mr. McCorkle such transfer by the Hydro-Pneumatic Sprinkler & Mfg. Company had been ratified, I cannot see how, after the settlement above referred to, between Walsh and Butler and the Murphy heirs, and his administratrix, settling the litigation of every kind, and dismissing appeals, and satisfying judgments, there can now be any cause of action in the plaintiffs against the defendant in this suit.

"For the reasons above given and others that appear in the record of this case, I am satisfied that the plaintiffs are not entitled to recover, and the bill will be dismissed."

We think this decision so correctly states the propositions of law here involved and is

so fully supported by the facts in evidence, that we do not consider it necessary to add anything to it by way of amplification or further discussion, except this:

In the contract of January 25th, 1906, in which Walsh and Murphy were named as parties of the first part and the Murphys as parties of the second part, it is among other things agreed that:

The parties of the second part undertook and agreed to transfer or cause to be transferred "by instrument of assignment, to said parties of the first part all their interest in and to all of the shares of the capital stock of the St. Louis Street Cleaning Company, said stock, however, being pledged in part, as follows: * * * Thirty-one (31) shares to John S. Poindexter, to secure the payment of three thousand dollars (\$3000), which said stock was last heard of in the hands of John S. Poindexter. Of the above amounts, the parties of the first part agree to pay, immediately, to the parties so holding said stock as collateral, their respective amounts, except as to the said John S. Poindexter against whose claim the parties of the first part guarantee to protect and hold harmless the parties of the second part and the estate of Thomas M. Murphy."

[4-6] By this it appears that provision was made as to this very stock when that compromise agreement was made. It is clear from the testimony in the case that Thomas M. Murphy owed Poindexter \$6,500 on a judgment, this compromised at \$3,000 to avoid appeals. The evidence tends to show that the plaintiffs had agreed to pay Poindexter this \$3,000; although it is true that there was testimony to the effect that this arrangement was merely tentative. But in view of the compromise agreement it is difficult to see how plaintiff can assert any claim to this Poindexter stock superior to that of Poindexter. Moreover, plaintiffs, by the testimony which they themselves introduced, showed that Poindexter had borrowed money on this stock and pledged it for the debt. It does not appear who holds this Poindexter stock at present and the compromise agreement itself leaves the question of present ownership in doubt. However that may be, the party to whom Poindexter had pledged this stock, so far as appears from anything in the record, was an innocent holder. It is therefore impossible, in the absence of that party or any showing of knowledge by him, to substitute the plaintiffs as the owners of these 31 shares of stock, as is prayed for in the decree. There is no positive or convincing testimony in the case, nor any preponderance of testimony even, to bring home a knowledge of the claims of plaintiff to these 31 shares of stock to Poindexter prior to the time Thomas M. Murphy had pledged this stock to Poindexter. This really goes to the very root of the case against Poindexter and in itself is conclusive as against the present claim of these plaintiffs to have them entered on the books of the company as owners of any part of those 31 shares, and that is the real gravamen of this action.

The judgment of the circuit court should be and is affirmed.

ALLEN, J., concurs.

HIGHFIELD v. UNITED MAGAZINE PRESS et al. (No. 14514.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. APPEAL AND ERROR \S 639(1) — RECORD — ABSTRACT—DEFECTS—AIDED BY CERTIFICATE OF CLERK.

On appeal from judgment for interpleader, the abstract, notwithstanding defects, when considered in connection with the certificate of clerk of the circuit court, filed under Rev. St. 1909, \S 2048, as to certified transcript of part of the record in dispute, held sufficient to warrant review not only of the record proper but of that part made a part of the record by bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2829; Dec. Dig. \S 639(1).]

2. JUSTICES OF THE PEACE \S 91(1) — PLEADING—PLAINTIFF'S STATEMENT.

Rev. St. 1909, \S 7412, as to pleading in justice court, providing that no formal pleadings shall be required from either party, but plaintiff shall file either the instrument sued on or a statement of the account and of the facts on which suit is founded, does not require the same accuracy and particularity in the statement as is required in a petition in court of record by section 1794, as to contents of such petition.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 307-309, 323; Dec. Dig. \S 91(1).]

3. JUSTICES OF THE PEACE \S 91(1) — PLEADING—PLAINTIFF'S STATEMENT.

Where a statement in justice court was entitled against a certain named corporation, "also doing business as" a certain named printing company, but did not otherwise indicate that the action was against the printing company, it was insufficient to show that the action was against the printing company.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 307-309, 323; Dec. Dig. \S 91(1).]

4. ATTACHMENT \S 308(3)—EVIDENCE—TITLE OF THIRD PERSON—INTERPLEADER.

Admission of evidence for an interpleader claiming title to goods attached, tending to show that the attaching plaintiff was a member of the firm to whom interpleader conditionally sold the goods, in order to show he was not a creditor of the firm within Rev. St. 1909, \S 2889, making conditional sales not recorded void as to creditors, was not error, where the record was insufficient to show that attaching plaintiff was proceeding against such firm, and the testimony was uncontroverted that plaintiff was a member of the partnership, but there was nothing to show he was a creditor of the firm.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 1106-1108; Dec. Dig. \S 308(3).]

5. ELECTION OF REMEDIES \S 12 — ATTACHMENT—THIRD PERSON CLAIM.

A claimant of attached goods is not barred, on the theory of election, from claiming the goods by interpleader, by his having made a third party claim in the attachment action under the laws applicable to the city of St. Louis as to indemnifying bond in attachment (Rev. St. 1899, p. 2550; Rombauer's Compilation of Rev. Code of St. Louis [Ed. 1912] pp. 22-27), where

the officer has not taken a lawful bond giving claimant right of action thereon.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 15; Dec. Dig. ¶ 12.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

"Not to be officially published."

Action by Frank T. Highfield against the United Magazine Press, in which the American Multigraph Sales Company interpleaded. From judgment for interpleader, plaintiff appeals. Affirmed.

Henderson & Henderson, of St. Louis, for appellant. McShane & Goodwin, of St. Louis, for respondent.

REYNOLDS, P. J. This action, tried in the circuit court, was on an interplea interposed by the American Multigraph Sales Company. The abstract furnished us by appellant, after giving the title of the cause as we have set it out above, proceeds, under the heading, "Pleadings," "Omitting caption, signature and affidavit, the interplea of respondent filed February 12, 1913, in the Justice Court of Robert Walker, was as follows:" Then, under the caption, "Interplea," follows, that, in substance, that the American Multigraph Sales Company, a corporation, doing business under the laws of this state, comes and "interpleads in the above cause, and states that on the 25th day of January, 1913, by virtue of a writ of attachment issued before that time in said cause, No. 178, January, 1913," by the above named justice to the constable of his district in favor of Frank T. Highfield "and against the property of the said United Magazine Press, a corporation, and returnable February 11th, 1913," the constable levied upon and seized as the property of the United Magazine Press one American multigraph gammeter and small electric motor attached thereto, of the value of \$420 and still holds possession of the same; "and the said American Multigraph Sales Company declares that said American multigraph gammeter and small electric motor attached, at the time of said levy and seizure was not the property of the said United Magazine Press, but was, and still is absolutely the property of this claimant, and that the same is not subject to said attachment." Judgment is prayed for the recovery of the property, \$100 damages and costs. Following this are what purport to be copies of record entries, but in what court they were made, nowhere appears. These entries recite that on February 2nd, 1914, a forthcoming bond was filed by leave, the jury sworn and trial progressed; that it was concluded February 3rd and verdict and judgment in favor of the American Multigraph Sales Company, interpleader, and against plaintiff, and that the interpleader is entitled to possession of the property, describing it. Following these entries are en-

tries of the filing of a motion for new trial, the fact of its being overruled, affidavit for appeal filed and appeal allowed to our court, and on February 6th, 1915, plaintiff's bill of exceptions allowed, signed by the trial judge, filed and made part of the record. The affidavit for appeal does appear as in the circuit court, is entitled, after proper venue and as in the circuit court, "Frank T. Highfield v. United Magazine Press, also doing business as Swift Printing Company, defendant, The American Multigraph Sales Company, a corporation, Interpleader," and is made by the plaintiff. Following this is the bill of exceptions, which appears to have been signed by the judge who tried the cause as well as by his successor.

[1] Learned counsel for respondent, American Multigraph Sales Company, attacks this abstract as entirely insufficient and contends that there is nothing before us but the record proper. It must be admitted that this abstract is very defective, but when we consider it in connection with the certificate of the clerk of the circuit court, filed under the provisions of section 2048, Revised Statutes 1909, it does appear that the interplea was heard in the circuit court of the city of St. Louis under the last above caption; that it was there tried before the court and a jury; a verdict rendered in favor of the interpleader, finding it entitled to the possession of the machine involved; judgment accordingly, directing the constable to turn the machine over to the interpleader, as also a judgment for costs and awarding execution. Following this is an extension of time granted plaintiff to file his bill of exceptions and allowance of an appeal to our court on affidavit duly filed. On this we think that notwithstanding the defects in the abstract we have enough before us to warrant us in saying the appeal is to be determined not alone on the record proper but on that made a part of the record by the filing of a bill of exceptions.

Six assignments of error are made which relate to the admission of testimony, to overruling the demurrer to the evidence and to the giving of instructions requested by the interpleader as also to the overruling of the motion for new trial.

A very diligent reading of the testimony in the case and of the proceedings at the trial in connection with its admission and rejection, fails to satisfy us that the court committed any material error in respect to either of these matters.

The most strenuous objection is made to the reception of any evidence tending to show that plaintiff in the attachment, Highfield, was not a creditor of the Swift Printing Company but was a member of that partnership; it being argued that the interpleader could not attack the validity of the claim of plaintiff in the attachment or the validity

of the attachment; that the interpleader's right to the property does not depend upon the character of the attachment, whether valid or invalid. Learned counsel for respondent concedes this, but contends that he was not attempting to attack either the position of Highfield as creditor of the United Magazine Press Company, or his right to attach, but was seeking to show that Highfield was not a creditor of the Swift Printing Company within the meaning of section 2889, Revised Statutes 1909, but a member of that partnership, in order to show that he was affected with notice of the interpleader's contract of conditional sale though not recorded.

It appears by the writ of attachment issued by the justice that he commanded the constable of his district "to attach United Magazine Press Company, a corporation, doing business also as Swift Printing Company, by all and singular its goods," etc., and that the constable summon "the said defendant, United Magazine Press, a corporation, doing business also as Swift Printing Company, to appear before me, the said justice," etc.

Conceding that the case was entitled, "Frank T. Highfield v. United Magazine Press, also doing business as Swift Printing Company," there is nothing whatever in the abstract before us, other than this, to show that United Magazine Press Company was doing business as Swift Printing Company. The statement filed with the justice in the attachment proceeding, assuming that one was there filed, is not before us, either in full or in substance.

[2] Our statute, ever since the adoption of our code, has always provided, as now provided by section 1794, Revised Statutes 1909, that a petition shall contain:

"First, the title of the cause, specifying the term, the name of the court and county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants; second, a plain and concise statement of the facts constituting a cause of action."

That applies, of course, to actions instituted in courts of record. While there is no provision in the statute governing institution of suits before the justice as to what the statement, when one is there filed, shall contain, section 7412, Revised Statutes 1909, providing that no formal pleadings shall be required on the part of either party, provides that the plaintiff shall file with the justice either the instrument sued on or a statement of the account and of the facts constituting the cause of action upon which the suit is founded. That is practically the requirement as to a petition in courts of record, but of course the accuracy and particularity required in a petition is not necessary in a statement. It is sufficient if it informs the defendant of the nature of the claim, and it must appear by the statement, however in-

formally, that plaintiff is a creditor or has some claim against defendant, and is definite enough to bar another action for the same cause.

In an early case, *State, to Use of J. E. Tapley's Adm'rs, v. Matson et al.*, 88 Mo. 489, loc. cit. 491, it is said:

"The objection to the petition is that it contains no averment of the right of these parties to sue. In the caption they are designated in the manner above stated (*State to the Use of Tapley's Admrs.*); but the fact of their appointment, their legal authority to act as such, and their right to recover against the defendants upon the facts stated, is nowhere averred. Nor indeed is there any statement made from which it might be legitimately inferred that these parties had any right of action whatever."

The petition was held bad on demurrer, the court saying that the designation as administrator in the caption was merely descriptive personae.

In *State, to the Use of Worth County, v. Patton et al.*, 42 Mo. 530, loc. cit. 534, it is said, referring to *State to the Use of Tapley's Adm'rs v. Matson et al.*, supra:

"The want of a proper statement of the parties in the caption of the petition is not fatal where it is supplied in the body of the pleading by a substantial averment showing the capacity of the plaintiff to sue and recover upon the cause of action stated."

In *Wolff v. Ward*, 104 Mo. 127, loc. cit. 157, 16 S. W. 161, 169, it is said by the court, in answer to the objection that the name of one of the defendants was omitted from the caption, that his name is often used in the body of the petition and that the omission of the name from the caption was a clerical error. "The rule is to look to the body of the petition to ascertain its purport and sufficiency, and this shows beyond controversy that he was retained as a defendant." Where, however, the names of plaintiff and defendant have been set out in the caption, it has been held that it is sufficient to thereafter refer to them in the body of the petition as plaintiff and defendant, without repeating the names.

[3, 4] In the light of these decisions, therefore, and with nothing before us but the caption of the petition or statement on which the attachment was founded, we cannot hold that in the proceeding in attachment the plaintiff was proceeding against the Swift Printing Company as his debtor. More especially is that true when it appears by uncontroverted testimony in the case at bar—and appellant introduced no testimony—that Swift Printing Company was the business name of a partnership of which plaintiff himself was a member, and the interpleader claims the machine as against the United Magazine Press Company alone. We do not think, therefore, that there was any error committed by the learned trial court in admitting evidence in this case to show that the plaintiff was not a creditor of his

own partnership, the Swift Printing Company.

Whether the United Magazine Press, a corporation, and the Swift Printing Company were one and the same, was an issue which the court distinctly submitted to the jury in its instructions, telling the jury that the mere fact that plaintiff had charged in his attachment suit that the defendant, United Magazine Press, a corporation, was doing business as the Swift Printing Company, was not binding on the interpleader and no evidence of the truth of that charge; and that if the jury found from the evidence that the business of the Swift Printing Company was not conducted by the United Magazine Press, a corporation, as part of its corporate business and that the business of the Swift Printing Company was conducted and carried on separate and distinct from the United Magazine Press, even though both concerns occupied the same building, their verdict must be in favor of the interpleader and against plaintiff for the possession of the property in suit. The court further emphasizes this idea in other instructions, to the effect that if the jury found the United Magazine Press Company did not actually own or control the business of the Swift Printing Company as its own separate corporate business at the time of the selling of the property to the interpleader by the Swift Printing Company, their verdict must be for the interpleader, and further correctly instructed the jury as to what would constitute a partnership. The underlying fact in the case is, that the interpleader had sold and delivered the machine in controversy to the Swift Printing Company for the price and sum of \$420, under an agreement that the title to the machine would not pass until the purchase price had been paid in full and until that time should remain the property of the American Multi-graph Sales Company. This contract was not recorded, and counsel for appellant contend that, not being of record, the agreement as to title, in the face of the delivery to the Swift Printing Company, was not binding on creditors under the provisions of section 2889, Revised Statutes 1909. So it was contended that if plaintiff was not a creditor of the Swift Printing Company, that section was irrelevant for the protection of plaintiff. He could only invoke it if a creditor of the Swift Printing Company. How he could be that and assert his right as such creditor in an action at law, he being a member of the partnership doing business under the trade name of the Swift Printing Company, is difficult, almost impossible to imagine. We hold, therefore, that the evidence was properly admitted to show that Highfield was not a creditor of the Swift Printing Company, there being nothing before the court or before us to show that Highfield was such creditor. Moreover, as a member of the Swift Printing Company partnership or firm, he is at least constructively charged with notice of the con-

tract between it and the interpleader, and as to him or his firm, it was not necessary that the contract should be of record.

[5] It is argued before us that the interpleader having made a third party claim in the attachment action, is estopped from maintaining this action. The attachment pending in the City of St. Louis before a justice of the peace of that city, any claim which a party desired to make to the attached property must be made under the law governing matters of that kind particularly applicable to the city of St. Louis and to the county of St. Louis. This law, enacted in 1855, will be found in the Revised Statutes 1890, page 2550, as also in Rombauer's Compilation of the Revised Code of St. Louis (Ed. 1912). The first section of that law (section 22, page 83, Rombauer's Revision) provides that when any sheriff, marshal or constable, or other duly authorized officer shall levy an execution or attachment on any personal property and any person other than the defendant in such execution or attachment shall claim such property or any interest therein, the officer may demand of the plaintiff in the execution or attachment a sufficient indemnification bond, "to be approved of by such officer." The second section (section 23, Rombauer's Revision), provides the form of the bond and that the officer taking it "shall return the same with such execution or attachment." The third section (section 24, Rombauer's Revision) provides the form of the claim and that it shall be in writing and verified. The fourth section (section 25, Rombauer's Revision) provides that if a claimant shall be injured or damaged in consequence of any levy or sale under or by virtue of such execution or attachment and shall in good faith pay the owner of the interest claimed by him in the property, he may bring a civil action on the bond in the name of the state to his own use against plaintiff and his sureties. The sections immediately following (sections 26 and 27, Rombauer's Revision) provide that when the officer has taken a good bond with sufficient securities, he shall not be liable to the claimant for damages, or that if the indemnification bond is adjudged insufficient, then the officer and his sureties shall be liable to all parties injured.

It is very strenuously argued by the learned counsel for the appellant that by making the third party claim, the American Multi-graph Sales Company, respondent here, is estopped from now maintaining this action by way of interpleader; that it had its election of remedies and having chosen them, having elected to make a third party claim, cannot now maintain the present proceeding.

In *Bradley v. Holloway*, 28 Mo. 150, it is held that this law is primarily for the protection of the officer. In *State to the Use of Goldsall v. Watson*, 30 Mo. 122, and again in *Hambleton v. Lynch*, 32 Mo. 259, and *Dodd v. Thomas*, 69 Mo. 364, as well as in many

cases by the appellate courts from Hawk v. Applegate, 37 Mo. App. 32, to Kesse v. Wilson, 139 Mo. App. 1, loc. cit. 3, 4, 119 S. W. 508, it is held that where a party has made his claim as required by the statute, and the constable had thereupon taken a bond of indemnity, the plaintiff would be held to elect either to sue on the bond or to proceed against the property by replevying it, or to sue the officer for damages. But in all of these cases, many of which are referred to in the case last cited, it appears that it was essential that the third party had made a claim; that a bond had been given and approved by the proper officer; that the bond has been returned by that officer with the writ; in brief, that this special statute had been complied with. In the case at bar there is no proof that any bond, as required, had been approved by the constable or returned by him with the writ. In point of fact the only bond in evidence was approved by the justice of the peace and not by the constable, and was not returned by the constable with the writ but appears to have been first filed in the circuit court while this cause was there pending. Could the interpleader, before then claimant, have recovered on this bond? Obviously not, for the steps necessary to make that a valid bond had not been followed. The whole object of this statute relating to a third party claim and the exaction of a bond, is to give the party entitled to the benefit of the bond his right of action for any damages which he sustained against the party who had retained or taken possession of it and his sureties. If that party has not given a lawful bond lawfully approved and returned and which could be enforced, then the respondent had no right of action on a bond, and even though it did make its claim and was not then afforded the protection of a lawful bond, respondent cannot be held to be bound by having elected between one remedy and another. The fatal defects attendant upon the giving of the bond, did not open up any field for election. So that the claim that respondent had elected by making a third party claim between this present remedy by interplea and that by making a third party claim, falls to the ground, as there could have been no recovery on that bond, and this for the very sufficient reason that in that proceeding no bond was filed, approved or returned by the constable on which respondent here could have successfully maintained an action to recover damages on a bond by reason of its property having been unlawfully taken from it and held under the attachment.

Without going more fully into detail in the case, we think the verdict and judgment in the trial court was for the right party and that judgment is affirmed.

ALLEN and THOMPSON, JJ., concur.

GRAYSON v. GRAYSON. (No. 11932.)
(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

1. APPEAL AND ERROR ¶1002 — REVIEW — FINDINGS.

Findings of fact by the jury on conflicting evidence will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8935-8937; Dec. Dig. ¶1002.]

2. FRAUDS, STATUTE OF ¶133 — ORAL AGREEMENT TO CONVEY LAND — PART PERFORMANCE.

Where the parties have carried out an oral agreement to convey land and the only thing left undone is the payment of the price, the statute of frauds does not apply.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 293-298; Dec. Dig. ¶133.]

3. EVIDENCE ¶114—ADMISSIBILITY.

In an action to recover plaintiff's interest in real estate previously conveyed by plaintiff and her husband to the defendant upon defendant's oral agreement to pay plaintiff the value of her interest, in which defendant denied the promise to pay, collateral evidence of plaintiff's troubles with her husband was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125-132; Dec. Dig. ¶114.]

4. DOWER ¶35—VALUE.

In an action to recover plaintiff's interest in real estate formerly conveyed by herself and husband to defendant upon defendant's oral promise to pay plaintiff the value of her interest, plaintiff could recover for the value of her inchoate right of dower in the land.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 85, 86; Dec. Dig. ¶35.]

5. DOWER ¶84—VALUATION—MORTALITY TABLES—STATUTE.

Rev. St. 1909, §§ 8490-8501, providing for the ascertaining of uncertain or contingent values by mortality tables, are not necessarily exclusive and do not refer to an inchoate dower estate.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 822-824; Dec. Dig. ¶84.]

6. APPEAL AND ERROR ¶173(2)—RESERVATION IN LOWER COURT—GROUNDS FOR REVIEW.

In an action to recover plaintiff's interest in real estate formerly conveyed to defendant by herself and husband, upon defendant's oral agreement to pay plaintiff the value of her interest, where defendant rested his whole case on nonliability and made no issue by instructions or otherwise on the value of plaintiff's interest or the measure of her recovery, he cannot make such issue on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1110; Dec. Dig. ¶173(2).]

7. TRIAL ¶256(13)—INSTRUCTIONS—OBJECTIONS.

Where plaintiff's instruction as to the value of her inchoate dower estate was generally good if defendant wished to restrict it, he should have asked an instruction himself on that subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 640; Dec. Dig. ¶256(13).]

Appeal from Circuit Court, Clinton County;
A. D. Burnes, Judge.

"Not to be officially published."

Action by Myrtle Grayson against John M. Grayson. Judgment for plaintiff, and defendant appeals. Affirmed.

Frost & Frost, of Plattsburg, and E. C. Hall, of Kansas City, for appellant. Pross T. Cross, of Lathrop, and Culver & Phillip, of St. Joseph, for respondent.

ELLISON, P. J. This is an action for the value of plaintiff's interest in a large body of land in Bates county. The judgment in the trial court was for the plaintiff.

It appears that plaintiff was defendant's daughter-in-law, and that she married defendant's son in Clinton county, where all the parties then lived, about 17 years prior to the trial of this cause. Four or five years prior to the trial she and her husband moved to Bates county where they acquired a large tract of valuable land. In a part of this land plaintiff's interest was an estate by the entirety with her husband, and in another part her interest was an inchoate right of dower. It was shown in evidence that her husband desired to get the full title to the entire tract in his own name, and there was evidence tending to show that defendant became a party to the plan decided upon, by verbally agreeing with plaintiff that she should join with her husband in a deed to him and that he would pay her the value of all her interest; that she consented to this arrangement and joined in the deed to defendant; that defendant accepted the deed and then immediately conveyed the same land to plaintiff's husband.

[1] While defendant admitted that, to help out his son (plaintiff's husband) he received a deed to the lands from plaintiff and her husband and that he conveyed the land back to the latter, he denied that he promised to pay plaintiff the value of her interest; insisting the transaction, on his part, was as a mere volunteer conduit through whom to pass the title to his son at the request and for the accommodation of both plaintiff and the son. On this simple question of fact there was evidence favoring either view and we must, of course, accept the verdict of the jury as putting such fact with the plaintiff.

[2] It is said by defendant that the contract being for the sale of an interest in real estate, the verbal contract is not enforceable. That would be true if it were yet to be enforced. But the parties themselves have carried it out, one conveying and the other accepting the conveyance; the only thing left undone, being the payment of the price of such conveyance. The statute of frauds finds no application to such case. *Farrar v. Patton*, 20 Mo. 81; *Suggett v. Cason*, 26 Mo. 221; *Tatum v. Brooker*, 51 Mo. 148. Numerous authorities announcing this rule will be found collected in *Railroad v. Wingerter*, 124 Mo. App. 426, 431, 101 S. W. 1113. It ought to be too plain for dispute that a man who accepts a deed for real estate will not be permitted to escape paying the purchase price. The case of *Sursa v. Cash*, 171 Mo. App. 396, 156 S. W. 779, cited by defendant, gives no countenance to such proposition. The rule we

have stated is expressly recognized (171 Mo. App. at pages 406, 407, 156 S. W. 779).

[3] Another objection is that the court excluded proper evidence offered in defendant's behalf. As we have stated, defendant's theory of defense was that he made no promise to pay plaintiff for her interest and only acted at her request and for her and her husband's accommodation. In his attempt to develop this theory, he sought to prove what plaintiff said to him about her troubles with her husband, the effort being to show that she was the party greatly at fault. The trial court, on objections of counsel, ruled that collateral issues of that nature could not be heard. But it was expressly conceded by plaintiff's counsel, and ruled by the court, that anything plaintiff said about making the deed, or about this transaction, would be proper evidence. The drift of the evidence sought by defendant would have been proper evidence in the divorce case which, it appears, was then, or had been pending, but it had no relevancy to the case on trial.

[4-6] It is suggested that there was no tangible value to an inchoate right of dower, and that it was therefore error to include anything in the verdict for such right. This is ruled to the contrary in *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367. And in connection with this suggestion it is said here, but not in the trial court, that such value could only be shown by mortality tables. While such tables are a proper mode of ascertaining uncertain or contingent values, they are not necessarily an exclusive way, in this character of estate even under our statute. Sections 8499-8501, R. S. 1909. That statute does not refer to an inchoate dower estate. Evidence was heard as to the value of the land and the age of plaintiff and her husband was shown. Neither side referred to mortality tables. Defendant staked his whole case on nonliability altogether, and made no issue by instructions, or otherwise, on the value of plaintiff's interest, or the measure of her recovery. He cannot make an issue here he did not present at the trial.

[7] If he had made such issue it would not have aided his objection to plaintiff's instruction, for it was good generally so far as it went. If defendant wished to restrict it, he should have asked an instruction himself on that subject. *Browning v. Railroad*, 124 Mo. 55, 71, 27 S. W. 644.

We think the criticism made on plaintiff's first instruction is not substantial. There are several other objections which we have not specifically noticed for the reason that they are really divisions of the general objection to the exclusion of evidence of the nature set out above, which we have ruled against defendant.

Finding as we do that there was substantial evidence in the cause tending to show that defendant agreed with plaintiff that he would pay to her the value of her interest if she joined in the deed conveying it to

him, and, having disposed of the various objections made, it leaves nothing upon which the appeal can rest, and the judgment must be affirmed. All concur.

WALSER v. LEACH et al. (No. 12184.)
(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. APPEAL AND ERROR ⇐367—AFFIDAVIT FOR APPEAL—JURISDICTION OF COURT.

Regardless of recitals in the order of the circuit court granting an appeal, jurisdiction is not conferred on the appellate court in the absence of sufficient affidavit, as required by Rev. St. 1909, § 2040, since the right of appeal is purely statutory, and in order to avail himself thereof a party must conform to statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1993-1996; Dec. Dig. ⇐367.]

2. APPEAL AND ERROR ⇐367—AFFIDAVIT FOR APPEAL—JURISDICTION OF COURT.

It is not necessary that the affidavit for appeal follow the statutory language literally, though it must be in substantial compliance therewith; but, where the affidavit shows on its face an attempt to comply with the statute, even an error of substance by omission of some words, can be treated as clerical.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1993-1996; Dec. Dig. ⇐367.]

3. APPEAL AND ERROR ⇐367—AFFIDAVIT FOR APPEAL—JURISDICTION OF COURT.

An affidavit for appeal by an attorney stating that he makes the affidavit for the client, that the appeal is prayed "from the merits of the cause," and in order that substantial justice may be done, and not to hinder or delay the cause, is insufficient under Rev. St. 1909, § 2040, providing that the affidavit shall state that the appeal is not made for vexation or delay, but because the affiant believes the appellant is aggrieved by the judgment; for the reason that such affidavit does not purport to show that the appellant is aggrieved nor that the appeal is not for vexation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1993-1996; Dec. Dig. ⇐367.]

Appeal from Circuit Court, Cole County; Jack G. Slate, Judge.

Action by A. N. Walsen against George H. Leach and another, doing business under the partnership name of George H. Leach & Co. Judgment for plaintiff, and defendants appeal, and plaintiff moves to dismiss the appeal. Appeal dismissed.

Irwin & Haley, of Jefferson City, for appellants. Pope & Lohman, of Jefferson City, for respondent.

TRIMBLE, J. Respondent has filed a motion to dismiss the appeal herein on the ground that the affidavit for appeal does not comply with the statute so as to vest us with jurisdiction.

An agent and attorney of appellant made the affidavit, and it recites that:

He, "being duly sworn, upon his oath, says that he is attorney and agent for Sarah M. Leach and as such makes this affidavit on her

behalf and in her stead, and prays for an appeal of the above-entitled cause to the Kansas City Court of Appeals, and says that the appeal herein prayed for is from the merits of the cause, and that it is made in order that substantial justice may be done, and not for the purpose of hindering or delaying said cause."

Section 2040, R. S. Mo. 1909, provides that:

"No * * * appeal shall be allowed unless * * * the appellant or his agent shall * * * file * * * his affidavit, stating that such appeal is not made for vexation or delay, but because the affiant believes * * * the appellant is aggrieved by the judgment or decision of the court."

[1] Regardless of the recitals in the order of the circuit court granting an appeal, jurisdiction is not conferred upon the appellate court in the absence of a sufficient affidavit. *Cassidy v. City of St. Joseph*, 247 Mo. 197, 152 S. W. 306. The right of appeal is purely statutory, and in order that a party may avail himself of that right he must conform to the requirements of the statute. *Drainage District No. 4 v. Wabash Ry. Co.*, 216 Mo. 709, 116 S. W. 549; *Owens v. Mathews*, 226 Mo. 77, 125 S. W. 1100; *United Iron Works Co. v. Sand Ridge, etc., Co.*, 126 Mo. App. 238, 102 S. W. 1104.

[2] It is not necessary that the affidavit follow the language of the statute literally, but it must be in substantial compliance therewith; and where the affidavit shows on its face that there was an attempt to comply with the statute, then even though an error of substance is committed by the omission of some one or more words, the error can be treated as a mere clerical error. *Cassidy v. City of St. Joseph*, 247 Mo. 197, 203, 204, 152 S. W. 306.

[3] But in the case now before us, there is no attempt to follow the statute. In this affidavit the affiant says "it is made in order that substantial justice may be done"; that is, because the affiant wants to see substantial justice done, while the statute requires that the affidavit must recite that the appeal is prayed "because the affiant believes the appellant is aggrieved by the judgment," etc. In *Cassidy v. St. Joseph*, supra, the Supreme Court held that the omission of the word "vexation" was not a mere error of form, and that an affidavit omitting such word was not a substantial compliance with the statute, but that the affidavit showed upon its face that the statute was intended to be followed, and that its absence was the mere "accidental omission of something the scrivener intended to write, and it would require evidence to convince us that it was his deliberate intentional act." In the case at bar the affidavit says nothing about "vexation," nor does it say anything about the appellant being aggrieved. As stated above, the affidavit makes no attempt to follow the statute, hence there is no room for the application of the "clerical error" rule. Clearly the affidavit does not, in substance, contain what the statute says it must contain,

and we cannot say it means the same as the statute requires. If we can accept the wording of this affidavit in lieu of the one required by the statute, then it is difficult to say where a limit should be placed. If, by construction, we can treat the words of this affidavit as a sufficient substitute for the requirements of the statute, where would the variance permissible come to an end? As said in the Cassidy Case, *supra*, 247 Mo. p. 204, 152 S. W. 308:

"Similar reasoning would apply should we undertake to substitute any other words contained in the statutory affidavit for that omitted. It has a signification of its own which the Legislature had the right to take into consideration, and we have little sympathy for judicial construction which substitutes the judgment of the courts for the judgment of the Legislature."

The appeal is therefore dismissed. The other Judges concur.

BYRNE v. NEWS CORP. et al. (No. 12150.)

(Kansas City Court of Appeals. Missouri.
Nov. 27, 1916. Rehearing Denied
Dec. 29, 1916.)

1. LIBEL AND SLANDER ¶124(4)—INSTRUCTION—REFERENCE OF ARTICLE TO PLAINTIFF.

Where the libelous article complained of did not show on its face that it referred to plaintiff, and defendants, neither by their answers in the course of trial nor by proof, conceded that the readers of the article would understand it as applying to plaintiff, the jury should have been required to find that readers understood that the article referred to plaintiff, and an instruction covering the case and authorizing a verdict, without requiring the jury to find that the readers of the article so understood it, was erroneous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 866; Dec. Dig. ¶124(4).]

2. LIBEL AND SLANDER ¶21—UNDERSTANDING OF LIBEL BY READERS.

It is not enough to constitute libel that defendants knew of whom they were writing, but other persons, who read the libel, must have reasonably understood that plaintiff was referred to.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. ¶21.]

3. LIBEL AND SLANDER ¶112(1)—AMBIGUITY IN LIBELOUS ARTICLE—PROOF OF UNDERSTANDING.

Where a libelous article is ambiguous, either as to its meaning or as to the person to whom it applies, there must be some proof that third persons understood its actual meaning, and also to whom its words applied.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 825-828, 830, 831, 841; Dec. Dig. ¶112(1).]

4. TRIAL ¶253(3)—INSTRUCTIONS IGNORING ISSUES—LIBEL—AMBIGUOUS ARTICLE.

Where the libelous article did not on its face refer to plaintiff, an instruction that there was only one point at issue, whether the charge in the article was true or false, was improper, since there was also the question whether any third person understood the article to refer to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. ¶253(3).]

5. LIBEL AND SLANDER ¶124(4)—INSTRUCTION—FINDING ACCORDING TO INNUENDO.

In an action for libel, where the answers of both defendants admitted that they published the words complained of, and alleged that they were substantially true, and defendants attempted to establish their truth by offering evidence tending to show that plaintiff filed a false pedigree of swine in the office of the secretary of an association, and thereby obtained the registration of a false pedigree, as charged in plaintiff's innuendo, there being no dispute as to the meaning of the words, plaintiff's instruction was not erroneous because failing to require the jury to specifically find according to the innuendo that defendants charged plaintiff with having committed the crime of obtaining the registration of hogs by knowingly and in writing making and filing false, forged, and untrue pedigrees of such hogs; Rev. St. 1909, § 4589, making it a misdemeanor to obtain a false pedigree by such means.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 866; Dec. Dig. ¶124(4).]

6. TRIAL ¶233(3)—INSTRUCTIONS—ISSUES—REFERENCE TO PLEADINGS.

In an action for libel, an instruction should have explicitly told the jury the precise statement in the article which was claimed to be false, and, if false, libelous, and should not have instructed that if the jury found and believed that "the publication complained of" was false and libelous they should return verdict for plaintiff, since the jury should not be required to refer to the pleadings to ascertain what the precise statement is that they must find to be false in order to find libel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529; Dec. Dig. ¶233(3).]

7. LIBEL AND SLANDER ¶19 — DETERMINATION OF LIBELOUS CHARACTER OF FALSE STATEMENT—CONSIDERATION OF ENTIRE ARTICLE.

In determining whether an alleged false statement was a libel, the jury could take the entire article wherein it was published into consideration.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. ¶19.]

8. LIBEL AND SLANDER ¶124(8)—MALICE IN LAW—PUNITIVE DAMAGES—INSTRUCTIONS.

If the charge contained in a communication to a newspaper is false, and is such as to constitute a libel, and the newspaper publishes said communication, such paper cannot necessarily escape the charge of being guilty of malice in law merely by showing that without negligence and in good faith it published the article, believing it to be true and with good grounds for such belief. Hence defendant newspaper is not entitled to instructions stating that, under such circumstances, the jury cannot find punitive damages.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. ¶124(8).]

9. LIBEL AND SLANDER ¶120(2)—PUNITIVE DAMAGES—MALICE IMPLIED BY LAW.

In an action for libel, the jury may award punitive damages based merely on malice implied by law, and need not find actual or express malice before they can award punitive damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 351; Dec. Dig. ¶120(2).]

10. LIBEL AND SLANDER ¶124(3)—INSTRUCTION.

In an action for libel against a newspaper and the party who wrote a letter to its People's Forum, making charges against plaintiff, the court instructed that there were two kinds of damages, actual and punitive, that punitive damages were entirely within the discretion of the jury and are allowed where the wrongful acts of defendant have been characterized by

willfulness, maliciousness, and ill will, and that such damages are to punish defendant and caution him against repeating his acts, and that, if the jury believed and found that the publication was maliciously made, then, in addition to actual damages, they might allow such exemplary and punitive damages as under all the circumstances they thought defendants ought to be punished. *Held*, that the charge was improper as an invitation to the jury to consider the actual malice of the individual defendant in fixing the amount of the punitive damage it would assess against both, without regard as to whether the newspaper was guilty of actual or implied malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 369; Dec. Dig. ¶124(3).]

11. LIBEL AND SLANDER ¶111—OFFER OF RETRACTION—MITIGATION.

In an action for libel against a newspaper and the writer of an article, evidence, as to the paper's owner's telling plaintiff that if he wanted any statement or explanation of the matter printed they would be glad to print it for him, was properly excluded, the transaction having taken place after suit was brought, so that it could not be considered in mitigation even if it were an offer of retraction.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. ¶111.]

12. WITNESSES ¶414(1) — CORROBORATION — EVIDENCE — DOCUMENTS — PRIVATE MEMORANDA—LIVE STOCK REGISTER.

In an action for libel against a newspaper and a party who wrote a letter to its public forum, the letter charging plaintiff with obtaining the registration of hogs by forging pedigrees, the notations appearing on the individual defendant's private hog register, as to disposition of certain pigs, were properly excluded, where its only purpose was to corroborate defendant's testimony to the facts shown by them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1287; Dec. Dig. ¶414(1).]

Appeal from Circuit Court, Buchanan County; Arch B. Davis, Special Judge.

Action by Ulysses S. Byrne against the News Corporation and Robert I. Young. From a judgment for plaintiff against both defendants, they appeal. Judgment reversed, and cause remanded.

Lucian J. Eastin and Culver & Phillip, all of St. Joseph, for appellants. Randolph & Randolph, of St. Joseph, for respondent.

TRIMBLE, J. This is an action for libel. Defendant Robert I. Young is a farmer near St. Joseph, and defendant News Corporation publishes a daily (except Sunday) newspaper in said city, called the "St. Joseph News-Press," which has a circulation of 40,000 copies a day, covering not only the city but also Northwest Missouri, Eastern Kansas, and Southern Iowa. Plaintiff resided near said city and was a breeder and seller of pure-bred, pedigreed, and registered Poland China hogs. These pedigrees, the petition alleged, he registered in the Herd Register of the Standard Poland China Record Association having its headquarters at Maryville, Mo., and the pedigrees thus registered were furnished by him to buyers of his animals.

A column called "The People's Forum" was

maintained in said paper, wherein individuals might express their opinions on current topics or anything else that was fit for publication and not abusive. The defendant Young wrote an article, or communication in the form of a letter to the editor, and sent it through the mail for publication in said column, and it duly appeared therein on September 18, 1914. Plaintiff thereupon brought this suit. Said article is here set forth in full, the portion thereof charged to be and declared on as libelous being put by us in italics, as follows:

"St. Joseph Stock Breeder's View of the Fair.

"Editor News-Press: In an editorial appearing in your much esteemed paper you say: 'Our own dairymen did not exhibit because they were afraid they would be outclassed by the nonresident exhibitors.' I know it to be a fact that there are three herds of dairy cattle within two miles of the city limits of St. Joseph, Mo., that won more prizes at the World's Fair, St. Louis, Mo., than any three herds in the United States. Then why say we are afraid to exhibit at a tri-state fair? I can pick an exhibition herd from these three herds that, with any kind of a fair man for judge, can win against the whole world.

"We want a tri-state or national fair at St. Joseph if the citizens of St. Joseph have a mind to back it up. St. Joseph is too big a town to fall back into the county fair business. The fair association has made a few mistakes and this reminds us that they who make no mistakes never made much of anything.

"I exhibited at a fair last year, and when the cattle were led out into the show ring I made the discovery that I had very strong competition. Not that the other exhibitor had better cattle than I had, but the judge who, by the way was also imported, was none other than a partner of my strongest opponent. When the show was over the judge (¶) came to me and said: 'You have a very choice heifer there, and I am sorry she did not win first. What will you take for her?' A price was named—he bought the heifer, and in ten minutes afterward made the statement to a friend of mine that she was the best heifer he ever saw. If she was why did she not win first prize?

"I bought a load of feed, and after dragging it three miles through the gumbo I was informed that I must buy my feed from a firm that had bought the concession. This firm had doubled the price of feed and straw. A foreign exhibitor stole my clipping machine, currycomb, brush and twenty-two halters. I had him located all right, but the management told me it was too small a matter to bother about. I made a county exhibit and over 200 private exhibits. My son made an exhibit in the boys' department. My son was ruled out, and my private exhibits were all ruled out because, as the farm adviser superintendent of agriculture, who had never seen a two-row corn cultivator until he came to the county in which the fair was held, decided that he had never seen anything of the kind in the Ozarks and he would not allow one man to make so many entries. The fact is: The superintendent had a lot of exhibits that he was making for a few special friends.

"I am not a 'hoss' man and know nothing about that department, but the superintendent of the swine department was a hummer. There is a number of forged pedigrees of hogs in the secretary's office to his credit, and swine breeders were disgusted. Why place such a man in such a position? I did not show at said fair this year.

Robert I. Young."

The petition then alleged that a fair was held in St. Joseph in September, 1913, and

another in August, 1914, and that in both years plaintiff was "superintendent of the swine department," and that said fact was well known to the public, the patrons of said fair, plaintiff's friends and neighbors, and to breeders generally throughout the territory tributary to St. Joseph. The petition alleged that defendant, by means of said false and libelous article and publication, intended to charge, and did charge: That plaintiff "by false pretense, to wit, by means of false, forged, and untrue pedigrees in writing did obtain the registration of certain swine in the Herd Register of the Standard Poland China Record Association at its office at Maryville, Missouri"; that "the plaintiff did knowingly, in writing, give a false pedigree of swine"; that "the plaintiff had knowingly and willfully, falsely and fraudulently signed some name other than his own to pedigrees of swine, and filed same in the office of the secretary of the Standard Poland China Record Association at Maryville, Missouri"; and that said defendants, by said false and libelous matter, "intended to charge and did charge the plaintiff with having committed the crime of obtaining from the said Standard Poland China Record Association the registration of hogs by knowingly, and in writing, making and filing false, forged, and untrue pedigrees of such hogs."

A trial resulted in a verdict and judgment against both defendants for \$1,000 actual and \$4,000 punitive damages. Both have appealed.

The article does not refer to plaintiff by name. It will be observed that, after speaking of the St. Joseph fair, it then takes up, at the beginning of the third paragraph, the consideration of some other fair not named or identified in any way. It says, "I exhibited at a fair last year," and then goes on to relate the troubles and difficulties he had at that fair, and says his and his son's exhibits were ruled out because a certain official had never seen a two-row corn cultivator until he came "to the county in which the fair was held." Another reason given why his exhibits were ruled out at that fair was because the superintendent thereof "had a lot of exhibits he was making for a few special friends." And then comes the part complained of as libelous, and the article closes by saying, "I did not exhibit at said fair this year." Now, on the face of the article, what fair was it, where there was a superintendent of swine who had forged pedigrees? Taking the article as it reads on its face, it was some unnamed fair of last year at which the author exhibited, at which he had so much trouble, at which so many of his exhibits were improperly ruled out, and at which he did not exhibit this year.

[1] This being so, the jury should have been required to find that the readers of said article understood that it referred to plaintiff. If they would not understand that plaintiff was the superintendent mentioned,

then there was no libel as to him; for "the gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary, to constitute libel, that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to." *Duvivier v. French*, 104 Fed. 278, loc. cit. 280, 43 C. C. A. 529, 531.

[2] Neither is it enough to constitute libel that the defendants knew of whom they were writing. Persons other than these must have reasonably understood that plaintiff was the man referred to. Same case, 104 Fed. 281, 43 C. C. A. 529. It may be that the allegations of the petition and the proof that plaintiff was the "superintendent of the swine department" of the St. Joseph fair in both years of 1913 and 1914, and that this was well known, would be sufficient to enable the jury to say that readers of the article would understand that plaintiff was the man. But they should have been allowed to so find and should have so found before returning a verdict in plaintiff's favor. Plaintiff's first instruction, however, covered the case and authorized a verdict without requiring the jury to find that the readers of the article so understood it. It reads:

"The court instructs the jury that it stands admitted in this case that the defendants made the publication set out in the plaintiff's petition of and concerning the plaintiff. Therefore the court instructs the jury that, if they find and believe from the evidence that the publication complained of is false and libelous, they should return a verdict for the plaintiff; and the jury are further instructed that in determining the amount of actual damages sustained by the plaintiff, if any, you will take into consideration such injury, if any, as was naturally and probably done to the plaintiff's reputation, and to his business and character, and such damages as he may have suffered because of mental anguish, shame, and humiliation, if any, you believe he has suffered by reason of such publication."

[3] It cannot be said that the article conclusively shows on its face what fair it is dealing with, at which there was a superintendent of swine who had forged pedigrees. It was for the jury to say what fair the readers of the article would understand was meant. Where the article is ambiguous, either as to its meaning or as to the person to whom it applies, there must be some proof that third persons understood its actual meaning and also understood to whom the words applied. 25 Cyc. 362, 452, 453; *Wisner v. Nichols*, 165 Iowa, 15, 143 N. W. 1020, 1025; *De Witt v. Wright*, 57 Cal. 576.

As stated, there was no proof that the readers understood that plaintiff was charged with the forgery alleged. We do not understand that, because plaintiff said his attention was called to the article, this supplied that proof; but, if it did, the jury should still be allowed and required to pass on the matter.

Nor did the defendants, either by their respective answers or in the course of trial or by their proof, concede that the readers of said article would understand it as applying to plaintiff. These things had no reference whatever to the construction the readers would put on the article or their understanding as to whom was meant. Consequently, we are of the opinion that instruction No. 1 for plaintiff was erroneous.

[4] And for the same reason instruction No. 8 was also erroneous. It reads:

"The jury are instructed that the defendants in this case, under the evidence, are making but one defense, and there is only one point at issue between the plaintiff and the defendants, and that is whether or not the publication complained of and shown in evidence was, so far as it relates to this plaintiff, true or false; and the jury are instructed that the burden of proof in this case upon that issue, as to whether or not said publication was true or false, is upon the defendants to show to the reasonable satisfaction of the jury and by a preponderance of the evidence that said publication with reference to this plaintiff was true, and if the defendants have failed to prove to the satisfaction of the jury and by a preponderance of the testimony that said publication, as it referred to the plaintiff, was true, then your verdict must be for the plaintiff."

There was more than "one point" at issue, or, at any rate, more than one thing was required to be found by the jury before plaintiff could recover. Whether the charge in the article was true or false was one, and whether any third person understood it to refer to plaintiff was another, if indeed there were not still others.

These are errors which call for a reversal and a remanding of the case. Inasmuch as the case is to be retried, we must notice some other points raised by defendants.

[5] In view of the answers of both defendants that they published the words complained of as libelous, and alleged that they were substantially true, and attempted to establish their truth by offering evidence tending to show that plaintiff did file a false pedigree of swine in the office of the secretary of the association at Maryville and did thereby obtain the registration of a false pedigree as charged in plaintiff's innuendo, we do not think plaintiff's instruction was erroneous because it failed to require the jury to specifically find according to the innuendo. Section 4589, R. S. Mo. 1909, makes it a misdemeanor to obtain a false pedigree by such means. And the inevitable and necessary conclusion to be drawn from defendants' answers and evidence is that, if such evidence was true, the plaintiff was guilty within the meaning of the words charged and of the innuendo laid. There was therefore no dispute as to the meaning of the words, but only whether they were true. If they were false, then they were libelous *per se*; hence all that the jury had to do, as to this particular feature of the matter, was to say whether they were false or not. There being no issue as to the sense or meaning in

which the words were used, the jury were not required to find whether they had the meaning given them by the innuendo, and hence the instruction was not erroneous in this regard.

[6, 7] Properly speaking, the instruction should have explicitly told the jury the precise statement in the article that was claimed to be false and, if false, libelous; and should not have referred to them in such general terms as "the publication complained of." Of course, in determining whether the alleged false statement was a libel, the jury could take the entire article into consideration; but, as the instruction is now drawn, the jury might think that, if any part of the article was false, the same was libelous although the part they thought was false might not be the particular part declared on as libelous. While the part in relation to false pedigrees was the portion declared on in the petition as libelous, yet the entire article was set out; and, of course, by referring to the pleadings and analyzing them with the trained ability of a legal mind, one would know what particular words were referred to in the instruction, but the jury should not be required to refer to the pleadings to ascertain what the precise statement was that they must find to be false in order to find libel. Even if defendant Young's instruction No. 3 stated specifically the precise words which the jury were to say were true or false, which may perhaps have prevented the jury from being misled, yet plaintiff's instruction is complete in itself and directs a verdict without requiring the jury to find the facts upon which the case was based. To avoid any misunderstanding of the effect of the two instructions, the plaintiff's instruction should clearly set forth just what the jury were asked to decide was false or true. In this way the issue would be set before them sharp, clear, and distinct, and with no danger of mistake.

It is conceded there was no actual malice on the part of the newspaper. There was evidence also tending to show actual malice on the part of Young. He had had controversies and litigation with plaintiff before. The two defendants were sued jointly. Plaintiff asked, and the court gave, the following instructions on malice and damages:

"(5) The jury are instructed that in law there are two kinds of malice—malice in fact and malice in law. By 'malice in fact' is meant actual spite and ill will toward a person; by 'malice in law' is meant the intentional doing of a wrongful act without legal justification or excuse.

"You are further instructed that, if you believe that the publication herein complained of was libelous and false, you may infer that it was maliciously done.

"You are further instructed that if you believe and find from the evidence that the publication herein complained of was maliciously made, as defined in these instructions, then, in addition to the actual damages you may believe the plaintiff to have suffered, you may allow such exemplary or punitive damages as

under all the circumstances you think the defendants ought to be punished."

"(10) The jury are instructed that in law there are two kinds of damages—actual damages and punitive damages. 'Punitive damages' are entirely within the discretion of the jury and are allowed in those cases where the wrongful acts of the defendant have been characterized by willfulness, maliciousness, and ill will, and such damages are for the purpose of punishing the defendant for the willful and malicious acts, and cautioning the defendant against the repetition of such acts.

"You are therefore instructed that if you believe and find from the evidence that the publication herein complained of was maliciously made, as defined in these instructions, then, in addition to the actual damages you may believe the plaintiff to have suffered, you may in your discretion allow such exemplary or punitive damages as under all the circumstances you think the defendants ought to be punished."

"(13) The jury are instructed that, when a publication charges the person named in the publication with dishonest conduct with reference to his business, the law presumes that the person so mentioned is damaged thereby, and it is not necessary for him to prove any damages whatever. If therefore the jury believe and find from the evidence that the publication shown in evidence is libelous and charges the plaintiff with dishonest conduct and that such charges have not been shown to be true, then the jury should find actual damages in favor of the plaintiff, and, if the jury also find that the publication was malicious as defined in other instructions, they may also award to the plaintiff punitive damages, as stated in other instructions."

{8} The defendant newspaper prayed, but the court refused, the following:

"If you find from the evidence that as a matter of fact the News Corporation, acting through its officers and agent who caused the article complained of to be published, was not actuated by any malice whatever, but made such publication in good faith, believing the same to be true, and that at the time said officers and agents so making said publication had good grounds to believe and did believe said article to be true, and in the exercise of care on their part would not have otherwise believed, then you cannot find any punitive damages against said defendant the News Corporation."

"If you find from the evidence that as a matter of fact the News Corporation, acting through its officers and agents who caused the article complained of to be published, was not actuated by any malice whatever, but made such publication in good faith, believing the same to be true, and that at the time said officers and agents so making said publication had good grounds to believe and did believe said article to be true, and in the exercise of care on their part would not have otherwise believed, then you cannot find any punitive damages against either of the defendants."

These two instructions were properly refused. Under the conceded facts in the case there was malice in law in publishing the article if it was false. The two instructions told the jury that, under certain circumstances, they could not find any punitive damages against the paper. The circumstances detailed in the instruction were not sufficient to eliminate malice in law, and yet the jury were told that, if they found such facts, they could not find punitive damages.

[8] If the jury found the statement in the article was false, then it was within the

discretion of the jury whether they would give punitive damages or not, and they could not properly be told they must not; for, whatever may be the rule in other jurisdictions, the rule in Missouri is that the jury may award punitive damages based merely on malice implied by law. They are not required to find actual or express malice before they can award punitive damages. *Callahan v. St. Louis Transit Co.*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; *Arnold v. Sayings Co.*, 76 Mo. App. 159; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597, 77 S. W. 162; 18 Am. & Eng. Ency. of Law (2d Ed.) 1093.

[10] With reference to plaintiff's instructions above set forth, it seems to us that instruction No. 10 was an invitation to the jury to consider the actual malice on the part of one of the defendants in fixing the amount of the punitive damage it would assess against both, without regard to whether the other defendant was guilty of actual or implied malice. No doubt the jury could assess punitive damages against both where one was guilty of actual and the other of implied malice only. But an assessment, if any, of punitive damages, must be in one amount and against both defendants. There can be but one judgment, and there cannot be a heavier assessment against one than against the other. The jury therefore cannot assess punitive damages in any larger sum than the amount which, in reason, they think should be laid upon the defendant that is least culpable and for that reason should be punished least. It is true, the jury may award punitive damages to the same extent against both, where one is guilty of actual malice and the other of implied malice only; but we all know the natural tendency is to give a larger amount of punitive damages for actual malice than where malice is only implied by law. Now instruction No. 10, in defining "punitive damages," says they are allowed in cases where the wrongful acts of the defendant have been characterized by ill will, and that such damages are for the purpose of punishment and to caution the defendant against repeating such acts. The instruction then says that, if the publication was made with the malice defined, then punitive damages may be given in such sum as the jury thinks the defendants ought to be punished. Punitive damages are allowed in libel suits whether the malice be actual or merely legal. The different kinds of malice had already been defined in instruction No. 5, and the jury were told that if they found malice—I. e., malice of any kind—they could allow punitive damages. In the latter halves of the three instructions 5, 10, and 13, the jury were told over and over again that they could allow punitive damages. There is no need, in this state, of the existence of actual malice in order to justify punitive damages. Hence there was no neces-

sity for instruction No. 10 to refer again to actual malice and in that connection to tell the jury punitive damages were to caution the defendant against the repetition of such, and that they could allow such punitive damages as they thought the defendants ought to be punished. Such ringing of the changes on punitive damages and actual malice could not fail to have a prejudicial effect and create in the minds of the jury that they should measure the punitive damages according to the actual malice of one defendant rather than according to the legal malice of the other. We do not wish to be understood as meaning to say that the jury could not do this if they saw fit. No doubt they can, and under some circumstances they should, but what we are saying is that they should not be given an instruction to do so by repeated instructions on punitive damages. By having so many instructions on them and by laying an unnecessary stress upon actual malice in No. 10, the jury were, impliedly at least, invited to assess the amount of punitive damages with reference to the actual malice of one defendant rather than the legal malice of the other, who might otherwise be deemed worthy of less punishment.

[11] The evidence as to the paper's owner telling plaintiff, if he wanted any statement or explanation of the matter printed, they would be glad to print it for him, was properly excluded. This was after suit was brought, and therefore could not be considered in mitigation even if it were an offer of retraction. *Evening News v. Tryon*, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450; *Dinkel-spiel v. New York Evening Journal*, 42 Misc. Rep. 74, 85 N. Y. Supp. 570. As the matter

appears in the record, however, it is not even an offer of retraction.

[12] The notations appearing on the defendant Young's private hog register as to what he did with certain pigs noted to have been farrowed by two sows therein, and as to what became of other pigs of said sows, were properly excluded. Defendant testified of his own knowledge to the facts shown by these notations. They did not refer to any fact relating to pedigree of which the book was a record. The only purpose of the notations was to corroborate defendant Young's statement that he had let plaintiff have the pigs of one pedigreed sow to raise, and that (according to defendant Young) plaintiff had, in the pedigree supplied to the Association Herd Register, registered these pigs as the pigs of a different sow. These notations on the register were, so far as anything on the face of the book itself concerned, such as could have been placed there at any time. There was nothing on the face of the book itself, or in the way it was kept, to show that they must have been made before and not after a controversy had arisen; and a controversy between the two men over the genuineness of the pedigrees of these pigs registered by plaintiff had existed for a long time prior to the occurrence on which this litigation is based. The notations then were of no higher authority or greater force than Young's personal testimony which he could and did give. They were properly excluded.

This covers the questions which, thus far, appear likely to occur upon a retrial of the case.

For the reasons hereinabove given, the judgment is reversed, and the cause remanded. All concur.

DOWELL v. WABASH RY. CO. (No. 11791.)
(Kansas City Court of Appeals. Missouri. Feb.
21, 1916. On Motion for Rehearing,
Dec. 18, 1916.)

1. COMMERCE \S 27—**FEDERAL EMPLOYERS' LIABILITY ACT**—"ENGAGED IN INTERSTATE COMMERCE."

A section man engaged in the service of defendant, an interstate carrier, and who when hurt was repairing a side track leading from the main track to scales on which cars destined to other states were weighed to ascertain whether they were overloaded, was "engaged in interstate commerce," and might sue under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, \S 8657-8665]).

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. \S 25; Dec. Dig. \S 27.

For other definitions, see *Words and Phrases*, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT \S 286(4)—**FEDERAL EMPLOYERS' LIABILITY ACT**—**QUESTION FOR JURY**—**NEGLIGENCE**.

In an action under the federal Employers' Liability Act for injury to a section man from a defective hammer with which he was ordered to use old spikes to fasten rails to new ties, evidence held to make the defendant's negligence a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 1011; Dec. Dig. \S 286 (4).]

3. NEGLIGENCE \S 101—**FEDERAL EMPLOYERS' LIABILITY ACT**—**COMPARATIVE NEGLIGENCE**—**DAMAGES**.

Where the causal negligence is attributable partly to the master and partly to the injured employé, he can recover only a diminished sum bearing the same relation to the full damages that the negligence attributable to the master bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employé's contribution to the total negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. \S 85, 163, 164, 167; Dec. Dig. \S 101; *Damages*, Cent. Dig. \S 371.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Thomas J. Dowell against the Wabash Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

J. L. Minnis, of St. Louis, Jones & Conkling, of Carrolton, and J. M. Davis, of Chillicothe, for appellant. Scott J. Miller, of Chillicothe, for respondent.

ELLISON, P. J. Plaintiff's action is in damages flowing from personal injury alleged to have been received through the negligence of defendant. He recovered judgment in the trial court.

[1] It was conceded that defendant was an interstate carrier, and the evidence showed that plaintiff was engaged in its service as a section man, and his particular employment when hurt was repairing a spur or side track leading from the main track to scales on which cars loaded with freight destined to other states were weighed to ascertain if

they were overloaded. We think he was engaged in interstate service. *Hardwick v. Railroad*, 181 Mo. App. 156, 161, 168 S. W. 328.

[2] Old ties were being removed and new ones substituted, the old spikes being used to fasten the rails to the new ties. The spikes were scattered along the side of the track about as they had been pulled out of the old ties. The metal maul or hammer used to drive the spikes was very much battered and its face was quite uneven. It had a defective handle made by the foreman out of a stick he cut from the brush nearby. Plaintiff doubted whether the hammer was safe, whereupon the foreman told him there was no other. So of the spikes; there were no other than the old ones and there was not enough for choice between them—all had to be used. While the case, in its facts, is strikingly like that of *Miller v. Railroad*, 175 Mo. App. 349, 162 S. W. 290, a case instituted under the state law, yet there are distinguishing features that require a different ruling from that made in that case. In that case the servant was using the same hammer he had been using and it had become defective in his hands; and the spikes were in quantity sufficient for him to make choice of the good from the bad, uninfluenced by the foreman. While in this case the handle of the hammer was one improvised by the foreman who, in effect, ordered plaintiff to use it and the evidence tends to show that he had no choice of spikes. Taking his testimony as true, the proper inference is that he was ordered to use all the spikes, good or bad, as well as the hammer.

[3] But plaintiff's instruction on the measure of damages is attacked. After having stated therein that although plaintiff may have been guilty of contributory negligence, that fact would not bar a recovery, the following was added:

"And in making up your verdict you will on that account diminish the amount of your verdict he should have received had he not been guilty of contributory negligence in the amount as you may believe his negligence contributed to his injury."

This was erroneous. *Seaboard Air Line v. Tilghman*, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069; *Norfolk R. R. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; *N. C. & St. L. R. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554; *L. & N. Ry. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343. The rule, as announced in these cases, is:

"That where the causal negligence is attributable partly to the carrier and partly to the injured employé, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employé's contribution to the total negligence."

For this error the judgment must be reversed, and the cause remanded. All concur.

On Motion for Rehearing.

PER CURIAM. A rehearing was granted in this case, and further consideration has convinced us that there is no good cause for complaint against the conclusion announced in the opinion on the first submission.

We have been cited by defendant to a recent case in the Supreme Court (*Lowe v. Railroad*, 265 Mo. 587, 178 S. W. 442) as an authority in support of its position that this plaintiff failed to make a case for the jury. That case, certainly, was correctly decided; but it bears little likeness to this one. There the negligence charged was furnishing the injured servant with a dull pick which he would sink into ties and pull them from under the loosened rails. It had frequently slipped out of a tie as the servant was pulling and he thought nothing of it, when, finally, not having braced himself for such an occurrence, he fell and was hurt. He had worked with the pick unsharpened, practically all the time, and had no thought of any hurtful result. The court said that in the absence of a reason to apprehend danger of injury by the use of the pick while dull, there arose no duty on the part of the railroad company to keep it sharp.

In this case there were defective spikes which were to be driven with a defective hammer, or maul. This maul was about 10 or 12 inches long, the striking, or face, end being about one inch and a half in diameter; and this was battered and worn at the edges, while the handle was crooked and had been cut by the foreman from some brush near by. The spikes to be driven were old ones that had been drawn from ties, and they were bent and ill shaped. These were to be used by plaintiff by the order of the foreman.

Without setting out the case again, it will suffice to say that we are satisfied with our disposition of it on the first hearing, including the condemnation of the instruction.

The judgment is reversed, and the cause remanded.

STATE ex rel. ALTON, Pros. Atty., v.
SALLEY. (No. 11989.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. JURY. ¶31(3)—INJUNCTION—ABATEMENT.

While an injunction will lie to abate a public nuisance, although the maintaining of the nuisance involves a crime, there must be proof of the nuisance as distinguished from the mere crime, and it will not lie to prevent or punish the commission of a crime, which would evade the constitutional provision for a jury in criminal cases.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 206; Dec. Dig. ¶31(3).]

2. INTOXICATING LIQUORS. ¶275 — PUBLIC NUISANCE—EVIDENCE.

In a suit to restrain a public nuisance, in selling intoxicating liquors, evidence held not to show that defendant was guilty of maintaining a public nuisance, as distinguished from a mere violation of the liquor laws.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 411; Dec. Dig. ¶275.]
Johnson, J., dissenting.

Appeal from Circuit Court, Benton County; C. A. Calvird, Judge.

"Not to be officially published."

Suit for injunction by State ex rel. T. W. Alton, Prosecuting Attorney of Benton County, against W. R. Salley. From a judgment sustaining the bill, the defendant appeals. Reversed.

C. C. Barrett, of Warsaw, and W. A. Dollarhide, of Hermitage, for appellant. T. W. Alton, of Warsaw, for respondent.

ELLISON, P. J. This proceeding was begun by bill in equity charging defendant with maintaining a public nuisance and praying that he be enjoined and restrained from continuing such nuisance. The trial court sustained the bill, and defendant appealed.

The defendant is the proprietor of a drug store in the village of Fairfield, Benton county, and the charge is that he sold intoxicating liquors illegally, and that he so conducted and operated his business that it was a public nuisance as that term is defined by the law. The defense is that there was a total failure to make a case against defendant, and that this failure not only appears from the whole evidence, but from the testimony introduced by plaintiff alone, and so we have concluded. At the opening of the trial, this statement was made by the court:

"I want to say right now I am going to, in this case, disregard the technical rules of evidence. What I am interested in in this particular case is to get the facts, and in order that we may get the facts I am going to disregard, in this particular case, the technical rules of evidence ordinarily enforced in the trial of a law case, it being an equitable case before the court; and that will apply to both sides of the case."

Under that ruling the substance of the greater part of the evidence was of hearsay character.

The great preponderance of the evidence introduced by plaintiff showed that defendant kept a "nice drug store; he has patent medicines, toilet articles, drug sundries, and groceries; so far as I know I think he does a nice business." The witnesses stated that they never saw any disorder there—there were no disreputable characters there; no dangerous men—no quarreling or fighting. The best of the people, including the women of the village, traded with defendant—going in and out continuously. Most of the witnesses for the state testified that they and their families traded with defendant, and that he was a well-respected citizen of the community.

Witnesses for the state were allowed to say what they had heard, or thought, or suspected concerning defendant's store as being the place where persons got their liquor who were seen intoxicated in the country anywhere from one to ten miles distant; notwithstanding the well-proven fact that intoxicants were sold at Warsaw, the county seat, and taken to the country, and that liquors were shipped from there to different places.

One witness, testifying over a space of ten years, stated that on one occasion an intoxicated man broke a showcase in his store; and at another time an intoxicated man went into his telephone booth and vomited there. He did not know, but supposed they got their liquor from defendant; at the same time he admitted that whisky went out from Warsaw daily. He further testified generally that he considered a man who sold liquor a public nuisance. He further said that barring the sale of liquor defendant kept a nice, clean business. He was asked if he was "ever attracted over there [defendant's store] by reason of any knockdowns, fights, or anything of that kind," and answered, "No;" and that he never had seen "any thieves, burglars, robbers, murderers, cut-throats, or people of that class congregated there." Though "I have seen bunches congregated around there, I don't suppose there were any thieves or robbers among them."

As a fair sample of a large part of the evidence, Mr. Wisdom, who lived $3\frac{1}{2}$ miles in the country, testified that:

"We had a girl that worked for us right away after camp meeting, that told us she got out of the way in the road one night to keep from getting run over; she had to jump out of the road, and lost her overhoses, and almost crippled herself; and they charged up and got off to assist her, and she told them to keep back and keep out of the way; she would take care of herself."

Again, a Mr. Sutor, living in the town of Iconium in an adjoining county and ten miles west from defendant's town of Fairfield, testifying in answer to a question whether "he knew of any specific case where they have gone to Fairfield and got it," answered, "Well, only my son; he went to Fairfield and got three gallons quite a while back, so he says." This witness stated that "nearly every two weeks there is a drunken crowd in Iconium; suppose they all come from Fairfield, from what I can find out by the talk." He also testified that "Saturday night a man came to me two-thirds drunk and wanted to borrow a dollar to go to Fairfield; borrow a dollar from me; I don't know what he wanted to go to Fairfield with a dollar for." Another witness, living six miles from Fairfield, testified that the father of a boy told him that the boy told the father that he furnished another boy the money, and that the latter went to defendant's and bought liquor.

A witness was asked if the sale of intoxicating liquor conducted by defendant was a

nuisance. The question was objected to on the ground that no foundation was laid for it by proof that the liquors came from defendant. The court stated that: "Strictly speaking, your objection is good, but in this case I have decided to disregard the technical rules of evidence and to try to get at the facts in the best way I can. You can answer: Do you consider it a public nuisance?" The answer was: "I do—the liquor business."

Another witness, living eight miles from Fairfield, testifying in answer to a question if he knew where the liquor came from, answered:

"Well, there was a young fellow there at our place; that is, this last spring a year ago; now I was away from home; it was on Sunday; my wife, if I understand her right, she said there was about three of them, running their horses, cursing and swearing; and out into my alfalfa patch there, I have no fence along the road; as I went to church that night, I found one young man that I would call him drunk; he smelt like a drunk man; handled himself like a drunk man, with a two year old mule tied to his leg; he said he got the whisky at Fairfield—full as a goose."

The evidence on the part of the defense was made up of the testimony of men and women of the village, merchants, bankers, members of different churches and others, living in such proximity as necessarily to know if defendant conducted his place of business in disorder, either mild or riotous. Men and women testified (as had witnesses for plaintiff) that his store was nice, orderly, and quiet. That he enjoyed the patronage of the general public, including the women and children of the village and surrounding country. Women testified that they frequently sent their little boys and girls for purchases. So overwhelming was this character of proof, from representative people in the village and vicinity, that on its being admitted by the state that the defendant had more witnesses who would give like testimony, the examination ceased. It will be unnecessary to make any further reference to the evidence, save a short statement of the testimony of R. W. Hudson called by defendant. He was cashier of the bank at Fairfield, a member of the church, and had been school commissioner of the county. He stated that defendant "kept a nice decent orderly store," and that he had "seen nothing of immoral or wrong character about his store." That he (defendant) enjoyed the patronage of the community generally, including women and children. That he saw a disturbance about the store on one occasion four years prior to the trial which he thought was traceable to liquor, but that the parties did not live there and came into the village already intoxicated, but in recent years there had not been any trouble, though "once in a while hear of a man intoxicated." He further testified that defendant owned a store when he (the witness) went to the village ten or eleven years prior to the trial and sold out; "after he sold out we had three or four years when we had all kinds of times

there in Fairfield; it was not safe to be on the streets there for three or four years; that is, for women; I wouldn't have my wife go on the streets; but Mr. Salley wasn't in business at that time; later on they put this place out of business, selling booze there, and Mr. Salley built this building of his own and put in a nice drug store there, and since that time we have been a peaceable people there in Fairfield, as far as I see." The witness further stated that it was generally believed that defendant sold liquor, but he stated he very often saw men on the road coming from Warsaw drunk as he came over on Saturday evenings, and that he saw more men drunk on that road than he ever saw at Fairfield.

When the evidence in behalf of the state is analyzed it is found to be practically valueless. Not that the testimony was not given by good and conscientious people, for they were, in great part at least, we judge the best of law-abiding citizens. But their testimony shows on its face that they knew nothing of their own knowledge connecting defendant with maintaining a public nuisance. No one was called who had been in any disturbance, or who had any part in the matters complained of. But, as has been already stated, witnesses told of seeing intoxicated persons in different parts of the country and of what they had heard or suspected as to where the liquor came from, at the same time conceding the indisputable fact that whisky was gotten at Warsaw, the county seat, and other places, and taken to all parts of the county. No one was called who would have had knowledge of these things. Hearsay, in some instances, as above shown, twice or three times removed was resorted to.

Eminent jurists have frequently found it difficult to determine what constituted what is known in the law as a public nuisance, but in this case the witnesses themselves decided the question; numbers of them stated that the mere sale of intoxicating liquor was a public nuisance; and that a man who merely sold liquor, his act made him guilty of maintaining a public nuisance; and that a man who sold liquor was himself a public nuisance.

[1] In this state a licensed druggist may legally sell intoxicating liquor in quantities of four gallons or more, and a licensed merchant five gallons or more. So that the mere fact that defendant kept liquors at his store and that he received considerable quantities through freight and express would not be sufficient to show he sold illegally by less quantities. But conceding that he did, he should, for such offenses, be prosecuted, convicted, fined, and imprisoned as is plainly provided by the statute. Why the officers of the county charged and sworn to enforce the law should attempt to revolutionize the criminal procedure of the state by substituting a bill in equity against lawbreakers instead

of prosecuting and imprisoning them, is difficult to understand. The record in this case incidentally shows that Benton county has its churches and schools, and we have no doubt that it is populated with an upright and a law-abiding people who would condemn the bad and uphold the good as quickly as any other part of the country. In fact it was shown in this trial that defendant had been convicted in that county for illegal sales, and that other prosecutions were pending. It is true that an injunction will lie to abate a public nuisance though the maintaining of the nuisance involves a crime. *State ex rel. v. Schwellhardt*, 109 Mo. 496, 19 S. W. 47; *State ex rel. v. Canty*, 207 Mo. 439, 105 S. W. 1078, 14 L. R. A. (N. S.) 836; *State ex rel. v. Lamb*, 237 Mo. 437, 141 S. W. 665; *Laymaster v. Goodin*, 260 Mo. 613, 168 S. W. 754, Ann. Cas. 1916C, 452. But there must be proof of the nuisance as distinguished from the mere crime. In other words, as repeatedly stated in the cases just cited, an injunction will not lie to prevent, or punish, the commission of a crime, nor is it any part of the intention of the law that constitutional provisions shall be evaded by substituting a civil for criminal procedure, or a single judge for a jury.

[2] Being satisfied that defendant was not shown to have been guilty of maintaining a "public nuisance," as that term is known to the law, the petition should have been dismissed, to the end that if he is guilty of violating the criminal laws of the state he may be prosecuted and condemned therefor in accord with a criminal procedure.

TRIMBLE, J., concurs. JOHNSON, J., dissents, and cause certified to Supreme Court on his certificate that he deems the decision contrary to decisions of that court in *Ex parte Laymaster*, 260 Mo. 613, 168 S. W. 754, Ann. Cas. 1916C, 452.

JOHNSON, J. (dissenting). The prosecuting attorney of Benton county brought this suit for an injunction against defendant, a merchant in the unincorporated town of Fairfield, for the abatement of a public nuisance. The alleged nuisance consists of the continuous use by defendant of his grocery and drug store as a cover for the indiscriminate sale of intoxicating liquors, in violation of law, in such manner and extent as to menace the public peace and impair the morals of the community. The allegations of the petition referring to the acts of defendant and their consequences are specific and their nature is disclosed in the findings of fact made and filed by the court at the close of the evidence heard at the trial, from which we quote as follows:

"That Fairfield in Benton county, Mo., is situated south of the Osage river in said county about eight miles from Warsaw, the county seat of said county, and is an unincorporated town without police protection and contains about 185 inhabitants. That it has two church-

es, Baptist and Methodist, a good school, four stores, hotel, post office and blacksmith shop. That more than five years before the filing of this proceeding the defendant moved into and occupied the building on the premises described in the petition with the avowed and pretended intention, as stated by him, of conducting a drug store therein, and has since combined with his pretended drug store a pretended grocery store. That the defendant has been up to the time the temporary writ was issued in this cause conducting said pretended drug and grocery store as a mere subterfuge and blind and an attempt to conceal the illegal sale of intoxicating liquors therein. That the defendant ever since he opened said pretended drug store has engaged in the indiscriminate and illegal sale of intoxicating liquors to both adults and minors. That such sales were made on Sundays as well as every other day of the week. That the defendant since the 1st day of January, 1915, has received at his pretended drug and grocery store and illegally sold there large quantities of intoxicating liquors as shown by the evidence in this cause. That a large portion of these intoxicating liquors were sold to boys under the age of 21 years of age. That defendant is not a registered pharmacist and has no right to fill prescriptions or to compound medicines. That defendant since he opened said pretended drug and grocery store has been convicted of the illegal sale of intoxicating liquors therein, and that there is now pending against him five cases in which he is charged with the illegal sale of intoxicating liquors in said store building. That the indiscriminate sale of intoxicating liquors at said pretended drug and grocery store by defendant has attracted thereto a large number of men and boys addicted to the use of intoxicating liquors, and while under the influence of intoxicating liquor sold them by defendant they have at various times within the past year engaged in disorderly conduct in the streets of said town of Fairfield, at the post office, at the churches and other public places in said town, and on the public roads and at public meetings met for lawful purposes in the community adjacent to said town. That said disorderly conduct has a tendency to disturb the peace, good order and morals of the respective communities, and to prejudice the good name and welfare of the people thereof.

"The court further finds from the evidence that the alleged sale of intoxicating liquors at said pretended drug and grocery store by the defendant is a menace to the peace and good order of the town of Fairfield and the communities adjacent thereto, and that said pretended drug and grocery store as conducted by the defendant is a public nuisance within the meaning of the law. The court further finds that owing to the low minimum fines, in cases for the illegal sale of intoxicating liquors, the difficulty in obtaining evidence, and all the facts and circumstances surrounding this case, the plaintiff has no adequate remedy by the ordinary process of law, and that a permanent injunction ought to be granted in this case."

These findings are abundantly supported by evidence from which it appears that defendant, who has a license from the national government to sell intoxicating liquors, is a persistent violator of law, is debauching and corrupting the young men and boys of the community, causing them to conduct themselves on the public streets and roads and at public assemblages in ways shocking to all sense of decency and propriety and destructive of public peace and good order. Parents testified to the baleful results the continuous practice of defendant in selling

liquors to minors had produced upon their boys and the young men of the neighborhood. There can be no question of the fact that this "store" of defendant is the source of corruptive influences which seriously menace the morals of the community and are a continuous cause of public annoyance and disquiet.

Counsel for defendant argue that since all the offenses which lie at the bottom of this general public nuisance are crimes, for the punishment of which the criminal law may and should be applied, the equitable remedy of injunction cannot be invoked by the prosecuting attorney acting on behalf and for the benefit of the public, for the reason that restraining the commission of crimes is not a subject of equitable cognizance. *Laymaster v. Goodin*, 260 Mo. 613, 168 S. W. 754, Ann. Cas. 1916C, 452; *State ex rel. v. Canty*, 207 Mo. 439, 105 S. W. 1078, 14 L. R. A. (N. S.) 836; *State ex rel. v. Lamb*, 237 Mo. 437, 141 S. W. 665; *State ex rel. v. Schwellhardt*, 109 Mo. 496, 19 S. W. 47; *State ex rel. v. Chambers*, 192 Mo. App. 496, 182 S. W. 775.

The rule clearly stated in the more recent decisions of the Supreme Court—i. e., the *Canty*, *Lamb*, and *Laymaster* Cases, supra—is that while courts of equity, will not enjoin the commission of a crime, yet when a given state of facts discloses a public nuisance, a court of equity will issue its writ of injunction for its abatement, though the acts which constitute it themselves be crimes. Acts, which in addition to being punishable offenses against the criminal laws, are of a nature to create and maintain a breeding place of disorder and pollution which constantly disturbs, corrupts, and offends the community, are sufficient to constitute a public nuisance within the definition of that term in the cited cases.

In the *Laymaster* Case the rule was stated that where the business complained of was of so vile, open, notorious, and vicious a character as to attract weak, dissolute, and vicious men and cause them to act in a manner to menace the peace and safety of society, it became a public nuisance which "may be enjoined by a court of equity * * * not because of the crime, but because of its inherent and constitutional authority to abate such nuisances." In that case the remedy was refused because on the face of the record proper, which was the only record before the court, the petition failed to charge that the defendant had set up and was maintaining a public nuisance; the only allegation being that she was guilty of the criminal offense of keeping a bawdyhouse. All of the judges, except, perhaps, Brown, J., concurred in the view that if it had been made to appear by allegation and proof that the bawdyhouse was being conducted in a manner to constitute a public nuisance its further operation might be prevented by injunction.

To hold otherwise would be to say there is some merit and defensive force in crime. Since equity has jurisdiction of the subject of the abatement of public nuisances the very existence of which is sufficient ground for equitable intervention, it is immaterial whether the ingredients of the particular nuisance in question be criminal or merely willful, or negligent, acts, or whether the threatened continuation of such nuisance will consist entirely of future criminal acts. Given a public nuisance the authority of a court of equity to abate it cannot be successfully questioned.

Our recent decision in *State ex rel. v. Chambers*, 192 Mo. App. 496, 182 S. W. 775, which holds to the contrary, proceeds from an erroneous interpretation of the rule defined and applied in the *Laymaster Case*, and consequently should be disapproved. The court did not err in making the temporary order permanent, and the judgment should be affirmed.

Deeming the majority opinion to be in conflict with the decision of the Supreme Court in the *Laymaster Case*, supra, I request that the cause be certified to the Supreme Court.

ARMSTRONG et al. v. DENVER & R. G. R. CO. (No. 11874.)

(Kansas City Court of Appeals. Missouri. Dec. 18, 1916. Rehearing Denied Dec. 29, 1916.)

1. RAILROADS ⚡396(1)—INJURY ON TRACK—BURDEN OF PROOF—NEGLIGENCE.

In an action for the death of a telegraph foreman killed by defendant's train, on the ground of the engineer's failure to give warning signals on entering curves and cuts, the burden of proving such negligence was upon the plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1341-1343; Dec. Dig. ⚡396(1).]

2. RAILROADS ⚡400(6)—INJURY ON TRACK—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In such action evidence held insufficient to raise a debatable issue of fact as to the negligence of defendant's engineer in failing to give warning signals on entering the curves and cuts.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1373; Dec. Dig. ⚡400(6).]

3. RAILROADS ⚡390—INJURY ON TRACK—HUMANITARIAN RULE—CONTRIBUTORY NEGLIGENCE.

In respect to negligence under the humanitarian rule contributory negligence is no defense, either under the laws of this state or of Colorado, where the cause of action for a killing on defendant's track arose.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⚡390.]

4. RAILROADS ⚡394(6)—INJURY ON TRACK—PETITION—HUMANITARIAN RULE.

A petition in an action for the killing of a telegraph foreman on defendant's track alleging that he was in a situation of peril of which he was oblivious, that the engineer saw him in such position, or by ordinary care could have seen him in time, by ordinary care could have avoided the injury by stopping or reducing the speed of the train, but negligently failed to

exercise such care, stated a cause of action based on last chance negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1338; Dec. Dig. ⚡394(6).]

5. PLEADING ⚡406(3)—ANSWER—WAIVER.

By answering to the merits defendant waived mere formal irregularities and insufficiencies in the petition.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1358; Dec. Dig. ⚡406(3).]

6. RAILROADS ⚡390—ACTION FOR INJURY—HUMANITARIAN RULE—LOOKOUT.

An engineer's failure to keep a lookout may be an ingredient, but is not an indispensable element, of a cause of action predicated upon a breach of humanitarian duty.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⚡390.]

7. RAILROADS ⚡390—INJURY ON TRACK—LIABILITY—HUMANITARIAN RULE.

Where an engineer was keeping a lookout, and saw and realized the full peril of a person on the track, the humanitarian duty devolved upon him to exercise reasonable care to avert injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⚡390.]

8. RAILROADS ⚡400(14)—INJURY ON TRACK—NEGLIGENCE—HUMANITARIAN RULE—SUFFICIENCY OF EVIDENCE.

In an action for the death of a telegraph foreman killed on defendant's track, evidence held sufficient to take the question of the defendant's negligence under the humanitarian rule to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1375; Dec. Dig. ⚡400(14).]

9. TRIAL ⚡252(9) — INSTRUCTIONS — EVIDENCE.

In an action for the death of telegraph foreman killed on defendant's track, the submission of issues as to the engineer's negligence in failing to give signals for curves and cuts, where there was a total failure of evidence in support of that charge, was reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 603; Dec. Dig. ⚡252(9).]

Appeal from Circuit Court, Jackson County; Jas. P. Aylward, Special Judge.

Action by Helen Armstrong and Dorothy Armstrong, a minor, by Emma Armstrong, her next friend, against the Denver & Rio Grande Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

White, Hackney & Lyons, of Kansas City, for appellant. Prince & Harris, J. E. Westfall, and Joseph S. Rust, all of Kansas City, for respondents.

JOHNSON, J. Robert J. Armstrong, employed by the Western Union Telegraph Company as foreman of a company of workmen engaged in repairing one of its telegraph lines along defendant's right of way, was killed in April, 1910, near Castle Rock, Colo., by a passenger train, and this action was commenced in July, 1911, by his daughters, as plaintiffs (his widow having failed to sue), to recover damages for his death on the ground that it was caused by negligence of defendant in the operation of the train. Verdict and judgment were for plaintiff in the

circuit court, and the cause is here on the appeal of defendant.

The repairers, ten in number, under the leadership of Armstrong, had been repairing injuries to the line caused by a severe and extensive storm, and in the prosecution of the work traveled on hand cars with the knowledge and consent of defendant. They boarded at Castle Rock while working in that vicinity, and on the morning of the injury in question started at the usual time to travel on two hand cars to their place of work which was some distance north of Castle Rock. Half of the workmen, including the assistant foreman, one Hinerman, departed first on one hand car and the other half with Armstrong, the foreman, operated the second car, which followed the first at a distance of about a quarter of a mile. If defendant's north-bound passenger train had been on time that morning, it would have passed Castle Rock a few minutes before the hand cars were due to leave, but it was 19 minutes late, a fact known to Armstrong, and did not arrive at that station, where it stopped to receive and discharge passengers, until a few minutes after the hand cars had started. After leaving the station, the train attained a rate of speed about which the witnesses differ, but which, for present purposes, may be estimated at 30 miles per hour, and it was running at that rate when the engine, emerging from a cut where the track, following a sinuous course of reverse curves, straightened into a tangent, afforded the engineer a view of the rear hand car which then was being removed from the track at a point in the middle of a fill which succeeded the cut.

The engineer, introduced as a witness by defendant, testified, in substance, that he saw the hand car and the men trying to remove it as soon as they came into view; that the car was 200 feet in front of the engine; that he immediately sounded the whistle, applied the air brakes, and succeeded in coming to a full stop in a distance of 500 feet, but not until after the locomotive struck and hurled the car from the track, but in his effort to stop he did not reverse the power. Warned by a signal from the men on the first hand car that the train was coming, Armstrong had stopped his car, and he and the men had succeeded in removing all but one corner from the track, and Armstrong alone was trying to complete the removal, the other men having fled to places of safety, when the train struck the car, which, in turn, struck Armstrong and inflicted injuries from which he died. The engineer said:

"Armstrong was in the act of going around the hand car. You see the whole car was not on the track at the time I saw it; it was all off, with the exception of the right front wheel, on the west side of the track. The whole car was off with the exception of the west front wheel, which was in between the rails; understand? The right front wheel was in right close to the rail, and he must evidently have been trying to run around the front of the car to lift the wheel off, so he could throw it off the track

and keep from striking the car. I saw him do it, saw him going around, walking or running * * * just as fast as he could go. Of course, I just saw it for a second. The boiler obstructed the view after."

The petition alleges negligence of the engineer in not sounding the whistle, as was customary and usual on entering or passing around curves or through cuts, and also negligence under the humanitarian doctrine in not making a reasonable effort to stop or slacken speed of the train after the engineer saw, or should have seen, and realized, that Armstrong was in a position of danger. Certain sections of the Colorado statutes are pleaded, but in the view we have of the case, they are not material to the determinative issues now before us, and therefore need not be stated.

At the close of plaintiff's evidence, and at the conclusion of all the evidence, defendant requested that a peremptory instruction be given the jury to return a verdict in its favor, but these requests were refused. These rulings are challenged by defendant, and the questions they involve first shall receive our attention.

[1, 2] Taking up the issue of negligence predicated of the alleged failure of the engineer to give warning signals on entering the curves and cuts, it may be conceded for argument that it was his duty to give such signals, and that a failure to give them would constitute negligence for which defendant, his employer, would be liable for the injurious consequences. The burden of proving such negligence devolved upon plaintiffs, and we find ourselves constrained to hold they have failed in their proof. Defendant introduced witnesses who were in a position to know with certainty about the signals, and they testified that such signals were given by the sounding of one long and one short blast of the whistle. The only witnesses introduced by plaintiff to prove that no signals were given were men who were on the hand car, which was running at 12 or 15 miles per hour at the time the whistles should have been blown. Their statement that they did not hear the whistle should not be allowed to weigh against the positive testimony to the contrary, since the noises of the hand car and the intervening distance and topographical obstacles to the transmission of sound might, and in all reasonable probability did, prevent them from hearing signals which were actually given. There is no necessary conflict between their testimony and that of the more favorably circumstanced witnesses who say the signals were given, and such testimony must be regarded as purely negative in character, as lacking in affirmative strength, and therefore wholly insufficient of itself to raise a debatable issue of fact in the face of a mass of positive evidence that the signal was given. *McNeill v. Railway*, 182 S. W. 762; *Williamson v. Railway*, 139 Mo. App. 481, 489, 122 S. W.

1118; *Quinley v. Traction Co.*, 180 Mo. App. 297, 165 S. W. 346; *Sanders v. Railroad*, 147 Mo. loc. cit. 424, 48 S. W. 855; *Bennett v. Railroad*, 122 Mo. App. loc. cit. 709, 99 S. W. 480; *Shaw v. Railroad*, 104 Mo. loc. cit. 657, 16 S. W. 832; *Rashall v. Railway*, 249 Mo. 509, 522, 155 S. W. 426.

[3] Since plaintiffs have failed to adduce substantial evidence to support their first charge of negligence to which contributory negligence of Armstrong (alleged in the answer) would be a defense, it is unnecessary to discuss the subject of contributory negligence, and we pass to the questions relating to the issue of negligence of defendant under the humanitarian rule, to which contributory negligence would be no defense under the laws either of Missouri or of Colorado, where the cause of action arose.

[4, 5] Counsel for defendant attack the sufficiency of the petition to state a cause of action based on "last chance" negligence on the ground that the petition fails to allege that Armstrong was at a place where the engineer should have anticipated the presence of persons on the track. By answering to the merits defendant waived mere formal irregularities and insufficiencies in the petition, but we find that pleading free from even such objections. It alleges that Armstrong was in a situation of peril of which he was oblivious; that the engineer saw him in such position, or by the exercise of ordinary care could have seen him in such position, in time, by the exercise of ordinary care, to have avoided the injury by stopping or reducing the speed of the train, but carelessly and negligently failed to exercise such care. The cause thus averred was not restricted to negligence of the engineer to keep a proper lookout at a place where he had reason to anticipate the track would not be clear, but included negligence in failing to observe the peril of Armstrong and the latter's lack of knowledge of such peril, as well as negligence in failing to put forth a reasonable effort to avert the injury after receiving knowledge of the perilous situation.

[6] The petition stated the precise cause of action we find the evidence of plaintiffs tends to establish, and this cause does not rest upon any failure of the engineer to keep a lookout. Such negligence may be an ingredient, but is not an indispensable element of a cause of action predicated of a breach of a humanitarian duty. An utterance to the contrary in *Nivert v. Railroad*, 232 Mo. loc. cit. 639, 135 S. W. 33, did not receive the approval of a majority of the court, and therefore is not authoritative.

[7, 8] The engineer says he was keeping a lookout, saw and realized the peril as soon as the hand car and Armstrong came into

view, and gave the alarm signal, shut off the power, and set the air brakes at once. If this is so, what does it matter whether or not this was a place where he was in duty bound to keep a lookout? If he was looking—and the jury were entitled to infer that he was—and if he saw and realized the full peril of Armstrong's situation, the humanitarian duty devolved upon him to exercise reasonable care to avert the injury; and we come to the question of whether or not the evidence in its aspect most favorable to plaintiffs tends to show a negligent breach of that duty. In the face of substantial evidence that when the hand car first became visible to the engineer it was 465 feet away, and of expert testimony that the train, under conditions which obtained, could have been stopped in less than 300 feet, the statements of the engineer that the hand car was only 200 feet distant and the stop he made in 500 feet was as short a space as the train could have been stopped in could be accorded no greater evidentiary strength than that of raising issues of fact for the jury to determine.

A reasonable inference may be drawn from all the evidence that the engineer actually saw and realized the peril of Armstrong in ample time to save him, but failed to exercise reasonable care to prevent striking the hand car. An instant longer and Armstrong would have lifted and pulled the corner of the car out of the way, and a slight reduction of speed would have enabled him to escape. There is substantial evidence that the train did not slacken speed until after the collision, and if the jury believed that evidence they could not avoid the conclusion that the engineer made no reasonable effort to lessen the danger and avoid the injury.

The requests for a peremptory instruction were properly refused.

[9] But the judgment must be reversed and the cause remanded for errors in the instructions of plaintiffs which submitted issues under the first charge of negligence; i. e., negligence in failing to give signals for the curves and cuts when, as we have shown, there was a total failure to adduce evidence in support of that charge. There are other errors in the instructions which need not be specifically pointed out, since they have been sufficiently indicated in what we have said.

A motion to affirm the judgment or dismiss the appeal recently filed by plaintiffs and addressed to certain alleged deficiencies in the abstract is found not to be well grounded and is overruled. The motion for a new trial is sufficiently specific to raise the issues we have determined.

The judgment is reversed, and the cause remanded. All concur.

AMERICAN NAT. BANK v. ALLEN et al.
(No. 12200.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. **BILLS AND NOTES** ¶117 — **WHAT LAW GOVERNS.**

A note delivered to a payee residing in Illinois, but which was executed and delivered, and by its terms made payable in Missouri, was to be regarded as a Missouri contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 248-254; Dec. Dig. ¶¶ 117.]

2. **SALES** ¶363—**ACTION—DIRECTION OF VERDICT.**

In an action on a note given in payment for a stallion where defendants did not establish their defense of false and fraudulent representations as to his foal-getting qualities, and did not plead breach of warranty, it was proper to direct verdict for plaintiff a purchaser before maturity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. ¶¶ 363.]

3. **SALES** ¶426 — **BREACH OF WARRANTY — REMEDY.**

Where the parties stand on equal ground, the law will not interfere with their right to make their own contracts, and where a contract for the sale of a stallion contained a guaranty of the truth of the seller's representations as to his foal-getting qualities and provided that on a breach of such guaranty the stallion might be returned for a similar one, the buyer had no other remedy for such breach in an action founded upon the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1209; Dec. Dig. ¶¶ 426.]

Appeal from Circuit Court, Vernon County; B. G. Thurmond, Judge.

Action by the American National Bank against Ed. D. Allen and another. Judgment for plaintiff, and defendants appeal. Affirmed.

M. T. January, of Nevada, Mo., for appellants. A. E. Elliott, of Nevada, Mo., for respondent.

JOHNSON, J. [1] This is a suit on a promissory note for \$550 executed and delivered January 31, 1912, by defendants (husband and wife) to Oltmanns Bros. who resided, and were engaged in business, in Illinois. The note was executed and delivered and by its terms made payable at Nevada, Mo., and therefore must be regarded as a Missouri contract (Johnston v. Gawtry, 83 Mo. 839; Insurance Co. v. Simons, 52 Mo. App. 357), and subject to the provisions of the Negotiable Instruments Act which was in force in this state at the inception of the contract. The note and another for a like amount were executed by defendants in payment of the purchase price of a Percheron stallion which defendant Ed. S. Allen purchased from Oltmanns Bros., under the terms of a written contract which contained a guaranty by the vendors that the stallion "with proper care and handling and bred to healthy producing mares, to be at least a 60 per cent. foal-

getter" and a stipulation that "if said horse does not prove to be as represented the said party of the first part [vendors] covenants and agrees to take said stallion back and replace said horse with another Percheron stallion equally as good, to said second party, provided said second party shall return said stallion to said first party in as good health and condition on or before March 1, 1913, as when said stallion was delivered to said second party."

[2] The answer alleges that the vendors through their sales agent induced the defendant vendee to enter into the contract for the purchase of the stallion "by false and fraudulent representations that said horse was sound and was a 60 per cent. foal-getter."

The evidence of defendants tended to show that the sales agent did represent the stallion to be sound and a 60 per cent. foal-getter, and that after the sale it was discovered by the vendee that the animal was afflicted with a latent disease of the testicles which impaired his usefulness for breeding purposes to such an extent as to reduce his productive ability far below the guaranteed standard. But the oral representations made by the sales agent were repeated and guaranteed in the written contract, and there is an entire absence of proof of the alleged defense that the contract was induced by fraud. As was aptly said by the Court of Civil Appeals of Texas in a very similar case (Oltmanns Bros. v. Poland, 142 S. W. 653):

"There was no fraud upon the part of Oltmanns Bros., in inducing Poland to accept the said guaranty. It does not appear that the terms thereof were misrepresented or concealed, or that he did not * * * fully understand them."

The burden of proof was upon the defendants to establish their defense of fraud, and since they do not defend on the ground of a breach of an express warranty, the court was right in directing a verdict for the plaintiff who purchased the note for value before maturity.

[3] It may be observed that a defense of a breach of an implied warranty, if pleaded, would not have been available to defendants. Since the written contract of sale defined the vendor's liability by a special warranty, the remedy it provided became exclusive. In the sale of personal property, as in all other transactions, the vendor has a right to define his liability by a special warranty and provide the measure of damages, or the manner of fulfilling his warranty. Where the parties stand on equal ground the law will not interfere with their right to make their own contracts, and where the contract they make contains a guaranty of the truth of representations made by the vendor concerning the subject of the sale, and provides a fair and sufficient remedy for a breach of such guaranty, the vendee should be allowed no other remedy for such breach in an action or de-

fense founded upon the contract. See *Oltmanns Bros. v. Poland*, supra, and authorities therein discussed.

Since we find the defense of fraud has failed other questions discussed in the briefs become academic and need not be considered.

The judgment rendered for plaintiff is affirmed. All concur.

WINGATE v. BUNTON. (No. 12220.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

TRIAL. §329.—VERDICT—EXPRESS CONTRACT OF HIRE—RECOVERY OF PART OF SALARY.

Where the president of a bank, to whom its cashier agreed to pay \$50 a month as salary, and who performed the contemplated service from August, 1907, to August, 1912, amounting to \$3,000, was absent from the town on other business affairs a substantial part of the time, and so rendered no services then, a verdict for \$2,000 will not be disturbed on the ground that it was based on a quantum meruit, where the case was submitted on the theory of an express contract, and the jury was instructed that plaintiff could not recover for the time he was absent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. §329.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Suit by William T. Wingate against E. A. Bunton. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Hewitt & Hewitt, of Maysville, W. H. Haynes, of St. Joseph, M. E. Lawson, of Liberty, and Frank Sheetz, of Chillicothe, for appellant. Graham & Silverman, of St. Joseph, Craven & Moore, of Excelsior Springs, and B. B. Gill & Son, of Chillicothe, for respondent.

JOHNSON, J. Plaintiff commenced this suit in March, 1913, in the circuit court of De Kalb county to recover an accrued salary which he alleged defendant owed him for services rendered from August, 1907, to August, 1912, for the agreed compensation of \$50 per month. The pleaded cause is founded upon an express contract of hiring made in August, 1907, by the terms of which plaintiff, as the newly elected president of a bank in Maysville of which defendant was the cashier and principal stockholder, was to devote a portion of his time to working in and for the bank, and as compensation was to receive one-half of defendant's salary as cashier, which was \$100 per month. The answer is a general denial. The trial of the issues made by the pleadings resulted in a verdict and judgment for plaintiff for \$2,000, and in due course of procedure, defendant appealed.

The facts of the case are as follows: Plaintiff, a farmer of wealth and position in De

Kalb county, moved with his family to Maysville, the county seat, and at the request of defendant consented to accept the office of president of the bank of which defendant, as stated, was the principal executive officer and stockholder. The office was purely honorary, but as an inducement to plaintiff to accept it, defendant assured him that there would be "good big house rent and a little on the side in it." Satisfied with this vague promise, plaintiff consented to serve as president without pay from the bank, and, following his election to the office, devoted much of his time and energies to learning the banking business, and the services he rendered, which included every kind of activity from that of janitor to president, were of value to the bank. At the end of three months, plaintiff "had learned the banking business," and, according to his testimony, he and defendant agreed upon \$100 as a proper compensation for the period of apprenticeship, and defendant paid him that sum. Some time after that, and in August, 1907, defendant agreed to divide his salary as cashier with plaintiff, or, in other words, to pay the president \$50 per month out of his own pocket. This is denied by defendant who admits, however, that he did pay plaintiff \$100 for the first four months' work, and asserts that in a settlement he had with plaintiff in April, 1908, which covered all business transactions to that date, compensation for plaintiff's "bank work" was included. Thereafter, so defendant contends, plaintiff, though he remained in the office of president until August, 1912, performed very little service to the bank, and none for which he was to be paid by any one.

We find substantial evidence supporting the claim of plaintiff of an express contract by the terms of which he agreed to devote a part of his time to the service of the bank for which defendant was to pay him \$50 per month and that, pursuant to this contract, he performed such service from August, 1907, to August, 1912, for which he has not been paid, and, on the other hand, we find substantial evidence supporting the contention of defendant that no agreement for compensation existed after the settlement in April, 1908. Further there is evidence from which an inference might be drawn that while there was an express agreement for compensation after April, 1908, at the rate of \$50 per month, which continued until plaintiff resigned as president in August, 1912, there was a substantial part of the time during which plaintiff, being absent from Maysville on other business and affairs, rendered no service.

The amount of the verdict indicates that the last of these hypotheses was accepted by the jury, and that in obedience to the direction in plaintiff's instruction on the measure of damages that "you will not allow plaintiff anything for that portion of the time, if any,

between August, 1907, and August, 1912, during which plaintiff failed to perform services for said bank," the jury deducted compensation for such lost time and reduced plaintiff's recoverable demand from \$3,000 to \$2,000.

The court did not err in overruling defendant's request for a peremptory instruction. The demand alleged and proved by plaintiff and submitted to the jury in the instructions was a demand upon an express contract of hiring, and we perceive no ground for the application of the well-settled rule invoked by defendant that where the action is upon an express contract for services, no recovery should be allowed upon an implied contract or a quantum meruit. *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476; *Brookfield v. Drury College*, 139 Mo. App. 339, 123 S. W. 86.

The instructions clearly defined the issues and allowed no recovery, except upon the finding by the jury of an express contract. The verdict is abundantly supported by evidence, and, finding no prejudicial error in the record, the judgment is affirmed. All concur.

CARSON v. MISSOURI, K. & T. RY. CO.
(No. 12189.)

(Kansas City Court of Appeals. Missouri.
Dec. 19, 1916. Rehearing Denied
Dec. 29, 1916.)

1. RAILROADS §114(4) — OBSTRUCTION OF SURFACE WATERS—QUESTIONS FOR JURY.

In action against railroad for noncompliance with Rev. St. 1909, § 3150, requiring such companies to construct suitable ditches and drains where such construction is made necessary by railroad embankments, evidence that although drains piercing defendant's embankment which caused water to accumulate on plaintiff's land would not have afforded sufficient drainage to plaintiff's land because the land on the opposite side of the embankment was protected by dikes, yet defendant could have drained such accumulation by ditch going in another direction, held sufficient to carry to the jury the issue whether defendant's failure to maintain such ditch was the proximate cause of the injuries complained of.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 371; Dec. Dig. §114(4).]

2. RAILROADS §113(10)—SURFACE WATERS—OBSTRUCTION—INEVITABLE ACCIDENT.

Where injury to plaintiff's crops was caused by failure of the defendant railroad company to construct a drain for waters accumulated by its embankment, it could not escape liability for injuries from overflowing of plaintiff's land by showing the floods causing the injury were unusually violent and heavy, where floods sufficient to overflow the land were not unusual; it appearing that its negligence cooperated to cause the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 363; Dec. Dig. §113(10).]

3. TRIAL §191(6) — SURFACE WATERS — OBSTRUCTION—INSTRUCTION—ASSUMING FACT.

In action against railroad for failure to drain waters accumulated by its embankment, an instruction requiring the jury to find that in consequence of defendant's failure to maintain suitable ditches and drains, plaintiff's crops

were injured, etc., held not erroneous as assuming as a matter of fact that the creek into which the drains would have led would have been sufficient in connection therewith to have carried off the overflow of waters in time to have prevented damages to plaintiff's crops.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 429; Dec. Dig. §191(6).]

Appeal from Circuit Court, Cooper County; J. G. Slate, Judge.

"Not to be officially published."

Action by Hinton V. Carson against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 184 S. W. 1039.

J. W. Jamison, Gen. Counsel Missouri, K. & T. Ry. Co., of St. Louis, for appellant. Sam. C. Major, of Fayette, and Williams & Williams, of Boonville, for respondent.

JOHNSON, J. This action is founded upon the alleged noncompliance by defendant railroad company with the provisions of section 3150, R. S. 1909, requiring such companies—"to cause to be constructed and maintained * * * suitable ditches and drains along each side of the roadbed of such railroad, to connect with ditches, drains, or water courses, so as to afford sufficient outlet to drain and carry off the water, including surface water, along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad."

Plaintiff owns a farm near Pearson in Howard county lying in bottom lands just south of defendant's railroad which runs east and west. A natural water course known as Salt creek comes out of the hills lying to the north and turning east runs parallel to the railroad on the north side thereof, a distance of 3 or 3½ miles east, when it crosses over to the south side of the railroad and continues on to the Missouri river. In August, 1910, and in June, 1912, heavy rainfalls caused Salt creek to overflow and inundate the bottom lands, including plaintiff's farm, and the flood waters submerged the farm for such a time that the crops were destroyed.

In two counts the petition seeks the recovery of damages for these inundations on the ground that they were caused by the failure of defendant to construct and maintain a drainage ditch along the south side of the roadbed to drain off the flood waters on the subsidence of the overflow of Salt creek. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiff on both counts, and in due course of procedure an appeal was allowed defendant to the Supreme Court. Throughout the case defendant attacked the constitutionality of section 3150, R. S. 1909, but the Supreme Court held that issue had been foreclosed in the decision in *Tranbarger v. Railroad*, 250 Mo. 46, 156 S. W. 694, and transferred the cause to this court. Counsel for defendant insist that a verdict on both counts should have

been directed in its favor: First, because the evidence of plaintiff falls to show that the presence of a drainage ditch along the south side of the roadbed would have more expeditiously drained off the accumulated water, and thereby prevented the destruction of the crops; and, second, that both overflows were caused by rainfalls so violent and unusual as to fall within the legal classification of acts of God.

[1] The evidence of plaintiff tends to show that before the railroad was built the natural drainage which was northward into Salt creek was sufficient to drain flood waters from the farm in a period so short that growing crops would not sustain any serious injury from them. The railroad was upon an embankment four or five feet high which was not pierced by any lateral ditches or drains to carry the water northward into the creek. There is much plausibility in the view of counsel for defendant that such drains or ditches would have afforded no sufficient drainage of plaintiff's farm for the reason that the land on the opposite side was protected by dikes on three sides, which, with defendant's embankment, confined the stream to a channel so narrow that drainage into it at that place would have been wholly futile. Plaintiff's alleged causes of action are not founded on the absence of such drains and ditches which he concedes would have been practically useless, but upon the absence of a ditch along the south side of the roadbed which he contends, and his evidence tends to show, would have drained the flood waters eastward into Salt creek, where it crossed over to the south side of the railroad. Much stress is laid by defendant upon the testimony elicited on cross-examination from plaintiff's witnesses to the effect that no such ditch of reasonable size and cost of construction and maintenance would have sufficed to obviate the inundation of plaintiff's farm by floods such as those in question, which overflowed the railroad. But we think such evidence does not show conclusively that plaintiff has no cause of action. There is substantial evidence adduced by him that there was an average fall eastward in the elevation of the bottom land of over one foot to the mile and also a fall towards the north, so that a ditch of reasonable dimensions and cost would have materially aided the natural drainage eastward to such an extent as to prevent the submergence of plaintiff's land long enough to destroy the crops. We do not find this evidence is speculative or contrary to physical laws and regard it as

sufficient to carry to the jury as an issue of fact the question of whether or not defendant's failure to maintain such a ditch was the proximate cause of the injuries in dispute.

We do not agree with the view of defendant that the sole causes of the respective injuries were acts of God which defendant should not be held to have anticipated and provided against. *Warehouse Co. v. Railroad*, 124 Mo. App. 545, 102 S. W. 11; *Commission Co. v. Railroad*, 113 Mo. App. 544, 88 S. W. 117; *Brewing Ass'n v. Talbot*, 141 Mo. loc. cit. 682, 42 S. W. 679, 64 Am. St. Rep. 538; *Railroad v. Flour Mills* (Tex. Civ. App.) 143 S. W. loc. cit. 1182; *Cormack v. Railroad*, 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949.

[2] The evidence of defendant shows that the rainfall on both occasions was unusually violent and heavy, but floods in Salt creek of enough magnitude to overflow the bottom lands were not unusual, and the jury were entitled to infer were events which defendant was bound to anticipate and make reasonable provision against. There is evidence tending to show that a ditch parallel to the roadbed of proper dimensions to drain off ordinary floods would have drained off the flood waters on the occasions under review in ample time to have saved the crops. We have therefore a similar state of facts to those the Supreme Court reviewed in *Tranbarger v. Railroad*, supra, where the well-settled rule was applied that "where the negligence of the defendant concurs with an inevitable accident to produce injury, the person so damaged is entitled to recover." The demurrer to the evidence was properly overruled.

[3] The instructions given at the request of plaintiff are not subject to the criticism of assuming "as a matter of fact that Salt creek, if defendant had constructed or could have constructed ditches leading to it, would have been sufficient in connection with the ditches to have carried off the overflow waters in time to have prevented damages to plaintiff's crops."

The fact that no ditch along the roadbed was maintained was conceded, and the jury were required to find "that in consequence of defendant's failure to construct and maintain suitable ditches and drains along the sides of its said railroad, the corn and wheat growing upon said land were injured," etc.

The instructions treated no fact in controversy as proved, and fairly submitted the issues made by the pleadings and evidence. There is no prejudicial error in the record, and the judgment is affirmed. All concur.

STATE, to Use of GOODMAN et al. v. REGENT LAUNDRY CO. et al.
(No. 14525.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916.)

1. CONTRACTS \S 28(1)—EXECUTION—EVIDENCE—BURDEN OF PROOF.

Where two of the parties to a contract did not sign, the writing presumptively took effect upon its delivery and was binding upon the parties who signed it, and the burden of proof was on the plaintiffs who signed to show that the understanding was that the contract should not take effect until signed by all the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1755; Dec. Dig. \S 28(1).]

2. ESTOPPEL \S 92(2)—ACCEPTANCE OF BENEFITS.

Where a contract was not signed by two of the parties, the plaintiffs, who have received and retained the full benefits accruing to them under the contract which they signed and delivered as their contract, cannot be heard to repudiate its obligations on the ground that it was not signed by all of the parties named therein.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 281; Dec. Dig. \S 92(2).]

3. JUDGMENT \S 854—CONCLUSIVENESS—NONSUIT.

Although a nonsuit was involuntary and the plaintiff moved to set it aside and, upon such motion being overruled, appealed and the judgment was affirmed by the appellate court, it was still a judgment of nonsuit, and although terminating and disposing of the particular suit was not a final judgment on the merits or res adjudicata as to the cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. \S 854.]

4. CORPORATIONS \S 121(7)—SALE OF STOCK—BREACH—DAMAGES.

A defendant, who purchased one-half of the stock of a corporation under a contract in which the plaintiffs covenanted that the corporation's indebtedness would not exceed an amount stated, is to be regarded as having been damaged to the extent of one-half the amount by which the corporation's indebtedness exceeded that which the plaintiffs covenanted that it would be found to be.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. \S 121(7).]

5. APPEAL AND ERROR \S 1062(1)—REVIEW—REVERSIBLE ERROR.

Although Rev. St. 1909, § 1908, provides that when a verdict is for plaintiff in an action for recovery of money only, the jury shall also assess the amount of recovery, in view of section 2082, which commands that an appellate court shall not reverse a judgment unless it believes that error was committed, after materially affecting the merits, and section 1850, providing that errors not affecting substantial rights shall be disregarded and no judgment shall be reversed or affected by reason of such error, where a court directed the jury as to the amount to allow on a counterclaim and the amount was correctly calculated, the error was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. \S 1062(1).]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Proceedings by the State of Missouri, to the Use of Nat J. Goodman and another,

against the Regent Laundry Company and others, in which defendant Charles H. Wilson filed a counterclaim. From a judgment for plaintiffs and for defendant Wilson on his counterclaim, plaintiffs appeal. Affirmed.

William F. Fahey, of St. Louis, for appellants. Frank H. Haskins, of St. Louis, for respondents.

ALLEN, J. This is an action upon an attachment bond executed by defendants Regent Laundry Company, a corporation, and Wilson, as principals, and defendants Renard and Young, as securities, in the penal sum of \$2,200. Defendant Wilson interposed a counterclaim, the nature of which will be later shown. The trial, before the court and a jury, resulted in a verdict for plaintiffs on the bond sued upon, assessing their damages at the sum of \$518.77, and in favor of defendant Wilson on his counterclaim in the sum of \$867. From a judgment entered accordingly, the plaintiffs prosecute the appeal now before us.

The attachment suit, in which was given the bond here sued upon, was instituted on or about September 4, 1906, and grew out of a written agreement of date August 3, 1906, executed by these plaintiffs, Nat J. Goodman and Stella M. Goodman, the defendants Regent Laundry Company and Chas. H. Wilson, one D. L. Cahn and one B. S. Seasongood. In the writing defendant Wilson was named as the party of the first part, these plaintiffs as parties of the second part, D. L. Cahn and Ellen Cahn, his wife, as parties of the third part, Seasongood as party of the fourth part, and the defendant Regent Laundry Company as party of the fifth part; but neither Ellen Cahn nor the Regent Laundry Company signed the instrument. This agreement provided that the party of the first part therein (Wilson) agreed to purchase from the parties of the second and third parts (these plaintiffs and Cahn and wife) 85 shares of the capital stock of the Regent Laundry Company, agreeing to pay therefor at the rate of \$125 per share, such purchase price to be paid as follows: The sum of \$1,850 to be paid the Mercantile Trust Company to take up a note of the Regent Laundry Company, \$2,200 to be paid to these plaintiffs, and the remaining \$325 to be paid to Cahn and his wife. Following this the agreement contained a paragraph as follows, viz:

"And the parties of the second, third and fourth parts hereby agree and covenant with the party of the first part that with the exception of the said one thousand eight hundred fifty dollars (\$1,850), note, the party of the fifth part is not indebted to any person, firm or corporation in any sum other than the current bills for the month of July, 1906, excepting perhaps \$200, and they do hereby warrant that the outstanding accounts belonging to the party of the fifth part will at least equal said current bills for the month of July, 1906."

The agreement further provided that the plaintiffs herein would not in any way en-

gage in the laundry business for a certain period of time within a certain prescribed territory; that they agreed to sell to Wilson 25 shares of the capital stock of the Regent Laundry Company at the price mentioned; and that Cahn and wife agreed to sell to Wilson 10 shares of the capital stock of said company.

Though the instrument was not signed by Mrs. Cahn nor the Regent Laundry Company, it was delivered and was acted upon. It appears that defendant Wilson paid the note of the Regent Laundry Company for \$1,850, paid the said sum of \$2,200 to these plaintiffs, and the sum of \$325 to Mrs. Cahn, and received the 35 shares of stock of the Regent Laundry Company, being one-half of that company's capital stock. Thereafter it was discovered that the Regent Laundry Company was indebted to various persons in the sum of \$1,154.77, exclusive of current bills for the month of July, 1906, and exclusive of the note for \$1,850 above mentioned. Thereupon the Regent Laundry Company and Wilson instituted against these plaintiffs and Cahn and Seasongood, the attachment suit above mentioned, as for a breach of the covenant contained in the paragraph of the aforesaid contract which we have quoted in full above. In that action there was, at the court's direction, a verdict for the defendants therein (these plaintiffs) on their plea in abatement. Upon the trial on the merits, the plaintiffs therein were forced to a nonsuit, and upon the court's refusal to set the same aside they appealed to this court. On that appeal—for the reason stated in the opinion—we could review only the record proper, and, finding no error therein, the judgment of nonsuit entered by the circuit court was affirmed. See *Regent Laundry Co. v. Goodman et al.*, 142 Mo. App. 716, 121 S. W. 1082. Thereafter, to wit, on November 19, 1909, the present action was instituted by these plaintiffs on the bond given in the attachment suit as stated above.

It is unnecessary to notice the petition herein. The joint answer of defendants Renard and Young admits the execution of the bond sued upon, and denies each and every other allegation of the petition. The answer of defendant Regent Laundry Company is a general denial. Defendant Chas. H. Wilson interposed a general denial, coupled with a counterclaim predicated upon a breach of plaintiffs' said covenant in the contract of August 3, 1906, being the identical cause of action upon which Wilson and his codefendant Regent Laundry Company had sought a recovery against these plaintiffs in the above-mentioned attachment suit; Wilson averring that the former action, prosecuted by him and the Regent Laundry Company, resulted in a nonsuit, as we have stated above.

In their reply the plaintiffs plead that in the attachment suit the ruling of the trial

court, in forcing the plaintiffs therein to a nonsuit, was based upon a determination by that court that the written instrument of August 3, 1906, created no obligation in favor of defendant Wilson and his codefendant Regent Laundry Company, or either of them, against these plaintiffs, "that the subject-matter of said counterclaim has been finally adjudicated," and that defendant Wilson "is barred from further action thereon or from seeking to question said determination, finding, and judgment." The reply admits that on or about August 3, 1906, defendant Wilson agreed to purchase and did purchase from plaintiffs and Cahn and wife 35 shares of the capital stock of the laundry company, and paid the consideration therefor as stated above, but avers, in effect, that the alleged written instrument upon which the counterclaim is predicated never became a valid and subsisting contract binding upon plaintiffs; that it was understood and agreed, between all of the parties concerned, that the writing should be signed by all of the parties mentioned therein before becoming valid and effective; that it was in fact not signed by the Regent Laundry Company nor by Mrs. Ellen Cahn, by reason whereof it acquired no validity. Certain denials are made, putting in issue matters set up in the counterclaim, but they need not be here detailed.

On motion of defendant Wilson the court struck out all of that part of the reply which sought to set up the ruling and judgment in the attachment suit as a bar to the prosecution of defendant Wilson's counterclaim.

The questions before us on appeal relate entirely to the counterclaim; and touching that it need only be said that there was evidence pro and con on the issue as to whether the written agreement of August 3, 1906, was signed, by those who executed it, with the understanding and intention that it should not become effective unless signed by all parties named therein; and that plaintiffs' counsel, for the purposes of this case, stipulated that on August 3, 1906, the Regent Laundry Company was indebted to various persons in the sum of \$1,154.77, exclusive of current bills for the month of July, 1906, and exclusive of the note for \$1,850 mentioned in the counterclaim.

[1] I. The first point made by learned counsel for appellant is that the written instrument upon which the counterclaim of defendant Wilson is predicated never became binding upon plaintiffs for the reason that it was never signed by Mrs. Ellen Cahn, and that the court erred in admitting the writing in evidence and in refusing to direct a verdict for plaintiffs on the counterclaim. The trial court, as appears from its rulings throughout, took the view that the writing presumptively took effect and was binding upon the parties who signed it, upon its delivery, and that the burden of proof was on plaintiffs to show that the understanding and

intention of such parties were to the contrary. This is in accord with the settled law in this state as to the general rule applicable to such a situation.

In *Muehlbach v. Railroad*, 166 Mo. App. loc. cit. 314, 148 S. W. 456, it is said by Johnson, J.:

"The rule applicable to such cases is that a party who signs and delivers an instrument is bound by the obligations he therein assumes although it is not signed by all the parties named in it unless it appears that the parties signing mutually intended that it should be inchoate and incomplete and not take effect as a contract until signed by all the parties named. *State ex rel. v. Sandusky*, 46 Mo. 377; *Donnell Mfg. Co. v. Repass*, 75 Mo. App. 420; *Gay v. Murphy*, 184 Mo. 98 [34 S. W. 1091, 56 Am. St. Rep. 496]; *Mattoon v. Barnes*, 112 Mass. 463; *Dillon v. Anderson*, 43 N. Y. 231; *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495 [70 S. W. 390]; *Naylor v. Stene* [96 Minn. 57] 104 N. W. 685; *Edwards v. Gildemeister*, 61 Kan. 141 [59 Pac. 259]; *American Pub. Co. v. Walker*, 87 Mo. App. 508. And the burden is on the party attacking the contract to show that when he signed it was agreed that the contract should not take effect until signed by all the parties. Authorities supra."

In *State ex rel. v. Sandusky*, supra, the Supreme Court through Wagner, J., said:

"We think that the best and most intelligible principle is that where a writing obligatory is prepared to be signed by several and is not signed by all, whether it is the act of those who do sign it depends upon the question whether it was signed and delivered as an escrow only until signed by the others, or was delivered as the writing of the parties signing."

The court expressly approved the rule announced by the Supreme Court of Massachusetts in *Cutter v. Whittemore*, 10 Mass. 442.

In *Gay v. Murphy*, supra, the bond in question had been signed by the surety merely and not by the principal, and applying a well-recognized rule of law it was held that the surety would not be held liable on the instrument; but in that connection the court said:

"The rule is different when the bond is signed by the principal, and is not signed by one of the sureties named in the bond. In such circumstances the bond is prima facie binding on all who sign it. And if those who sign it would avoid responsibility thereon the burden rests upon them of showing that at the time of its execution it was agreed that the bond should not be delivered as their deed until all persons named in the bond as sureties had executed it."

[2] But in the case before us the written instrument, upon which the counterclaim is predicated, was not only delivered without Mrs. Cahn's signature, but was treated by these plaintiffs and defendant Wilson as a valid subsisting contract between them. The evidence shows that without waiting to procure the signature of Mrs. Cahn, who was unable to be present on account of sickness, plaintiffs, defendant Wilson, and Cahn proceeded at once to consummate the transaction, Cahn having in his possession his wife's stock indorsed in blank. Defendant

Wilson fully performed the contract on his part. Relying thereupon he paid to plaintiffs the full consideration to be paid them for their stock, and paid as well the other consideration mentioned. Plaintiffs have received and retained the full benefits accruing to them under the written instrument which they signed and delivered as their contract, and they cannot now be heard to repudiate its obligations on the ground that it was not signed by all the parties named therein. See *Muehlbach v. Railroad*, supra, 166 Mo. App. loc. cit. 314, 148 S. W. 453.

We need not enter into a discussion of the authorities relied upon by appellants. Some of them are cases dealing with contracts wholly executory; and none of them are persuasive in view of the facts disclosed by this record. It is argued, in effect, that plaintiffs would have had a remedy by way of contribution against Mrs. Cahn had she signed, which remedy is lost by her failure to execute the instrument, and that this affords a cogent reason why the writing should be held to be not binding on plaintiffs. See *Mattoon v. Barnes*, 112 Mass. loc. cit. 466; *Naylor v. Stene*, 96 Minn. loc. cit. 59, 104 N. W. 685. It may be that the fact that a remedy against a party who does not sign is thus lost, will, under appropriate circumstances, be an important factor in the case, bearing upon the question as to whether the parties signing mutually understood and intended that the instrument should be inchoate and incomplete, and ineffective as a contract, until signed by all the parties named. *Muehlbach v. Railroad*, supra. But be this as it may, what influence, if any, this factor may have in a given case must of necessity depend upon the circumstances surrounding the transaction. In the instant case it appears quite clear that this feature is without material influence. Certainly in the face of the facts above stated it would not warrant the court in declaring, as a matter of law, that the contract did not become binding upon those who signed it.

[3] II. Appellants insist, however, that the ruling and judgment in the attachment suit operates as a bar to the prosecution by respondent Wilson of the cause of action upon which his counterclaim is founded; and therefore the court erred in striking out that portion of plaintiffs' reply by which it was attempted to plead the same in bar. There is no merit in this contention. The judgment entered in the attachment case was one of nonsuit. Though the nonsuit was involuntary, and the plaintiffs in that action moved to set it aside, and, upon such motion being overruled, appealed, and the appellate court affirmed the judgment, such judgment was none the less one of nonsuit merely. *Mason v. K. C. Belt Ry. Co.*, 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N. S.) 914. Its legal effect is that of a "judgment of discontinuance or dismissal whereby the merits are left untouched." *Wetmore v. Crouch*, 188 Mo. loc.

cit. 654, 87 S. W. 954, 8 Ann. Cas. 94. A judgment of nonsuit, though it completely terminates and disposes of the particular suit, and is final in the sense that an appeal will lie therefrom where the nonsuit is involuntary, is not a final judgment upon the merits nor *res adjudicata* as to the cause of action. The cause of action is not merged in a judgment of this character, as in a final judgment on the merits, but survives and may be further prosecuted within the time allowed by law. See *Mason v. K. O. Belt R. Co.*, *supra*; *Hewitt v. Steele*, 136 Mo. 327, 38 S. W. 82; *Wlethaupt v. City of St. Louis*, 158 Mo. 655, 59 S. W. 960; *Manning v. Insurance Co.*, 176 Mo. App. 678, 159 S. W. 750; *Woods v. Mo. Pac. Ry. Co.*, 192 Mo. App. 165, 179 S. W. 727. The ground upon which the court trying the attachment suit gave the peremptory instruction forcing the plaintiffs therein to a nonsuit is not here a matter of consequence. We are concerned only with the fact that the judgment entered was one of nonsuit, operating as a discontinuance or dismissal of that particular action.

[4] III. The court instructed the jury that if they found for defendant Wilson on his counterclaim to assess his damages at the sum of \$667. Appellants argue that the giving of this instruction constituted reversible error.

In the first place it is appellants' contention that defendant Wilson did not prove that he suffered any damage by reason of the alleged breach by plaintiffs of the covenant counted upon in the counterclaim, and could, at most, recover nominal damages only. The argument is that Wilson failed to affirmatively show that the stock which he purchased on August 3, 1906, was owned by him at the time when the debts of the Regent Laundry Company—in excess of the sum mentioned in the contract as being the total indebtedness of the company—were paid, or when the suit was brought. But the fact is that Wilson, in conformity to the terms of the contract, acquired one-half of the stock of the corporation, and that the said covenant of plaintiffs was broken immediately when made; and the presumptions thus afforded suffice to sustain a recovery of substantial damages. And we take it that, *prima facie*, defendant Wilson, having purchased one-half of the capital stock of the corporation, is to be regarded as having been damaged to the extent of one-half of the amount by which the corporation's indebtedness exceeded that which plaintiffs covenanted that it would be found to be. Presumptively the value of Wilson's stock was less by one-half of this additional indebtedness than it would have been had such additional indebtedness not existed.

[5] But it is argued that in any event the court erred in directing the jury to return a verdict for plaintiff for a definite sum, thereby depriving the jury of the right to assess

the damages. It is true that section 1993, Rev. Stat. 1909, provides that:

"When a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess amount of the recovery."

Adjudged by some of the earlier decisions in this state, applying this statute, the giving of this instruction would constitute fatal error, though in *Wells v. Zallee*, 59 Mo. 509, a suit on a promissory note, it was held that the giving of an instruction directing the jury as to what amount to allow if they found for plaintiff was not reversible error, the amount being correctly calculated, which ruling was followed in *Doud v. Reid*, 53 Mo. App. 553. However, in the recent case of *Beekman Lumber Co. v. Acme Harvester Company*, 215 Mo. 221, loc. cit. 251, 114 S. W. 1087, the giving of an instruction directing the amount of a verdict on an account, including interest calculated and added to the amount due on the account, was held not to be fatal error notwithstanding the above statute, since it appeared that the items of the account were not disputed, and the interest had been properly calculated. In disposing of the matter the court invoked section 2082, Rev. Stat. 1909, which commands that an appellate court shall not reverse a judgment unless it believe that error was committed, against the appellant or plaintiffs in error, materially affecting the merits of the action. We followed this ruling in *McCormick Machine Co. v. Blair*, 181 Mo. App. 593, 164 S. W. 856, and in *Moore v. McHaney*, 191 Mo. App. loc. cit. 698, 178 S. W. 258.

In the case before us it is admitted that on August 3, 1906, the Regent Laundry Company was indebted to various persons in the sum of \$1,154.77, exclusive of current bills for the month of July, 1906, and exclusive of the note for \$1,850 mentioned. Deducting from the \$1,154.77 the sum of \$200, in accordance with the terms of the paragraph of the contract above quoted, one-half of the remainder, to wit, \$477.38, will constitute Wilson's damages, exclusive of interest, under the rule stated above. The institution of the attachment suit, September 4, 1906, constituted a demand by Wilson; and if interest be computed on \$477.38 from said date to the date of the trial below, and added to said sum, the total will be found to be a little more than \$667, the amount of the verdict on the counterclaim under this instruction. The action of the court therefore in thus directing the amount for which the jury should return a verdict, on the counterclaim, if for defendant Wilson, cannot be said to be error materially affecting the merits of the action (section 2082, *supra*), or affecting the substantial rights of appellants. See section 1850, Rev. Stat. 1909.

IV. Other questions raised respecting the instructions given are either disposed of by

what we have said above or are not such as to warrant discussion.

The judgment is affirmed.

REYNOLDS, P. J., and THOMPSON, J., concur.

**CLEVELAND VILLAGE SCHOOL DIST. NO.
118 OF CASS COUNTY v. ZION.**
(No. 12195.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

**1. SCHOOLS AND SCHOOL DISTRICTS — 41(3) —
FORMATION OF NEW DISTRICT — DIVISION OF
FUNDS — SUIT — JURISDICTION OF CIRCUIT
COURT.**

Under Rev. St. 1909, § 10839, providing that, on formation of a new school district, the districts affected shall agree upon a division of the property, and section 10840, providing that, if they fail to agree, either may appeal to the county superintendent of schools, who shall appoint a board of arbitrators to determine the amounts due, the circuit court had no jurisdiction of a suit by a village school district, formed with another from the territory of an original common school district, against the treasurer of such original district, to recover its proportionate share of the school funds in his hands, especially where the other new district was not made a party.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 74-79; Dec. Dig. 41(8).]

**2. SCHOOLS AND SCHOOL DISTRICTS — 44 —
FUNDS — STATUTES.**

Laws 1891, pp. 204, 205, authorizing county courts to reapportion moneys in the hands of county treasurers and belonging to disorganized school districts, does not apply to schools in counties under township organization where the township trustee is the treasurer of the school district instead of the county treasurer, and it is not made applicable to township trustees the same as to county treasurers by Rev. St. 1909, § 10830, providing that township trustees, as custodians of school moneys of the township, shall have duties corresponding to those of county treasurer.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 88-91; Dec. Dig. 44.]

**3. SCHOOLS AND SCHOOL DISTRICTS — 110 —
DIVISION OF FUNDS.**

Money collected by taxation for school purposes cannot be diverted from one fund to another, and money in the teachers' fund cannot be transferred to and used in the incidental fund.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 261-264; Dec. Dig. 110.]

Appeal from Circuit Court, Cass County;
B. G. Thurman, Judge.

Suit by the Cleveland Village School District No. 118 of Cass County, and its directors and treasurer, against Henry Zion, wherein the petition was amended by striking out all plaintiffs except the school district. From a judgment for plaintiff, defendant appeals. Judgment reversed.

W. L. P. Burney and D. C. Barnett, both of Harrisonville, for appellant. W. D. Summers, of Harrisonville, for respondent.

TRIMBLE, J. This suit was brought, originally, by the Cleveland Village school district No. 118 of Cass county, and Brown, Laffoon, Edelen, Job, Noyes, and Corey, directors, and P. R. Brown, treasurer thereof, against defendant, Zion, to recover certain funds alleged to have come into his hands as township trustee and treasurer of Glen Wild school district, a common school district heretofore existing but disorganized in 1903 by the incorporation of the north two-thirds of its territory into the Cleveland Village school district and the south one-third of said territory into the West Line school district.

The petition was in two counts, the first of which, after alleging the official positions of all the persons above named, the existence of Glen Wild school district, and the later disorganization thereof by the incorporation of two-thirds of its territory into the Cleveland Village school district and the rest into the West Line district, further alleged that at the time of said disorganization said Zion, as said township trustee and treasurer, had in his hands funds belonging to said disorganized district amounting to the sum of \$183.46. Said first count further alleged that, "under the statutes made and provided," the said funds in the hands of said Zion were to be divided to said districts according to the number of children of school age that were transferred to each of the districts that absorbed the territory of the disorganized district; that there were 25 children transferred to the Cleveland district and 7 to the West Line district, whereby the former became entitled to $\frac{25}{32}$ of said funds and the latter to $\frac{7}{32}$ thereof; and that the said Cleveland district was entitled to \$143.46 and said West Line district to \$40.21. (This, it will be observed, is 21 cents more than is alleged to be in defendant's hands.) Said first count, after alleging demand therefor and refusal to pay, prayed judgment with interest from the — day of April, 1908. The second count of the petition alleged that in a proceeding in the county court of Cass county, at the April term, 1908, wherein the Cleveland district was plaintiff and the West Line district and said Zion were defendants, a judgment was rendered finding that the treasurer of the Cleveland district was entitled to receive \$143.46, and the custodian of the funds of the West Line district was entitled to receive \$40.21, and ordering that said Zion honor warrants for the said amounts respectively due said districts; that said judgment in favor of plaintiff for \$143.46 is a final judgment and remains unpaid; wherefore judgment is asked for said sum, etc.

Defendant herein offered a demurrer to the petition. Plaintiffs thereupon amended said petition by striking out all of the plaintiffs except the Cleveland Village school district. After this, the court upon consid-

eration of the demurrer overruled it, and defendant elected to stand thereon. Thereupon the court heard plaintiff's evidence and found the issues for the plaintiff upon the first count of the petition and found that the defendant was indebted to plaintiff in the sum of \$143.66 (which is 20 cents more than the petition asked), with 6 per cent. from April 30, 1908, making an aggregate of \$207.58 for which judgment was rendered. Thereupon defendant appealed.

The judgment having been rendered on the first count of the petition, the second count need not be specially considered, and it would not have been mentioned except for the fact that it is necessary in order to understand the references herein to the order and judgment of the county court, and also because, from the recitals in the judgment herein appealed from, it seems that the circuit court accepted the county court judgment as fixing and determining the plaintiff's proportionate share of the fund in defendant's hands.

[1] The main contention raised by the demurrer is that the circuit court is without jurisdiction to entertain this suit because the law has provided a method whereby the funds and property of the absorbed district may be divided between the new districts and that method should be followed. Section 10839, R. S. Mo. 1909, provides that, upon the formation of a new district, the districts affected shall agree upon a division of the property on hand and upon the sum to be paid to the new district, and section 10840 provides that, if they fail to agree, either of the districts may appeal to the county superintendent of schools, who shall appoint a board of arbitrators, consisting of four persons, to ascertain and determine the amounts due. Where the statute provides a method of procedure by which the school districts may adjust their differences, that method must be followed. *Rice v. McClelland*, 58 Mo. 116; *School Dist. v. Sims*, 186 S. W. 4; *District 6 v. District 5 of Henry County*, 18 Mo. App. 266. If it be said that sections 10839 and 10840, being found in the chapter on county common school districts, does not apply to a village district, the answer is that the disorganized district and also the West Line district were such districts, and the sections do not by their terms exclude a village district when that happens to be the new district that is formed.

It may perhaps very well be that, if the Cleveland Village school district had absorbed all of the Glen Wild district, then the former would be entitled to sue for and recover the property belonging to the latter, as successor to all its rights and liabilities. *Abler v. School District of St. Joseph*, 141 Mo. App. 189, 197, 124 S. W. 564. As said in *District v. District*, 18 Mo. App. 272:

"Where a corporation goes entirely out of existence, by annexation to or merger in another corporation, if no arrangement be made

respecting the property and liabilities of the defunct corporation, the subsisting corporation succeeds to all the property and liabilities of the former. This rests on the principle of succession of rights and devolution of obligations."

But in this case plaintiff does not succeed to all of the property of the disorganized district, but only to a proportionate part thereof. And this suggests another difficulty affecting the validity of the judgment, which difficulty appears upon the face of the petition, and that is this: How can the plaintiff's share in the funds of the old district be finally ascertained and determined in a case to which the other district is not a party? It will not be bound by any ascertainment of plaintiff's share, in a case to which it was not made a party, and therefore defendant ought not to be made to pay the amount adjudged, since it will not protect him from the demand of the other district in case it should claim a larger amount than that accorded it. It may be that defendant is not entitled to rely on this as a ground of demurrer, since it does not appear to have been clearly and sharply set up therein; but, if so, then this feature can be referred to as illustrating very clearly at least one reason why the Legislature provides that the districts should, if possible, get together and adjust the matter themselves, or, if unable to do so, should appeal to the county superintendent, where their differences could be settled by arbitration. In that way all parties interested will be protected and bound. The law contemplates that school matters will be administered by men without technical training in the law, and seeks to provide, in so far as it is possible, a method by which they may adjust their own matters among themselves by a speedy and somewhat informal procedure. We are of the opinion that it should have been followed in this case, especially as one of the districts entitled to participate in the fund of the disorganized district is not made a party and will not be bound by any ascertainment of plaintiff's share.

[2] But it is said the other district was a party to the proceeding in the county court, and that tribunal adjudged the amount of the share going to such other district and, indeed, fixed the proportions going to each of the districts. That proceeding was based upon an act of the General Assembly approved March 16, 1891 (Laws 1891, pp. 204, 205), which seems to have been omitted from subsequent revisions of the statutes—at least we have been unable to find where it has been repealed. But an examination of that act, if it is still in force, will disclose that it does not apply to schools in counties under township organization where the township trustee is the treasurer of the school district instead of the county treasurer. By the clear wording of the act it applies "to moneys remaining in the hands of the county treasurer-

ers of said counties" which have been apportioned by the court to the district before it was disorganized. Plaintiff claims that section 10830, R. S. Mo. 1909, makes the act also applicable to township trustees the same as to county treasurers. But this view is untenable, since the clause referred to in that section has no reference to any power granted to the county court, but merely provides that township trustees, as custodians of school moneys of the township, shall have duties corresponding to those of county treasurer. Since the act in question has no application to the matter of dividing the funds involved herein, the division made by the county court amounts to nothing, and no division thereof has been made. And if, as seems likely, the trial court herein merely adopted the division made by the county court, there has not been, anywhere, even an attempted division of the funds between the two districts.

[3] Again, money collected by taxation for school purposes cannot be diverted from one fund to another. Certainly money in the teacher's fund cannot be transferred to and used in the incidental fund. There is nothing in either the petition or judgment showing to what fund the money belongs or to what fund it should go when paid to plaintiff. If the division is made between the two districts as provided by sections 10839 and 10840, the matters as to the various funds will be fully known and the money can be properly distributed.

We are of the opinion that these sections provide the only law applicable to the division of the property of the disorganized district, and that the procedure pointed out therein should be followed. When that is done and the rights of both districts are determined, if defendant still refuses to pay over the money, a remedy can be had to compel its payment.

The judgment is reversed. The other Judges concur.

STATE v. LEONARD. (No. 12205.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. INTOXICATING LIQUORS §219—OFFENSES—INDICTMENT—NAME OF PARTY—"KEEP FOR ANOTHER."

In a prosecution on a charge of unlawfully keeping for and delivering liquor to another the term "keep for another" includes such other, and the offense is complete without regard to the particular person to whom the sale is made or for whom it is kept, as their rights are not violated or involved, so that a charge of such offense is complete without naming the particular person for whom it was kept, etc.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239; Dec. Dig. § 218.]

2. INTOXICATING LIQUORS §219—OFFENSES—"SALE."

The word "sale," in respect to the sale of intoxicating liquor, *vi ex termini*, includes a person to whom the sale is made.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239; Dec. Dig. § 218.]

For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. INTOXICATING LIQUORS §223(6) — HARMLESS ERROR—VARIANCE.

Where the information charged the unlawful keeping of intoxicating liquor for "one John Doe whose true name is unknown," and the proof was that the party for whom it was kept was one John Medley, the variance, if any, between the charge and the proof was no ground for reversal, unless the trial court found that such variance was material to the merits of the case, and prejudicial to the defense as provided by Rev. St. 1909, § 5114.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 274; Dec. Dig. § 223(6).]

4. INTOXICATING LIQUORS §219 — KEEPING—INFORMATION—PARTY.

In an information charging that defendant unlawfully kept for and delivered to "one John Doe, whose true name is unknown," a certain amount of intoxicating liquor, the charge that it was kept for a person unknown could be treated as surplusage, so that the information was not invalid as not stating the name of the party for whom it was kept.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239; Dec. Dig. § 219.]

5. INTOXICATING LIQUORS §139—OFFENSES—TERRITORY—STATUTE.

Rev. St. 1909, § 7227, providing that no person shall keep for another person in a county that has adopted the local option law any intoxicating liquors of any kind, applies to towns of 2,500 inhabitants having local option and located in a county that has adopted it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.]

Appeal from Circuit Court, Bates County;
C. A. Calvird, Judge.

Walter Leonard was convicted of keeping liquor for another, and he appeals. Affirmed.

E. B. Silvers, of Kansas City, for appellant. D. O. Chastain, of Butler, for the State.

TRIMBLE, J. Defendant was prosecuted under an information which, after alleging that the city of Butler in Bates county, Mo., was a city of more than 2,500 inhabitants and the local option law (Rev. St. 1909, §§ 7238-7246, amended by Acts 1913, p. 391) was in force therein, charged that:

"Walter Leonard, in said city of Butler aforesaid did then and there unlawfully keep for, store for and deliver to one John Doe, who (se) true name is unknown, intoxicating liquor, to wit, 24 pint(s) of whisky without then and there having any authority so to do and against the peace and dignity of the state."

A jury was waived and the case was tried by the court. The trial resulted in the court finding the defendant guilty of keeping liquor for another, and his punishment fixed at

imprisonment in the county jail for six months. Defendant has appealed.

There is no question but that the evidence clearly shows that the defendant, a negro, knowingly kept intoxicating liquor for another person. The defendant offered no testimony, and it is not claimed that the evidence was not sufficient to show keeping for another.

[1, 2] The defense is that in a prosecution for the offense of keeping liquor for another, the particular person for whom it is kept is as essential an element of the offense as is the ownership of property in the case of larceny, and that, therefore, the information is bad since a fictitious name of the person for whom the liquor is kept is not a sufficient description of the offense. Point is also made that in this case the proof showed that the liquor was kept for one John Medley, and that there is a fatal variance on this account.

In prosecutions for the sale of intoxicating liquor it is well settled that the name of the one to whom the liquor is sold is immaterial; the person to whom it is sold not being an element of the offense. *State v. Curtwright*, 134 Mo. App. 588, 114 S. W. 1146; *State v. Haney*, 151 Mo. App. 251, 132 S. W. 55; *State v. Spain*, 29 Mo. 415; *State v. Jaques*, 68 Mo. 280; *State v. Ladd*, 15 Mo. 430. It would seem that, in reason, the same rule would apply in a prosecution for keeping liquor for another. The word "sale," *vi ex termini*, includes a person to whom the sale is made, as much so as the phrase "keep for another" includes such other. As noted in the *Ladd* Case, however, the offense of larceny violates an individual right of another, namely, the owner or holder of the property, and hence the name of such other must be stated in order to completely state the offense. But the sale of liquor to another and the keeping of it for another are complete in themselves without regard to the particular person to whom the sale is made or for whom it is kept, as their rights are not violated nor involved, and thus a charge of either act is complete without naming the other person implied or included in the terms.

[3, 4] However, if the name of the one for whom it is kept were necessary to be stated, the information states it was kept for "John Doe, whose true name is unknown." The evidence is that, at the time the information

was filed, it was not known to the prosecutor whom the liquor was kept for, but at the trial it developed that the man for whom it was kept was John Medley. And if this may constitute a variance between the charge and the proof as to the person for whom the liquor was kept, it is nevertheless no ground for reversal of the case unless the court be-fore which the trial was had finds that such variance was "material to the merits of the case and prejudicial to the defense of the defendant." Section 5114, R. S. Mo. 1909; *State v. Barker*, 64 Mo. 282. But the information shows on its face that the name of John Doe is fictitious and that the true name is unknown. Hence it is the same as if the information had merely charged that defendant kept the liquor for another person unknown to the informant. And if the name of the person for whom the liquor is kept forms no part of the offense (and we hold that it does not), then the words in the information charging that it was for a person unknown can be regarded and treated as surplusage. *State v. Ladd*, 15 Mo. 430, 433. We therefore hold that the information is not invalid by reason of the point urged.

[5] Finally, point is made that the statute on which this prosecution is maintained does not apply to towns where local option is in force, but only to counties. The statute (section 7227, R. S. Mo. 1909) is as follows:

"No person shall keep * * * for * * * another person, in any county that has adopted or may hereafter adopt the local option law, any intoxicating liquors of any kind whatsoever."

The evidence shows that local option was in force in the city of Butler and also in Bates county, in which Butler is located. Hence the offense was committed in a town, having local option in force, which town was in a county that had adopted local option. In *State v. Rawlings*, 232 Mo. 544, 552, 134 S. W. 530, the Supreme Court's manifest holding is that section 7227 applies to towns of 2,500 inhabitants which have local option and are in a county that had adopted it. Hence the point urged by defendant in his brief that the law (section 7227) does not apply to towns is untenable.

These are all the points that are presented for our consideration and relied upon in defendant's brief. They are not sufficient to call for a reversal of the case.

The judgment is therefore affirmed. All concur.

SCHWALL v. HIGGINSVILLE MILLING CO. (No. 11759.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. EVIDENCE — 354(26)—WITNESSES — 257—DOCUMENTARY EVIDENCE—ORIGINAL BOOKS OF ENTRY—REFRESHING MEMORY.

In an action for breach of contract to sell and deliver flour, the books and records kept at the terminal carrier's station, relating to the arrival of shipments, the time of unloading and storing, and the notification of the consignees, the entries having been made by various clerks in the usual course of business, were admissible in evidence, both as aids to the testimony of a witness who had general charge and supervision of the books, and on account of their own probative force.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1482; Dec. Dig. — 354(26); Witnesses, Cent. Dig. § 892; Dec. Dig. — 257.]

2. EVIDENCE — 177 — DOCUMENTARY EVIDENCE—COPIES.

In such action, where the general foreman at the terminal carrier's station who had supervision over such books and records, but who did not himself make the entries in the original books, produced copies thereof which he had made himself and compared with the memoranda from which they were entered and found to be correct, they were admissible where the books of original entry were in another state and could not be produced in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 557, 570-579; Dec. Dig. — 177.]

3. SALES — 291—STOPPAGE IN TRANSIT—INSOLVENCY OF BUYER.

The insolvency of a buyer is a sufficient justification for the seller's refusal to ship goods, or of his stopping shipments in transitu.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 827-830; Dec. Dig. — 291.]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Henry O. Schwall against the Higginsville Milling Company. Judgment for defendant, and plaintiff appeals. Affirmed.

H. C. Wallace, of Lexington, and John S. Wise, of New York City, for appellant. Chas. Lyons and O. L. Ristine, both of Lexington, for respondent.

JOHNSON, J. Action for breach of contract by the terms of which defendant, a miller at Higginsville, sold and agreed to deliver to plaintiff, a broker in New York, 4,750 barrels of flour for delivery as follows: 2,000 barrels during February and March, 1912; 750 barrels in the first half of April; and 2,000 barrels during the whole month of April. The agreed price for the last 2,000 barrels was \$4.07½ per barrel, and for the remainder, \$4.05 per barrel. All of the shipments were to be billed from Higginsville, "lighterage free and inspection allowed" to the Sixtieth Street Depot in New York, a terminal of the New York Central Railroad. The terms of payment were cash on delivery. Pursuant to this contract, and following shipping instructions, defendant shipped four

cars, containing 250 barrels, each of the value of \$886.57, on February 6th, 12th, 14th, and 19th, respectively, and drew on plaintiff for the respective shipments attaching the bill of lading to the draft. These drafts were forwarded by defendant's bank through a regular channel to a bank in New York City, but were not paid by plaintiff until April 16th. On the date of the last of these shipments (February 19th) plaintiff wired defendant:

"Before shipping any more of our orders that you have instructions for, please await our advice and oblige."

No further instructions were given until April 12th, when plaintiff wired an order to ship seven cars more, and on April 16th another order for six cars. On the latter date defendant notified plaintiff of its refusal to fill the orders or to ship any more flour under the contract. The ground of the refusal was the failure of plaintiff to pay the drafts promptly under circumstances which gave defendant reasonable cause to think that plaintiff would refuse or would be unable to pay the purchase price of future deliveries. The contracts gave plaintiff the right to an opportunity to inspect the flour at the Sixtieth Street Station before his obligation or duty arose to pay the draft for the purchase price of such flour, and it is the contention of plaintiff, supported by evidence, that on account of various delays on the part of the transportation companies, he was not afforded such opportunity with respect to the four cars shipped in February, until just before he paid the drafts, and therefore that he was not in default in the performance of his contractual duty to pay cash on delivery. On the other hand, the evidence of defendant shows the cars arrived at the Sixtieth Street Depot, and were unloaded and the flour stored in the railroad company's warehouse at that place, where plaintiff, who had been promptly notified of the arrivals, had full opportunity to inspect the flour during a period of more than a month preceding the payment of the drafts, which plaintiff delayed paying until he succeeded in reselling the flour. The evidence of plaintiff tends to show that at the time of the alleged default of defendant the market price of flour in New York had advanced to such an extent that plaintiff would have realized a profit of more than \$5,000 on the shipments defendant refused to make, while the evidence of defendant tends to show that plaintiff was not damaged. These issues raised by the pleadings and evidence were submitted to the jury, a verdict was returned for defendant, and plaintiff appealed.

[1, 2] We are asked to reverse the judgment and remand the cause on the ground of error in the rulings allowing the deposition of Archie Carley to be read to the jury. The witness was the general foreman of the New York Central Railroad Company at the Sixtieth

eth Street Depot, and, as such, appears to have had general charge and supervision over the books and records at that office relating to the arrival of shipments, the time of unloading and storing in the lofts or warehouse, and the notification of the consignees. He produced copies from the books of original entry which he had made himself, and they were admitted in evidence. In substance they showed that the four cars arrived at that station, were unloaded, contents stored in the lofts, plaintiff was notified, and that all these events occurred more than a month before the drafts were paid. The entries were made in the books of original entry by different clerks in the usual course of business at the time of the happening of the events and facts recorded. The witness did not write any of these entries himself, but, before testifying, compared them with the memoranda from which they were entered, and found them to be correct. The books themselves would have been admissible in evidence, both as aids to the testimony of the witness and on account of their own probative force. *Lyons v. Corder*, 253 Mo. loc. cit. 549, 162 S. W. 606; *Milling Co. v. Walsh*, 108 Mo. loc. cit. 284, 285, 18 S. W. 904, 32 Am. St. Rep. 600; *Robinson v. Smith*, 111 Mo. loc. cit. 207, 20 S. W. 29, 33 Am. St. Rep. 510. And since they were in another state and could not be produced in evidence, it was proper to receive the copies which the testimony of the witness showed were exactly the same as the original. *Wright v. Railroad*, 118 Mo. App. 392, 94 S. W. 555, and authorities cited.

The fact that the witness did not write the original entries into the books does not detract from the evidentiary value of his testimony or of the verified copy. Where, as here, the entries in the original books of great business concerns are made by different hands, a rule, requiring the clerk who made a given entry to testify to its accuracy and authenticity, would be impracticable; and no good reason could be given for holding that the officer of the corporation who had charge and general supervision of the books in his office which are kept in the usual course of business, and who has compared the entries in the books with the memoranda from which they were made, is not a competent witness to identify the books and testify from their contents.

[3] We do not share the view of plaintiff that the court erred in modifying his instruction numbered 5. There is evidence to the effect that plaintiff was not able to pay the purchase price of the flour, but was depending upon reselling it to obtain the necessary funds to pay the drafts. Insolvency of the vendee is a sufficient justification of a refusal of the vendor to ship goods, or of stopping shipments in transitu. *Grocery Co. v. Railroad*, 138 Mo. App. 352, 122 S. W.

10; *Schwabacher v. Kane*, 13 Mo. App. 126; *Garden Co. v. Railway*, 64 Mo. App. loc. cit. 305. Other points raised by plaintiff have been examined, and are found to be without merit. The case was fairly tried and submitted to the jury.

The judgment is affirmed. All concur.

CROWE v. BANKERS' LIFE INS. CO. (No. 12226.)

(Kansas City Court of Appeals, Missouri,
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

1. INSURANCE — §648(4)—LIFE INSURANCE— LOAN ON POLICY—PRESUMPTION.

Where insured's prior payments of premiums entitled him to a loan under the provisions of his life policy, the presumption, in his administratrix's action on the policy, was that a loan made to insured by the insurer, the note itself reciting that it was for a loan secured by the policy, was a loan in reality, and not a note given on account of a premium due.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1657; Dec. Dig. § 646(4).]

2. INSURANCE — §665(3)—LIFE INSURANCE— ACTION — EVIDENCE — BINDING FORCE ON COURT.

In an administratrix's action on a life policy, where the case turned on whether insured paid the fifth premium before ceasing to pay, or gave his note for it, the trial court was not bound to believe the statements made in the testimony of insurer's witness concerning what the record of the company showed, but could find for plaintiff on her prima facie case made by the presumption that a loan to insured on the policy was such, especially where it was clear that the witness was only stating his interpretation of the record.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716; Dec. Dig. § 665(3).]

3. INSURANCE — §665(3)—LIFE INSURANCE— PAYMENT OF PREMIUM IN CASH—SUFFICIEN- CY OF EVIDENCE.

In an administratrix's action on a life policy, evidence held sufficient to justify the trial court in finding that an entry on the insurer's record, representing the fifth premium, was a cash payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716; Dec. Dig. § 665(3).]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Edith M. Crowe against the Bankers' Life Insurance Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

G. Petrus Peterson, of Lincoln, Neb., and Scott J. Miller, of Chillicothe, for appellant. Paul D. Kitt, of Chillicothe, for respondent.

ELLISON, P. J. Plaintiff is administratrix of the estate of Phyllander G. Crowe, deceased, and brought this action on a policy of life insurance issued to him by defendant. The trial was without the aid of a jury, and no declarations of law were asked or given. The judgment was for the plaintiff.

The policy was issued on the 25th of April,

1901, for the sum of \$1,000 at an annual premium of \$25.70. The parties agree that Crowe paid four premiums; and plaintiff affirms, and defendant denies, that he paid the fifth, and that has become the question of fact upon which the solution of the case depends. The statute governing the case is section 7897, R. S. 1890, and it provides that after the payment of the first three premiums the policy shall not be forfeited for future defaults, but it shall be subject to commutation as follows: The net value of the policy when the premium becomes due and is not paid shall be computed upon a table of mortality, with 4 per cent. interest, and after deducting from three-fourths of such net value any notes or other evidence of indebtedness to the company, given on account of past premium payments on the policy, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured, etc.

If deceased paid the fifth premium before ceasing to pay, then three-fourths of the net value would give him extended insurance, under the terms of the statute, for a period beyond the day of his death; but if he did not pay the fifth premium and gave his note for it, as claimed by defendant, then the note must be deducted from three-fourths of the net value, and there would not be sufficient left to pay extended insurance up to the date of his death.

The fifth premium was due on the 25th of April, 1905, and it is agreed that deceased gave his note to defendant for some purpose on that day for \$25.70, due the 25th of October, 1905. It was not paid when due, but deceased gave a new note for \$26.48, which defendant says was in renewal of the other including the interest. These notes defendant says were given for the fifth premium, while plaintiff, as we have said, insists they were for money borrowed of the defendant. The last note is in these words:

"\$26.48. Lincoln, Neb., Oct. 25, 1905.
 "Six months after date for value received I promise to pay to the order of the Bankers' Life Insurance Company of Nebraska twenty-six and ⁴⁸/₁₀₀ dollars with six per cent. interest from date. This note is given in payment of a loan on a policy of insurance in said company. In the event of the death of the maker, before the maturity of this note, this note shall be a lien on the policy. Payable at home office, Lincoln Nebraska. Due April and October.
 "Philander G. Crowe."

[1] The policy itself provides that, after three annual premiums have been paid, the insured might borrow of the company any amount not exceeding one-half the reserve and surplus. At the date of this note, deceased was entitled to borrow under this provision more than the amount of the note.

Now, it will be noticed that the note itself recites that it is for a loan, secured on the policy, which means that the amount of it shall be deducted from the sum due on the policy if not paid before death. It is true that the "loan" may have been to pay a premium, but since the deceased's prior payments of premiums entitled him to a loan, under the provisions of the policy, the presumption is that this was a loan in reality and not a note given on account of a premium due. *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560. This is in keeping with the ordinary understanding of the word "loan" as distinguished from giving a note in settlement of an account.

[2] We think the trial court was not bound to believe the statements made in the testimony of defendant's witness concerning what the record of the company showed, and that it could find for plaintiff on her *prima facie* case. *Printz v. Miller*, 233 Mo. 47, 49, 135 S. W. 19; *Hunter v. Wethington*, 205 Mo. 284, 293, 108 S. W. 543, 12 Ann. Cas. 529; *Mowry v. Norman*, 204 Mo. 173, 191, 103 S. W. 15; *Milliken v. Commission Co.*, 202 Mo. 637, 655, 100 S. W. 604; *Seehorn v. Bank*, 148 Mo. 256, 265, 49 S. W. 886.

[3] Especially is this true when it was clear the witness was only stating his interpretation of the record. But, more than this, the record itself bears strong mark upon its face that the note was a distinct thing from the premium and had no reference to it; for in the list of premiums paid, just below the entry of, "Note \$25.70 Oct. 25, 05," there is this: "1905-January 16th, 06.\$25.70." Plaintiff insists, and we agree with her, that the trial court could well find that such entry of January 16th (which represented the fifth premium) was a cash payment.

The insuperable difficulty with defendant's case is that the finding of the trial court is against it.

The judgment is affirmed. All concur.

GROSS et al. v. MORELAND. (No. 12203.) (Kansas City Court of Appeals. Missouri. Dec. 18, 1916. Rehearing Denied Dec. 29, 1916.)

SCHOOLS AND SCHOOL DISTRICTS ~~§~~88—CONSOLIDATION—INJUNCTION—PETITION.

Petition to enjoin formation of a consolidated school district is subject to demurrer, the acts and proposed acts alleged and complained of, though characterized as unlawful and harmful, being only such as are justified by Laws 1913, p. 722.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 55; Dec. Dig. ~~§~~88.]

Appeal from Circuit Court, Bates County; C. A. Calvird, Judge.

"Not to be officially published."

Action by E. V. Gross and others against A. C. Moreland. From an adverse judgment, plaintiffs appeal. Affirmed.

C. A. Denton, of Butler, for appellants. Silvers & Dawson, of Butler, for respondent.

ELLISON, P. J. This proceeding is in equity to enjoin defendant, as county school superintendent of schools and certain citizens from performing certain acts preliminary to the formation of a consolidated school district. The trial court refused a temporary injunction, and at the succeeding term of court, defendant demurred to the bill, and the court sustained the demurrer, whereupon plaintiff refused to plead further, and judgment was rendered for defendant.

Before considering the allegations of the petition we will refer to the late statute on the subject of consolidating school districts (Laws 1913, p. 722). Section 1 of that act provides that:

"The qualified voters of any community in Missouri may organize a consolidated school district."

Section 3, provides that:

"When the resident citizens of any community desire to form a consolidated district, a petition signed by at least twenty-five qualified voters of said community shall be filed with the county superintendent of public schools"

—and that on receipt of this petition it becomes the duty of the superintendent "to visit the community" and investigate its needs "and determine the exact boundaries of the proposed consolidated district"; that he shall call a meeting of the voters of the proposed district to consider the question of consolidation; that he shall give notice, make plats, etc.; that "the special meeting shall be called to order by the superintendent," or some one deputized by him; that a chairman shall be chosen and an election held as under section 10865, R. S. 1909. Section 3 further recognizes that the consolidated district may lie partly in each of adjoining counties.

It is alleged in the petition that the plaintiffs were residing in a consolidated district known as No. 2, duly organized under the law in May, 1913, and composed of lands in Cass county and the adjoining county of Bates, and that said district had been conducting its school since then; that afterwards, in December, 1915, a properly signed petition was delivered to the defendant superintendent, asking for an election to form a consolidated district which, when formed, would take from the first district organized (No. 2) that part of its territory lying in Bates county; that said defendant superintendent, in carrying out the provisions of the law of 1913 aforesaid, "has visited the community, and in violation of the laws of the state with reference to fixing boundaries of consolidated school districts, and desiring to deprive district No. 2 of that part of the territory of said district which lies in Bates county," did fix the boundary lines of the proposed new district so as to include that

part of the old district No. 2 that was situated in Bates county. It is further averred that the defendant superintendent has called an election of voters within the boundaries of the proposed new district to be held Friday the 31st of December, 1915; that he has prepared plats and posted notices as required by the law aforesaid; "and that the county superintendent is now proposing and intending, on the 31st day of December, 1915, to attend the said special meeting so called by him, or deputize some one to represent him."

It is then further alleged that defendant superintendent "has no power or authority, under the petition so presented to him under the act of 1913, * * * to include within the proposed district that part of said district No. 2 of Cass county lying in Bates county; that that part of said district No. 2 of Cass county belongs to and is a part of said district, and beyond the power and control of the county superintendent of Bates county, so far as taking it from the said consolidated school district"; that to take said part of the district from the present Cass county district No. 2 would work irreparable injury to the latter district, by depriving it of the income of taxation, etc.; that it will increase the rate of taxation on what is left of the old district; that it will work a hardship on the children in compelling them to attend school in the proposed new district.

The prayer of the petition is to enjoin defendant superintendent, or any one acting for him, from attending said meeting for the purpose of holding the election aforesaid on the 31st of December, 1915, and also to enjoin "any and all parties from voting at said meeting," etc., and for all proper relief.

In our opinion the trial court's condemnation of the petition was proper. So far as concerns the allegations of acts and proceedings of the school superintendent, as well as his intended acts, together with the alleged intended acts of the voters, they consist of nothing but what is justified by Laws 1913, p. 722. Every step alleged to have been taken is authorized by that law as interpreted by the Supreme Court in *State ex inf. v. Jones*, 266 Mo. 191, 181 S. W. 50. It is true the pleader characterizes certain proposed acts as unlawful and harmful, but that does not make them so, and the petition itself shows the contrary.

In carrying out the project of forming the new consolidated district, the superintendent is given important powers, and he is required to have "due regard to the welfare of adjoining districts." What might develop on a trial of a case of this nature we cannot say. Nor are we attempting to say what rules should govern the trial or limit the powers and discretion of the superintendent. It is sufficient to dispose of this case to say that no cause for injunction is stated.

The judgment is affirmed. All concur.

STOUTZENBERGER v. LAMB. (No. 11984.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. PLEADING ⇐98(2)—REPUGNANCY OF DEFENSES.

In action on contract of sale, the defenses of false representations, avoiding the contract and a breach of warranty expressed in the contract, are wholly repugnant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. ⇐93(2).]

2. SALES ⇐437(1)—BREACH OF WARRANTY—PLEADING.

Where defendant, in an action for the price of a separator, claimed fraudulent representations, but not a warranty, he could not have the defense of warranty submitted, having elected to repudiate the contract by pleading its nullity for fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248-1250; Dec. Dig. ⇐437(1).]

3. APPEAL AND ERROR ⇐218(1)—THEORY OF CASE BELOW.

A verdict, erroneous because based on a defense not pleaded, will be set aside, notwithstanding counsel in their briefs assumed that such defense was in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1319, 1321, 1323; Dec. Dig. ⇐218(1).]

Appeal from Circuit Court, Cass County;
D. H. Harris, Judge.

"Not to be officially published."

Action by E. Stoutzenberger against W. T. Lamb. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Allen Glenn & Son, of Harrisonville, for appellant. J. S. Briery and W. D. Summers, both of Harrisonville, for respondent.

JOHNSON, J. Plaintiff sued in the circuit court of Cass county for the purchase price of a "sharpless tubular cream separator" he sold and delivered to defendant under the terms of a written order signed by defendant.

[1] The answer admits the delivery of the machine, but alleges that it was placed on trial with defendant for 30 days, and that the signature of defendant to the written order, which is a contract of purchase, coupled with an express warranty, was procured by false and fraudulent representations of plaintiff. There are allegations in the answer to the effect that the machine, when tested by trial, failed "to fulfill the warranty," but we do not construe the answer as attempting to interpose the wholly repugnant defenses of a repudiation of the contract for false and fraudulent representa-

tions and a breach of a warranty expressed in the contract. *Cement Co. v. Stewart*, 108 Mo. App. 182, 77 S. W. 124; *Fruit Ass'n v. Hartman*, 146 Mo. App. 155, 123 S. W. 957. Nor was such construction entertained by the court or the parties at the trial. The position of plaintiff was that the contract is in full force, and that the only remedy defendant could have would be for a breach of the warranty it provided, and that such remedy had been lost by the failure of defendant to comply with the conditions the contract imposed upon him. In reply to an observation from plaintiff's counsel that defendant had "laid no foundation or asked for a compliance with the warranty," counsel for defendant said: "Of course, you are relying on the warranty, but I am not."

[2, 3] The evidence, offered by defendant to establish his defense predicated of false and fraudulent representations which induced him to sign a written order at variance with the real agreement he entered into with plaintiff, is insufficient to raise an issue of fact, and the court properly refused the instructions asked by defendant, which submitted that issue to the jury. But the court did give instructions, asked by defendant and excepted to by plaintiff, which directed a verdict for defendant if the jury should find from the evidence "that said separator did not comply with the terms of said warranty," etc. Clearly this was error. In acting upon the instructions the court seems to have lost sight of the answer and submitted a defense based upon the contract, which, to be available to defendant, should have been pleaded, but was not, and which was utterly repugnant to the only affirmative defense alleged. If a defendant relies upon a warranty and its breach, he must plead it, and, although counsel in their briefs seem to have fallen into the erroneous view that the issue of a breach of warranty is properly before us, that cannot be allowed to deter us from setting aside the verdict and judgment for defendant which have no foundation in the pleadings. *Cement Co. v. Stewart*, *supra*.

Defendant cannot be suffered to blow hot and cold; to rescind and to affirm the contract. He must take one position or the other and stand by it, and since he did elect in his answer to repudiate the contract, he should not have been permitted to shift his ground and recover upon the contract.

The judgment is reversed, and the cause remanded. All concur.

STATE ex rel. TAUBMAN v. DAVIS et al.
(No. 12098.)

(Kansas City Court of Appeals. Missouri. Nov. 27, 1916. Rehearing Denied Dec. 21, 1916.)

1. PLEADING \S 350(3)—MOTION FOR JUDGMENT ON PLEADINGS—FACTS ADMITTED—RESIDENCE.

In a proceeding for prohibition directed to a judge claiming to have jurisdiction of a divorce suit by a husband, the wife's allegation of residence in another county than that of her husband is a fact admitted as true by motion for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1075, 1077; Dec. Dig. \S 350(3).]

2. COURTS \S 474—CONFLICTING JURISDICTION—SEPARATE ACTIONS.

Where husband and wife residing in different counties each started a suit for divorce on the same day, and the wife's petition was first filed and summons issued but the husband's summons was first served, the court in which the wife's suit was filed acquired exclusive jurisdiction under Rev. St. 1909, \S 1756, providing that the filing of a petition in a court of record and suing out of process therein shall be deemed the commencement of the suit; the proceeding being one in rem.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1228; Dec. Dig. \S 474.]

3. COURTS \S 474—CONFLICTING JURISDICTION—ACTION IN REM.

As between the immediate parties in a proceeding in rem, jurisdiction must be regarded as attaching when the suit is filed and process issued, which jurisdiction cannot be defeated by bringing suit in another court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1228; Dec. Dig. \S 474.]

4. COURTS \S 480(1)—WRONGFUL ASSUMPTION OF JURISDICTION—ACTIONS IN REM.

Where one court has acquired jurisdiction over the res in an action in rem, another court will be prevented from interfering by prohibition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1270, 1271, 1274-1278; Dec. Dig. \S 480(1).]

Original proceeding in prohibition by the State, on relation of Birdie Taubman, relatrix, against Samuel Davis and others. On motion for judgment on the pleadings. Motion overruled.

Campbell & Ellison, of Kirksville, and Aull & Aull, of Lexington, for relatrix. Alexander Graves, Charles Lyons, and C. L. Ristine, all of Lexington, J. E. Rieger, of Kirksville, and Willard P. Hall, of Kansas City, for respondents.

JOHNSON, J. The petition in this an original proceeding for a writ of prohibition is directed against Edwin M. Taubman, the husband of the relatrix, and the judge of the circuit court of Lafayette county, to prevent the exercise of jurisdiction by that court over an action for divorce begun therein by the respondent Edwin against the relatrix. The ground upon which the relief is sought is that the Lafayette court is without jurisdiction to try the suit or to proceed therein for the reason that complete jurisdiction of

the cause was vested in the circuit court of Adair county in an action for divorce commenced in that court by relatrix before the filing of the petition in the Lafayette court. A provisional writ of prohibition returnable March 6, 1916, was issued and served on respondents, who in due time appeared and filed their return and answer. A reply was filed, and on the following day respondents filed a motion for judgment on the pleadings quashing the preliminary writ and dismissing the petition. The case is now before us on this motion.

The facts alleged in the petition may be stated as follows: The Taubmans were married in Putnam county, November 30, 1912, and lived together as husband and wife in Lafayette county until December 15, 1915, when the wife, compelled by cruelty and intolerable indignities, left her husband and moved to Adair county, where she was residing at the time she began her suit for divorce in that county. Her petition stated statutory grounds for a divorce and prayed for the allowance of temporary and permanent alimony. It was filed December 17, 1915, before 6 o'clock p. m., and immediately thereafter summons was issued by the clerk of the court directed to the sheriff of Lafayette county, commanding him to summon defendant to appear and answer on the first day of the regular January, 1916, term of court. This summons was served on the defendant in Lafayette county on December 20, 1915.

On the same day relatrix filed her petition (December 17th); but, about five hours later in the day, the respondent Taubman filed a petition for divorce in the circuit court of Lafayette county, in which he charged his wife with indignities and desertion without cause, but in which, of course, no issue of alimony was tendered. Summons was issued at once on the day of filing directed to the sheriff of Adair county returnable on the 14th day of February, 1916, and this summons was served upon relatrix at her home in Adair county December 18, 1915.

Mrs. Taubman appeared in the circuit court of Lafayette county on the return day and filed answer to her husband's petition, in which she alleged she had become a resident of Adair county and had begun her suit for divorce therein prior to the institution of her husband's suit and interposed the pendency of her suit as a ground for the abatement of her husband's.

It was alleged in the petition for prohibition that relatrix's suit could not be tried until the May, 1916, term of the Adair circuit court; that respondents had caused the husband's suit to be set for trial on February 22, 1916; and that they would proceed to try that case on that date despite the fact that the Lafayette court is without jurisdic-

tion to hear and determine the cause. In their return, respondents denied that Mrs. Taubman was a resident of Adair county when she filed her petition, and one of the points urged in respondent's motion for judgment on the pleadings is that the preliminary writ should be quashed for the reason that the question of jurisdiction depends upon the solution of the issue of whether or not relatrix resided in Adair or Lafayette county at the time she began her suit. The rule is invoked that, where prohibition is sought to restrain an inferior court from exercising a jurisdiction it does not possess, and the question of the attempted abuse of power depends upon the solution of an issue of fact outside the record, prohibition will be denied because it is within the province of the court, the jurisdiction of which is attacked to determine the controverted issue of fact, and if its decision be erroneous the remedy is by appeal, and not by an extraordinary remedy. *State ex rel. v. Mills*, 231 Mo. 493, loc. cit. 500, 133 S. W. 22; *Bankers' Life Ass'n v. Shelton*, 84 Mo. App. 634.

[1] The answer to this argument is that the motion for judgment on the pleadings, being in the nature of a demurrer, admits the truth of all the facts alleged by the relatrix in her petition, and tenders, as the sole issue, the question of whether or not such facts entitle her in law to the relief prayed. *State ex rel. v. Hardware Co.*, 109 Mo. 118, 18 S. W. 1125; *State ex rel. v. Bradley*, 193 Mo. loc. cit. 38, 91 S. W. 483.

The allegation that relatrix was a resident of Adair county at the time in question must be accepted as true for the purposes of this motion, and respondents are not entitled to judgment on the ground just discussed. Since relatrix was a resident of Adair county and had resided in Missouri one whole year next before the filing of her suit, she had the unquestionable right to bring her suit in the circuit court of that county and to prosecute it to judgment, unless it be true, as argued by respondents, that the Lafayette circuit court absorbed the complete and exclusive jurisdiction over the cause by the fact that the summons issued in the husband's suit was served on the wife before the summons in her case was served upon the husband, though her suit was begun before his. We have here two courts of equal rank and dignity, each of which had jurisdiction to entertain an action to divorce the parties; the Adair court from the fact that the wife was a resident of that county, and the Lafayette court because the husband resided within its territorial jurisdiction.

As was aptly observed by Judge Trimble in a former opinion filed in this case, from which a rehearing was allowed:

"The case now before us is not one concerning two circuit courts one of which has jurisdiction to entertain a divorce suit between the parties

and the other has not. The power to entertain a divorce suit between the parties existed concurrently in each court. The reason a court of concurrent jurisdiction with another court over a cause is without authority to proceed in a particular case when the other court is possessed of the same cause of action is because such other court has absorbed unto itself all the power or jurisdiction there is growing out of that cause, power not only to entertain the cause but also power to proceed therein; and, until such other court has possessed itself of all the power there is in the case, there is nothing to prevent the first court exercising its power."

[2] Our statutes (section 1756, R. S. 1909) provide that:

"The filing of a petition in a court of record, * * * and suing out of process therein, shall be taken and deemed the commencement of a suit."

This provision settles the question of which of the contending parties first brought the cause within the jurisdiction of a court of competent jurisdiction. We are aware that numerous courts in other jurisdictions have held that jurisdiction of a cause does not attach by the filing of a petition and the issuance of summons; but as a rule those cases deal with statutes which, unlike our own, provide that a suit shall not be deemed commenced until the service of summons. Under our statutes the suit is deemed commenced, i. e., lodged within the jurisdiction of the court when the petition is filed and summons issued. In the case in hand we do not find it necessary or useful to go into the subject of whether or not there is a substantial difference, for purposes of jurisdiction, between the commencement and the pendency of an action. It may be conceded, for argument, that in actions in personam "there is a substantial difference between the commencement of an action and its being a suit between the parties, the first having reference only to the act of the plaintiff, but the second also to the position of defendant." In other words, it may be admitted that in such cases, since complete jurisdiction of the action does not attach until the defendant is legally summoned to appear and answer, the court, until that is done, has not absorbed all the jurisdiction "there is growing out of that cause," and may be ousted of the partial jurisdiction it has acquired by the completed jurisdiction acquired over the cause and parties by another court in which a subsequent action has been commenced.

[3] The rule is different with respect to actions or proceedings in rem.

"The contention that the jurisdiction of the state court first attached, because, although the suit therein was not commenced till after the commencement of the suit in the federal court, the summons issued by the state court was served before the service of the writ of subpoena issued by the federal court, is not well founded. * * * As between the immediate parties, in a proceeding in rem, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served, in accordance with the rules of practice of the court. The defendants could not defeat juris-

diction thus acquired, and supplant the case, by bringing suit in another court. * * * The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." *Farmers' Loan Co. v. Railway Co.*, 177 U. S. 57, 20 Sup. Ct. 564, 44 L. Ed. 66.

"The case must then be considered as having been commenced at the date of the process served upon the defendant, and by relation the date of such process will determine the time from which the right of the court to take jurisdiction to hear and determine the case must be computed." *Railroad Co. v. Commissioners*, 42 Kan. 226, 21 Pac. 1071.

[4] In this state the rule that, where one court has acquired jurisdiction over the res in an action in rem, another court has no power to interfere and will be prevented from interfering by prohibition, is so well and firmly established that a general review of the authorities dealing with this interesting subject would be superfluous. *State ex rel. v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *State ex rel. v. Barnett*, 245 Mo. 99, 149 S. W. 311; *State ex rel. v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468.

Does an action for divorce fall within this rule of proceedings in rem? The view of the nature of an action for divorce which appears to be recognized as sound in the decisions in this state tersely expressed in 1 Bishop, 29, is that "a divorce suit is in rem as to the status of the marriage and in personam as to collateral property rights."

It is said in *Ellison v. Martin*, 53 Mo. loc. cit. 578:

"A divorce suit is a proceeding in rem, and the res is the status of the plaintiff in relation to the defendant to be acted on by the court."

This language is repeated with approval in *Moss v. Fitch*, 212 Mo. loc. cit. 499, 111 S. W. 475, where it is observed that "a judgment on order of publication can only be given in a proceeding in rem."

It will be noted our courts do not seem to recognize the New Jersey doctrine that a suit for divorce is not strictly in rem but only quasi in rem, but under the latter doctrine the status or relationship of the parties is regarded as a res, and the action is held to be "sufficiently a proceeding in rem to permit a court having jurisdiction of even part of the res to adjudicate upon it without having to bring the person of the defendant within its jurisdiction, either by voluntary appearance or by service of process within the territorial limits of its authority." See *Minor, Conflict of Laws*, p. 205, § 94.

"Certain cases are said to proceed in rem, because they take notice rather of the thing in controversy than of the persons concerned." *Cooley, Const. Limitations*, p. 580.

The state regards itself a party to every divorce suit and is most vitally concerned in the question of whether or not the status which society is interested in maintaining ought to be dissolved. Neither husband nor wife, nor both, may dissolve that status at will or by agreement, nor may it be terminated by the courts except for statutory cause. Consequently, the law takes notice rather of the status than of the persons concerned. If this were not so and the action were regarded as principally a proceeding in personam, as in New York, the defendant could only be brought into court by summons served upon him within the state and could not be held bound by constructive service.

Jurisdiction of the res is jurisdiction for all purposes, and it is acquired in a divorce suit, so far as dealing with the status of the parties is concerned, by the filing of the petition and the issuance of the summons. When this is done, the entire jurisdiction is absorbed, and nothing is left for another court of concurrent jurisdiction to lay hold on. *Wells v. Montcalm*, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520.

The motion for judgment on the pleadings is overruled.

DUNN v. MISSOURI PAC. RY. CO. (No. 12185.)

(Kansas City Court of Appeals. Missouri.
Nov. 6, 1916. Rehearing Denied
Dec. 20, 1916.)

1. MASTER AND SERVANT ⇨289(40)—INJURY TO SERVANT—RAILROAD EMPLOYE—HUMANITARIAN RULE—QUESTION FOR JURY.

In an action against a railroad for injury to its carpenter struck by an engine while stooping near a switch track, evidence held sufficient to take the question, whether defendant's servants on the engine saw plaintiff in a position of imminent peril in time to have stopped or to have warned him, to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1182; Dec. Dig. ⇨289(40).]

2. APPEAL AND ERROR ⇨927(5)—REVIEW—DEMURRER TO EVIDENCE.

On review of order overruling defendant's demurrer to the evidence, the appellate court must deal with the case from the standpoint of the evidence in plaintiff's behalf and reasonable inferences to be drawn therefrom.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3748; Dec. Dig. ⇨927(5).]

3. APPEAL AND ERROR ⇨1066 — HARMLESS ERROR—INJURIES TO SERVANT—RAILROAD EMPLOYE—INSTRUCTION.

Where an employé was struck by a switch engine while near the track, an instruction that he was entitled to notice of the movement of engines and trains manifestly did not mean engines not in position to injure him, and, though stating an abstract proposition of law, could not mislead the jury to the defendant's prejudice.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. ⇨1066.]

4. MASTER AND SERVANT ⇐248—INJURY TO SERVANT—RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN RULE.

In an action against a railroad for injury to its carpenter, struck by a switching engine, based upon the humanitarian rule alone, contributory negligence is not a defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. ⇐248.]

5. MASTER AND SERVANT ⇐137(4)—INJURIES TO SERVANT.

A carpenter injured by a switching engine while near the track, whose duties did not require his presence on or about the tracks, was not within the class to which a railroad's servants do not owe a lookout duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278; Dec. Dig. ⇐137(4).]

6. APPEAL AND ERROR ⇐1066 — REVIEW — HARMLESS ERROR.

In an action against a railroad for injuries to employé, where defendant's servant standing on the footboard of the engine which struck plaintiff testified that he saw plaintiff while 30 feet away, error in an instruction submitting the hypothesis of defendant's servants being able to see plaintiff, if they had been in the exercise of ordinary care, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇐1066.]

7. COMMERCE ⇐27 — RAILROAD EMPLOYE — "ENGAGED IN INTERSTATE COMMERCE."

A carpenter injured while riveting a stovepipe for a stove to be used in a roundhouse, where engines engaged in interstate commerce were sheltered, was not "engaged in interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇐27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from Circuit Court, Cole County; Jack G. Slate, Judge.

"Not to be officially published."

Action by Napoleon B. Dunn against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. D. Corum, of St. Louis, for appellant. James H. Lay and A. T. Dumm, both of Jefferson City, for respondent.

ELLISON, P. J. Plaintiff's action is for personal injury received by being run upon by one of defendant's engines, whereby his foot was so injured that amputation was necessary. He recovered judgment in the trial court.

This is the second appeal of the case. The first is reported in 192 Mo. App. 260, 182 S. W. 109. The first trial involved an issue of contributory negligence pleaded by defendant. In the present appeal that issue is eliminated by an amended petition which bottoms the case on the humanitarian rule alone. Contributory negligence is conceded. The facts are detailed in the former opinion. Plaintiff was a carpenter and had only been in defendant's employ perhaps an hour, when he was put to work riveting a stovepipe at a

place near defendant's south tracks in the yards at Jefferson City. He needed a hard substance upon which to drive and clinch the rivets, and saw a piece of gaspipe near some rubbish 32 feet west and south of the south rail of the south switch track. A path ran east and west along this track and about 4 feet south of it. Plaintiff walked along this path to the pipe, picked it up, and as he was rising from a stooped position, and at the same time in the act of turning, he was struck on the left side of his head by the end of the pilot beam of a switch engine going west. He had seen the engine on another track as he started after the gaspipe, but did not know it was to be switched, and did not observe it coming towards him on the switch track. We need not dwell upon this phase of the case, since his contributory negligence is conceded, and the question is: Is there sufficient evidence to justify the court in submitting to the jury whether defendant's servants on the engine saw him in a position of imminent peril in time to have stopped, or to have given him warning?

[1] It appears to us that evidence in that direction is abundant. We so concluded on the first appeal. At the second trial the evidence was practically the same, save two additional witnesses for plaintiff. The engine was running at a speed of from 12 to 15 miles an hour, and as it moved west along the switch track one of defendant's servants who opened switches was standing on the footboard in front of the engine, and plaintiff was plainly in his view. He made no outcry to plaintiff, nor did those on the engine ring the bell, sound the whistle, or make any effort to stop, or slacken speed.

[2] The only other question is: Was his position such as to advise those on the engine, as reasonable men, that he was in danger of being struck by the engine? The man on the front of the engine was facing west in the direction it was going, and must have seen that plaintiff had his back to the engine and that he was stooping to pick up something from the ground. He was thus standing on the front footboard of the engine for the very purpose of looking out for danger. He knew that no warning was being given to plaintiff, and the fact that plaintiff was struck as he raised from his stooping position shows that he was perilously near the track. We are dealing with the case, as is our duty, from the standpoint of the evidence in plaintiff's behalf and reasonable inferences to be drawn therefrom. This has been so well amplified in the former opinion that we refer to it for a complete answer to defendant's objections as embodied in his demurrer to the evidence.

[3] Plaintiff's first instruction is objected to on two grounds; one that it declares that he was entitled to notice of the movement of engines and trains. This, of course, must

be considered in connection with the evidence. It manifestly did not mean that plaintiff was entitled to notice of the movement of engines which were not in a position to harm him. Conceding it stated an abstract proposition of law, it would, we think, be trifling with justice to say that it misled the jury to defendant's prejudice.

[4] Plaintiff's second instruction is objected to on four specific grounds. The first is that, though the instruction purports to cover the whole case, it omits matters of contributory negligence. On the case prosecuted by plaintiff, contributory negligence, as we have already intimated, will not avail as a defense. The second is that it assumes the truth of controverted facts. We do not think it subject to that criticism. Another objection is that it submits the hypothesis of defendant's servants being able to see plaintiff if they had been in the exercise of due care; it being contended that such servants were under no duty to observe if the track was clear of employes such as plaintiff was.

[5] As already stated, plaintiff was a carpenter, and had only been employed by defendant the night before the morning he was hurt. He reported that morning, and was told to prepare a place to rivet some stovepipe which was to be used on stoves in the roundhouse. He prepared a frame, and then started to get the piece of gaspipe as above described. He was neither an engineman, a trainman, nor a trackman. He was not a switch tender, a trackwalker, an engine pilot in railway yards, nor a car clerk. He was not one whose duties required his presence on, among, or about the tracks. *Newkirk v. Pryor*, 183 S. W. 685. He had not been engaged in defendant's service an hour when he was hurt, and that service was riveting a stovepipe for the roundhouse. Consequently he did not fall within that class in which a railroad company's servants do not owe a lookout duty, and which have been the subject of discussion in numerous cases in the Supreme Court, of which *Degonia v. Railroad*, 224 Mo. 564, 123 S. W. 807, *Evans*

v. Railroad, 178 Mo. 508, 77 S. W. 515, and *Rashall v. Railroad*, 249 Mo. 500, 155 S. W. 426, are types.

[6] But, aside from the consideration just mentioned, we think, if it were conceded that plaintiff belonged to that class, that portion of the instruction objected to was harmless; for the testimony of the man on the footboard in front of the engine was that he was there to be on the lookout for persons in danger, that he got on the footboard with his face to the east, but that he immediately turned round "facing west to keep a lookout." He was then 100 yards (300 feet) away, and he says he "was looking west all the time." It is true that at another place he stated that when he first saw plaintiff he was 30 feet away, and that then he looked up to see another train, but it was not in sight, and then he looked, and plaintiff was "right in front of the engine." From this evidence it is apparent that defendant's servant actually saw plaintiff, and there is no question, as stated in the instruction, that if he did not see him, he might have if he had exercised ordinary care.

[7] The court gave three instructions for defendant; the third in a modified form. They were exceedingly liberal to defendant, especially the first. The modification to the third was but eliminating matter in the way of emphasis which had already been sufficiently stated. Refused instruction D, as to excitement and error of judgment on part of defendant's employes, was without evidence to support it.

Instruction F was based on the idea that plaintiff was engaged in interstate commerce service. This upon the idea that riveting a stovepipe for a stove to be used in a roundhouse, a place where engines were sheltered was service in interstate commerce. We do not think so. More than that, there was no evidence to show that the engines sheltered in such house were interstate engines.

We find ourselves without right to disturb the judgment, and it is therefore affirmed. All concur.

HARRIS v. DECKER et al. (No. 12304.)(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)**1. NEGLIGENCE §56(1)—PROXIMATE CAUSE—NECESSITY.**

There is no right to even nominal damages in an action founded on negligence, unless such negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. §56(1).]

2. TELEGRAPHS AND TELEPHONES §20(2)—INJURY TO LINES—OWNERSHIP.

P., being sued as owner and lessor of a telephone line, the wires of which had crossed with those of plaintiff's line, and plaintiff introducing evidence of such alleged ownership, P. could show that he had transferred such line before plaintiff built his line, and so owed no duty to plaintiff to maintain the old line in repair.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. §20(2).]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by William Harris against J. M. Decker and another. Judgment for defendants, and plaintiff appeals. Affirmed.

E. L. Marshall and J. E. Watkins, both of Chillicothe, for appellant. E. C. Orr, of Chillicothe, for respondent Decker.

JOHNSON, J. Plaintiff, a farmer, living five miles south of Dawn, a town in Livingston county, owned a private telephone line, which connected his residence with the telephone exchange operated by defendant Decker in that town. Plaintiff built his line of cedar poles along the public highways and, for a distance of three miles or more, it ran parallel to, and two or three feet away from, a telephone line on which Decker maintained some wires. The latter line had been in service 20 years, and during the period of 5 years which intervened between the building of plaintiff's line and the commencement of this suit, the old line, owing to the falling or displacement of rotten poles, frequently fell into such a state of ill repair as to cause the wires to become grounded and to cross the wires on plaintiff's line, thereby interrupting the service over both lines. The petition alleges that these injuries to plaintiff's line and service were caused by the negligence of defendants in failing to maintain their line in reasonable repair, and seeks to hold the defendant corporation liable on the ground that it was the owner of the old line, and the defendant Decker, on the ground that he maintained service wires on that line under an agreement with the owner to maintain the pole line in proper repair. The defendants answered separately, and the issues of fact tendered by the petition were tried and submitted to the jury, which returned a verdict for both defendants. Plaintiff appealed.

[1] The evidence, in its aspect most favorable to defendants, will support an inference that the occasional crossing of the wires on the two lines and the resultant interruptions to plaintiff's service were due to the close proximity of the two lines for which defendants, whose line was first constructed, were not responsible, and not to any neglect of defendants, or either of them, to keep the old line in proper repair. Since the jury were entitled to draw such an inference from all the evidence, there can be no merit in the suggestion of plaintiff that, at least, he should have been allowed nominal damages. If negligence of defendants was not the proximate cause of his injury, he has no cause of action.

[2] The only other point urged by plaintiff is that the court erred in allowing defendants to introduce evidence relating to the issue of the ownership of the old line. That issue was tendered in the petition, and was most germane to the right, if any, of plaintiff to recover from the defendant corporation. - If, as that defendant insisted, it was not the owner and lessor of the old line when plaintiff constructed his line, but had transferred the old line to its codefendant, it was under no duty to plaintiff to maintain that line in repair. Plaintiff adduced evidence tending to support his allegation that the corporation defendant was such owner and lessor, and at his request the court instructed the jury on that issue. We perceive no reason for his present view that the evidence of his adversaries bearing upon that issue tended to becloud the real issues and confuse the jury.

There is no error in the record, and the judgment is affirmed. All concur.

COLLIER v. WABASH R. CO. et al.
(No. 12215.)(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)**1. COMMERCE §33—"INTERSTATE COMMERCE"—SINGLE OR SEPARATE CONTRACT.**

Where property is delivered to a carrier for through transportation to a point beyond the state, the character of interstate commerce attaches, and it is immaterial whether the shipment be made on a through contract or upon separate contracts issued by each carrier.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. §33.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. CARRIERS §177(4)—INTERSTATE SHIPMENT—LIABILITY OF CONNECTING CARRIER.

Nothing in the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, para. 11, 12, 24 Stat. 386) abrogates or impairs the right which the shipper had under existing federal laws to pursue the connecting carrier whose wrong caused the loss; so that a shipper was entitled to sue an inter-

mediate carrier for its negligent breach of its contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 791-803; Dec. Dig. § 177(4).]

Appeal from Circuit Court, Callaway County; D. H. Harris, Judge.

"Not to be officially published."

Action by William N. Collier against the Wabash Railroad Company and the Chicago & Alton Railroad Company. Directed verdict for the Alton Company, and verdict for plaintiff against defendant Wabash Railroad Company, and it appeals. Affirmed.

J. L. Minnis, Gen. Counsel, and N. S. Brown, both of St. Louis, and Cave & Eversole, of Fulton, for appellant. John R. Baker, of Fulton, for respondent.

JOHNSON, J. Plaintiff sued the Wabash Railroad Company and the Chicago & Alton Railroad Company to recover damages resulting from negligence in the transportation of 16 head of fine Hereford cattle which were shipped at Audubon, Iowa, for carriage to Fulton, Mo. There was a directed verdict for the Alton Company, but the request of the Wabash for a peremptory instruction was overruled, and the jury returned a verdict against that defendant for \$500, and the cause is here on appeal from a judgment rendered against it on that verdict.

The cattle were delivered to and received by the Chicago, Rock Island & Pacific Railroad Company at Audubon, Iowa, for continuous transportation to Fulton. That company hauled the car to Des Moines, Iowa, and turned it over to the Wabash Company, which took up the original shipping contract and issued one of its own which provided for transportation to Mexico, Mo., but recited that the destination of the shipment was Fulton. At Mexico the Wabash Company delivered the car to the Alton Company, which took up the Wabash contract and issued a contract of its own for transportation to Fulton.

The evidence of plaintiff tends to show that the car arrived at Mexico one Saturday morning in ample time for delivery to the Alton and inclusion in the morning freight train which the latter company ran from Mexico to Fulton. Instead of switching the car to the transfer track, the Wabash Company left it on a track in its own yards, and when the caretaker of plaintiff who accompanied the cattle discovered what had been done and asked the agent to have the car moved to the transfer track, the train which brought the car to Mexico had proceeded on its way and there was no engine in the yards to move the car. The caretaker then applied to the agent of the Alton, but was informed that company could not go into the yards of the Wabash for the car. The Alton ran no freight train from Mexico to Fulton on Sunday, and the car did not

leave Mexico until Monday morning. This unnecessary delay of two days at Mexico injured the cattle, and this suit is for the recovery of the resultant damages.

The charge of negligence in the petition is:

"That said carload of cattle reached Mexico, Mo., at 5:30 a. m. Saturday morning, November 13th, but that the defendants carelessly and negligently kept said carload of cattle on the tracks in Mexico, Mo., from that time until 7:30 a. m. Monday, November 15, 1915, and that although this plaintiff had paid an increased freight rate, in order that feed and water might be furnished said cattle within said car, the defendants, during the period of time that said cattle were on the tracks in Mexico, Mo., carelessly and negligently failed and refused to furnish sufficient water for said cattle in said car."

Plaintiff states that:

"By reason of such negligence and carelessness and unreasonable delay in delivering said carload of cattle, and by reason of defendant's careless and negligent failure to furnish water as he had agreed to do in said car, the said 16 head of cattle were damaged, and plaintiff has sustained damage in the sum of \$500."

It will be observed the damages are claimed for the consequences of two separate and distinct acts of negligence, viz. negligence in holding the cattle an unreasonable time in Mexico, and negligence in failing to furnish sufficient water for them during their detention there. The evidence of plaintiff tends to support both of these charges, and is sufficient to raise the issues of fact which we find the court submitted to the jury in appropriate instructions. The jury were warranted in finding that the injury was caused entirely by the negligence of the Wabash Company.

[1] This was an interstate shipment for through transportation, and the fact that each of the three carriers whose lines were employed transported the car under a separate contract did not change the character of the transportation and split it into separate undertakings by each carrier to haul the car only to the end of its own line. There is no merit in the suggestion that, so far as the Wabash Company is concerned, Mexico was the destination of the car, and the obligation of that carrier was fully performed when it left the car in its own yards instead of switching it to the transfer track.

Where property is delivered to a carrier to be transported on a continuous trip to a point beyond the limits of the state where delivered, the character of interstate commerce attaches thereto, and it is immaterial whether the shipment be made on a through contract or upon separate contracts issued by each carrier employed in the transportation. *Bailey v. Railroad*, 184 Mo. App. loc. cit. 462, 171 S. W. 44; *Conley v. Railroads*, 192 Mo. App. 534, 183 S. W. 1111; *Terminal Co. v. Interstate Commerce Com.*, 219 U. S. loc. cit. 527, 31 Sup. Ct. 279, 55 L. Ed. 310; *Commission Co. v. Worthington*, 225 U. S. 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Rail-*

way v. Railroad, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

[2] The argument that the Wabash Company, as the intermediate carrier, is not responsible, under the Carmack Amendment to the Interstate Commerce Act, for injury to the property caused by the negligence of the final carrier, the Alton Company, is foreign to the cause of action submitted to the jury, which, as we have said, was abundantly supported by proof. This cause is grounded on negligence of the intermediate carrier, the appealing defendant. As we said in *Conley v. Railroads*, supra, there is nothing in the act abrogating or impairing the right which the shipper had under existing federal laws to pursue the connecting carrier whose wrong caused the loss and consequently plaintiff was entitled to sue the Wabash Company under the federal laws for a negligent breach by that carrier of the contract.

There is no merit in the point that the verdict was excessive nor in the criticism of plaintiff's second instruction.

The record is free from prejudicial error, and the judgment is affirmed. All concur.

ANTRIM LUMBER CO. v. DALY. (No. 11778.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. EVIDENCE \S 897(1)—VARYING TERMS OF WRITTEN CONTRACT.

Where a written contract is plain and unambiguous, it cannot be contradicted by any letter or letters written by one of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1756, 1763-1765; Dec. Dig. \S 397(1).]

2. SALES \S 52(2)—CONTRACT—EVIDENCE.

Where a buyer wrote asking for certain lumber quotations, to which the seller replied by letter that he was quoting prices, and shortly thereafter the seller wrote that "this order is accepted," and mailed an itemized list of lumber with prices stating that, not hearing to the contrary, the seller would ship as entered, and stating that the communication was an acknowledgment of the customer's order, the letters were parts of the contract, and admissible in evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 124, 125, 127, 128; Dec. Dig. \S 52(2).]

3. SALES \S 273(1)—IMPLIED WARRANTY.

Where lumber is ordered for the specific purpose of building a boat, acceptance of such order indicates the seller undertakes to furnish lumber fit for that purpose, and he impliedly warrants that he will do so.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 772; Dec. Dig. \S 273(1).]

4. SALES \S 847(3), 418(1) — REMEDY OF BUYER.

Lumber ordered for building a boat was not present for inspection by the buyer, and when it arrived at destination and he paid the freight and had it unloaded, he found on inspection it was in greater part unfit for the purposes for which purchased. The seller was immediately notified that it was at his disposal, but did not accept it, and the buyer made use of some parts

of it. *Held*, that the buyer, retaining the property, could plead a failure or partial failure of consideration; the measure of damages being the difference between the agreed price and the actual value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 965, 1174, 1180, 1201; Dec. Dig. \S 347(3), 418(1).]

5. SALES \S 440(3)—ACTION—EVIDENCE.

In action for price of lumber sold, defense being breach of warranty, the correspondence of the parties after the dispute arose concerning the quality of the lumber, offer to have it inspected, etc., was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1266-1270; Dec. Dig. \S 440(3).]

Appeal from Circuit Court, Bates County; C. A. Calvird, Judge.

"Not to be officially published."

Action by the Antrim Lumber Company against J. A. Daly. From judgment for defendant, plaintiff appeals. Affirmed.

Charles E. Gilbert, of Nevada, Mo., for appellant. W. M. Bowker and S. A. Wight, both of Nevada, Mo., for respondent.

ELLISON, P. J. This action is for the price of a carload of lumber shipped to defendant on his order. Defendant set up in his answer that the lumber was ordered for a certain purpose, and that it was unfit for such purpose and for that reason defendant asked judgment for the amount he paid out in freight, together with cost of unloading. There was a judgment for defendant for \$50, and plaintiff appealed.

[1] Plaintiff makes but two points against the judgment: The first, that its written acceptance of defendant's order was plain and unambiguous and constituted the written contract which could not be varied in its terms, and that therefore the trial court erred in admitting in evidence any letter or letters written by defendant; the second, that the verdict was against the evidence, the weight of the evidence, and the law under the evidence.

There is no doubt that plaintiff's statement of the law forbidding evidence aliunde the written contract to vary its terms is correct. But we do not agree with plaintiff that evidence aliunde the contract was admitted. The particular matter complained of was defendant's letter ordering the lumber. Plaintiff insists that the complete contract is embodied in its answer to this order itemizing the lumber and asking that defendant check it up, and, if correct, to notify it, when immediate shipment would be made. The facts do not bear out this insistence.

[2] On the 15th of August, 1913, defendant wrote plaintiff asking quotations on a certain lot of lumber f. o. b. on car at Osage, Okl., with which to build a boat, the lumber to be "strictly No. 1 stuff with no sap streaks. Kindly let us have your quotations as early as possible." In a few days plaintiff wrote to defendant that it was quoting prices "on

high grade material." On the 10th of September following plaintiff mailed to defendant an itemized list of the lumber with prices. Heading these items is this statement:

"This order [defendant's] is accepted subject to the terms and conditions on back thereof."

Following the items is this:

"Please check over carefully and if not O. K. advise us promptly. Not hearing from you to the contrary we will ship as entered."

At the close of this communication are these words:

"This is an acknowledgment of your order as entered, and we ask you to kindly check it over very carefully. Not hearing from you by return mail, we will assume same has been entered to your entire satisfaction. We appreciate the business and thank you kindly for same."

Now these communications from plaintiff to defendant show on their face that the contract is founded upon an order from defendant, and necessarily the transaction could not become known in its completeness, without reference to that order. These communications compose parts of the contract, and hence the court did not err in admitting them in evidence. Plaintiff's first point is therefore ruled in defendant's favor.

[3] The second point is built largely upon the assumed correctness of the first. The facts, as shown by defendant's letter, are that he wanted the lumber for the specific purpose of building a boat. When that is the case the vendor undertakes to furnish lumber fit for that purpose; he impliedly warrants that he will do so. *Moore v. Koger*, 118 Mo. App. 423, 87 S. W. 602. The St. Louis Court of Appeals decided the same question in the same way. *Lee v. Sickles Saddlery Co.*, 38 Mo. App. 201.

[4] It must be borne in mind that this was not a sale of property present for inspection by the vendee. When it arrived at destination, defendant paid the freight and had it unloaded, but the evidence tended to show, and since the verdict we must assume it to be true, that on inspection it was found in greater part to be unfit for the purpose for which it was purchased, and plaintiff was immediately notified.

While defendant placed the lumber at plaintiff's disposal, it seems that the latter did not accept it, and it appears that defendant made use of it, or at least parts of it. In the condition of case thus presented, the applicable law is that the vendee retaining the property can plead a failure, or partial failure, of consideration; the measure of damage being the difference between the agreed price and the actual value. *Brown v. Weldon*, 99 Mo. 564, 13 S. W. 342; *Miles v. Withers*, 76 Mo. App. 87; *Noble v. Nelson*, 154 Mo. App. 616, 136 S. W. 12; *Machine Co. v. Gasperson*, 168 Mo. App. 558, 153 S. W. 1069.

[5] On the question of defendant's outlay

of money for freight, etc., and of the value of the lumber, there was ample evidence to sustain the verdict. The correspondence between the parties after the dispute arose between them was properly admitted in evidence. It concerned the quality of the lumber, the offer to have inspected, etc. It is lengthy and it would serve no purpose to set it out. Suffice it to say we think there was abundant evidence upon which the verdict can stand.

We have no alternative, and must affirm the judgment. All concur.

DAWSON et al. v. FLINTOM. (No. 11681.)

(Kansas City Court of Appeals, Missouri.
Dec. 18, 1916. On Rehearing,
Dec. 29, 1916.)

1. CONTRACTS \S 270(2, 3)—RESCISSION FOR FRAUD—REASONABLE TIME.

A person desiring to rescind a contract for fraud is entitled to a reasonable time in which to investigate the facts, and, unless there is such delay that reasonable minds would not differ, the question of what is reasonable time is for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1189, 1200; Dec. Dig. \S 270 (2, 3).]

2. CORPORATIONS \S 121(6)—SALE OF STOCKS—RESCISSION FOR FRAUD—REASONABLE TIME.

A delay of eight days for a seller in Kansas City to investigate curb market price of stock in New York, not regularly listed, before rescinding a contract to sell because of fraud in stating market price, was not as a matter of law unreasonable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 506; Dec. Dig. \S 121(6).]

3. CORPORATIONS \S 121(6)—SALE OF STOCKS—RESCISSION FOR FRAUD—REASONABLE TIME.

Where defendant, as soon as he became suspicious of plaintiff's representation as to value of stock sold latter, stopped presentation of draft therefor, and soon thereafter plaintiffs knew of this, it cannot be said as a matter of law that defendant did not rescind promptly.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 506; Dec. Dig. \S 121(6).]

4. APPEAL AND ERROR \S 1068(4)—HARMLESS ERROR—INSTRUCTIONS.

The modification of plaintiff's instruction by striking out the amount "\$75," which could only have effect of diminishing amount of damages recoverable, was harmless error, where jury did not find for plaintiffs in any amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4228; Dec. Dig. \S 1068 (4); Trial, Cent. Dig. \S 553.]

5. TRIAL \S 194(13)—INSTRUCTION EXCLUDING ISSUE—RESCISSION OF CONTRACT.

An instruction, without qualification, that "defendant cannot make the defense that plaintiffs misrepresented to him the market price of said stock," was properly refused, when it was a question of fact as to whether defendant promptly rescinded contract to sell stock.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 462; Dec. Dig. \S 194(13).]

6. APPEAL AND ERROR \Leftrightarrow 204(2), 1050(1)—**HARMLESS ERROR—EVIDENCE.**

The admission of evidence of a conversation between defendant and a third party, not being prejudicial, and no objection or exception being taken thereto, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. \Leftrightarrow 204(2), 1050(1); Trial, Cent. Dig. § 172.]

7. CORPORATIONS \Leftrightarrow 121(6)—**SALE OF STOCK—INSTRUCTIONS AS TO RESCISSION.**

Where there was evidence that defendant rescinded his contract to sell stock to plaintiffs without delay, upon learning of the latter's false representation of market price, instructions that defendant had a right to rescind upon discovery of fraud were proper.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. \Leftrightarrow 121(6).]

8. TRIAL \Leftrightarrow 210(3)—**DISCRETION OF COURT—INSTRUCTION ON CREDIBILITY OF WITNESSES.**

The propriety of giving an instruction on the credibility of witnesses is left within the discretion of the trial court, and, where there was contradictory evidence upon a material point, such an instruction was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 482, 501; Dec. Dig. \Leftrightarrow 210(3).]

9. APPEAL AND ERROR \Leftrightarrow 1064(4)—**HARMLESS ERROR—INSTRUCTIONS.**

Where the only contradictory evidence in the case was upon material matters, the omission of the word "material," in instruction regarding credibility of witnesses, was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224; Dec. Dig. \Leftrightarrow 1064(4); Trial, Cent. Dig. § 525.]

On Rehearing.

10. CORPORATIONS \Leftrightarrow 121(5)—**SALES OF STOCK—MISREPRESENTATION—EVIDENCE.**

When the false representation by plaintiff as to the market value of stock was in issue, testimony of an offer by plaintiff to buy this same stock of a broker friend of defendant's and the making of the false representation to defendant immediately thereafter was material.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. \Leftrightarrow 121(5).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by Northrup Dawson and another against A. D. Flintom. Judgment for defendant, and plaintiffs appeal. Affirmed.

Sharp & Sharp and Ed E. Akeshire, all of Kansas City, for appellants. Hadley, Cooper & Neel and John S. Wright, all of Kansas City, for respondent.

TRIMBLE, J. Plaintiffs, who are stock-brokers in New York City, made a contract over the telephone and telegraph with defendant at Kansas City, whereby the latter agreed to sell certain shares of stock at a specified price. The defendant afterwards refused to perform, and plaintiffs brought this suit to recover damages for the breach. The defense was that the contract was rescinded because it had been obtained through plaintiffs' fraudulent representations concerning the market price of the stock in New

York. The finding of the jury was for defendant, and the plaintiffs have appealed.

There is evidence tending to show that the plaintiffs represented to defendant that \$70 a share was the highest market price of the stock in New York, that no sales had been made for a higher price, and that the stock was not worth more. The evidence also clearly tends to show that defendant wanted more and inquired particularly as to the market price, and finally, relying on plaintiffs' representations, agreed to sell at that figure. The evidence also shows that the market price was in fact higher than that, being as high as \$80 per share, or between \$70 and \$80, and that plaintiffs knew this fact, as they dealt in said stock shortly before the representations were made to defendant.

[1] Plaintiffs claim they were entitled to a peremptory instruction in their favor because defendant did not rescind promptly. There is no doubt but that, in order to rescind a contract for fraud, one must do so promptly. *Lapp v. Ryan*, 23 Mo. App. 436; *Emery v. Boehmer Shoe Co.*, 167 Mo. App. 793, 151 S. W. 174. But the one desiring to rescind is entitled to a reasonable time in which to investigate the facts in order to determine whether a rescission should be made; and that time is, within certain limits, a question for the jury to determine. Of course, if the delay is so long that reasonable minds could not differ on the question, then the court can say as a matter of law that defendant did not rescind promptly. *Woods v. Thompson*, 114 Mo. App. 88, 88 S. W. 1126; *Enterprise Soap Works v. Sayers*, 65 Mo. App. 15; *Pierce Steam Heating Co. v. Siegel Gas Fixture Co.*, 60 Mo. App. 148; *Tower v. Pauly*, 51 Mo. App. 75.

[2] However, we do not think it can be so said in this case. The stock in question was not listed on the stock exchange, and hence there was no record of sales, bids for, or deliveries thereof, which defendant could consult and determine for himself in a moment what the market price was. It seems that defendant's stock was held by the Mercantile Bank of Kansas City as collateral security. As soon as defendant agreed to sell the stock at \$70 to plaintiff, he had the bank forward the stock to the Merchants' National Bank of New York City with instructions to deliver the stock to plaintiffs on the payment of attached draft for the purchase price. This was done on the 16th of April. Afterwards, upon receipt of a telegram from a friend of his who was a broker in New York, defendant became suspicious of the representations made to him by plaintiffs and directed the Kansas City bank to telegraph the New York bank not to present the draft or stock to plaintiffs. This was done on the 18th. The stock arrived in New York on the 19th, and the bank there, in accordance with its last instructions, did not present the same. De-

defendant proceeded at once, after having stopped the presentation of the stock, to investigate the true market conditions, and on April 24th, eight days after having made the contract, he wired plaintiffs, in answer to their telegram of inquiry, that he would not and could not deliver the stock. There being no record of prices on this stock, as it was not listed, we cannot say, as a matter of law, that the delay of eight days was an unreasonably long one for a seller in Kansas City to investigate curb market prices of such stock in New York.

[3] There is, however, evidence tending to show that on the 21st of April, two days after the time for the delivery of the stock in New York under plaintiffs' contract, the plaintiffs knew of the rescission, and that defendant was not going to make delivery. Indeed, the facts are such as would entitle the jury to draw the inference that plaintiffs knew it before the 21st. The rule is that, in determining whether the vendor has acted in a reasonable time, the conditions of each particular case must be considered. The evidence tends to show that, as soon as defendant became suspicious of the representations made to him, he ordered that the presentation of the draft be not made, and shortly thereafter wrote his friend, the other broker in New York, to notify plaintiffs. The record contains no evidence expressly stating that this broker notified plaintiffs, but there is evidence which shows that knowledge of defendant's refusal to deliver was conveyed to plaintiffs in some way, and that they obtained this knowledge very shortly after defendant had, on account of his suspicions, stopped presentation of the draft.

[4] Error is claimed in that the court modified plaintiffs' instruction No. 3 by striking out the words "seventy-five dollars (\$75)." It is not shown in the record at what place these words appeared, and we cannot tell but what it was proper to strike them out. But the instruction merely went to the amount of plaintiffs' damages and contained the provision that, if the jury found defendant agreed to sell at \$70 per share and then afterwards refused to sell, and plaintiffs were compelled to buy at an increased price other stock to take the place of the stock they had bought of defendant, then the jury should find for plaintiffs in such sum as the evidence showed plaintiffs to have been damaged. The striking out of the words "seventy-five dollars (\$75)" could only have a tendency to diminish the amount of damages recoverable, while the retention of the words "seventy dollars" would entitle plaintiffs to some damages if the jury found for plaintiffs. But the jury did not find for plaintiffs even for this lesser amount. Hence the modification, even if erroneous, is harmless error, since the only effect of leaving in the words stricken out would have been to increase the amount of damages which the jury could have found if they had found for plaintiffs in any amount.

As they did not find for plaintiffs at all, the plaintiffs cannot complain of the modification. *Feary v. Met. St. Ry.*, 162 Mo. 75, loc. cit. 98, 62 S. W. 452; *Ogle v. Sidwell*, 167 Mo. App. 292, loc. cit. 303, 147 S. W. 973.

[5] The court properly refused plaintiffs' instruction No. 4, since it told the jury without qualification that:

"Defendant cannot make the defense that plaintiffs misrepresented to him the market price of said stock on the 16th of April, 1913."

This made it a peremptory instruction to find for plaintiffs when, as we have seen, it was a question for the jury to say whether defendant rescinded promptly or not.

[6] Error is claimed in the admission of evidence as to a conversation defendant said he had with the cashier of the Kansas City bank at the time defendant went there to have the presentation of the draft stopped. There was no evidence of what this conversation was, except that defendant was told to go and consult his attorney first and then see the bank further about it. There was nothing prejudicial in this. Defendant, in saying "it looked to me that these people had misled me by not stating the proper market to me" was not relating a part of the conversation, but was merely telling what his suspicions were which caused him to go to the bank. No objection was made to this evidence and no exception was saved. It cannot be regarded as reversible error.

[7] Defendant's instructions 1 and 2 are not comments upon the evidence. Neither do they assume as true facts which were for the jury to determine. Nor do they omit any feature of the case necessary to be established in order to find for defendant. They told the jury that before they could find for defendant they must find that the representations as to price were made, that they were untrue, that plaintiffs knew they were false, that defendant relied upon them, and upon discovery of the fraud, and because thereof, repudiated the sale. These instructions presented defendant's theory of the case, namely, that, as soon as defendant's suspicions were confirmed, he rescinded the sale. Plaintiffs take the view that the evidence clearly shows an unreasonable delay and that there are no inferences to the contrary, hence they did not submit to the jury, as a question of fact, whether there was a delay, but asked the court to peremptorily instruct the jury that because of an unreasonable delay defendant could not rescind. But since there is evidence from which the jury could find that defendant rescinded without delay and that plaintiffs knew, very shortly after the sale, that defendant was not going to deliver the stock, the defendant's instructions properly presented his theory of the case when they told the jury defendant had a right to rescind upon discovery of the fraud.

[8] Defendant's instruction No. 5 was upon the credibility of the witnesses. The ob-

jection to this instruction is that it is not warranted by the facts in the case and is erroneous in that it omits the word "material." As to the first objection, the rule is that the propriety of giving an instruction on the credibility of witnesses must be left largely within the discretion of the trial court, although, of course, there must be some basis for it. *State v. Hickam*, 95 Mo. 322; 8 S. W. 252, 6 Am. St. Rep. 54; *McCormick v. City of Monroe*, 64 Mo. App. 197. In the case at bar the evidence amply justified the giving of an instruction on the credibility of the witnesses. Defendant's evidence as to the representations and as to their constituting a vital element or basis of the sale was sharply contradicted, and there was no other contradictory evidence in the record; and this evidence was so palpably contradictory in itself and gave rise to inferences so directly conflicting as to amply justify the trial court in giving a correct instruction on the credibility of witnesses. *Sampson v. St. Louis, etc., R. Co.*, 156 Mo. App. 419, 138 S. W. 98; *Millar v. Madison Car Co.*, 130 Mo. 517, loc. cit. 525, 526, 81 S. W. 574; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Hall v. Manufacturers' Coal & Coke Co.*, 260 Mo. 351, loc. cit. 364, 370, 188 S. W. 927, Ann. Cas. 1916C, 375; *Seligman v. Rogers*, 113 Mo. 642, loc. cit. 658, 21 S. W. 94.

[9] The other objection is more serious, namely, that the instruction is bad because in leaving out the word "material" it omits the qualification that the false testimony must be with regard to a material matter in issue in order to justify the jury in disregarding the whole evidence of a witness whose testimony is false in part. It has been frequently held, and correctly so, that an instruction which omits this feature is erroneous and constitutes reversible error. *White v. Lowenberg*, 55 Mo. App. 69; *McCormick v. City of Monroe*, 64 Mo. App. 202; *Henry v. Wabash Western Railroad Co.*, 109 Mo. 488, loc. cit. 494, 19 S. W. 239; *Lloyd v. Meservey, Pierce & German*, 129 Mo. App. 636, 108 S. W. 595. But in the case at bar the instruction should not be considered prejudicial because the only contradictory evidence in the case was upon material matters. The only matters in dispute were whether representations as to market price were made and relied upon, and, if so, whether they were false; and the contradictory evidence did not relate to anything else. Hence there were no immaterial matters about which the jury could think a witness had testified falsely and thus be led to disregard his testimony on material things. The Supreme Court of Illinois, in *Butz v. Schwartz*, 135 Ill. 180, loc. cit. 184, 25 N. E. 1007, 1008, in passing on the point that an instruction is erroneous if it omits the qualification that the false testimony must be with regard to a material matter in issue, says:

"On examining the evidence, however, it is not perceived how this omission in these three instructions could have prejudiced the appellant, for it is apparent that all the supposed false testimony to which the instructions would be understood to refer was upon material points. When this is so, the error will not vitiate, even in capital cases, where life is at stake. *Dacey v. People*, 116 Ill. 555, 6 N. E. 165."

The Supreme Court of Alabama, in *Alabama Great Southern R. Co. v. Frazier*, 93 Ala. 45, loc. cit. 51, 9 South. 803, 807 (30 Am. St. Rep. 28), say:

"There is no evidence of either of these witnesses in this record which is not material to the issues presented. The charges must be construed with reference to the evidence with respect to which they are given. *Holland v. Tenn. Coal, Iron & R. Co.*, 91 Ala. 444 [8 South. 524, 12 L. R. A. 232]. So construed, the supposed infirmity of the instructions, resulting from their failure to expressly base the right of the jury to disregard the testimony of these witnesses upon the willful false swearing in a material particular, is eliminated. The particular referred to must have been a material one, since no immaterial evidence had been drawn from the witnesses in question."

There being no testimony on immaterial matters, the instruction was not harmful. 38 Cyc. 1735. Hence the instruction, as given, did not affect the merits of the case, and it should not be reversed on that account. Section 2082, R. S. Mo. 1909; *Sappington v. St. Joseph, etc., Co.*, 77 Mo. App. 270; *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119, 81 S. W. 1158; *Hanford v. City of Kansas*, 108 Mo. 172, 15 S. W. 753; *Berkson v. Kansas City, etc., R. Co.*, 144 Mo. 211, 45 S. W. 1119; *Swanson v. City of Sedalia*, 89 Mo. App. 121, loc. cit. 128.

The judgment is affirmed. All concur.

On Rehearing.

JOHNSON, J. We allowed a rehearing in this case thinking there was plausibility in the argument of counsel for plaintiffs that some immaterial matters had been made the subject of an evidentiary controversy between the parties, but a further examination and analysis of the evidence convinces us we were accurate in our statement that:

"The only contradictory evidence in the case was upon material matters, and therefore the omission of the adjective 'material' from the instruction on the credibility of the witnesses should be regarded as a harmless error."

The ultimate issue in the case was whether or not plaintiffs, who enjoyed superior advantages over defendant with reference to knowledge of the market value of the stock in New York, falsely represented the value to be less than it was, intending that defendant should rely and act upon such representation and thereby inducing defendant to sell the stock at the represented value, which was \$70 per share, when, in truth and in fact, as plaintiffs well knew, it was worth \$5 per share more.

[10] The broker friend of defendant in New York testified to a conversation he had with one of the plaintiffs in which the latter

offered him \$75 per share for the stock, with knowledge that it belonged to defendant, and the evidence of defendant further tends to show that immediately after this conversation plaintiffs called defendant by telephone and made the false representations. This conversation is denied by plaintiffs, and their counsel suggest in the motion for a rehearing that the issue thus raised "did not necessarily go to the merits of the case." We think it did, and that it was not only material to the main issue, but was of the most vital importance.

In view of the vigorous attack in the motion upon the approval, in the foregoing opinion, of defendant's instruction No. 2, we think it not amiss to say that the hypothesis it submits has the support of substantial evidence and by no means should be regarded as subject to the criticism of being a comment on the evidence.

We readopt our former opinion and affirm the judgment. All concur.

KINGERY v. CITY OF JEFFERSON. (No. 12212.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. MUNICIPAL CORPORATIONS \S 816(1)—DEFECTIVE SIDEWALK—ACTION FOR INJURY—GROUNDS.

A petition alleging that where a street descended a hill there was a stairway sidewalk with a rail and banister which the city was bound to keep in a reasonably safe condition, that not only the sidewalk but the post to which the banister was nailed had become defective and dangerous to travel, which condition had existed so long that defendant knew or should have known of it, that by reason of defendant's negligence the stairway and banister were defective and unsafe for ordinary travel, that while plaintiff was carefully passing over such stairway and holding to the banister it gave way and she fell into the street, was so framed as to declare upon the defective condition of the stairway, which had remained in an obviously defective condition for a sufficient time to charge the city with notice thereof, and not alone upon the condition of the banister, the defect in which was latent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1711; Dec. Dig. \S 816(1).]

2. MUNICIPAL CORPORATIONS \S 819(4)—PERSONAL INJURY — DEFECTIVE STAIRWAY IN STREET—EVIDENCE.

In such case evidence held to show that the defective step and the defective banister both contributed to cause plaintiff's injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1739; Dec. Dig. \S 819(4).]

3. MUNICIPAL CORPORATIONS \S 819(6)—DEFECT IN STREET—NOTICE—EVIDENCE.

In an action against a city for personal injury from a defective step in a stairway in a street, and a defective banister which gave way, causing plaintiff to fall, evidence held to warrant a finding that the defective banister, if the sole cause of the fall, had existed for such time as to enable the city in the exercise of rea-

sonable care to know of it, and to prevent the accident by repairing it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1741; Dec. Dig. \S 819(6).]

4. TRIAL \S 53—STRIKING OUT EVIDENCE—CROSS-EXAMINATION.

In an action against a city for personal injury from a defective stairway, where evidence that two days before the accident a pedestrian who had complained of same to one of the city aldermen was stricken out, it was brought back into the case by defendant's recalling the witness for cross-examination and eliciting that his complaint mentioned only the steps and said nothing about the banister.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 124, 129; Dec. Dig. \S 53.]

5. MUNICIPAL CORPORATIONS \S 821(20) — PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In such action evidence held not to show that plaintiff was guilty of contributory negligence as matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1754; Dec. Dig. \S 821(20).]

6. TRIAL \S 114 — REMARKS OF COUNSEL — FACTS IN EVIDENCE.

In an action against a city for personal injury from a defective sidewalk, remarks of plaintiff's counsel addressed to facts in evidence and brought out by defendant's cross-examination were not improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 275-278, 296; Dec. Dig. \S 114.]

Appeal from Circuit Court, Osage County; Ransom A. Brewer, Judge.

"Not to be officially published."

Action by Elizabeth Kingery against the City of Jefferson. Judgment for plaintiff, and defendant appeals. Affirmed.

N. G. Sevier and W. O. Irwin, both of Jefferson City, for appellant. James H. Lay, of Jefferson City, and E. M. Zevely and J. P. Peters, both of Linn, for respondent.

TRIMBLE, J. Plaintiff brought suit for damages resulting from a fall she had on a sidewalk maintained in the form of a stairway on one of the public streets of the defendant city. She recovered judgment in the sum of \$1,500, and defendant has appealed.

The petition charged that Dunklin street, in going from Broadway to Mulberry, descended a hill, and on the north side of Dunklin, between Broadway and Mulberry, was a stairway sidewalk with a rail and banister on the south side thereof for the protection of pedestrians, all of which the city was in duty bound to maintain in a reasonably safe condition; that not only the sidewalk but also the post to which the rail or banister was nailed had become rotten, defective, unsafe, and dangerous to ordinary travel; that said condition had existed for such a length of time that the defendant knew, or could have known, of said unsafe condition by the exercise of ordinary care; that defendant so negligently conducted itself in ref-

erence to said sidewalk stairway that it was in a dangerous condition, and both sidewalk and banister were so defective and rotten by reason of said neglect as to make them dangerous and not reasonably safe for ordinary travel; and that plaintiff "while lawfully and carefully and properly passing along and over said sidewalk stairway in said Dunklin street aforesaid and while holding to said rail and banister to avoid falling on account of decayed steps, the said railing suddenly gave way by reason of the said defective and decayed condition and negligence of said city as aforesaid," and the plaintiff was precipitated headlong into said street, receiving the injuries, for which damages were prayed. The answer was a general denial, with a plea of contributory negligence.

[1] Defendant very earnestly contends that its demurrer to the evidence should have been sustained. The precise ground of this objection evidently is that there is no evidence tending to show that the city had either actual or constructive notice of the alleged defective condition. The contention of defendant that its demurrer should have been sustained may be said to rest upon the view that the negligence complained of, and relied upon as causing the injury, consists solely in allowing the banister to become defective, and hence the claim that plaintiff did not make out a prima facie case narrows still further down to the question whether the city should have known that the banister was defective. There is no question but that there was ample evidence to establish the fact that the city built the stairway and maintained it for public travel, that there was much travel thereon, and that the stairway was in a decayed and bad condition; that at least two steps therein had decayed and fallen from their proper place to the ground underneath the stairway; that the stairway had been there for a long time—some eight or ten years—and had gotten into what some of the witnesses termed "bad shape." This condition of the stairway had existed, one of the witnesses said, "a long time before" the injury. Another said it had been thus for a month or two before, and another said a month or six weeks before the accident. And this condition was observable to passers-by and they had observed it. So that the contention of no notice to the city, to have any appearance of justification whatever, must be that the decayed banister was the sole cause of the injury, and that its condition was not apparent so as to give notice to the city and render it negligent in not having repaired said banister.

[2] We think the petition was so framed as to declare upon the defective condition of both the stairway and banister, that the defective condition of the step caused the plaintiff to take hold of and rely upon the ban-

ister to prevent her from falling, and that the defective condition of the banister allowed it to give way, causing plaintiff to fall. The evidence is that plaintiff, a woman 66 years of age, and her granddaughter, a young girl 15 years old, were going to church. It was after sunset, but was not yet dark. In going down the stairway sidewalk they came to where one of the steps had fallen from its place in the rise and lay upon the ground. The steps had a rise of six inches, so that having one step out, or down resting on the ground, necessitated the taking of a longer step to the next one in order to pass over the defect. Plaintiff and her granddaughter observed that the step was out when they came to it, and the girl stepped down on the next lower step and took hold of her grandmother's arm to help her down. Plaintiff took hold of the rail or banister with one hand to steady herself and to keep from falling, and was in the act of stepping down over the loose or missing step in the stair when the end of the banister, which was a mere rail nailed to posts at intervals, came loose from the post to which it was nailed and swung or sprung outward, causing plaintiff to fall down and outward into the street, pulling her granddaughter down also. Fortunately, the granddaughter was not hurt, though she fell farther than the grandmother. Both women testify that the accident happened in this way: The granddaughter says the banister broke loose because of the grandmother's weight thereon when she took hold of it and started to step down. The grandmother says she took hold of the banister and was stepping down when the railing pulled loose at the end and she fell. In one place she says she doesn't think she was bearing very much weight on the banister, was just holding to it when it came loose, but later she said she guessed she did bear weight on it sufficient at least to cause the nail by which it was fastened to the post to pull out and allow the rail or banister to swing out and let her fall. It is evident that if the rail swung out as they say it did, then it was caused by the increased weight placed upon it by plaintiff in stepping over the missing or defective step. Plaintiff says if the rail had not broken loose or swung out she would not have fallen. This, however, does not make the defective banister the sole cause of her injury, since if it had not been for the defective step in the stair she would not have put added weight on the rail or banister, causing it to give way with her. Hence it was the two defects that caused her injury.

[3, 4] But even upon the view that the defective banister was the sole cause of the fall, we think there was evidence from which the jury could reasonably find that the defect in it had existed and was observable for a sufficient length of time before the accident to have enabled the city, in the exercise of

reasonable care, to know of it and to prevent the accident by repairing the defect.

As stated, the evidence was that the stairway had been there a long time and was in a decayed condition. The evidence is that the rail or banister and the posts to which it was nailed were also old in appearance. Snyder, an apparently disinterested witness, says that the post, from which plaintiff says the rail came loose, was decayed and rotten so that it would not hold a nail; that more than once he observed its rotten condition and that he had looked at and saw it was bad before Mrs. Kingery was hurt; that the rail was twelve feet long, nailed to posts, but was loose at one end. It is true he described the condition of the post at the time of or next day after the day of Mrs. Kingery's fall, but on cross-examination he said he had noticed the condition of the post and rail or banister a long time before her fall, and it was then loose at the lower end—as much as a month or six weeks before she was hurt. He also says anybody passing along there could have seen it was loose. Joseph Hartmann, another witness, also said that he had passed over the stairway, going to work, for three or four months before the injury, and the stairway was rotten and decayed, and a few days before the accident he noticed that the post to which the banister was nailed was rotted; that he took hold of banister but did not lean on it hard enough to cause it to give way, and did not see the banister loose. It is clear, therefore, that there was ample evidence from which the jury could find the city had sufficient constructive notice of the defective condition of the banister itself. In addition to this, the evidence shows that the whole stairway was old and in bad condition. If the steps in the stairway were rotted this would be an indication to the city that very likely the banister too was affected. And since the banister was for the purpose of saving persons from falling, the very fact that the stairs were defective would reasonably lead to an inspection of the banister if due care had been used to maintain the place in a reasonably safe condition for travel. There was evidence that two days before the accident a pedestrian had gone to one of the aldermen of the defendant city, a city of the third class, and complained of the condition of the steps. This was stricken out upon objection by the defendant. But afterwards, and notwithstanding the evidence had been stricken out, the defendant recalled the witness for further cross-examination, and, during the course of it, elicited from him the fact that in his complaint to the alderman he mentioned only the steps and said nothing about the banister. In *Cropper v. City of Mexico*, 62 Mo. App. 385, it was held that, as the stat-

ute charged the aldermen with the duty of acting in reference to streets and sidewalks, evidence of knowledge or notice to an alderman was admissible. It would seem that even if the evidence was properly stricken out on objection, it was brought back into the case again by the cross-examination above mentioned. However, without regard to the actual notice said to have been given this alderman, we hold that there was ample evidence tending to show constructive notice to the city both as to the condition of the stair and banister. The street was much traveled, the place was at a declivity where, if a defect existed, it was unusually dangerous, and therefore called for the observance of care as to the condition of both stair and banister. The demurrer, therefore, was correctly disposed of by the trial court.

[5] The contention that the plaintiff was guilty of contributory negligence is equally untenable. She had previously passed over the stairway, the last time some two weeks before the injury. When plaintiff reached the missing or loose step she saw it was out it is true, but the evidence as to the defect and her activity and ability to get around was such as to show that it was not unreasonable for her to suppose she could pass over it safely. The evidence shows she was exercising not only care, but a great degree of care, in stepping over it, and that, had it not been for the sudden and unexpected swinging out of the lower end of the banister rail, she would have passed on in safety. There was certainly no contributory negligence as a matter of law. *Flynn v. City of Neosho*, 114 Mo. 567, 21 S. W. 903; *Boulton v. City of Columbia*, 71 Mo. App. 519; *Chilton v. City of St. Joseph*, 143 Mo. 192, 44 S. W. 766. None of the grounds upon which contributory negligence is urged are tenable. *Bradley v. City of Spickardsville*, 90 Mo. App. 416; *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448; *Graney v. St. Louis*, 141 Mo. App. 180, 42 S. W. 941; *Taylor v. City of Springfield*, 61 Mo. App. 263.

[6] The verdict of \$1,500 is not excessive, and the remarks of plaintiff's counsel in argument were not improper. They were addressed to facts which were in evidence and which were brought out by defendant's cross-examination.

Complaint is made of the refusal of defendant's instructions 1 and 2, and of the giving of plaintiff's instruction A. Defendant's six given instructions covered the case and fully stated the law, and the two refused were erroneous. The objections to plaintiff's instruction A are without merit.

Finding no reversible error in the case, the judgment must be, and is, affirmed. It is so ordered. The other Judges concur.

WILSON v. ST. LOUIS ENVELOPE & PAPER BOX CO. (No. 14490.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. APPEAL AND ERROR ¶1011(1)—FINDINGS—CONFLICTING EVIDENCE.

Findings of the trial court, based on substantial, although conflicting, evidence, are not reviewable; it being for that court, trying the case as a jury, to determine the credibility of witnesses, seen and heard by him, and the weight to be given their testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ¶1011(1).]

2. PHYSICIANS AND SURGEONS ¶18—IMPLIED PROMISE TO PAY.

The engaging of a physician and surgeon to care for a corporation's employé, by instruction by the corporation to "go on until you hear from" the corporation, carried with it an implied promise to pay the reasonable value of services thereunder.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 18-20; Dec. Dig. ¶18.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by Robert E. Wilson against the St. Louis Envelope & Paper Box Company. From judgment for plaintiff, defendant appeals. Affirmed.

Fred Armstrong, Jr., and W. H. Woodward, both of St. Louis, for appellant. F. W. Imslepen and George F. Osiek, both of St. Louis, for respondent.

REYNOLDS, P. J. This action was commenced before a justice of the peace to recover the value of professional services rendered by plaintiff, a physician and surgeon, in attendance upon one Brune, an employé of defendant, injured while in that employment.

The amended statement or petition, as it is called, filed with the justice, avers that on February 26th, 1913, Brune had sustained personal injuries at the plant of defendant and that "then and thereupon" defendant employed plaintiff to provide him with proper surgical and medical treatment at the business place of defendant and at St. John's Hospital and elsewhere until Brune was healed of his injuries, and that defendant promised to pay plaintiff the reasonable value thereof; that thereupon plaintiff, in pursuance of his employment, treated Brune continuously day after day for a period from February 26th, to April 24th, when on said last day Brune was healed; that in the course of this treatment plaintiff necessarily and actually visited and treated Brune daily for the entire period of 57 days; that the surgical treatment rendered Brune for the first two days was commonly known as "first aid treatment" in cleaning wounds, setting broken bones, etc.; that the reasonable value for the first aid treatment so rendered by plaintiff to Brune was \$150, and that plain-

tiff necessarily continued his treatment for the entire period from February 28th to April 24th, in all 55 days, the reasonable value of which was \$280; that although payment was demanded by plaintiff of defendant for this amount he had refused to pay it, and that thereafter, and while the suit was pending before the justice, the part of the bill for first aid treatment had been compromised between plaintiff and a casualty company at \$100, reducing plaintiff's bill to \$280.

On a trial before the justice plaintiff recovered this amount and defendant appealed, giving the United States Fidelity & Guaranty Company as surety on its appeal bond. The case afterwards coming on for trial in the circuit court, a jury was waived and the cause heard by the court, resulting in a finding for plaintiff for the amount claimed with interest from July 9th, 1913. Filing its motion for a new trial and excepting to that being overruled, judgment followed against defendant and its surety and from this defendant has duly appealed to our court.

The court gave one declaration of law at the instance of plaintiff and five at the instance of defendant, striking out part of one. Four declarations of law asked by defendant were refused.

The errors here assigned are to the refusal of certain instructions and to changing the one asked by defendant. Error is also assigned to the refusal of a demurrer interposed by defendant at the close of plaintiff's case in chief. As the defendant afterwards put in its evidence, and plaintiff introduced evidence in rebuttal, it is unnecessary to consider that demurrer. The demurrer was practically renewed at the close of all of the evidence.

It is claimed, among other things, that as the statement upon which the case was tried laid the contract of employment and the implied contract for the payment of services of plaintiff by defendant as of February 26th, 1913, and as that employment was for the emergency treatment alone, which was paid for, that the subsequent services were rendered under an employment made two or three days afterwards. We do not think there is any substantial ground for this contention. What is said to be the subsequent employment or retention of plaintiff was really a confirmation of the first employment, as testified to by plaintiff's assistant, and, in our view of the testimony in this case, constituted but one contract.

A witness for plaintiff, who was his paid assistant and acting for plaintiff, testified that when he was first called in to take charge of the case he put a splint around the injured limb and wrapped it, checking the hemorrhage and then said to the president of the defendant that Brune had to be taken to a hospital, to which the presi-

dent said, "All right, do anything you can for the man." Brune said, "If I have to be taken to the hospital I will have to be taken to the City Hospital," whereupon the president of the defendant said to the witness, "Do anything you can for him." Plaintiff himself, testifying in chief, said that a day or two after Brune was under his care in the hospital and after he had given him the emergency treatment, he called up the place of business of the defendant and talked with some one, whom he could not then identify, and as the result of that conversation continued the treatment. As plaintiff could not identify the person with whom he had this conversation, he was not permitted to give it. However, it afterwards appeared from the testimony introduced by the defendant that the person with whom plaintiff had had the conversation over the telephone was the secretary of the defendant company and plaintiff was then permitted to give his version of that conversation. His version was, that calling on the telephone a day or two after February 26th, he asked for one of the members of the defendant company and was told he was talking to the secretary, whom it appears was a Mr. Blackford, Sr. He told Mr. Blackford that he was treating Brune for the fracture; that gangrene of the foot and leg had developed; that the chances were the foot would have to come off, and that he would like to have some one who was interested notified, telling Mr. Blackford that it was going to be a long drawn out and critical condition and he would like to know to whom he should look for his compensation; that Brune had told him that as far as he was concerned, he was unable to bear the expense and that if he had to bear it himself, he wanted to be sent to the City Hospital. Mr. Blackford, according to plaintiff, then said to him that they would not be responsible for the treatment and that he (plaintiff) would have to look to Brune. Plaintiff then told Mr. Blackford what Brune said about the City Hospital and Mr. Blackford then said, "Go on until you hear from me." Never hearing anything further from Mr. Blackford or from anyone else connected with the defendant, plaintiff continued the treatment until a cure had taken place. Mr. Blackford, on his part, positively denied making any such statement and two or three other witnesses, who testified that they were present when this conversation took place between Dr. Wilson and Mr. Blackford over the telephone, testified that they heard Mr. Blackford's part of it and that he had not made the statement in that conversation testified to by plaintiff.

[1] This presented substantial evidence in favor of plaintiff. The witnesses being before the court, seen and heard by him, it was for the court, trying the case as a jury, to determine their credibility and the weight to be given to their testimony.

The learned counsel for appellant very strenuously insists in argument, printed and oral, that we, as an appellate court, may weigh the evidence and that an appellate court will set aside the judgment of the trial court sitting as a jury, not only on the ground that there was no evidence to support the verdict, but upon the ground that the judgment is not merely against what seems to the appellate court to be the weight of the evidence, but is so clearly against the evidence as to convince the appellate court that there is no reasonable probability that the finding is correct. That is not an accurate statement of the law.

It is true that in some earlier cases, as for instance *Martin v. Withington*, 4 Mo. 518; *Scott v. Brockway*, 7 Mo. 61, and possibly other cases in the appellate courts, it has been said that when it appears to the appellate court that the circuit judge sitting as a jury in an action at law, on the state of facts developed, ought to have found a verdict one way and given judgment accordingly, the appellate court is justified in setting aside its finding. Later decisions, however, do not hold to that view. Thus, in *People's Nat. Bank of Rock Island v. Central Trust Co.*, 179 Mo. 848, loc. cit. 660, 78 S. W. 618, referring to *Miller v. Breneke*, 83 Mo. 163; *Bethune v. Cleveland, St. L. & K. C. Ry. Co.*, 139 Mo. 574, 41 S. W. 213, and *Wischmeyer v. Richardson*, 153 Mo. 556, 55 S. W. 74, it is held, in effect, that in an action at law, tried by the court without a jury, the appellate court will not weigh the evidence as in an equity case but will review only questions of law. So the Kansas City Court of Appeals held in *Hanenkratt v. Brougham*, 164 Mo. App. 108, loc. cit. 110, 147 S. W. 1129.

In *People's Nat. Bank v. Central Trust Co.*, supra, no instructions were asked except one in the nature of a demurrer to the evidence, which the court refused, and exception to that ruling having been duly preserved, our Supreme Court held that the ruling of the court on that instruction was properly before it for judgment and as that demurrer challenged the probative force of all the evidence, the Supreme Court would review it for the purpose of determining whether the demurrer had been properly refused.

Our court, in *Krampe v. St. Louis Brewing Ass'n*, 59 Mo. App. 277, loc. cit. 283, held that where it appeared that the trial court, in its declarations of law, had misconceived the law governing the case, the appellate court would review its finding.

[2] The secretary of defendant had authority to make the contract of employment, and having made it, if he did, and so the trial court found, it carried with it an implied promise to pay the reasonable value of the services rendered thereunder. The matter of the engagement of physicians and surgeons

by employers for the treatment of employes who have been injured in their service, has been so thoroughly considered by our court in *Greensfelder v. Witte Hardware Co.*, 139 Mo. App. 576, 175 S. W. 275, that we do not think it necessary to add anything to what is there said on that branch of the case.

It will serve no useful purpose to set out the declarations given, modified or refused. It is sufficient to say of the action of the trial court on them, that we find no error to the prejudice of the defendant nor any reason to hold that that learned court misapprehended or misapplied the law.

The judgment of the circuit court is affirmed.

ALLEN and THOMPSON, JJ., concur.

WATERFIELD v. WABASH RY. CO. (No. 12219.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

1. RAILROADS \S 350(1)—ACCIDENT AT CROSSING—QUESTION FOR JURY.

Where the evidence most favorable to plaintiff showed that, while standing at street crossing, between railway tracks, awaiting the passage of a train upon which his attention was centered, before crossing to station to become a passenger, he was struck by engine which approached on another track without warning, he being sober and with unimpaired faculties, it was proper to submit case to jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1152; Dec. Dig. \S 350(1).]

2. RAILROADS \S 338—ACCIDENT AT CROSSING—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

The failure of an engineer to stop engine or give warning, when approaching plaintiff, who was standing in plain view at crossing between tracks, awaiting the passage of another train, in attitude of absorbed attention to such train, was negligence under the humanitarian doctrine, to which plaintiff's contributory negligence was no defense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1096-1099; Dec. Dig. \S 338.]

3. APPEAL AND ERROR \S 1060(1)—ARGUMENT OF COUNSEL—HARMLESS ERROR.

Where proof showed that there was nothing to prevent the engineer from seeing plaintiff in time to avoid injuring him, the remarks of plaintiff's counsel to jury that the fireman also should have seen him were harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4135; Dec. Dig. \S 1060(1).]

Appeal from Circuit Court, Boone County;
D. H. Harris, Judge.

"Not to be officially published."

Action by Columbus Waterfield against the

Wabash Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

N. S. Brown, Gen. Counsel, of St. Louis, and McBaine & Clark, of Columbia, for appellant. Don C. Carter and W. H. Hulett, both of Sturgeon, for respondent.

JOHNSON, J. Plaintiff was injured at the crossing of a public street in Centralia by defendant's railroad and sued to recover damages on the ground that his injury was caused by negligence of defendant in the operation of the locomotive which struck and injured him. In his petition he alleges negligence to which contributory negligence would be a defense, and also negligence under the humanitarian rule, but during the trial he abandoned the first charge and elected to go to the jury on the issue of "last chance" negligence. He prevailed in the circuit court, and the cause is here on the appeal of defendant.

[1] The case has been elaborately stated and discussed in the briefs and arguments of counsel, but the main question for our decision is whether or not the evidence most favorable to plaintiff made out a case for the jury, and the facts pertinent to this question are few and simple.

Plaintiff, 42 years old, in good health, and with unimpaired senses, proceeded north on the east sidewalk of Allen street, in Centralia, to go to the station of defendant, for the purpose of becoming a passenger on an outgoing train. The station was east of Allen street and north of the railroad tracks, which were three in number, with intervening spaces of 8 feet between them. Plaintiff proceeded on the sidewalk across the south and middle tracks, and then stopped and waited for the passing of a west-bound freight train which was running on the north track at 10 or 12 miles per hour and was blocking the crossing. This train was composed of an engine, 32 cars and a caboose, and, according to the evidence of plaintiff, blocked his passage a half minute or more, during which time he stood on or near the north rail of the middle track facing towards the northeast, with his attention centered upon the passing train. While in such position and attitude, and while thus preoccupied, a locomotive approached, tender first, from the west on the middle track at a speed of perhaps 6 or 7 miles per hour, and without checking speed or giving any warning signal, crossed the street and collided with and injured plaintiff. The contention of defendant, which has substantial evidentiary support, is that plaintiff was standing in the clear in the space between the north and middle tracks, that there was nothing in his position or appearance to indicate he was in peril, or oblivious to the approach of the engine, and that suddenly and unexpectedly

he staggered back (being under the influence of liquor) immediately in front of the engine.

On the other hand, the evidence of plaintiff tends to show that he had not been drinking, and that, as stated, he was standing in the path of the approaching engine, unaware of its coming, and in an attitude and situation which proclaimed his obliviousness to the danger which threatened him. In passing on the request of defendant for a peremptory instruction, it was the duty of the trial judge to view the evidence in its aspect most favorable to plaintiff, but in their argument upon the demurrer to the evidence, which they insist should have been given, counsel for defendant seem to ignore this rule, and draw their conclusion from disputed evidence which tends to show that plaintiff, until the moment the engine struck him, was standing in the space between the north and middle tracks in the clear, without being in apparent danger, and that his injury was caused entirely by his sudden and unlooked-for drunken stagger backward into the path of danger. We need not pause to consider whether or not the situation of plaintiff, as thus portrayed, was not one of both real and apparent danger. For present purposes we cannot accept a state of facts contradictory of that disclosed by plaintiff's evidence which, if accepted as true by the triers of fact, would prove that plaintiff was sober and in full possession of normal senses and faculties, and that he was standing in a place of obvious danger, oblivious to its existence.

[2] It was the duty of the engineer of the engine which struck him to be on the lookout while approaching and passing over the public street crossing, and on the first appearance of danger to a traveler on the street such as plaintiff, to employ every reasonable means to avert the danger. The jury were entitled to infer from all the circumstances of plaintiff's situation that he presented to a person in the position of the engineer the appearance of being in peril and of being oblivious to the existence of that peril. The roar of the passing freight train would prevent him from hearing the lesser noise of the approaching engine, and his position on the middle track and attitude of absorbed attention should have been a sufficient indication to an observant person in the situation of the engineer that he had not seen, and might not see, the engine. The engineer states that at the speed the engine was running he could have stopped it in less than 10 feet. There was nothing to prevent him seeing plaintiff in the position we have described while the engine was crossing the street, which was 80 feet wide. It would seem too plain for argument that in such circumstances his failure either to stop the engine or to give a warning signal was negligence under the humanitarian doctrine to which the contributory negligence of plaintiff would be no defense.

The case differs in vital respects from those relied upon by defendant, such as *Keele v. Railroad*, 258 Mo. 62, 167 S. W. 433; *Bennett v. Railroad*, 242 Mo. 129, 145 S. W. 133, and *Veatch v. Railroad*, 145 Mo. App. 232, 129 S. W. 404, where the evidence of the plaintiff's failed to show such an appearance of danger as would preclude the engineer from relying upon the presumption that the person on or near the track was aware of the approach of the train and would step out of the way in time to avoid injury.

The demurrer to the evidence was properly overruled.

The criticism of plaintiff's first instruction on the ground that it omitted to require the jury to find the engineer saw or should have seen plaintiff was oblivious to his peril would be meritorious if the instruction which assumed to cover the whole case were thus defective. *Keele v. Railroad*, 151 Mo. App. 377, 131 S. W. 730; *Veatch v. Railroad*, 145 Mo. App. 232, 129 S. W. 404; *Degonia v. Railroad*, 224 Mo. loc. cit. 595, 123 S. W. 807. In explicit terms it includes this element in the hypothesis submitted, and required the jury to find that plaintiff "was oblivious to his danger," and that the servants of defendant "in charge of said engine * * * saw, or by the exercise of ordinary care could have seen, him in said situation or position of danger, * * * and that plaintiff was unaware of such danger * * * and neglected to exercise ordinary care to warn plaintiff of his danger, if any, or to stop said engine and avoid striking him after they had seen him, or by the exercise of ordinary care could have seen him as aforesaid."

[3] It may be conceded for argument that the objection to alleged prejudicial remarks of counsel for plaintiff in argument to the jury to the effect that the fireman of the engine also should have been on the lookout at the crossing of the street should have been sustained under the rule stated in *McGee v. Railroad*, 214 Mo. 530, 114 S. W. 33; but the error, if any, in overruling the objection must be regarded as harmless in this case. If plaintiff was where the engineer says he was—i. e., standing between the two tracks—there was nothing to prevent the engineer from seeing him every moment during the crossing of the street, nor was there anything to obstruct his vision of plaintiff if the latter, as he states, was standing on the north rail of the track. In any view of the evidence defendant would be in no position to claim that plaintiff was not in plain view of the engineer and that it was not the duty of the latter, on the first appearance of danger, to try to avoid any injury to him. Defendant would not be allowed to draw any advantage from the fact that the engineer did not see what was in plain sight, and since the proper performance by him of his duty to keep a reasonable lookout would have brought him full knowledge of plaintiff's ap-

parent situation, it is immaterial what the fireman was doing, about whose actions the evidence is entirely silent. Finding plaintiff was in real and discoverable peril, and that the engineer had a clear view of him while crossing the street, the jury were bound to conclude that the engineer either did not look, as it was his duty to do, or else, looking, negligently failed to exert himself to save plaintiff, and it is obvious that the conclusion which the verdict shows the jury adopted could not have been induced in any degree by the wholly irrelevant assertion that the fireman also should have seen plaintiff, and should have told the engineer of the peril of which the latter was in duty bound to have full knowledge.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

BENNING v. FARMERS' BANK OF ODESSA et al. (No. 11980.)

(Kansas City Court of Appeals. Missouri. Dec. 18, 1916.)

1. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS OF COURT—FACTS.

Whether materials were furnished and entered into the construction of a building, and, if so, when, are questions of fact, and findings thereon supported by substantial evidence are binding on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. § 1010(1).]

2. MECHANICS' LIENS §281(1)—USE OF MATERIAL—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to enforce liens for material furnished a contractor and subcontractor in the construction or reconstruction of a building, held sufficient to sustain a finding that the material was used in the construction of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-567; Dec. Dig. § 281(1).]

3. MECHANICS' LIENS §182(5)—ACCRUAL—USE OF MATERIAL.

For lien purposes, the date the material is put into the building determines the accrual of the indebtedness therefor as against the building, and, if no lien could be had for the material which did not become a permanent part of a finished building, the date the material which had been torn down went back permanently into the building determined the date of the accrual of the indebtedness.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 194; Dec. Dig. § 182(5).]

4. MECHANICS' LIENS §263(1) — ACTION TO ENFORCE—JOINDER OF PARTIES—STATUTE.

Act April 3, 1911 (Laws 1911, p. 314), providing that any and all liens provided for therein may be adjudicated and determined in one action, which action shall be an equitable action for the purpose of determining the various rights of all the parties interested, was intended to do away with a multiplicity of suits, minimize the costs, and simplify the manner of enforcing mechanics' liens, so that in a material-man's action to enforce a lien against the

contractor and subcontractor there was no misjoinder of parties.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471, 480; Dec. Dig. § 263(1).]

5. JUDGMENT §266—MOTION IN ARREST—EFFECT.

A motion in arrest goes only to defects appearing on the face of the record proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

"Not to be officially published."

Action to enforce mechanics' liens by Martha L. Benning, assignee of Lee Benning, against the Farmers' Bank of Odessa, Mo., owner, and one Kinney, contractor, and Puhr & Schimp, subcontractors. From the part of the judgment adjudging a lien on the building, the bank appeals. Affirmed.

Henry C. Wallace, of Lexington, and Ball & Ryland, of Kansas City, for Farmers' Bank of Odessa. Toby Fishman, of Kansas City, for Puhr & Schimp. Walker Bascom, of Odessa, and Chiles & Chiles, of Lexington, for respondent.

TRIMBLE, J. The defendant Kinney was the general contractor, and the defendants Puhr & Schimp were the subcontractors, in the erection of a one-story brick and stone building for the defendant Farmers' Bank of Odessa. Lee Benning furnished to said Kinney materials aggregating \$57.13 and to Puhr & Schimp materials aggregating \$558.35. On June 9, 1914, he filed liens against the bank building for the respective amounts named. On September 4, 1914, he brought suit to enforce both lien claims in one action. Kinney made default. Puhr & Schimp demurred for misjoinder of parties, misjoinder of causes of action, and for improperly uniting in the same petition separate and independent causes of action. This was overruled, and, as they did not plead further, judgment by default went against them. The bank answered with a general denial. A jury was waived, and the case was submitted. The court rendered judgment against Kinney on the account against him, but denied a lien therefor, and also rendered judgment for \$585.15 against Puhr & Schimp on the account against them and adjudged a lien on the building for \$549, directing that said lien be enforced against said building if no sufficient property of defendants Puhr & Schimp be found with which to satisfy said lien amount. The bank has appealed. After the appeal was taken, plaintiff Benning assigned the judgment to his wife, Martha L. Benning, and died.

Appellant's contention is that the court erred in sustaining a lien as to the Puhr & Schimp account and refusing the bank's declaration of law that no lien should be established for any part thereof, the bank claiming

that the account did not accrue within four months of the filing of the lien claim. This, as stated, was filed on June 9, 1914. The four months preceding that date began on February 9, 1914. So that if the indebtedness on the account accrued, as against the building, prior to instead of after that date, the lien must fail.

To maintain its position, appellant's claim is that, if the last items of the account are excluded, the account does not come down to within the four months. The item next preceding the last three items on the account is dated February 5, 1914. Then came the said last three items as follows:

Feb. 10, 1914.	To 2 barrels of lime at	
	\$1.25 per barrel.....	\$ 2.50
Feb. 10, 1914.	To 2 barrels of lime	
	at \$1.25 per barrel..	\$ 2.50
Jan. 22, 1914.	To 18,820 pounds of	
	sand at 9c per bushel	\$18.74

The evidence for plaintiff tended to show that the last item, of January 22, 1914, is made up of five items, the first being 3,690 pounds of sand sold and delivered on said date; the second and third of 3,660 pounds and 3,690 pounds, respectively, of sand sold and delivered on January 30, 1914; the fourth of 3,690 pounds of sand sold and delivered on February 5th; and the fifth of 3,690 pounds of sand sold and delivered February 10, 1914. Plaintiff's evidence as to these five items appearing all in one item of January 22d, and the last on the account, is that each of the different items was weighed on the scales and noted on the scale book as they were hauled, and that the different dates and amounts of sand sold and delivered were copied onto the body of the same ticket. The account was made up from the tickets, and this ticket of January 22d was introduced in evidence, and shows that at the head it is dated January 22d, but in the body of it appear the other dates and amounts of sand sold and delivered. But, even with plaintiff's explanation that a part of the item appearing as of date of January 22d was in reality sold and delivered on February 10th, the bank's position is that no sand of this item and no lime of the other two items of February 10th went into said building, and therefore the lien must fail. At the same time the bank building was being erected, Puhr & Schimp were erecting two other buildings, one on each side of or very near to the bank building, and plaintiff Lee Benning furnished materials to all three buildings. The evidence for plaintiff shows, however, that care was exercised to keep the account for materials furnished for each job separate and distinct from the others, and there is now no contest over the question whether the other items of the account relied on went into the bank building; the defendant in this court centering its attack solely upon the point that the materials in the last three items were not shown to have entered into the construction of the building.

[1-3] Whether materials were furnished

and entered into the construction of a building, and, if so, when, are questions of fact, and the findings thereon of the court, sitting as a trier of the facts, are binding upon us if there is any substantial evidence to support them. *St. Louis Sash & Door Works v. Tonkins*, 188 Mo. App. 1, 9, 173 S. W. 47. The question therefore is whether there is any substantial evidence to support the court's findings. We think there is.

It was shown in evidence that care was used to keep the materials for each job separate; that, when the materials were sent out from the store on the drays, tickets were made out on which was designated the building for which they were intended. These tickets were signed by the drayman, who testified that he delivered the materials at the bank building on the dates specified in the tickets. The tickets themselves were introduced and showed the items of materials, the bank building for which they were sold, the date they were sold, and the signature of the drayman. It is true, the drayman admitted on cross-examination that he could not remember the delivery of any specific article independent of the tickets themselves; but, inasmuch as he swore that he was careful to deliver every article according to the building designated on the ticket, this, in connection with the tickets themselves and the other testimony concerning them, was sufficient to enable the trial court to find that he did deliver the stuff to the bank building. And the mere fact that the drayman could not remember the delivery of any article to the bank building, independently of the ticket, would not destroy his testimony. The delivery was during 1913 and the first month and ten days of 1914, while the trial at which the drayman testified was in June, 1915. It would have been remarkable if he had retained an independent memory of each particular or of any particular ordinary article delivered by him to the bank building in contradistinction to those delivered to the other buildings.

But the contractor and the subcontractors were for some reason removed from the work by the architect before the building was fully completed; and appellant contends that on February 10th, when plaintiff claims to have delivered the last items, the subcontractors had ceased work on the building, or at least had so nearly completed the building that they could not have used the material claimed to have been furnished on that day; and that they thereafter did no work on it, their contract having been canceled by the architect. The contractors themselves did not testify, and the only evidence to the effect that no sand or lime was used on or after the 10th of February comes from the architect and the contractor he got to finish the job, and their testimony shows that it is no more than their conclusion that no such materials were used. The cashier of the bank testified that he was not positive whether

Puhr & Schimp were at work on the building on the 10th or not, but that they were at work there on the 11th, and he thought they worked there on the 10th. He was certain they did not work after the 11th. The architect swore he came down from Kansas City on the 11th, reaching Odessa about noon; that Puhr & Schimp were then engaged in putting the top stone work on and had practically finished the building; that he immediately ordered the upper portion of the front part to be taken down; and that on the 18th he canceled their contract. His evidence shows that the stone work was backed by brick, and he did not know whether lime was used in the mortar for the brick or not, but that he could not see where the subcontractors could have used the lime claimed to have been delivered on the 10th if they had followed their contract and used cement as the specifications required. He also admitted that he did not know how much of lime and sand they had used before he got down there.

The architect's contractor who finished the job admitted that Puhr & Schimp built the wall with lime mortar and that they were using mortar made of lime and sand on the 11th when he got there at noon. However, the testimony of the architect and of his contractor was that the brick and stone work on the upper front part down to the capitals were torn out for the reason that such part would, in their opinion, have fallen down in less than two years. And defendant's idea seems to be that, even if the lime and sand furnished on February 10th were used by Puhr & Schimp in the construction of this portion torn out and rebuilt, still the one who furnished such material could claim no lien therefor, citing *Shine's Ex'r v. Helmburger*, 60 Mo. App. 174, in support thereof. In that case the building for which the material in suit was furnished had been blown out of existence by a cyclone, and none of the old material went into the reconstructed building. Hence there was no building, in the construction of which the materials in suit were used, to which a lien could primarily attach, and, since a lien affects the real estate only incidentally through the building in which the materials are used, one who furnished materials for the destroyed building could not claim a lien on either the new building or the land, where none of the old materials were used in the reconstruction, unless the contract specifically so provided. Such is not the situation here, however. In *Meyer v. Schmidt*, 130 Mo. App. 333, 109 S. W. 832, it was held that it is not incumbent upon the one furnishing the materials to ascertain, on peril of acquiring no lien, that the material is of the kind called for in the contract between the owner and the contractors other than the materialman. It might seem that, on the same principle, a materialman who, in good faith, furnished materials for a building and which were

used therein, should not lose his lien therefor merely because the subcontractor did a portion of his work poorly and that portion was torn out and ordered reconstructed. However, we need not decide this question, since in the case at bar it is clear that the brick which were torn out of this poorly constructed part were used in the reconstruction thereof, at least all that were not broken in taking them down. The cashier of the bank testified that he thought the brick were all re-used in such reconstruction. And the architect, defendant's witness, said they were so used except those broken. The evidence was that Benning furnished all the brick for the building, a number of items for which entered into the account sued on. Now, for lien purposes, the date the material is put into the building determines the accrual of the indebtedness therefor, as against the building. *United States Water Co. v. Sunny Slope Realty Co.*, 152 Mo. App. 300, 133 S. W. 371.

There was ample evidence that Benning furnished the brick and that, of the brick torn out of the badly constructed part, most of them were used in the reconstruction. If no lien can be had for the material that did not become a permanent part of the finished building, then, under the principle announced in the *Sunny Slope Case*, supra, the date the brick went back finally and permanently into the building determines the date of the accrual of the indebtedness, so far as concerns the building itself and the claim for lien thereon. This date was concededly after the 9th of February and within the four months, so that, if the views herein expressed are correct, there is no question but that, so far as the building is concerned, the indebtedness accrued clearly within the four months. It is true, the new contractor says he used no material except that which he himself procured, but his testimony does not bind the trial court. The weight and credibility of the testimony was for the trier of fact to determine.

Under all the facts and circumstances disclosed by the record to support the finding of the trial court, we are not authorized to disturb that finding or to say, as a matter of law, that there is no evidence that any materials sold and delivered by plaintiff went into the construction of said building after February 9th. The evidence more than comes up to the degree of strictness of proof required in many of the cases. *Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 151, 80 S. W. 688; *Moon v. Brown*, 172 Mo. App. 516, 525, 158 S. W. 79; *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546; *O'Neill Lumber Co. v. Greffet*, 154 Mo. App. 33, 133 S. W. 118; *Banner Lumber Co. v. Robson*, 182 Mo. App. 611, 168 S. W. 244.

[4, 5] It is urged that there is a misjoinder of parties because the facts do not disclose a case permitting a suit under the act of April 8, 1911 (Laws 1911, p. 814).

Puhr & Schimp have not complained and did not appeal. The appellant bank raised no objection before trial, but made the point in its motion in arrest that:

"The petition seeks to establish and enforce two separate and independent mechanics' liens in one action, and is not such a suit as is authorized by law for the enforcement of mechanics' liens."

Waiving the question whether this is the proper way to save the point that the facts do not bring the case within the act of 1911 (since the motion in arrest goes only to defects appearing on the face of the record proper), we think the case was within the terms of the act. It says:

"Any and all liens in this article provided for may be adjudicated and determined * * * in one action," etc.

The next sentence provides that "such action shall be an equitable action for the purpose of determining the various rights," etc., of all persons interested. In other words, the Legislature intended to do away with a multiplicity of suits, minimize the costs, and simplify the manner of enforcing mechanics' liens, by providing for the settlement of all controversies in one action. The statute is not limited to any particular situation in which liens may exist, but applies to any and all liens.

The judgment is affirmed. The other Judges concur.

GOBEN v. MURRELL. (No. 12110.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916. Rehearing Denied
Dec. 29, 1916.)

1. TRIAL \S 368 — AGREED STATEMENT OF FACTS.

An agreed statement of facts is like a special verdict, and must contain every essential element without any omission and without doubt or ambiguity to support the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 880; Dec. Dig. \S 368.]

2. ELECTIONS \S 291 — QUALIFICATION—PRESUMPTION AND BURDEN OF PROOF.

Where students were allowed to vote by the election officers of a city they would be presumed to be legal voters, and it would not be enough to destroy such presumption to show that they were students going to school in the city, as the fact that one goes into a city only for the purpose of going to school does not conclude the question whether he is a legal voter, and the burden to show that he is not a qualified voter is on one contesting his vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 286; Dec. Dig. \S 291.]

3. ELECTIONS \S 76—QUALIFICATION OF VOTERS—RESIDENCE—INTENTION.

Whether a student intends to reside at the place to which he comes to attend school is a question of intention, not, however, determined conclusively by his testimony.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 72; Dec. Dig. \S 76.]

4. ELECTIONS \S 76—QUALIFICATIONS OF VOTERS—STUDENTS—"RESIDENCE."

Students who left their places of residence and came to a city for the sole purpose of be-

coming students at an institution of learning, with the intention of remaining three years, and of then locating at places elsewhere for the practice of osteopathy, and who never changed their intention of leaving the city as soon as their course of study was completed, and whose intention if any, to become residents and voters was not evidenced by anything more than their physical stay, did not lose their old residence nor gain a new residence, as "residence" must have some connection or identification with the community, and implies at least an indefinite and not merely a temporary stay, and hence were not entitled to vote at a city election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 72; Dec. Dig. \S 76.

For other definitions, see Words and Phrases, First and Second Series, Residence.]

Appeal from Circuit Court, Adair County; C. D. Stewart, Judge.

Election contest by G. A. Goben against Charles E. Murrell. Judgment for contestee, and contestant appeals. Judgment reversed, and judgment entered for contestant.

H. F. Millan, J. C. Fugate, and A. Doneghy, all of Kirksville, for appellant. Campbell & Ellison, Weatherby & Frank, and J. A. Cooley, all of Kirksville, for respondent.

ELLISON, P. J. Contestant Goben and contestee Murrell were opposing candidates for mayor of the city of Kirksville, the latter being elected on the face of the returns. Contestant instituted a contest of the election, and the judgment in the trial court was against him. He appealed.

The ground of the contest is that 200 students of the American School of Osteopathy in Kirksville voted for the contestee whom the contestant charges were not legal voters, in that they had not resided in such city more than 60 days prior to the election. The case was submitted to the trial court upon the following agreed statement of facts, neither party asking declarations of law, and it was not necessary that he should do so, viz.:

"* * * That at a primary election held in said city on the 21st day of March, 1916, contestant and contestee were duly and regularly nominated as candidates for the office of mayor of said city. That the two candidates above mentioned were the only candidates voted on for the office of mayor at the regular city election held April 4, 1916. That the votes cast at said general city election for said candidates were officially counted on the 5th day of April, 1916, and by official count and returns it showed a total vote for G. A. Goben, contestant, of 770, and a total vote for Charles E. Murrell, contestee, of 804; the face of such returns showing that Charles E. Murrell, contestee, received a majority of the votes cast at said election, and that thereafter a certificate of election was issued to said Charles E. Murrell, contestee, and that he thereupon entered into his duties of mayor of said city and is now filling said office. It is further agreed that the contestant possessed at all of said times herein mentioned, and does now possess, all of the qualifications required by law for the office of mayor of the said city of Kirksville. It is further agreed: That at the election held on the 4th day of April, 1916, there were cast and counted for the contestee

more than 200 votes cast by persons who came to the city of Kirksville from their respective homes and places of residence outside of the city of Kirksville and Adair county, Mo., and were, before and at the time of leaving their said homes and places of residence to come to Kirksville, residents of the places from whence they came. That said persons came to Kirksville for the sole purpose of becoming students at the American School of Osteopathy, an institution of learning located at said city, with the intention of remaining in said school three years, and of then locating at places elsewhere for the practice of osteopathy. That they did so become students in said school and were such students at the time of said election and time of voting, and had been such students in said school for one year next before said election, and that each of said persons voted in the respective wards in which they lodged during said time. That said persons have never altered their intentions of leaving the city of Kirksville as soon as their course of study at said school shall have been completed. That the names of the persons who cast the 200 votes above mentioned are set out in contestant's notice of election contest, filed in this cause. It is further agreed that the said persons so voting at said election were qualified voters at said election if they were, at the time of said election, legal residents of said city of Kirksville, within the meaning of the election laws of the state of Missouri. * * *

[1] An agreed statement of facts is like a special verdict, and it must contain every essential element, without any omission and without doubt or ambiguity to support the judgment. *Gage v. Gates*, 62 Mo. 412; *Carr v. Lewis Coal Co.*, 96 Mo. 149, 155, 8 S. W. 907, 9 Am. St. Rep. 328; *Hughes v. Moore*, 17 Mo. App. 148, 155; *Moore v. Henry*, 18 Mo. App. 35, 40.

If the judgment has been rendered against the complaining party and he appeals, he must be supported, unequivocally, on every essential point in his case, by the agreed statement; otherwise the judgment should be that the defendant, or contestee, will be entitled to a discharge.

[2, 3] Now in this case the students, having been allowed to vote by the election officers, are presumed to be legal voters. *Gass v. Evans*, 244 Mo. 329, 344, 149 S. W. 628. It is not enough to destroy such presumption to show that the voter was a student going to school in the city where he voted (*Gumm v. Hubbard*, 97 Mo. 311, 320, 11 S. W. 61, 10 Am. St. Rep. 312), for the fact that one goes into a city only for the purpose of going to school does not conclude the question whether he is a legal voter. He may intend to reside at such place. It is a question of intention, not, however, determined conclusively by his testimony. *Hall v. Schoenecke*, 128 Mo. 661, 666, 31 S. W. 97; *Seibold v. Wahl (Wis.)* 159 N. W. 546. The onus of showing that he was not a qualified voter is on the contestant. *South Mo. Land Co. v. Combs*, 53 Mo. App. 298; *State, to Use, v. Hudson*, 86 Mo. App. 501, 510; *Gilliland v. Railroad*, 19 Mo. App. 411, 419; *Appleman v. Sporting Goods Co.*, 64 Mo. App. 71.

[4] In this view of the law, has the con-

testant, through the agreed statement, clearly shown that the students who voted for the contestee were not legal voters? We think he has. He has shown by that statement that they left their places of residence and "came to Kirksville for the sole purpose of becoming students at the American School of Osteopathy, an institution of learning located at said city, with the intention of remaining in said school three years and of then locating at places elsewhere for the practice of osteopathy; * * * and that said persons have never altered their intentions of leaving the city of Kirksville as soon as their course of study at said school shall have been completed." That is to say, they came to Kirksville not to "reside," as that word is understood in its application to the qualification of voters, but for a temporary purpose, which, when accomplished, was to end their presence there. Residence must have some connection or identification with the community. One's stay should at least be indefinite and not, as shown here, for the mere temporary purpose of attending school and then immediately leaving to locate in a permanent home elsewhere.

Fry's Election Case, 71 Pa. 802, 810, 10 Am. Rep. 698, is much like this. The discussion is able and interesting. It was there said (italics the court's) that:

"The stated case expressly declares that the students referred to in it came to Allentown from other counties for no other purpose than to receive a collegiate education, but intended to leave after graduating. It is evident that the college was not their true and permanent home; their stay there was not to be indefinite, as the place of a fixed abode, until future circumstances should induce them to remove. Their purpose was indefinite (definite) and temporary, and when accomplished they intended to leave. They retained their original domicile, for the facts stated show that they never lost it. On this point the authorities are in entire accord."

Continuing (71 Pa. 311, 10 Am. Rep. 698) the court further said:

"Having, as the case states, come to Allentown for no other purpose than to receive a collegiate education, and intending to leave after graduating, they have not lost their home domicile, and could vote there on returning to it though they should not re-enter their father's house."

Another instructive case is *Sanders v. Getchell*, 76 Me. 158, 165, 49 Am. Rep. 606. In the course of discussion of the law as applicable to students the court said:

"It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place coupled with an intention to make such place a home will establish a domicile or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be, not to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or

limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise."

And the same view is taken in *Vanderpool v. O'Hanlon*, 53 Iowa, 246, 5 N. W. 119, 36 Am. Rep. 216.

Under our election law a student neither loses his old residence nor gains a new one during his absence from the former, or presence at the latter. It is true that this law does not preclude his becoming a resident and voter at the school, town, or city, but his intention must be evidenced by something more than his mere physical stay in the place. He must intend to make it his home—not that he shall remain for life—but his home indefinitely. And so if he comes into the place for the temporary purpose of getting an education and then to leave for other parts, he has not such a residence as entitles him to vote. *Matter of Garvey*, 147 N. Y. 117, 41 N. E. 439.

The same kind of residence (except in some cases as to length of time) necessary to make a legal voter will qualify a person to hold office. Would one suppose that mere students are eligible to the offices at the locality of the school? There are municipalities in which schools are located, where the students outnumber the citizens proper. It certainly would strike one as extraordinary to learn that it was in the power of these nontaxpaying sojourners to wrest the city or county government from the voice and hand of the permanent citizens.

We think the agreed statement clearly and unequivocally shows that the students in question were not qualified voters, and that the proper finding should have been for the contestant.

The judgment rendered for the contestee will therefore be reversed, and a proper judgment will be entered here for the contestant. The other Judges concur.

LUMB v. FORNEY. (No. 11961.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. TRIAL §191(8)—AUTOMOBILE COLLISION—INSTRUCTION.

In an action for damages in a collision between automobiles, the court charged that, if the cars collided near a curve, and the operator of plaintiff's automobile failed to signal, he was guilty of negligence. Under any view of the evidence the omission of plaintiff's driver to signal could not be said to have had any place in the chain of causal events producing the collision. *Held*, that the instruction was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 429; Dec. Dig. §191(8).]

2. NEGLIGENCE §119(6) — CONTRIBUTORY NEGLIGENCE—PLEADING.

Where the evidence of plaintiff indisputably discloses negligence on his part as a contributory cause of the injury, defendant is entitled to a peremptory instruction, whether or not he has pleaded such negligence as a defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 202, 210; Dec. Dig. §119(6).]

3. NEGLIGENCE §119(6) — CONTRIBUTORY NEGLIGENCE—PLEADING.

Where the evidence presents contributory negligence on plaintiff's part as a controverted issue of fact, defendant cannot avail himself of the defense without pleading it, since contributory negligence is an affirmative defense and must be affirmatively pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 202, 210; Dec. Dig. §119(6).]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

"Not to be officially published."

Suit by John Lumb against Frank Forney. The jury found against plaintiff on his cause of action and against defendant on his counterclaim, and from judgment sustaining plaintiff's motion for new trial, defendant appeals. Judgment affirmed.

M. J. Lilly and J. W. Wight, both of Moberly, for appellant. Aubrey R. Hammett, of Moberly, for respondent.

JOHNSON, J. Plaintiff sued to recover damages resulting from the wrecking of his automobile in a collision with an automobile owned and operated by defendant. Defendant filed an answer and a counterclaim for the damages to his car in the collision which he alleges was caused by negligence of the driver of plaintiff's car. The jury found against plaintiff on his cause of action and against defendant on his counterclaim, but the court afterward sustained plaintiff's motion for a new trial on the grounds stated in the order that "the court erred: First, in giving defendant's instruction No. 1," and, second, "in amending plaintiff's instruction No. 4 by inserting therein the words 'and without negligence on the part of the driver of plaintiff's car contributing thereto,' thereby submitting to the jury the issue of contributory negligence on plaintiff's part whereas no such issue was raised by the pleadings." Defendant appealed from the judgment allowing the new trial.

The collision, in which both cars were badly injured, occurred at 11:30 p. m. July 9, 1914, near Huntsville on the Huntsville and Moberly public road at a point near a slight curve in the road around the dump of an abandoned coal mine. The curve and some weeds at the roadside offered obstructions to the view of the road ahead, but the collision occurred after defendant's car, which was going west, had rounded the curve, and the evidence of both parties shows beyond question that the headlight of each car was visible to the driver of the other in ample time for the

collision to have been avoided had both observed even reasonable care, and points to negligence of one or the other of the drivers as the proximate cause of the injury. The evidence of plaintiff tends to show that the driver of his car, which was occupied by six persons, drove at moderate speed along a course on the extreme right of the traveled roadway; that defendant's car rounded the curve at high speed on the wrong side of the road, and, pursuing a sinuous course on that side, bore down on plaintiff's car, striking it broadside about the middle; that defendant was under the influence of intoxicants, and that he failed to signal for the curve. On the other hand, defendant's evidence throws the sole blame for the collision on the driver of plaintiff's car. It tends to show that defendant ran his car as far over as possible on the right side of the road, that the other driver approached on that side, and just before the collision, swerved his car around towards the southeast, but not in time to prevent the collision.

It was conceded by plaintiff's witnesses that the driver of his car did not blow a signal for the curve on his horn. The answer does not plead contributory negligence, and the parties in their evidence proceeded on the theory that there was no issue of contributory negligence in the case, but that the collision was caused solely by the gross negligence of one of the autoists while the other was in the exercise of the highest degree of care.

In the first instruction given at the request of defendant the jury were told that:

If "said cars collided near said curve, then it was as much the duty of the operator of plaintiff's automobile to give a timely signal with his bell, horn or other device for signaling as it was the duty of defendant's automobile, and you are further instructed that it is admitted by the operator of plaintiff's automobile that he did not give such signal; therefore, if you find and believe from the evidence that said automobiles did approach each other around a curve in the highway where the view of the operator of plaintiff's automobile was obstructed, then the operator of plaintiff's automobile was guilty of negligence."

[1] The driver of plaintiff's car said he was 150 or 175 feet west of the dump when defendant's car came around the curve into full view, and that before that he had seen the reflection of the headlight and knew that a car was coming. He had no need of a signal from defendant, and in the testimony of defendant it is just as positively stated that the approach of plaintiff's car was known to defendant at a time when, as he endeavors to show, he was on the north side of the roadway as far over as he could go, and the slightest care on the part of the other driver would have averted a collision. In such state of case it is difficult to perceive in what way a signal from plaintiff's driver could have

altered the situation, or played any part in preventing a collision. The statutes (see Laws 1911, p. 823, § 8) require that "every person operating * * * a motor vehicle on the public highways of this state shall also, when approaching a crossroad outside the limits of a city or incorporated town or village, * * * sound his bell, horn or other device for signaling in such manner as to give notice and warning of his approach," but do not require such signals to be given at other places in the road. Without any statutory law on the subject, it would be the duty of an autoist, on entering a curve where his view of the road in front is obstructed, to run his car at safe speed and to take such other precautions as the exercise of the highest degree of care would prompt an ordinarily careful and prudent man to take under like circumstances. Where it appears from the evidence that such autoist failed to give a signal by bell or horn and that such failure was a proximate cause of the collision, the question of whether or not it was negligence becomes one of fact for the triers of fact to determine, but in the present case the omission of plaintiff's driver to give a signal cannot be said, under any view of the evidence, to have had any place in the chain of causal events, and no hypothesis according it such dignity should have been submitted to the jury. The instructions under review erroneously assumed that the failure of plaintiff's driver to give the signal on approaching the curve amounted to negligence in law, and in substance and effect was a peremptory instruction, since the facts that the signal was not given and that the automobiles did approach each other around a curve in the highway were conceded. The court did not err in granting a new trial on the ground of prejudicial error in this instruction.

[2, 3] In view of another trial of the case, it is not amiss to add that, since contributory negligence is not pleaded in the answer, such negligence, as an issue of fact, should not be submitted to the jury. Where the evidence of plaintiff indisputably discloses negligence on his part as a contributory cause of the injury, defendant is entitled to a peremptory instruction, whether or not he has pleaded such negligence as a defense, but where the evidence presents such negligence as a controverted issue of fact for the triers of fact to determine, the defendant cannot avail himself of that defense without pleading it, since the rule is well settled "that contributory negligence is strictly an affirmative defense, and in order to avail a defendant it must be affirmatively pleaded." *Hudson v. Railway*, 101 Mo. loc. cit. 29, 14 S. W. 15, and cases cited; *Hughes v. Railway*, 127 Mo. loc. cit. 453, 30 S. W. 127.

The judgment is affirmed. All concur.

**COLLINS et al. v. JOHN PFINGSTEN
LEATHER CO. (No. 14508.)**

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. REPLEVIN \S 12(2)—SET-OFF—LIEN RIGHT.

In replevin for hides tanned into leather by defendant for plaintiffs on a contract, the defense being lien thereon for such tanning, plaintiffs could, in their reply, not only dispute the claimed indebtedness, but also claim, by way of set-off or recoupment, a larger amount owing by defendant on indebtedness growing out of the contract on which the lien claim was founded, since this would affect defendant's right of lien.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 106; Dec. Dig. \S 12(2).]

2. LIENS \S 16—WAIVER OF LIEN.

The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender or waive his lien for the sum really due.

[Ed. Note.—For other cases, see Liens, Cent. Dig. \S 7-16; Dec. Dig. \S 16.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by W. D. Collins and another against John Pfingsten Leather Company. From judgment for defendant, plaintiffs appeal. Reversed and remanded.

Charles E. Morrow, of St. Louis, for appellants. Arthur N. Sager, of New York City, for respondent.

THOMPSON, J. This is a suit in replevin for 142 bales of leather. The petition was filed in the circuit court, city of St. Louis, on the 7th day of February, 1913, and is in the usual form, accompanied by an affidavit that the property was wrongfully detained, and that its actual value was \$4,000, and that the plaintiffs would be in danger of losing said property unless it be taken from the possession of the defendant or otherwise secured. The order of delivery was duly made by the court, and thereafter the plaintiffs gave the sheriff a bond in the sum of \$8,000, and the sheriff thereupon took the property and delivered it to plaintiffs.

The suit was originally against John Pfingsten Leather Company, Chicago & Alton Railroad Company, and Columbia Transfer Company, but the railroad company and the transfer company simply had the leather in question as carriers, and by stipulation of all of the parties the cause was dismissed as to those two defendants. The real issues were raised by the answer of the defendant, John Pfingsten Leather Company and the reply of the plaintiffs thereto.

The answer of the defendant, John Pfingsten Leather Company, alleged that it was a corporation, and that the plaintiffs were co-partners, and alleged that on or about the 15th day of August, 1912, it entered into a verbal contract with the plaintiffs to treat and tan at its tannery in Milwaukee, Wis.,

certain hides to be furnished by plaintiffs at a price of 4 cents per square foot, and that pursuant to that contract plaintiffs furnished and delivered to the defendant certain hides which were treated and tanned by it and converted into leather, and that after this was done and they were finished and ready for shipment, the leather was bundled into convenient form for shipment, and aggregated 142 bundles and contained about 24,981½ square feet of leather; that on or about the 29th day of January, 1913, these bundles of leather were delivered to the Goodrich Transit Company, a common carrier, consigned and billed to the order of itself at St. Louis, Mo., notify the plaintiffs, and that when the said leather so billed arrived in St. Louis and was in possession of the Chicago & Alton Railroad Company, it was seized by the sheriff under writ of replevin and given into the possession of the plaintiffs. Defendant further alleged in its answer that the plaintiffs were not entitled to the possession of the leather, for the reason that it had a lien on the leather, under the law, for work and labor which it had done in converting said hides into leather, which lien, at the agreed price of 4 cents per square foot, amounted to the sum of \$999.26, and that the defendant had the right of possession of said leather to satisfy its claim for that amount; therefore defendant prayed judgment against the plaintiffs for the possession of the 142 bundles of leather and for damages in the sum of \$500, or in the event the plaintiffs were unable to restore the leather, judgment was asked against the plaintiffs and each of them in the sum of \$999.26, with interest, and \$500 for damages.

To this answer the plaintiffs filed a reply. In which they admitted that the defendant was a corporation doing business in Milwaukee, Wis., and that they had furnished the hides from which the 142 bundles of leather were made, involved in this case, and admitted that on or about the 29th day of January, 1913, the defendant had shipped the 142 bundles of leather from Milwaukee to St. Louis, consigned to the order of itself, notify plaintiffs, and admitted that they had taken possession of the leather under a writ of replevin. Plaintiffs, further replying, stated that on or about the 22d day of August, plaintiffs and defendant had entered into an oral contract whereby the defendant agreed to treat and tan hides which were to be bought and furnished by the plaintiffs, at a price of 4 cents per square foot for grain leather and 1½ cents per square foot for split leather, and that by the terms of said oral agreement the defendant was to pay interest to the plaintiffs at the rate of 6 per cent. per annum on the money invested by the plaintiffs in the hides purchased and shipped to defendant for tanning under said contract, and also interest at 6 per cent. per

annum upon any sums of money advanced to defendant by plaintiffs for any reason whatsoever in connection with said contract, and that defendant agreed to tan all hides in a good and workmanlike manner. For further reply the plaintiffs stated that after the making of said oral contract and pursuant thereto, the plaintiffs delivered to the defendant at Milwaukee, Wis., certain hides, and also purchased and held certain hides under the contract, for defendant, to be treated by it under said contract, among which were the leather and hides in question in this suit, being 142 bundles. The plaintiffs denied that the said hides were duly and properly tanned and converted into leather, and denied that the reasonable value for so treating and tanning these 142 bundles was 4 cents per square foot, or any other sum, and alleged that in the tanning of these 142 bundles of hides in question, the defendant so treated them that they became damaged and depreciated in value to the extent of \$1,998.48, and that therefore the plaintiffs were not indebted to the defendant in the sum claimed in the answer, or any other amount, and that therefore defendant had no lien upon the 142 bundles of leather involved in this controversy. Plaintiffs, replying, further stated that at the agreed price of 4 cents per square foot the defendant would only have a claim for services rendered in tanning said hides, amounting to \$999.26, and that at the time the said hides in suit were shipped bill of lading was attached to secure \$1,666.68, and this was an exorbitant and unreasonable amount, and included an unjust and nonlien demand which was grossly excessive, and because of this fact defendant had no lien upon the 142 bundles of leather involved in this case. Further replying, the plaintiffs stated that, after entering into this oral contract, they from time to time advanced money to the defendant on said contract, which was unpaid at the time this suit was instituted, and which amounted to \$752.54, and further alleged that plaintiffs had invested in hides to be furnished under said contract the interest on which at the rate of 6 per cent. per annum, in accordance with the terms of the contract, amounted to \$2,126.86, and this, together with the amount advanced, aggregated \$2,879.40, which was due and owing under said contract from the defendant to the plaintiffs at the time of the institution of the suit, and that therefore, even if the defendant had a claim for services rendered in tanning the hides amounting to \$999.26, it should be deducted from the amount due from defendant to plaintiffs under the contract, and that defendant, therefore, could not have a lien upon the 142 bundles of leather. Further replying, plaintiffs alleged that it had delivered to defendant under said contract certain half hides to the number of 1,015, and of the value of \$279.12, which defendant received, but neglected to tan, and

converted the same to its own use, thereby rendering defendant further indebted to plaintiffs. Further replying, the plaintiffs alleged that it delivered to defendant certain hides to be treated under said contract to the value of \$2,618.78, and that defendant failed to treat said hides in a workmanlike manner, but, on the contrary, in the process of tanning, they entirely ruined them and rendered them worthless, and that because of that fact the defendant was indebted to the plaintiffs in the sum of \$2,618.78 for said hides so ruined, and that because of that fact defendant had no lien or charge against the hides involved in this case.

The evidence tended to show that the defendant was operating a tannery in Milwaukee, Wis., and that in August, 1912, Mr. Collins, one of the plaintiffs, made an arrangement with the defendant to tan hides for the plaintiffs. The contract was oral. By the terms of this contract it was orally agreed between the plaintiffs and defendant that the plaintiffs should furnish certain hides to the defendant to be tanned, and the plaintiffs were to pay the defendant 4 cents per square foot for tanning the grain leather and 1½ cents per square foot for tanning split leather. The president of the defendant company indicated that from time to time he would have to have money advanced to him by the plaintiffs to carry on the work of tanning the hides under the contract. Plaintiffs agreed to advance said moneys from time to time, and the evidence shows that some advances were in fact made. Under the terms of the agreement the defendant was to pay the plaintiffs 6 per cent. interest on said sums so advanced, and also was to pay the plaintiffs 6 per cent. interest on the moneys invested by the plaintiffs in said hides which were to be tanned by defendant under said contract, and it was further agreed that after the tanning had been done and the leather was sold, the defendant was to allow plaintiffs 5 per cent. for selling the leather, and then the profits which accrued upon the selling of the leather, if any, were to be divided equally between plaintiffs and defendant. It was further understood that the leather was to be tanned by defendant in a workmanlike manner. There was no substantial dispute between the parties on the terms of the above agreement. Under these arrangements the plaintiffs bought and shipped to defendant at Milwaukee for tanning certain hides, among others, the hides from which the 142 bundles of leather involved in this suit were made.

The plaintiffs offered evidence to substantiate the various allegations set forth in its reply: First, to the effect that the hides from which the 142 bundles of leather involved in this case were not properly tanned, resulting in the leather depreciating \$1,998.48; second, that defendant was indebted to it under the contract for money advanced

and interest on the money invested amounting to \$2,879.40; third, that defendant had converted certain half hides to its own use, amounting to \$279.12; and, fourth, that defendant had damaged other hides, furnished under the contract, in the process of tanning rendering them worthless, which were of the reasonable value of \$2,618.78.

All of this evidence was objected to, and the objection was sustained by the court, except the evidence to the effect that the defendant had treated the hides, from which the 142 bundles of leather involved in this case were made, in an unworkmanlike manner. The court allowed evidence offered on the part of the plaintiffs tending to establish this fact to be admitted.

The defendant contended that the condition of the leather of the 142 bundles involved in this case was not on account of the tanning, but on account of the condition of the hides, in that they were poor and it was impossible to make good leather out of them, and defendant's evidence tended to show this. On instruction covering this point alone, the case went to the jury. The jury found a verdict in favor of the defendant. Plaintiffs filed a motion for a new trial, and, upon it being overruled, appeal.

As indicated before, the trial court ruled that the plaintiffs could only show the damage to the hides in question, if any, and whether or not plaintiffs had paid the defendant for tanning the particular hides in question, and ruled that the plaintiffs could not show that the defendant, at the time the suit was instituted, was indebted to the plaintiffs for sums of money advanced under the contract amounting to \$752.54, and interest on the amount invested, amounting to \$2,126.86, or that defendant was indebted to it to the extent of \$279.12 for the split or half hides alleged by plaintiffs to have been converted to defendant's own use, or that defendant was indebted to plaintiffs in the amount of \$2,618.78 by reason of having improperly tanned, spoiled, and rendered worthless certain other hides delivered by plaintiffs to defendant to be tanned under the contract, and refused to permit the plaintiffs to show the state of the account between the plaintiffs and defendant under the contract, and in effect ruled that, even though defendant was indebted to plaintiffs, it had a right to hold the hides in question until plaintiffs paid defendant for tanning the same, and that plaintiffs could not show, by way of set-off or recoupment or otherwise, any other demand or claim growing out of the contract against defendant's claim. To the exclusion of this evidence by the learned trial court the plaintiffs excepted at the time, and now assign error for the same in this court.

It is held that under our Code the terms "set-off and recoupment" are included within the term "counterclaim," and the distinction between set-off and recoupment is now im-

portant only from the fact that the former must arise from contract and can only be used in an action founded upon contract, while the latter may spring from a wrong, provided it arose out of a transaction set forth by the claimant or connected with the subject of the action. *Gordon v. Bruner*, 49 Mo. 570. The rule of the earlier cases was that a set-off or recoupment was not allowable in an action of replevin except where equitable relief might be demanded under exceptional circumstances. *Macky v. Dillinger*, 73 Pa. 85; *Phillips v. Monges*, 4 Whart. (Pa.) 226; *Warner v. Caulk*, 3 Whart. (Pa.) 193; *Peterson v. Haight*, 3 Whart. (Pa.) 150; *Patch Mfg. Co. v. Killinger*, 26 Pa. Co. Ct. R. 539. This was on the theory that the action of replevin sounded in tort for the wrongful detention of personal property, and that set-off, recoupment, or counterclaim, whatever might be its nature, could not be pleaded in an action of replevin, for it was reasoned it is no justification for a tortious act that the tort-feasor is indebted to the tort-feasor, and in some jurisdictions the filing of a counterclaim or set-off in a replevin suit is expressly prohibited by statute. *Sylvester v. Ammons*, 126 Iowa, 140, 101 N. W. 782. Since the adoption of the Code in most of the states, the doctrine of set-off and counterclaim has undergone much change. At first counterclaims were held not to be available in any action for a tort, and therefore not in replevin, which sounds in a tort. *Gottler v. Babcock*, 7 Abb. Prac. (N. Y.) 392. But this rule has been so far modified as to allow the interposition of a counterclaim in the full sense of the Code whether arising on contract or based upon a tort in an action of replevin whenever such counterclaim or set-off is founded upon a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or whenever it is connected with the subject of the action. *Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 206; *Deford v. Hutchinson*, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257; *Thompson v. Kessel*, 30 N. Y. 383; *Wilson v. Hughes*, 94 N. C. 182; *Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244. In this jurisdiction the following cases are to the same effect: *McCormick Harvesting Machine Company v. Hill*, 104 Mo. App. 544, 79 S. W. 745; *Close v. Hurst*, 151 Mo. App. 75, 131 S. W. 751; *Ely v. Sutton*, 177 Mo. App. 546, 162 S. W. 755; *Babb v. Talcott*, 47 Mo. 848. There are decisions in which this right of counterclaim is recognized, but in which the facts required it to be enforced only so far as necessary to defeat the plaintiff's demand, and some of the decisions expressly confined it within that limit, and deny the right to obtain affirmative relief on the counterclaim. *Johnson v. St. Louis Butchers' Supply Company*, 60 Ark. 387, 30 S. W. 429; *Ames Iron Works*

v. Rea, 56 Ark. 450, 19 S. W. 1063. In other words, in these decisions the effect of the counterclaim is purely defensive, and no judgment is rendered on the counterclaim. In other decisions counterclaims in replevin suits are not only sustained, but enforced to the extent of granting affirmative relief to defendants by judgment in their favor for amount above the amount found to be due the plaintiff. That is to say, the counterclaim is enforced in its proper sense, as a separate cause of action in favor of a defendant, and not merely as a matter of defense against a plaintiff's case. McCormick Harvesting Machine Company v. Hill, 104 Mo. App. 544, 79 S. W. 745, and cases therein cited.

The McCormick Harvesting Machine Company, supra, is the leading case in this state upon the matters involved herein. This was a case where the plaintiff brought replevin for the possession of certain horses and cattle covered by a chattel mortgage, given by the defendant to plaintiff. The defendant had purchased from the plaintiff a wheat binder, and gave the promissory notes, secured by a chattel mortgage on the horses and cattle in question. The defendant in this action filed a counterclaim, averring that he had purchased of plaintiff a wheat binder, and had executed his promissory notes therefor, secured by a chattel mortgage on the horses and cattle in question. The defendant paid plaintiff \$42 on the notes, which were secured by the chattel mortgage, and defendant further alleged that the plaintiff, without legal process, had taken possession of the binder, of the value of \$125, for the purpose of applying it on said indebtedness, and that defendant had overpaid the plaintiff. On trial the defendant recovered a judgment against the plaintiff for the sum of \$87.50. This judgment, the court held, under the evidence was excessive, because it was found by the jury that the value of the machine, taken from defendant in payment of the notes, only amounted to \$87.50, and that defendant had paid on the notes, secured by the chattel mortgage, the sum of \$42 in cash, making a credit on the said notes of \$129.50, which would still leave the notes unpaid, but the court distinctly held that the defendant had the right to plead the counterclaim, and would have been entitled to judgment in its favor and against the plaintiff if the evidence had shown, as defendant contended, that the aggregate amount of cash paid on the notes, secured by the mortgage, and the value of the machine turned over by defendant to plaintiff, had amounted to more than the notes secured by the chattel mortgage. In this case Judge Goode, one of the greatest jurists that ever sat upon any bench, held that the "subject of the action" was neither the animals mentioned in the complaint, nor their unlawful detention, but was the debt and the

chattel mortgage, and the plaintiff's right to the property depended on whether or not the notes had been paid and the lien of the mortgage thereby destroyed, the indebtedness being the subject of the action and its existence the fact in dispute.

[1] In this case the plaintiffs by its reply disputed the indebtedness claimed by the defendant for which it had a lien upon the leather. The plaintiffs claimed that, even though the defendant had properly tanned the hides in question and under the contract of 4 cents per square foot had a claim against the plaintiffs amounting to \$999.26, yet plaintiffs had a claim by way of offset or recoupment against defendant, growing out of the very contract which was the foundation of defendant's lien, amounting to more than the amount of the lien claimed by defendant. We are of the opinion that such matters may be said to constitute a cause of action which arises out of the contract which is the foundation of the defendant's lien as set forth by it in its answer in this case, and just as it would be a defense even to the extent of affirmative relief if the defendant were suing for the amount it claims, so it is available here as an offset to the amount claimed by defendant to be due him under the contract and for which he has a lien on the leather. Or, again, it might be said, as was said by Judge Goode in the McCormick Harvesting Machine Company Case, supra, that the subject of the defendant's claim is the indebtedness claimed to be due from plaintiffs to the extent of \$999.26. If plaintiffs did not owe this amount, or any other amount, to defendant for work and labor done and materials furnished upon the hides in question, then defendant, under the facts of this case, had no right to retain them in their possession, and, as we understand it, plaintiffs offered to show that very thing. In 34 Cyc. page 1418, in speaking of this subject it is said:

"If a counterclaim may be set up in a reply, it can be only to defeat a recovery on a counterclaim in the answer, and not for any affirmative judgment on it"

—and it is held in the case of Townsend v. Minneapolis Cold Storage Company, 46 Minn. 121, 48 N. W. 682, that where in an action of replevin defendant justifies the detention upon a lien claimed for storing the property, the plaintiff may, in order to defeat the claim of lien, allege and prove damages sustained by him to the property stored to as much as or more than the amount claimed to be due for storage.

In the case of Babb v. Talcott, 47 Mo. 348, the action was for the possession of a quantity of wheat, and the defendant's retention of the wheat was maintained on the ground that he had a lien on it for warehouse charges. A reply was filed in the nature of a recoupment, charging that some 40 bushels of wheat, while in possession of the warehouse,

were lost through their negligence, causing damage to the plaintiff in an amount equal to their charge. That recoupment against the defendant's lien in favor of the plaintiff was approved by the Supreme Court.

The case of *Brown v. Buckingham*, 11 Abb. Prac. (N. Y.) 387, was a suit to recover the possession of 325 pounds of silk which were delivered to the defendant for the special purpose of being manufactured into sewing silk, and which had been so manufactured, and which silk the defendant illegally detained after demanded. The defendant by answer denied the plaintiff's alleged right to the possession of the silk, claiming to have a lien thereon for some \$500, and claimed, also by counterclaim, that some time previous he had sold and delivered to plaintiff certain silk, for which there remained due to him the sum of \$400, and averred that such sale and delivery arose out of the contract and transaction set forth in the complaint as the foundation of the plaintiff's claim, and was connected with the subject of the action. The plaintiff demurred to the answer and counterclaim. The demurrer was sustained, but the court held that if the answer had sufficiently and fully stated that the silk sold by defendant to plaintiff had been sold and delivered under any contract which included or applied to the silk demanded by the plaintiff, or had set forth any facts connecting in any way the transaction stated in the complaint with the supposed cause of action stated in the answer, in that event it would have been available to defendant, and the answer would have been good.

We believe, therefore, that the evidence offered by the plaintiffs to support the allegations in the reply, tending to show that the plaintiffs were not indebted to the defendant for work and labor done on the hides in question under the contract set forth in the answer and reply, was improperly excluded.

[2] When the leather involved in this case was originally shipped from Milwaukee, Wis., the defendant claimed that the plaintiffs were indebted to it for work and labor done under this contract, and for which it had a lien on the hides to the extent of \$1,666.68. At the trial the defendant admitted by its answer that the indebtedness amounted to only \$999.26, and plaintiffs maintain that since the defendant claimed a greater amount than was due, it thereby waived its lien, if it ever had one, and that the judgment should be reversed. In 25 Cyc. 677, it is said:

"The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender nor waive his lien for the sum really due."

In *Kirtley v. Morris*, 43 Mo. App. loc. cit. 151, it is said:

"Nor ought the fact that he claimed there was more owing him than he afterwards claimed. *Everett v. Coffin*, 6 Wend. [N. Y.] 603 [22 Am.

Dec. 551]; *Comstock v. McCracker*, 53 Mich. 123 [18 N. W. 583]. Though there is authority contrary to the latter proposition, I am inclined to the opinion that claiming a lien for too much is not a waiver of the rightful lien. If the artisan claims more than his legal right, the demandant should tender him the sum for which he has a rightful lien."

—and it seems that it is only in those cases where an artisan so mixes his accounts that his claim against the given property cannot be distinguished from other accounts that he loses his lien. *Kirtley v. Morris*, 43 Mo. App. 144.

It follows from what has been said that the judgment of the lower court should be reversed and remanded; and it is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

CONTINENTAL INS. CO. OF NEW YORK v. PHIPPS. (No. 12201.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. INSURANCE — 238(1) — CANCELLATION OF POLICY—TIME.

Where a five-year policy of insurance differed from the oral representations of the insurer's agent that it would be for one year, but insured, having the right to cancel it at any time upon terms provided therein, retained it without objection from spring till fall, it was too late to refuse it on the ground of such misrepresentation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 516, 517; Dec. Dig. — 238(1).]

2. INSURANCE — 226 — CANCELLATION — RIGHT.

Where a contract of insurance had become effective between the parties, neither could cancel or terminate it without the other's consent, except upon strict compliance with the conditions provided in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 498, 499; Dec. Dig. — 226.]

3. INSURANCE — 238(1)—FIRE INSURANCE—CONDITIONS—CANCELLATION—VALIDITY.

A provision in a five-year policy of fire insurance that insured could cancel the policy by paying the premium note in full, and that then the insurer would take out of it the usual short rates and the expense of taking the risk and return the balance, whether reasonable or not, was a valid provision which the parties had the right to make, and which would be upheld.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 516, 517; Dec. Dig. — 238(1).]

4. INSURANCE — 365(1) — FIRE INSURANCE — CONSTRUCTION OF POLICY—FORFEITURE.

A five-year policy of fire insurance on which the insured paid the first annual premium and gave a note for the balance, payable in four annual installments, providing that in case of nonpayment of any annual installment when due the insurer should not be liable for any loss occurring during the default, and that the policy should lapse until payment was made, but that the whole amount of installments remaining unpaid would become due as earned premiums if no settlement was made according to short-term rates before the time expired, with a provision that insured might cancel it when the premiums had been fully paid, the insurer retaining the usual short rates and expense of taking the risk, where the insured did not cancel

it by paying the premium note in full, remained in force until default in the payment of the next annual installment of premium, and would have come into force at any time after the insured's payment of such installment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 982; Dec. Dig. ¶ 365(1).]

5. INSURANCE ¶ 183—FIRE INSURANCE—PREMIUM NOTE—REDUCTION.

Under a term policy for five years, whereby the whole premium was earned unless the policy was canceled in accordance with its provisions, the insured was not entitled to a reduction of his premium note because of his own failure to comply with the contract, so that after default, the insurer was entitled to recover the full amount of the note.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 394; Dec. Dig. ¶ 183.]

6. INSURANCE ¶ 187(3)—FIRE INSURANCE—PREMIUM NOTE—CONSIDERATION.

Where a fire insurance policy was issued for an indivisible period of five years, for a certain indivisible premium, \$15 cash and a premium note for \$60, the note was as much a part of the consideration for the insurance as the cash, so that it could not be claimed that there was no consideration for the note.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 401; Dec. Dig. ¶ 187(3).]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

"Not to be officially published."

Action by the Continental Insurance Company of New York against Thomas J. Phipps. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with direction to enter judgment on the note sued on.

D. A. Murphy, of Nevada, Mo., for appellant. A. J. King, of Nevada, Mo., for respondent.

TRIMBLE, J. This is a suit on defendant's promissory note for \$60 which, with \$15 cash, was given by him to plaintiff as the premium on a five-year policy of fire insurance running from noon of March 10, 1911, to noon of March 10, 1916. The note was to be paid in four annual installments of \$15 each on the 1st of March. The contract between the parties provided that in case of nonpayment of any one of the annual installments when due, the company should not be liable for any loss occurring during such default and the policy should lapse until payment was made, but the whole amount of installments remaining unpaid would become due and payable as earned premiums if no settlement was made, according to short-term rates, for time expired, as provided in the policy. This provision related to the terms on which the insured could cancel the policy, and reads as follows:

"The assured may cancel when the premium, or note or obligation given for such premium, has been fully and actually paid in cash, in which case the company shall retain the customary and usual short rates and expenses of taking the risk from the date of the policy up to the time it is received for such cancellation."

[1] Defendant admits that he paid the \$15 cash and executed the note in suit. He also

admits that about six weeks after signing the application, the policy was delivered to him through the mail. His testimony shows that he kept it without objection for several months, and until about the 20th of September, when he mailed it back to the company. The reason for so doing, he says, was because of alleged oral misrepresentations made by the agent at the time of securing the application for insurance. These alleged oral representations were in direct conflict with the written terms of the application, which defendant signed, and with the terms of the policy. If the policy was different from the oral representations, namely, that it would be for one year and could be canceled by defendant at any time, the plaintiff should have elected to return it within a reasonable time, but he did not do so. He retained it without objection from spring till fall, and then it was too late to refuse it upon the ground of oral misrepresentations. *American Ins. Co. v. Neiberger*, 74 Mo. 167. It may be observed that the assured did have the right to cancel the policy at any time but upon the terms provided in the policy. A trial before a jury was had, the court refused a peremptory instruction to find for plaintiff, and submitted the case to the jury, which returned a verdict for defendant. Thereupon the plaintiff appealed.

Respondent makes the point that appellant's abstract is faulty, and fails to comply with the rules of appellate practice. The point is not well taken. The abstract is in proper form, and contains the right matters, correctly stated in the proper place.

[2] The contract of insurance having become effective between the parties, neither could cancel or terminate it without the other's consent, except upon strict compliance with the conditions provided in the policy for its cancellation. *Chrisman, etc., Banking Co. v. Hartford Fire Ins. Co.*, 75 Mo. App. 310; *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 405; *Hollingsworth v. Germania, etc., Fire Ins. Co.*, 45 Ga. 294; 12 Am. Rep. 579; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *White v. Connecticut Fire Ins. Co.*, 120 Mass. 330.

[3] The policy provided that if the insured desired to cancel the policy, he could do so by first paying the premium note in full, and then the company would take out of it the customary and usual short rates and the expenses of taking the risk, and return the balance. This is a provision in the contract and, whether reasonable or not, is a valid one which the parties had a right to make and agree to, and therefore it will be upheld. The parties entered into such contract and the courts will not undertake to make a different one for them. *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539; *Kelm v. Home Mut., etc., Ins. Co.*, 42 Mo. 33, 97 Am. Dec. 291; *State Ins. Co. v. Horner*, 14 Colo. 391, 23 Pac. 788.

[4, 5] The defendant admits he did not send any money to the company at the time he says he sent the policy back in an attempt to cancel it. The evidence of the company is that the policy was never received. And the evidence shows that the customary short rate for the time the defendant had the policy, plus the expenses of taking the risk, were much more than the \$15 he had paid. According to the policy, the only way he could cancel the policy was by paying the premium note in full, and from that the company could retain the short rate and the expenses of taking the risk. Hence defendant did not cancel the policy, but it remained in force until default was made in the payment of the next annual installment of the premium and would have come into force again at any time upon the payment by defendant of said installment. The policy was a term policy for five years and, under its terms, the whole premium was earned unless the policy was canceled in accordance with the terms and conditions of the contract. *Barnes v. Insurance Co.*, supra; *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Robinson v. Insurance Co.*, 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251. The policy did not become absolutely void upon the nonpayment of the installments. The defendant could have kept it in force or reinstated it after default by paying the installments due. He is not entitled to a reduction on his note because of his own failure to comply with the contract. He defaulted when the installment became due, and under the terms of the contract the whole note then became due. Hence plaintiff is entitled to recover the full amount of the note. *Williams v. Albany, etc., Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95; *Blackerby v. Continental Ins. Co.*, 83 Ky. 574; *Cauffield v. Continental Ins. Co.*, 47 Mich. 447, 11 N. W. 264; *Minnesota, etc., Ins. Ass'n v. Olson*, 43 Minn. 21, 44 N. W. 672; *American Ins. Co. v. Garrett*, 71 Iowa, 243, 32 N. W. 356; *American Ins. Co. v. Hen-*

ley, 60 Ind. 515; *American Ins. Co. v. Klink*, 65 Mo. 78.

The law involved in cases of this kind is fully set forth in *Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 128 S. W. 273, and that case is decisive of this one. The defendant relies upon the case of *Home Ins. Co. v. Burnett*, 26 Mo. App. 175, as entitling him to a judgment. But that case differs from this in that, so far as the evidence in the case showed, the defendant therein had the right to cancel the policy by a mere notice to that effect. But in the case at bar the evidence clearly shows that defendant did not cancel the policy.

[6] It cannot be claimed there was no consideration for the note. The evidence shows that the policy was for an indivisible period of five years for a certain indivisible premium, to wit, \$15 cash and the note in suit. In other words, the note was as much a part of the consideration for the insurance as the cash that was paid. *German-American Ins. Co. v. Divilbiss*, 67 Mo. App. 500. The defendant had no right to terminate the contract unless he did so in accordance with the terms of the contract. This he failed to do. The policy became effective and the risk attached, and, under the terms of the contract, defendant was obligated to pay the whole premium unless he canceled the policy in the way pointed out in the contract. The evidence shows he did not do this, and there is no evidence that the company consented to the cancellation of the policy in the manner plaintiff attempted to do.

Defendant acknowledged he executed the note, and his own evidence shows that the policy took effect, the risk attached, and that he failed to cancel the policy and failed to pay the note. In that event the contract also shows that the company is entitled to payment thereof. Accordingly the judgment is reversed, and the cause is remanded, with directions to enter judgment on the note. It is so ordered. The other Judges concur.

BUOK v. MEYER et al. (No. 12187.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. ADOPTION \Leftrightarrow 6—CONTRACT TO MAKE PERSON HEIR—ENFORCEMENT IN EQUITY.

An oral contract of decedent to adopt plaintiff and make her his heir, when established by proper proof and shown to have been performed by plaintiff on her part, is enforceable in equity.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 11; Dec. Dig. \Leftrightarrow 6.]

2. SPECIFIC PERFORMANCE \Leftrightarrow 121(4) — PART PERFORMANCE OF ORAL CONTRACT — EVIDENCE.

In a suit in equity to sustain an oral contract void under the statute of frauds but for the fact of part performance, the proof must be so convincing as to leave no doubt that the particular contract, as alleged, existed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393; Dec. Dig. \Leftrightarrow 121(4).]

3. SPECIFIC PERFORMANCE \Leftrightarrow 121(7) — CONTRACT TO MAKE PERSON HEIR—EVIDENCE OF EXISTENCE.

Where the evidence clearly showed that decedent, having no legitimate children, orally promised plaintiff, his illegitimate daughter, that if she would move to America he would adopt her and make her his heir, which she did, and ever afterwards he recognized and acknowledged her as his daughter and her children as his grandchildren, and the evidence of such contract is corroborated by every act of decedent both before and after except in a will later made in his second wife's favor, the evidence was sufficient to enforce such contract in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393; Dec. Dig. \Leftrightarrow 121(7).]

4. JUDGMENT \Leftrightarrow 249—CONFORMITY TO PLEADINGS—EQUITABLE RELIEF.

A petition, alleging facts creating an equitable cause of action upon contract entitling plaintiff to be made a pretermitted heir, praying a money judgment "and all other proper relief," was properly regarded as an equitable cause, and the court could give the proper relief required.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 435; Dec. Dig. \Leftrightarrow 249.]

5. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 438(5) — JUDGMENT \Leftrightarrow 707—PARTIES AFFECTED—PERSONAL REPRESENTATIVES AND DEVISEES.

Where legatees and devisees were not named as parties, but administrator was so named, there was no defect of parties as to the legatees, whom the administrator represented, but the interest in real estate of devisees, not being so represented, could not be affected by the decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1772; Dec. Dig. \Leftrightarrow 438(5); Parties, Cent. Dig. § 50; Judgment, Cent. Dig. § 1230; Dec. Dig. \Leftrightarrow 707.]

6. APPEAL AND ERROR \Leftrightarrow 1152 — MODIFICATION OF DECREE—REDUCING AMOUNT OF RECOVERY.

Where there was nonjoinder of devisees in suit to enforce contract to make plaintiff an heir, and a decree can be made without affecting such interests, the judgment will not be reversed, but a decree making plaintiff pretermitted heir in the personalty only will be rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483-4496; Dec. Dig. \Leftrightarrow 1152.]

7. APPEAL AND ERROR \Leftrightarrow 801 — EFFECT OF FAILURE TO ASSIGN ERROR — MOTION FOR NEW TRIAL.

Where, in motion for new trial, no mention is made of a nonjoinder of parties, the objection cannot be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. \Leftrightarrow 801.]

8. WILLS \Leftrightarrow 57—CONTRACT TO DEVISE OR BEQUEATH—WHAT LAW GOVERNS.

A contract of decedent to make an illegitimate child his heir if she would move to America is to be determined by the law of the state into which she moved, that being the place of performance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 163; Dec. Dig. \Leftrightarrow 57.]

Appeal from Circuit Court, Montiteau County; J. G. Slate, Judge.

Suit by Anna C. Buck against Martin T. Meyer, administrator of the estate of John H. Asahl, and another. Judgment for plaintiff, and defendants appeal. Remanded, with direction to modify.

See, also, 184 S. W. 977.

R. M. Embry and S. O. Gill, both of California, Mo., for appellants. Charles R. Pence, of Kansas City, Roy L. Kay, of California, Mo., and Jay L. Oldham, of Kansas City, for respondent.

TRIMBLE, J. The petition in this case alleged that plaintiff is a daughter and only child of John H. Asahl, deceased, and was, during his life, always recognized and acknowledged as such; that in 1886 she was living with her family in Mecklenburg Schwerlen, Germany, on which date her father visited her and orally promised and agreed that if she would move with her family from Germany to the United States he "would adopt plaintiff as his child and make her his legal heir"; that plaintiff accepted said promise and agreement and did, in compliance therewith and in reliance thereon, remove her family to the United States, and ever since has resided therein; that in order to make said removal she had to dispose of her property in Germany at a sacrifice. The petition then alleged that said John H. Asahl neglected to adopt plaintiff; that he died in Montiteau county, Mo., without having made such adoption; that he left surviving him his widow, Margaret Asahl, who has since died; that he had no children other than the plaintiff; that at his death he was seised of real estate worth \$2,000 and of personal property worth \$8,000; and that plaintiff, under said contract and agreement, is entitled to receive and recover one-half of said property. The petition then concludes as follows:

"Wherefore plaintiff prays that she may have judgment for the sum of \$5,000 and that she may have all other proper relief."

The suit was brought against the administrator of John H. Asahl's estate, but afterwards the executor of the will of Margaret

Asahl, deceased, on his own motion, was made a party upon a showing by him that John H. Asahl left a will in which he devised and bequeathed all his property to said Margaret Asahl, his second wife.

After the issues were made up, a hearing was had, and the court rendered a decree in which it is stated that the court doth find: .

"That the plaintiff is an illegitimate and only child of John H. Asahl, deceased; that plaintiff was born in Germany; that said John H. Asahl, deceased, left Germany long prior to the year 1886, and came to the United States of America; that in the year 1886 the plaintiff, Anna C. Buck, was married and living with her family in Germany; that in the year 1886 John H. Asahl, deceased, left his home in California, Mo., and went to Germany to locate the plaintiff; that he found her and visited her and her family in her home in Germany; that during the time of his said visit to plaintiff's home in Germany he, the said John H. Asahl, in order to induce plaintiff to move with her family to the United States of America, proposed, promised, and agreed to adopt plaintiff and make her his legal heir; that plaintiff, relying upon said promise and agreement, did with her family move to the United States of America in the year 1887, and has ever since lived therein; that the said John H. Asahl, deceased, during his lifetime failed and neglected to carry out said promise and agreement with plaintiff."

And the judgment concludes thus:

"Wherefore it is considered, adjudged, and decreed by the court that plaintiff be and she is hereby declared a pretermitted heir of John H. Asahl, deceased, and entitled to a share as an heir in the estate of John H. Asahl, deceased."

Thereupon the executor of the widow's estate appealed to the Supreme Court. That tribunal, however, in an opinion handed down on the 30th of March, 1916, held that jurisdiction of the appeal was with us and transferred the case to this court.

[1] The contract declared on in the petition is an oral contract on the part of John H. Asahl to adopt plaintiff and make her his heir. Such contracts, when established according to the standard of proof required, and shown to have been performed on one side, can be enforced in equity. *Sharkey v. McDermot*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Nowack v. Berger*, 133 Mo. 24, 37, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Healey v. Simpson*, 113 Mo. 340, 346, 20 S. W. 881; *Lynn v. Hockaday*, 162 Mo. 111, 125, 61 S. W. 885, 85 Am. St. Rep. 480; *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575; *Thomas v. Maloney*, 142 Mo. App. 193, 197, 126 S. W. 522; *Horton v. Troll*, 183 Mo. App. 677, 691, 167 S. W. 1081.

[2] In cases of this kind where it is sought to establish an oral contract which, but for the fact of part performance, would be void under the statute of frauds, the authorities all hold that:

"To sustain the alleged oral contract, the proof must be so clear, cogent, and convincing as to leave no reasonable doubt in the mind of the chancellor, not only that a contract of the general nature alleged was made, but that the particular contract as alleged was made, and its terms and conditions clearly shown." *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895; *Wales v. Holden*, 209 Mo. 552, 558, 576, 108 S. W.

89; *McElvain v. McElvain*, 171 Mo. 244, 251, 71 S. W. 142.

Courts must be very careful not to lower the standard of proof in such cases, for, if that standard be lowered or weakened, the danger of unfounded and trumped-up claims being established against a person after his death is very great.

The most important question, then, and the one to be first decided, is whether the evidence is sufficient to entitle plaintiff to relief of any nature; for, if that be decided adversely to her, all other questions become academic.

There is no question but that John H. Asahl was a native of Germany and emigrated to this country many years prior to 1836. He lived in Moniteau county, Mo., was married, and at that time his first wife was alive. They had no children. In that year he made a trip to Germany.

Mrs. Willers, witness for plaintiff, testified that she was plaintiff's stepdaughter, and was born in Mecklenburg, Germany, in 1869; that she was living at home with her father and her stepmother, the plaintiff, in 1886 when John H. Asahl came there from the United States and made them a visit; that he said he came to hunt up his daughter, and that he found her, the plaintiff; that he wanted her to come to the United States and he would adopt her as his heir; that he came to hunt up his child. The witness stated that she herself was then 16 years old; that she heard the conversations between John H. Asahl and her stepmother; that one afternoon Mr. Asahl told her father to get the neighborhood school teacher, who was a notary, to come and make out the papers; that when the school teacher came they were all present, Mr. Asahl, the witness, her stepmother, and her father; that Mr. Asahl told the teacher that if plaintiff would come over to the United States he would adopt her and make her his heir. The witness says the teacher advised them to let it go until they came to the United States and then make out the papers to adopt her and make her his heir, that this conversation occurred in the living room, and that after that she heard it often talked about between them from that time on until Mr. Asahl left. The witness testified that the next year the family came to this country, and that the plaintiff came on the promise made to her by Mr. Asahl; that she (the witness) went to live at Mr. Asahl's home and stayed there about three years; that while living at his house she heard Mr. and Mrs. Asahl talk about his making the plaintiff his heir, and heard them talk about it a number of times. The witness also stated that she was not present when Mr. Asahl first met her stepmother, but that he spoke of Mrs. Buck as his child, called her his daughter, said he was her father, called her his heir, and called the children grandchildren.

August Seyffert, a friend of Asahl's testified that he had known him intimately for 80 or 40 years, saw him nearly every day; that in 1886 Asahl went to Germany, and while there the witness received from him a letter in which he said he had found his daughter and was staying with her; that, upon Asahl's return, the witness had heard him say he had found his daughter, but he never heard her name; that he (the witness) never met the plaintiff in the presence of Mr. Asahl and did not know of the latter having held her out and introducing her as his daughter in the town of California where Asahl lived; but in answer to a question by the court as to whether he had ever heard him speak of Anna Buck as his child, or ever heard him say that he brought his child home with him, or that she came over here, he replied: "I think I did, and that she moved to Kansas City."

A stepson of plaintiff, Ernest A. Buck, testified that he was born in Germany in February, 1875; that in May, 1886, John H. Asahl came to his father's home in Mecklenburg, Germany; that, in a conversation between Mr. Asahl and the plaintiff, Mr. Asahl said he was married over in this country (the United States) but that the marriage was childless and that he had come over to adopt her as his daughter and to make her his heir; that the conversation was along the line of adoption papers; that in the afternoon Mr. Asahl sent the witness' father for the school teacher of the place that acted as notary; that the school teacher came, and the two, Asahl and the teacher, talked it over; that the old gentleman, Mr. Asahl, said he had property over here and was childless, and that she was to come to this country and he would make her his heir; that the teacher told him it would not be necessary to draw up the papers there, because they would not be legal over here, and that they had better go on this side; that along about the end of July, or the first of August, 1886, Asahl returned to the United States, and in the following spring witness' father and stepmother, the plaintiff, came to the United States; that they came on Mr. Asahl's promise to adopt her and make her his heir; that when the family reached Kansas City they were met at the Union Depot by Charles Asahl, John H. Asahl's brother; that witness' father was a carpenter, and John H. Asahl had suggested that they come to Kansas City because the town of California was not a very good place to follow that business and Kansas City was on a boom; that upon their arrival at Kansas City they called Charles Asahl "Uncle" and his wife "Aunt." The witness further testified that John H. Asahl came to Kansas City about twice a year to visit them, and usually stayed from a week to two or three weeks, never less than a week, dividing his time between their house and that of his brother Charles; that his

stepmother went to the town of California to visit Mr. Asahl staying usually a week or ten days; that he was not certain about the number of times she went; that she went once during the lifetime of Asahl's first wife and twice after he married the second time to his certain knowledge; that she continued her visits up to the time of Mr. Asahl's death and was at his house at the time of his death; that he (the witness) never heard any conversation between plaintiff and Mr. Asahl about adopting her after she came to this country; that the first Mrs. Asahl treated the plaintiff as her own child; that, while on a visit to the plaintiff in Kansas City, the first Mrs. Asahl took sick and, after an illness of two or three days, died there and was taken to California for burial; that Mr. Asahl remained a widower two or three years; that, after his remarriage, the second Mrs. Asahl treated the family the very opposite of that of the first Mrs. Asahl, and from that time Mr. Asahl's visits were not as frequent as they were before. The witness further stated that, when Mr. Asahl was in Kansas City on a visit to the family, the plaintiff called him "Papa" and the children called him "Grandpa," and that as a rule Mr. Asahl addressed the children by their given names; that he had heard Mr. Asahl introduce the plaintiff as his daughter to his or her friends in Kansas City a dozen different times or more.

On cross-examination he said he meant, by introducing her, that Mr. Asahl referred to her as his daughter when talking to other people. The witness said he visited California only once during Mr. Asahl's life, and that the latter lived about 20 years after the family came to this country. On cross-examination, the witness said he remembered hearing Mr. Asahl say, while on his visit in Germany, that that was his birthplace; that his stepmother, the plaintiff, had never seen her father until he came there; that he learned then, from things Mr. Asahl said, that it was the same place where he and the plaintiff's mother lived; that the plaintiff's mother had married and was living in the same community, and Mr. Asahl went to call on them, and the call was returned at the witness' home; that the plaintiff's mother and Mr. Asahl had a conversation along general lines, and from this conversation the witness learned that they were young people together in that country before he came over here to live, and that they lived in the same village; that the witness heard Mr. Asahl in that conversation refer to the plaintiff as his child, but did not hear the plaintiff's mother refer to her as his child.

The foregoing was all the evidence offered by plaintiff. The defendant offered no witnesses in opposition to plaintiff's evidence, but introduced in evidence the will of John H. Asahl and also the will of his second wife, Margaret Asahl.

Asahl's will, after providing for his burial

in a decent manner, for the payment of his debts, and for a monument at his grave, bequeathed to his wife Margaret Asahl all the remainder of his estate "both real, personal and mixed, including moneys, notes and bonds, absolutely and forever after my death to be disposed by her as she shall see fit and proper." No one else was mentioned in his will and no executor was named.

The will of Margaret Asahl bequeathed all of her property to her various relatives and heirs, and appointed the defendant Nischwitz executor with the request that he be not required to give bond. Both wills were introduced in evidence over the objection of plaintiff.

[3] Was the foregoing evidence sufficient to justify the trial court in sustaining plaintiff's claim as to the existence of such a contract and her performance thereof?

In determining this question, it is well to ascertain the facts about which there can be no question. They were that John H. Asahl was born and reared in Germany; that he was married but never had had a legitimate child. There can also be no question but that he did go back to Germany and to the scenes of his youth in the year 1886. While there he wrote to his friend Seyffert (a disinterested witness living in or near California, Mo.) that he had found his daughter and was staying with her. Upon his return to America, he again said he had found his daughter. It is practically a conceded fact that plaintiff is his daughter. While that concession is not expressly made, yet in effect, it is conceded, for not a syllable of testimony was offered to dispute that fact, nor was any attempt made in the cross-examination of plaintiff's witnesses to show that she was not his daughter. Seyffert was asked as to whether Asahl held her out or introduced her as his daughter in the town of California, but this did not controvert the fact that she was his daughter, as this same witness said Asahl had written him from Germany that he had found his daughter, and upon his return said he had found her but did not mention her name, and the witness said he had heard Asahl afterwards say she had come to this country and had moved to Kansas City.

We think the fact that she was his daughter is very important, and, when taken in connection with the other facts about him and the course he pursued, makes the alleged contract reasonable and natural. His married life was childless. He went back to the scenes of his youth to hunt up his daughter and found her. He had not only a strong motive, but a moral duty toward her, and his course in hunting her up indicates a desire upon his part to perform that duty. She was the child of his body, and, as said in *Roberts v. Roberts*, 223 Fed. 775, 776, 138 C. C. A. 102, 103:

"This, together with the conceded fact of his childless married life, gave to him a natural

motive and imposed upon him a moral duty to plaintiff and her mother to make plaintiff his child in law as she was in nature. These two facts enter into all of plaintiff's evidence, giving to it reasonableness and probative force."

In the *Roberts Case* direct and express evidence of the contract seemed to be wanting; but the court refused to reverse the judgment on that account, holding that a contract could be found from the conduct of the adopting parents. In the case at bar there is definite and express evidence of the contract, and this is corroborated and enforced by everything the father did both before and afterwards, except in the will he made in his second wife's favor in which no mention of a child is made. That the two witnesses who testified to the contract were young does not destroy the force of their testimony. One was 18 and the other 11, but both were capable of being witnesses at that time, and the circumstances were such as to make a deep and lasting impression upon their minds, at a period when such impressions would be indelibly fixed in their memory. The coming of their stepmother's father whom she had never seen, his arrival from a new foreign land on the other side of the earth, the prospect of leaving the home where they were born and of going to that wonderful country where they must learn a new language and live under entirely different surroundings, could not fail to make a deep impress upon their minds. It was the opening of a new epoch and a wonderful vista in their lives, and it is no wonder that they could remember the contract and its terms, especially when we remember the power of youthful memory as to things that make a vital impression. Such testimony standing alone would not be sufficient to establish the contract, but when taken in connection with the fact that plaintiff was his daughter, that he had no children, that he hunted her up and acknowledged and treated her as his daughter, that from that time he recognized and acknowledged her as such and occupied the position of father and grandfather, the evidence becomes convincing, and comes up to the standard of proof required by the law in such cases.

The contract in this case was to adopt plaintiff and make her his heir; it is not a contract to will her all of his property. Whether Mr. Asahl could by will have cut plaintiff out is not in the case, since he did not do so. The case is therefore unlike that of *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887.

[4] Is the judgment which the court rendered permissible under the petition? It will be noted that the petition alleges all the constitutive facts necessary to create a cause of action in equity based upon a contract which would entitle plaintiff to be made a pretermitted heir. It is true, the petition in one aspect states the violation of a contract and prays judgment for \$5,000; but just

prior to this the petition states that the father left an estate of \$10,000, and that plaintiff under said contract was entitled to one-half thereof, and therefore the prayer is for said one-half or \$5,000 and that plaintiff "may have all other proper relief." So that it can be readily seen that what plaintiff is seeking is to obtain one-half of the estate as an heir and not by way of damages. In fact, damages are nowhere mentioned either in the petition or in the evidence. Now, under all the authorities, the enforcement of such contracts is in equity, and not by way of damages in a suit at law. In fact, no judgment for damages could be rendered, because, even if such a suit were maintained, the measure of the damages would be the share plaintiff would have as an heir, and that is not known, and, in fact, is not ascertainable in the trial court. It would seem therefore that, if the petition can be given any other construction, it should not be regarded as a suit for damages.

"Under our practice, if sufficient facts are stated to entitle the party to relief, the conclusions of law the pleader may draw from them, and the particular relief he may ask, may, if necessary, be disregarded, and in such cases the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues." *Sharkey v. McDermott*, 91 Mo. 657, 4 S. W. 111, 60 Am. Rep. 270; section 2100, R. S. Mo. 1906.

The court therefore could treat the petition according to its legal effect and give the "proper relief" that should follow the establishment of the facts stated.

[5, 6] It is urged that there is a defect of parties, since the legatees and devisees of the wife's will are not made parties to the suit. So far as concerns the personality of Asahl's estate, his administrator represents all who are interested in that, including, it would seem, even the estate of the second wife, but, if not, then the legatees of the latter are represented by her executor. 1 McQuillen's Mo. Practice, § 125; *Oromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466, 474. Neither the administrator nor the executor have or had anything to do with the real estate, consequently the wife's devisees are not represented, and, not being parties to the suit, their interest in the real estate is not affected in any degree. "Where the rights and interests of persons not before the court cannot be materially affected by the final decree, it will not be reversed for the omission to join them as parties." 20 Ency. of Pl. & Pr. 413. If

the situation were such that no decree whatever could be rendered without trenching upon or affecting the interests of those not parties to the suit, then the judgment could not be permitted to stand; but, since a decree can be made which will not in any manner affect the interests of those owning the real estate, the judgment should not be reversed entirely but such a decree should be rendered as can be enforced.

[7] In addition to what is here said, it should be observed that no mention is made in the motion for new trial of any error by reason of a defect of parties; and appellant is not in position to take advantage of it now. *Breidenstein v. Bertram*, 198 Mo. 346, 95 S. W. 828. There seems to have been only a small tract of real estate—the homestead of the Asahls. To reverse and remand the case in order that the devisees of this real estate might be made parties would seem to be unavailing, as we surmise, from remarks in the briefs, that the suit is now very likely barred as to them.

[8] The contract is to be determined according to our law, and not that of Germany; hence we need not assume that the common law is in force there and determine the case according to its rules. The contract was not complete until it was performed on plaintiff's part by coming to America. It was made by the parties with a view to its performance in this state, no part of it was performed until plaintiff came here, and, in that situation, our courts will supply the applicatory law in its equitable enforcement. *Scudder v. Union National Bank*, 91 U. S. 406, 411, 23 L. Ed. 245. The general rule is that, when a contract is made in one state to be performed in another, the essential validity of the contract is governed by the law of the place of performance. 2 Am. & Eng. Ency. of Law (2d Ed.) 1328.

The plaintiff has not sought to be made an heir to all of the property of her father, but only to one-half thereof, apparently considering and treating his wife as the other heir. As brought, her suit does not affect the interest of those claiming his real estate. Consequently, the judgment should be no greater than she demands, and, as hereinbefore stated, should not be broader in its terms than can be enforced. The judgment is therefore remanded, with directions to modify it so as to make plaintiff a pretermitted, or unmentioned, heir of John H. Asahl, deceased, as to one-half of the personal estate.

It is so ordered. The other Judges concur.

BELT et al. v. ST. LOUIS, I. M. & S. RY. CO.
(No. 12148.)

(Kansas City Court of Appeals. Missouri.
Nov. 6, 1916. Rehearing Denied
Dec. 20, 1916.)

1. PARTIES **⚡96(4)—ANSWER—WAIVER.**

An answer waived the objection that there was a misjoinder of parties plaintiff, as an answer is a waiver of a demurrer for any cause save jurisdiction and a failure to allege facts sufficient to state a cause of action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 173; Dec. Dig. **⚡96(4)**; Pleading, Cent. Dig. § 1405.]

2. PLEADING **⚡56—STATING CAUSE OF ACTION—PARTIES.**

Though facts constituting a good legal cause of action are stated in a petition, yet if it also appears that the plaintiff therein is not entitled to such action, no cause of action is stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 119-121; Dec. Dig. **⚡56**.]

3. ACTION **⚡50(8) — MISJOINDER — PARTIES PLAINTIFF.**

Where a cause of action was stated in the petition in favor of each of the parties plaintiff, which was several and not joint, the petition was objectionable for misjoinder.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 514-523; Dec. Dig. **⚡50(8)**; Pleading, Cent. Dig. § 137.]

4. APPEAL AND ERROR **⚡927(5)—QUESTIONS OF FACT—DEMURRER TO EVIDENCE.**

On demurrer to testimony, the Court of Appeals must look to the evidence in plaintiffs' behalf as establishing the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. **⚡927(5)**.]

5. RAILROADS **⚡482(2) — FIRES—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.**

In an action by insurers who had paid for the loss of a lot of cedar logs piled near defendant's track and alleged to have been destroyed by fire started by sparks from defendant's engine, evidence held to sustain a verdict for plaintiffs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1731, 1732; Dec. Dig. **⚡482(2)**.]

6. EVIDENCE **⚡471(24)—OPINIONS—FIRES.**

In such action, the exclusion of questions by defendant to an insurance agent living in New York, and knowing nothing of the fire, for the purpose of showing that the fire might have been started by tramps or campers, or by the leaving of matches, etc., was proper, as the agent's opinion could not change the opinion of the jury, who knew that tramps and campers are sometimes careless, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2150, 2151; Dec. Dig. **⚡471(24)**; Witnesses, Cent. Dig. § 833.]

Appeal from Circuit Court; Buchanan County; Charles H. Mayer, Judge.

"Not to be officially published."

Action by Alvin G. Belt and others, receivers, and others, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

James F. Green, of St. Louis, and Ben J. Woodson, of St. Joseph, for appellant. Culver & Phillip, of St. Joseph, and Bruce Barnett and Dayle C. McDonough, both of Kansas City, for respondents.

ELLISON, P. J. The American Lead Pencil Company was the owner of a lot of cedar logs piled in ricks about 4 feet high near to defendant's track. They were insured in different amounts by the several plaintiffs. The logs were burned by a fire which plaintiffs charge was started by sparks from one of defendant's passing engines. The loss was \$7,418.82, the aggregate insurance being much more than that. Plaintiffs paid, each for itself, its proportionate part of the loss, and have jointly brought this action, for the amount so paid. The action is based on the idea that defendant, as the wrongdoer, is liable to them for the amounts they were compelled to pay for the wrongful act. *Hartford Ins. Co. v. Railroad*, 74 Mo. App. 106. The judgment in the trial court was for the plaintiffs.

Defendant demurred to the petition on two grounds: First, that there was a misjoinder of parties plaintiff; and, second, that the petition on its face shows a cause of action in the Lead Pencil Company and not in either of the plaintiffs. The demurrer was overruled, whereupon defendant filed an answer to the merits.

[1-3] The answer waived the objection that there was a misjoinder of parties plaintiff. *Hudson v. Cahoon*, 193 Mo. 547, 91 S. W. 72; *Hendricks v. Calloway*, 211 Mo. 536, 557, 111 S. W. 60; *Hanson v. Neal*, 215 Mo. 256, 277, 114 S. W. 1073. An answer is a waiver of a demurrer for any cause save jurisdiction, and a failure to allege facts sufficient to state a cause of action. Defendant insists that the second cause of demurrer was, in effect, a charge that the petition did not state a cause of action. This insistence is upon the idea that the petition does not state a cause of action in the plaintiffs; that is, that while it may state facts showing a cause of action in some one, it does not show such cause in the plaintiffs. It is true that, though facts which compose a good legal cause of action are stated in a petition, yet if it also appears that the plaintiff therein is not entitled to such action, no cause of action is stated. *Poor v. Watson*, 92 Mo. App. 89, 101. This view is sustained by *Overshiner v. Britton*, 169 Mo. 341, 351, 69 S. W. 17, and *Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391. But in this case a cause of action is stated in the petition for each of the plaintiffs, the only trouble being that they are several causes and not joint. Therefore the only proper objection to the petition was that there was a misjoinder, a defect, as we have said, that is waived by the answer.

[4] This brings us to the question whether there is any substantial evidence in plaintiffs' behalf to support the verdict. Much is said by defendant which is taken from the evidence in its behalf. But on demurrers to testimony we must look to the evidence in

the plaintiffs' behalf as establishing the facts. *Turner v. Anderson*, 260 Mo. 1, 17, 168 S. W. 943; *Williams v. Railroad*, 257 Mo. 87, 112, 165 S. W. 788, 52 L. R. A. (N. S.) 443; *Whiteaker v. Railroad*, 252 Mo. 483, 452, 160 S. W. 1009.

[5] It was shown by plaintiff: That the logs were cedar and well seasoned, some of them having been piled about three years. They were piled in ricks, and extended from about 80 feet of the track up the side of what is called the mountain. The weather the summer preceding had been hot and dry, but on the 20th of January, near a month before the fire, there had been a wet snow, but this was gone, and at the time of the fire it was "tolerably dry." There was some grass. A passenger train passed at 12:30 p. m. going south and at upgrade at about 80 miles per hour. The engine was working steam. That while the engine had a spark arrester, in such circumstances it would throw sparks. Two freight trains passed shortly afterwards. There was evidence, further, tending to show that a live spark would carry from 75 to 100 feet, and that the northwest corner of the logs was only 30 feet away, and there was evidence which tended to show the fire started at that end. A strong wind was blowing in the direction of the logs from the track. There were no buildings near, nor did any other means of starting the fire appear. It was suggested in this connection that tramps frequently passed up and down the road, but none were seen on the day in question.

There was further evidence which showed that the fire was discovered by two persons about three-quarters of an hour after these trains passed. They were on top of a high and steep elevation. They immediately started to the fire, but the character of the country was such they were something more than a half hour in reaching it. From their observation of the progress of the fire before they reached the scene, and after they reached it, reasonable inference could be drawn

that the fire started at the time the passenger train passed.

After having given the authorities cited by defendant due consideration, including *Fritz v. Railroad*, 243 Mo. 62, 148 S. W. 74, we conclude that the evidence, the circumstances, and reasonable inferences to be drawn therefrom are sufficient to sustain the verdict. *Kenney v. Railroad*, 70 Mo. 243; *Campbell v. Railroad*, 121 Mo. 340, 350, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Matthews v. Railroad*, 142 Mo. 645, 656, 44 S. W. 802; *Erhart v. Railroad*, 136 Mo. App. 617, 118 S. W. 657; *Bowden v. Railroad*, 184 S. W. 1174, 1175.

[6] Complaint is made of the ruling of the court in sustaining objections to certain character of evidence offered by defendant. We think the court properly disposed of the evidence offered by refusing to allow the questions answered. The evidence seems to have been offered for the purpose of showing that tramps might have started the fire, or people on camping expeditions. There were many of these questions, put to an insurance agent, and they need not all be set out here. Among them were these:

"Do you know anything of the hazard of tramps on railroads increasing the danger of fire?" and "Do insurance companies care for them at all?" "Did you ever see tramps build fires along railroad tracks to warm themselves?" "Is it possible for people to leave matches?"

It is manifest that these generalities, put into the form of questions, had no bearing on the case. The jury knew that some people are careless, that tramps walk down railroad tracks, and that they sometimes build fires to keep warm, etc., and the affirmation or denial of this by an insurance agent living in New York, who knew nothing of the fire, or the incidents connected therewith, could not change their opinion.

We have gone over the objections to the judgment treated in defendant's brief, and find that we are without right to interfere, and hence affirm it. All concur.

STEPHENS v. CITY OF ELDORADO SPRINGS. (No. 11981.)

(Kansas City Court of Appeals. Missouri. Dec. 18, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 930(1)—**REVIEW—VERDICT.**

In reviewing a verdict for plaintiff, the appellate court must adopt the most favorable construction that can be given to the plaintiff's testimony as a whole.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755, 3756, 3758; Dec. Dig. \Leftrightarrow 930(1).]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 807(1)—**DEFECTS IN STREETS—DUTY OF PEDESTRIANS.**

A pedestrian is not bound to abandon his customary route of travel in a public street because of a defect therein, and is not guilty of contributory negligence in failing to do so, unless the defect is so patently dangerous that no ordinarily prudent and careful person would attempt to pass over it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1679; Dec. Dig. \Leftrightarrow 807(1).]

3. APPEAL AND ERROR \Leftrightarrow 1060(2)—**REVIEW—PREJUDICIAL ERROR.**

In view of Rev. St. 1909, § 2082, providing that a case shall not be reversed for error not materially affecting the merits of the action, where the court told the jury that question as to whether a witness had been indicted was immaterial, and that they were not to consider it, the failure to reprimand defendant's counsel for asking a witness if he had been indicted, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4185; Dec. Dig. \Leftrightarrow 1060(2).]

4. TRIAL \Leftrightarrow 131(3)—**REMARKS OF COUNSEL—OBJECTIONS.**

An objection to the remarks of counsel is insufficient which does not point out the specific statement complained of and does not call the attention of the trial court to the specific grounds upon which it is based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 314; Dec. Dig. \Leftrightarrow 131(3).]

5. TRIAL \Leftrightarrow 129—**STATEMENTS OF COUNSEL—RETALIATORY RULE.**

In an action against a city for personal injuries caused by defect in a sidewalk, in view of the testimony of an alderman that he had recommended that the board of aldermen spend \$2,000 to defeat plaintiff's cause of action as a "holdup," a statement of plaintiff's counsel that a verdict would not mean anything to the defendant but would mean a great deal to plaintiff, that if judgment was rendered against defendant its officers and servants would go on drawing their salaries, and that the defendant had money to throw to the birds, might be, in the discretion of the court, allowed as called forth by the statements of the other side, unless the attention of the court were called to a specific reason why the remarks of counsel were objectionable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 310; Dec. Dig. \Leftrightarrow 129.]

Appeal from Circuit Court, Cass County; Andrew A. Whitsett, Judge.

"Not to be officially published."

Action by W. A. Stephens against the City of Eldorado Springs. Judgment for plaintiff, and defendant appeals. Affirmed.

D. Walker Smith and J. F. Rhodes, both of Eldorado Springs, and T. N. Haynes, of Harrisonville, for appellant. W. M. Bowker, of Nevada, Mo., and J. S. Brierly and W. D. Summers, both of Harrisonville, for respondent.

TRIMBLE, J. Plaintiff, while walking on defendant's sidewalk, was thrown down and severely injured by reason of a defect therein. He sued the city alleging negligence in failing to keep the sidewalk in a reasonably safe condition. The city answered with a general denial, coupled with a plea of contributory negligence. On a change of venue the case was first sent to St. Clair county, where it was tried, resulting in a judgment for plaintiff, which, on appeal, was reversed by the Springfield Court of Appeals for error committed in the trial, and the cause remanded for a new hearing. Thereupon, another change of venue was awarded, and the case went to Cass county, where the trial now involved was had on substantially the same evidence as before, and resulting again in a verdict and judgment for plaintiff. Defendant has again appealed.

It is very strenuously and ably argued that we should reverse the case on the ground that the plaintiff's own testimony shows contributory negligence so clearly that we should declare it established as matter of law. There is no question as to the sufficiency of the evidence in regard to defendant's negligence; but it is insisted that plaintiff has been conclusively shown to be guilty of contributory negligence on account of which his judgment should be annulled.

[1] We have carefully and thoroughly gone over the record and find ourselves unable to agree with this contention. Adopting, as we must in view of the jury's verdict, the most favorable construction that can be legitimately given to plaintiff's testimony as a whole, it makes the question of his negligence a matter to be determined by the jury. The opinion of the Springfield Court of Appeals on the former appeal is reported in 185 Mo. App. 464, 171 S. W. 657, and we refer to it for a statement of the facts and for a more extended discussion of the point now under consideration. What is there said applies with cogency and force to the facts as they appear in the record now before us, and we see no need of adding to what that court said upon the point. We are convinced it was a proper case for the jury, and not the trial court, to pass upon.

[2] Defendant's instruction No. 9 was refused, and this it is claimed was error. The instruction, in effect, unqualifiedly declared that if plaintiff, by taking a roundabout way, could have avoided the defective place, he was guilty of contributory negligence in failing to do so. This is not the law. Gran-

ey v. City of St. Louis, 141 Mo. 180, 184, 42 S. W. 941. A person is not bound to abandon his customary route of travel in a public street because of a defect therein, unless the defect is so patently dangerous that no ordinarily prudent and careful person would attempt to pass over it. Loftis v. Kansas City, 156 Mo. App. 683, 137 S. W. 993; Heberling v. City of Warrensburg, 204 Mo. 604, 103 S. W. 36; Lueking v. City of Sedalia, 180 Mo. App. 203, 167 S. W. 1152; Besides, there was evidence that any roundabout way was as dangerous as the walk. In fact, one of the other ways was not accessible until after a ditch had been crossed, and it would have been more hazardous to have attempted this in the dark than to have continued on plaintiff's usual and nearest way home as he did.

[3] Complaint is made that the trial court did not adequately reprimand plaintiff's counsel for improper cross-examination of one of defendant's witnesses. The portion of cross-examination complained of is as follows:

"Q. Tom, you are indicted for bootlegging over there now?

"By Mr. Smith: Just wait a minute.

"By the Court: What is that?

"By Mr. Haynes: The attorney should be reprimanded for that. Q. Have you been convicted of bootlegging? A. No, sir; I haven't. Q. Have you ever been convicted of bootlegging over there? A. No, sir; I haven't.

"By Mr. Smith: Now, we think the attorney, Mr. Bowker ought to be reprimanded.

"By Mr. Bowker: The testimony is competent; I understand he has been tried for it.

"By Mr. Haynes: We object to that remark as being improper and ask that he should be reprimanded.

"By Mr. Bowker: I have got a right to ask that. If he has been convicted I can show it.

"By the Court: You have got a right to ask if he has been convicted. But now I will say to the jury this as to any case pending will be entirely withdrawn from the jury and they are not to consider that. As to whether he is indicted now or whether he isn't doesn't concern this case; it is incompetent in this case. (To which action of the court in refusing to reprimand plaintiff's counsel for his conduct, defendant excepted and saved its exceptions at the time.)"

On redirect examination the witness, in answer to a question of defendant's counsel, said he had never been convicted of bootlegging in Cedar county or anywhere else. We are asked to say that this cross-examination, together with the failure of the trial court to reprimand counsel for plaintiff, constitutes reversible error. A large number of witnesses were introduced on each side, and the testimony of the witness in question was merely cumulative. The court clearly and emphatically told the jury that the question as to whether the witness had ever been indicted was wholly immaterial, was incompetent, and was withdrawn from the jury, and that they were not to consider it. It is not reasonable to suppose that, in view of the court's ruling, the jury not only disregarded the court's admonition, but were influenced

by the mere question propounded to the witness as to whether he had been indicted. No evidence was given on that subject. The jury are presumed to have understood and heeded the judge's ruling and admonition. Under all the circumstances we do not think the rights of the defendant were prejudiced or that the failure of the court to reprimand (which is all that defendant asked) resulted in "materially affecting the merits of the action." This being so, the case should not be reversed on account thereof. Section 2082, R. S. Mo. 1909.

[4, 5] It is finally urged that the case should be reversed and remanded because of improper remarks of counsel for plaintiff in the closing argument. We set forth all that the record discloses in regard to this matter. It states that counsel for plaintiff said in substance:

"The verdict in this case doesn't mean anything to the defendant, but it means a great deal to the plaintiff, if the judgment is rendered against the city in this case, the city officers, the mayor and aldermen and marshal and night watch will go on drawing their salaries just the same; the city has money to throw to the birds. (To which remark the defendant excepted and asked the court to reprimand the counsel for plaintiff.)"

"By Mr. Bowker: Well, they said they would spend \$2,000 to beat Mr. Stephens in this lawsuit. (To which action of the court in refusing to reprimand plaintiff's said counsel defendant excepted and saved its exceptions at the time.)"

One of the aldermen of the city, who testified for the defendant, had admitted on cross-examination that he had advocated before the board of aldermen the spending of \$2,000 to defeat plaintiff's cause of action. On direct examination he said the reason he advocated such a policy was because he regarded plaintiff's case as a "holdup." And the record above quoted shows on its face that the remarks of plaintiff's counsel were in reference to that. And, in so far as they were in answer to that feature of the case, the remarks might be allowed to pass uncondemned under the retaliatory rule; i. e., that it was called forth by the evidence and the statements of the other side. It will be observed that no reason was given in support of the objection. Indeed, specifically, no objection was made except as it is implied in the fact that defendant excepted to the remark and prayed for a reprimand. But certainly no reason was given for the objection implied therein. The trial court knew of the feature to which the remarks were directed, and knew also the course of the trial and argument which called them forth, and, having these in mind, could well regard the remarks as unobjectionable unless his attention was called to some reason which made them improper. No reason was furnished. An objection to the remarks of counsel "is insufficient which does not point out the specific statement complained of and does not call the attention of the trial court to the specific grounds upon which it is based."

Torreyson v. United Railways, 246 Mo. 696, loc. cit. 707, 152 S. W. 32. See, also, *Riesling v. Juede*, 165 Mo. App. 216, 225, 147 S. W. 168, where it was held that a general objection to language used in argument is not sufficient, but that the objector should give the reason on which his objection is based so that the trial court may have opportunity to rule on the matter and correct the error if there be any. This is especially applicable here where the remarks of counsel were called forth by the bitter words from the other side to the effect that they would spend \$2,000 to defeat a "holdup," and, unless the attention of the court was called to the reason the remarks of counsel were objectionable, the court might well fail to see why they should be considered improper in view of his knowledge of what had called them forth. It should also be remembered that, as said in *Huckshold v. St. Louis, etc., Ry. Co.*, 90 Mo. 559, 2 S. W. 798:

"The trial judge, who had heard the speeches of opposing counsel, and knew what, if anything, was said to provoke the last remarks of counsel in his closing speech, was in a better position than we are to determine whether he should or should not interfere, and as to when, how, and to what extent a trial judge may interfere in any case, must depend upon the exercise of a sound discretion."

In view of this and of the fact that the trial judge was not given any reason for the objection nor was his attention called to what it was that made the remarks objectionable, we are unwilling to hold that reversible error was committed. It will also be observed that the trial court made no ruling on the matter, and the exception taken was not to the court's failure to rule, but to the failure to reprimand. Section 2081, R. S. Mo. 1909, provides that only those exceptions are available on appeal which have been expressly decided by the trial court. In *Ray County Savings Bank v. Hutton*, 224 Mo. 42, 50, 123 S. W. 47, attention is called to this statute, and it is said that the proper procedure, where the court fails to rule, is to except to the failure to rule. Doubtless the court's silence, in the case at bar, may be construed as a ruling adverse to the objector, and the facts in the *Hutton Case* may make it inapplicable here. We prefer to base our ruling in this case on the fact that no reason for the objection was given, and it was necessary that a reason should have been given, in view of the fact that the remarks were called forth as hereinabove indicated, and for that reason could not be regarded as wholly without justification and improper unless the court's attention was specifically called to some ground which otherwise made them not permissible.

Unless there is reversible error in the record, the judgment should be affirmed. The case has been tried twice and the plaintiff has obtained verdicts from widely separated and disinterested juries, the first time for

\$2,500, and the last for \$3,000. Neither of them appear to be excessive or unreasonable. Accordingly we affirm the judgment. The other Judges concur.

DITTRICH v. AMERICAN MFG. CO. (No. 14510.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. MASTER AND SERVANT ⇨238(4)—CONTRIBUTORY NEGLIGENCE—SAFE WAY OF WORK.

An employé, who has chosen an unsafe method of work when there is a safe way at hand, may still recover for resulting injuries, unless the way chosen was so dangerous that an ordinarily prudent man would not have chosen it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 746; Dec. Dig. ⇨238(4).]

2. MASTER AND SERVANT ⇨191(1)—FELLOW SERVANTS.

Where operators of cordage machines in the defendant's shop had nothing to do with repairing the machines, and blacksmiths and machinists who repaired them had nothing to do with operating them, the operators and blacksmiths were independent workers and not fellow servants, and defendant would be chargeable with the negligence of an operator resulting in injury to a blacksmith while repairing a machine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 475, 477, 478; Dec. Dig. ⇨191(1).]

3. MASTER AND SERVANT ⇨190(18) — VICE PRINCIPAL.

Where plaintiff blacksmith was ordered to repair a cordage machine by the defendant's machinist, the machinist was a vice principal, and defendant would be liable for his negligence in failing to signal the operator of the machine that the work was to be done.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 467; Dec. Dig. ⇨190(18).]

4. MASTER AND SERVANT ⇨190(18) — VICE PRINCIPAL.

Where defendant's cordage machines were placed 18 or 20 inches apart, with no light in such spaces, which were not only dark, but obstructed with dust, so that one repairing the machine would not be in view of those operating it, and no provision was made to notify operators nor to guard persons repairing the machines by any mechanical device, which could have been provided at a trifling cost, and defendant's foreman saw plaintiff assume his position to repair a machine without taking steps to notify the operator who remained at her post, or to notify one who was away at the time and likely to start the machine on her return, the defendant was guilty of gross negligence in failing to take precautions to guard the safety of its workmen as far as that could be reasonably done.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 467; Dec. Dig. ⇨190(18).]

5. MASTER AND SERVANT ⇨190(18) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

If it was defendant's duty to notify the operator of a cordage machine in defendant's shop before starting to repair it, if such notice

was given, it was immaterial whether the person who gave it was the plaintiff or another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 469, 470; Dec. Dig. ☞ 190(19).]

6. MASTER AND SERVANT ☞286(1)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

In a servant's action for injuries, question of defendant's negligence *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1001; Dec. Dig. ☞ 286(1).]

7. MASTER AND SERVANT ☞289(1)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

In a servant's action for injuries received, question of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. ☞ 289(1).]

8. MASTER AND SERVANT ☞219(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The doctrine of assumption of risk as such, unless the danger is obvious, does not exist in Missouri.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610, 624; Dec. Dig. ☞ 219(1).]

9. DAMAGES ☞30 — PERSONAL INJURIES — MEASURE OF DAMAGES.

In action for injuries received, plaintiff was entitled to a fair pecuniary compensation for the pain and anguish of body and mind, if any, as a direct result of the injury sued for, for loss of earnings \$250, and for any loss of earnings sustained since the filing of the suit directly caused by the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. ☞30.]

10. MASTER AND SERVANT ☞201(1)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

If a master's negligence causes injury to a servant, his negligence is not excused by the fact that the negligence of a fellow servant contributed to that of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 515; Dec. Dig. ☞ 201(1).]

11. DAMAGES ☞181(3)—PERSONAL INJURIES —EXCESSIVE VERDICT.

In an action for injuries received, where plaintiff was seriously crippled in his hand, suffered great pain, was put to large expense, and was unable to work for six months, a verdict of \$1,500 was not so excessive as to indicate prejudice or passion on the part of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 361, 362, 370; Dec. Dig. ☞ 181(3).]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

"Not to be officially published."

Action by Ignatius Dittrich against the American Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

William K. Koerner and Davis Biggs, both of St. Louis, for appellant. Claud D. Hall, of St. Louis, for respondent.

Statement.

REYNOLDS, P. J. Action by plaintiff for damages for injuries sustained while in the employ of defendant. Defendant is a man-

ufacturing concern operating a number of machines known as cordage machines. These machines are about five feet high, six feet wide, and twenty-one feet long, and are fitted with gears or cogwheels as part of their operating machinery. There were about fifty of them in one room, placed in rows about twenty inches apart, each machine being operated by two women operators, one at the front end, another at the rear end, the machine started or stopped by the operator using a lever, levers being on the side at each end of the machine. One McGraw was in charge of the shop, and the floor and machines operated on it were in charge of a foreman named Gast. When repairs were required to be made on the machines they were made by or under direction of the company's machinist, one Pecka, who was sometimes assisted by the blacksmith. On the afternoon of August 24th, 1911, Gast directed Pecka to make some changes in the gear of one of these machines. As Pecka saw that plaintiff, who was the company's blacksmith, was not working at the time he asked plaintiff to go with him. The two men went from their floor to that on which these machines were in place and found Gast standing by one of them. Gast instructed Pecka to change the gear of that machine; told him that he could "have the machine and to go ahead and take it." Gast thereupon left the vicinity. The machine was then at a standstill, and Mrs. B., the operator, having run out of material, stopped it, but remained at her post at the front end, and Mrs. R., the operator whose place was at the rear end, went to work at another machine and was absent about ten minutes. As Pecka and plaintiff passed Mrs. B., and just as they reached the machine, Pecka started taking the gear cover off and testifies that he waved his hand at Mrs. B. to give her notice not to start, that being the usual way of notifying the operator that the machine was not to be started. Pecka, after ascertaining the size of gear needed, and while plaintiff was loosening up the nuts, left it and went to procure another gear. In the meantime, that is, while plaintiff was at work removing the gear, —Mrs. R. had returned to her place at the foot or rear of the machine and, according to Mrs. R., Mrs. B. signalled to her by waving or raising her hand, to start the machine, Mrs. R. not having been warned by Mrs. B., or anyone else, that a man was working at it, and not seeing plaintiff, who was stooping down between this machine and another, started the machine. Plaintiff then had hold of the gear by its outer edge. The movement of the machine caught his hand and crushed two of his fingers.

In addition to the facts above, which are set out substantially as in the petition, there was evidence tending to show that these machines when in operation, not only made a

loud, deafening noise but raised a cloud of dust which made it impossible to see more than four or five feet. They were so close together and so high that the space between them was dark and obscured by dust. It does not appear that this space was fitted with artificial lights. The machines were used for weaving strands together for the manufacture of rope. The operatives of them would use one and then another, shifting from one to the other, using one until material at that machine was used up and then going to and operating another. It appears that the same two operators did not always work together on the same machine, but shifted from one to another and worked with other operators. The operators had nothing to do with repairing the machines and the machinists had nothing to do with operating them. The blacksmith shop where plaintiff usually worked was on a floor a little above the level of the floor on which the machines were situated, and plaintiff, while usually doing work as a blacksmith, assisted in repairing machines when requested by Pecka, often being sent down from this shop to the factory floor where the machines were, to repair them when repairs were required. When the blacksmiths came to work on a machine, if the operator was there, he or the machinist would give a signal by a wave of his hand or a rap of his hammer as a warning that the machine was being repaired. There was, however, no sign nor any rule or regulation notifying operatives who might be at that or at other machines, and who might come to and operate the machine, that any particular machine was being repaired, or that a blacksmith was working on it. The gear wheel which was being removed weighed about fifty or sixty pounds. The usual manner of removing it was to take hold of the spokes, which had a space of about three inches at one end and three-fourths of an inch at the other. The operator, Mrs. R., whose place was at the rear of the machine, as noted, had been engaged on another machine some six or seven feet away for about ten minutes and when she left the machine at which the accident occurred, as also noted, as she testified, she did not know that the machine was being repaired; that neither Gast nor any one else had notified her of that; when she came back to her machine she started it because she got a signal from her fellow-workwoman at the other end of the machine to start it, which she immediately did.

There is evidence to the effect that a lock or device could have been easily attached to the machine to keep it from being operated while undergoing repairs.

There are five assignments of negligence in the petition, but as the case was submitted to the jury on only two of them it is unnecessary to notice the others.

We follow the summary of these assign-

ments of negligence as made by the learned counsel for respondent in their statement, brief and argument before us.

The first submitted to the jury is, that the operators and blacksmiths were two separate and independent gangs of workmen. The second is, that defendant had failed to promulgate and enforce any rules or regulations by which the operators would be warned from operating these machines while a blacksmith or machinist was making repairs thereon, and that defendant failed to provide any system, sign, signal, lock or safety device in connection with the machines that would warn defendant's employes in the operating department that machinists were working upon the machines or that would prevent the machines from being started while in the process of being repaired.

The answer, after a general denial, pleaded assumption of risk and contributory negligence, the contributory negligence pleaded being, first, want of ordinary care on the part of plaintiff in going to work upon the machine without notifying the operator of that fact; second, in failing to watch and see that the machine was not started while he was working thereon; third, that plaintiff's injuries were due to the negligence and carelessness of a fellow-servant in starting the machine while plaintiff was in the act of repairing it.

The trial resulted in a verdict for plaintiff for \$1,500, from which defendant has duly appealed.

At the close of the testimony in the case in chief and at the close of all the evidence, defendant interposed demurrers or, more correctly speaking, asked for instructions to the effect that the jury, on the evidence, should return a verdict in favor of defendant. This was refused and error is assigned to this action of the court.

The court, at the instance of plaintiff, gave three instructions over the objection of defendant, and this action of the court is assigned as error. Defendant asked twelve instructions and these were refused but error is here assigned to the refusal of only one of them (the tenth).

Opinion.

Taking up the first point, which covers the action of the court in refusing to direct a verdict for defendant, and in connection with that, the point made when counsel criticize the first instruction given at the instance of plaintiff, and which is to the effect that the duty to put up a sign or provide some safeguard against the danger of the machine starting while being repaired, only applies where the work performed is complex or intricate, learned counsel argue that there is no evidence of negligence on the part of defendant in the case, and that plaintiff was guilty of contributory negligence as a matter of law in failing to be on the lookout for the operator of the machine and to notify

her of his presence in a dangerous position, and also in doing his work in a dangerous way when he could have done it in a safe way that was equally easy and feasible.

[1] Considering this last proposition, that plaintiff was guilty of contributory negligence as a matter of law in doing his work in a dangerous way when he could have done it in a safe way that was equally easy and feasible, it is to be said, that there was some evidence that the way in which plaintiff attempted to remove the wheel, that is, by taking hold of it on the outer surface instead of by the spokes, was not the safer, or the usual way to remove this gear. Non constat but that starting of the machinery while plaintiff had hold of the spokes, would not have resulted in his injury. But this is not sufficient in itself to have warranted the court, as a matter of law, in declaring plaintiff guilty of contributory negligence. It has been held by our court in *Boehm v. General Electric Co.*, 179 Mo. App. 663, loc. cit. 671, 162 S. W. 723, citing cases in support of the rule, that when an employé of his own free will chooses an unsafe manner for doing his work, or in using his employer's appliances, when other and safer ways are at hand, he may still recover for his injuries, unless the way chosen was so dangerous that an ordinarily prudent man would not have chosen it. That applies here.

Returning to the first proposition under this first point, that there is no evidence of negligence on the part of defendant, we cannot agree to this.

[2, 3] The evidence shows that this machine in place was one of a number of others, set very close together, and that anyone repairing it was obliged to get down in this narrow space, some eighteen or twenty inches wide, not only dark but obscured at the time with dust, so that he was not clearly in view of those operating the machinery, and that there was absolutely no provision made on the part of the employer to notify the operators of his presence or to guard the safety of persons working there, by any mechanical device, or by any sign. A very simple device, and at trifling cost, could easily have been provided. The levers could have been locked; an electric light could have been placed; a sign could have been hung out. None of these were present. The foreman of that floor, Gast, was present and saw the plaintiff assume his position to perform the work. Gast took no steps whatever to notify the operator of that machine, who remained at her post, that plaintiff was in this situation. He saw that the woman, who worked at the rear end of the machine, was away from her place at the time. He must have known that she would return and had it in her power and as a part of her duty, to start up the machine. The most ordinary prudence and care on the part of this foreman, who at the time was the vice-principal, would have required that he cau-

tion the woman who was at the other end of the machine, ready to start it, that there was a man working there and to see to it, that the absent operator, on returning, would not start the machine. He gave no such caution. Pecka testifies that he notified the woman who was at her place at the machine, in the usual manner, by raising his hand to her, so signifying that someone was at work there. That operator either did not see this motion or disregarded it. She not only disregarded the notice but, according to the testimony of the other operator, when the latter returned to resume her place at the machine, the operator at the front end of it raised her hand as a signal for her to put the machine in operation. Both of these operators were independent workers so far as concerns plaintiff; were not his fellow-servants. They were the agents and in the service of defendant, and defendant is chargeable with their negligence. If Pecka did not give the sign, as to plaintiff he was the superior and vice-principal, and defendant is liable for his neglect.

[4] Learned counsel for appellant argue, as before stated, that as the work to be done was not complex or intricate, it was not necessary to have any such appliances or signs, or to provide for locking the machinery when being repaired. Hence they contend that the cases cited in support of this duty are not applicable, and that the court should have instructed the jury as to what signs or devices were required. The cases referred to are *Gaska v. American Car & Foundry Co.*, 127 Mo. App. 169, 105 S. W. 3; *Peppers v. St. Louis Plate Glass Co.*, 165 Mo. App. 556, 148 S. W. 401; *Marques v. Koch & Kost*, 176 Mo. App. 143, loc. cit. 154, 161 S. W. 648, the latter more especially to the point that the instruction given at the instance of plaintiff should have told the jury what safety devices were required. Referring to that case, the instructions there given and condemned, and the facts in the case, bear no analogy to the case at bar. It is true that in *Gaska v. American Car & Foundry Co.*, and *Peppers v. St. Louis Plate Glass Co.*, supra, our court, referring to the fact that in those cases the machinery and work were complicated, so requiring devices to keep the machinery immobile while being repaired or worked upon, held some sign or device or mode of warning the employé should be adopted. But these cases fall far short of holding that safety appliances are only to be provided in case of complex machinery or work. The general rule announced in *Peppers v. St. Louis Plate Glass Co.*, supra, as to the duty of the employer to warn the employé when at work of the danger of the machinery or appliance being moved and injuring him while at work, is repeated and recognized as correct law by our court in *Kettlehake v. American Car & Foundry Co.*, 171 Mo. App. 528, loc. cit. 541, 153 S. W. 552. Here no pre-

cautions whatever to guard the machinists while at work about this machine, working too, in a narrow, dark and dusty space, were taken. As we view the case, appellant was guilty of gross negligence in failing to take some precaution and in failing to guard the safety of the workmen as far as that could reasonably be done.

[5] The other proposition advanced in support of this point, that a directed verdict should have been ordered in favor of defendant, is based on what is alleged to be the failure of plaintiff to be on the lookout for the operator of the machine and to notify her of his presence in a dangerous position. Admitting for the sake of argument that that was a duty devolving upon plaintiff, there is substantial evidence given by Pecka, the mechanic with and under whom plaintiff was at work, that Pecka had given notice to the woman operator, who was at the front end of this machine, by raising his hand to her, and there is testimony that that was the usual manner of warning an operator that someone was at work in, about or under the machine, and that it was not to be started. As long as this notice and warning had been given to this operator, who was then in immediate charge of the cordage machine, by anyone, it is utterly immaterial whether the person who gave that notice was plaintiff or someone else.

[6,7] Our conclusion is that the demurrers or requests for a directed verdict in favor of defendant were properly refused, and that there was no error in that part of the instruction on which error is assigned. The trial court would not have been justified in taking the case from the jury for lack of proof of actual negligence, nor could it declare plaintiff guilty of contributory negligence as a matter of law.

The remaining part of plaintiff's instruction on which error is assigned, is that that instruction is erroneous in that it purports to cover the whole case but gives undue prominence to particular parts and ignores important features of the defense. A very careful reading of the instruction, however, fails to convince us that there is any substance in this criticism. It is a long instruction, possibly under the facts and issues in the case necessarily so, but we do not think that it either gives undue prominence to particular parts of the evidence or that it ignores important features of the defense.

[8] The second instruction is objected to as misstating the rule of law relating to the assumption by a servant of a known risk. As to that we think it is unduly favorable to the defendant. Our Supreme Court has declared that the doctrine of the assumption of risk, as such, unless the danger was obvious, does not exist in our state, covering that, however, as comprehended in contributory negligence. This instruction as given is certainly not open to complaint by de-

fendant as it puts the law before the jury in a more favorable light for it than warranted.

[9] We see no error in the instruction of the court on the measure of damages, which is the third instruction attacked. It told the jury that if they found for plaintiff he was entitled to a fair pecuniary compensation, first, for the pain and anguish of body and mind, if any, he had suffered as shown by the evidence as a direct result of the injury sued for; second, for any loss of his earnings, not exceeding \$250; third, for any loss of the earnings of his labor that he had sustained since the filing of the suit, directly caused by the injury.

[10] The refusal of the tenth instruction asked by defendant is assigned as error. That instruction undertook to tell the jury that plaintiff and Pecka were fellow-servants with each other, and that plaintiff cannot recover for any act of negligence on the part of Pecka in failing to notify the operator of the machine not to start the same while plaintiff and Pecka were placing the gear wheel thereon, and that if the jury found from the evidence that the injury to plaintiff was caused by the failure of plaintiff or Pecka to notify the operator of the fact that they were working on the machine and that it was the duty of Pecka or plaintiff to give such notice under the rules and instructions of the defendant, the jury are instructed to find for the defendant.

In *Moriarty v. Schwarzschild & Sulzberger Co.*, 132 Mo. App. 650, 112 S. W. 1034, it is held by the Kansas City Court of Appeals that whether the mistake or carelessness of a fellow-servant contributed to the result, is immaterial, "as his negligence, combined with that of defendant, renders the defendant liable for the result. If the master is negligent, his negligence is not excused by the fact that the negligence of the fellow-servant of plaintiff contributed with that of the master to cause the injury. *Cole v. Transit Co.*, 183 Mo. 81 [81 S. W. 1138]."

All of the leading cases, reported up to its date, both those by our Supreme as well as by our Appellate Courts, which bear on this rule, are so fully collated by Judge Allen in *Mertz v. Leschen & Sons Rope Co.*, 174 Mo. App. 94, 156 S. W. 807, that it is unnecessary to go into a discussion of that rule, or cite other authorities for its support. That rule is stated in *Moriarty v. Schwarzschild & Sulzberger Co.*, supra. On the authority of these decisions we hold that this instruction was properly refused. This is so, if we regard Pecka as a fellow-servant. If he was a vice-principal, of course appellant is liable for his negligence, if that negligence resulted in hurt to plaintiff.

[11] Finally, it is urged that the verdict, which was for \$1,500, is excessive. That is a matter that is so much for the consideration of the jury and the trial judge, with the evidence before them, that we are not prepared,

as an appellate court, to say that it is excessive. Plaintiff was seriously injured, crippled in his hand. He suffered great pain, was put to large expense, and was cut off in his ability to work for some six months. Its amount, in our opinion, gives no evidence of prejudice or passion on the part of the jury.

Finding no reversible error in the case, the judgment of the circuit court is affirmed.

ALLEN and THOMPSON, JJ., concur.

KRETZER REALTY CO. v. THOMAS CUSACK CO. (No. 14519.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1918. Rehearing Denied Jan. 16, 1917.)

1. LANDLORD AND TENANT ⇨122—RIGHTS OF TENANT—OUTSIDE WALL.

Although a tenant in possession is entitled to the use of the outside walls and can delegate that use to a third person, he cannot so use the outer wall as to injure the freehold, or for purposes inconsistent with the lawful and reasonable enjoyment of the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 435; Dec. Dig. ⇨122.]

2. LANDLORD AND TENANT ⇨55(1)—DAMAGE TO FREEHOLD—RIGHTS OF LANDLORD.

Even if it was an unwarranted and unreasonable use of the premises for a tenant in a dwelling house, operating a boarding house therein, to cover one entire outside wall with a chewing gum sign, if the tenant permitted a third party to paint the sign, the third party is liable to the landlord only when the sign has done substantial damage to the freehold.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 136-139, 142; Dec. Dig. ⇨55(1).]

3. LANDLORD AND TENANT ⇨55(3)—INJURY TO FREEHOLD—TRIAL—INSTRUCTION.

Where the tenant of a dwelling house operating a boarding house therein permitted a third party to cover one outside wall with a chewing gum sign, in an action for damages by the landlord against the third party, an instruction, attempting to cover the entire case and direct a verdict, but failing to expressly require the jury to find that the property was substantially damaged by the sign before it could find for the plaintiff, was defective.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 143, 145-149; Dec. Dig. ⇨55(3).]

4. APPEAL AND ERROR ⇨1064(1)—REVERSAL—STATUTE—REVERSIBLE ERROR.

In view of Rev. St. 1909, § 1850, providing that error not affecting substantial rights shall be disregarded, and section 2082, providing that the case shall not be reversed except for error materially affecting the merits of the action, in an action by a landlord to recover for damages done to his interest in the property by a chewing gum sign, painted on the outside wall by permission of the tenant, where the fact that plaintiff's property was substantially damaged was established by the jury under proper instruction on the measure of damages, omission, in an instruction undertaking to cover the entire case and direct a verdict for plaintiff, of the requirement that the jury find that the proper-

ty was substantially damaged was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇨1064(1); Trial, Cent. Dig. § 525.]

5. APPEAL AND ERROR ⇨1068(1)—REVIEW—REVERSIBLE ERROR.

In an action by a landlord against a third party for damages caused by a chewing gum sign, painted on an outer wall by authority of the tenant, where the jury found that the sign did substantial damage to the freehold, an instruction that the tenant did not have authority to authorize or grant to defendant a permission to paint a sign on said premises, although not accurately drawn to indicate that it referred to the sign involved in the case did not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. ⇨1068(1); Trial, Cent. Dig. §§ 525, 526.]

6. APPEAL AND ERROR ⇨1068(4)—REVIEW—HARMLESS ERROR.

Where the jury returned no punitive damages against the defendant, error in an instruction authorizing a recovery of punitive damages was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⇨1068(4); Trial, Cent. Dig. § 558.]

7. LANDLORD AND TENANT ⇨55(3)—EVIDENCE—ADMISSIBILITY.

Evidence tending to show that the value of the property was substantially damaged immediately upon the painting of the sign was admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 143, 145-149; Dec. Dig. ⇨55(3).]

8. LANDLORD AND TENANT ⇨55(3)—INJURY TO FREEHOLD—EVIDENCE—ADMISSIBILITY.

Evidence that after the sign had been painted another building was placed on the lot, which covered up the sign, was properly excluded, since the measure of plaintiff's damages is the difference between the value of the property before and immediately after the sign was placed thereon, and any subsequent action of any person would be immaterial.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 143, 145-149; Dec. Dig. ⇨55(3).]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Suit by the Kretzer Realty Company against the Thomas Cusack Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bishop & Cobb, of St. Louis, for appellant. Richard A. Jones, of St. Louis, for respondent.

THOMPSON, J. This was a suit brought to recover alleged damages to plaintiff's fee or reversionary interest in the real estate known as 3028 Locust street, St. Louis, Mo., for the painting of a large sign thereon by defendant. The case was tried before a jury, resulting in a verdict for plaintiff in the sum of \$175 actual damage and no punitive damages. Judgment being rendered thereon, defendant perfected its appeal to this court.

Plaintiff was the owner of the fee to the property known as 3028 Locust street on October 11, 1912, and had been the owner of it

for a long time prior to that date, and was still the owner of it at the time of the trial. For possibly a year prior to October 11, 1912, the entire building known as number 3028 Locust street had been rented by the plaintiff through its agent to a Mrs. Mez for a boarding or rooming house. Mrs. Mez was the tenant in possession of the property, and occupied the entire building as a boarding or rooming house on October 11, 1912, and had been for possibly a year before, and continued to be until the trial of this case in May, 1914. She had, during all of that time, about three years, been paying \$35 per month for the premises. These premises consisted of a lot and a three-story brick building located on the south side of Locust street, setting back about 6 feet from the street, and surrounded by business houses and other residences. During October, 1912, there was a vacant lot immediately west of this building, making the west wall visible from Locust street. Prior to October, 1912, Mrs. Mez, the tenant, had displayed a sign, advertising rooms and board for rent. This appeared upon the front of the building, but whether it was painted thereon or contained on a card sign the evidence is not clear.

On October 3, 1912, Mrs. Mez, the tenant, gave to the defendant, in the form of a lease, permission to paint an advertising sign on the west wall of the building. This was a blank wall, containing no windows, and had never theretofore been painted. It seems that, pursuant to this written permission or authority, the defendant, between October 11th and October 14, 1912, painted an advertising sign on the west wall of this building, advertising a certain brand of chewing gum, and the sign covered the entire wall, which was 40 feet in height and 30 to 35 feet in length. After the painting of this sign had commenced by the defendant, and before it was completed, the plaintiff wrote a letter to defendant, complaining of the defacement by it of the wall. The plaintiff offered evidence intended to show that this letter was received by the defendant before the sign was completed, and that a representative of the defendant immediately called upon the plaintiff in response to this letter. The representative said that he would look into the matter, but plaintiff's evidence further tends to show that after the writing of the letter, and after the conference with the defendant's representative, the defendant continued to paint the sign, and completed it on October 14th. The defendant's evidence tended to show it received the letter written by the plaintiff on October 14th, after the painting of the sign was finished. The plaintiff offered evidence to the effect that the painting of the sign upon the building immediately reduced its value, and therefore damaged it to the extent of \$500 or \$600; whereas the defendant offered evidence that the painting of the sign upon the building was a benefit to the property. The evidence does

not disclose the character of the tenancy of Mrs. Mez, and we are unable to tell from a careful reading of the records whether she was a tenant from month to month or a tenant under lease for a term of years.

The court gave the following instructions to the jury at the instance and request of the plaintiff:

"(1) The court instructs the jury that if you find from the evidence plaintiff, on and subsequent to the 1st day of October, 1912, was the owner of premises and building No. 3028 Locust street in the city of St. Louis, and that on or about the 11th day of October, 1912, defendant, Thomas Cusack Company, by or through its workman or agents, without the consent or authority of plaintiff, caused to be placed on the west wall of said building a painted sign, your verdict will be in favor of plaintiff against defendant for such amount as you may find under the other instructions and the evidence plaintiff is entitled to recover.

"(2) The court instructs the jury that, under the evidence in this case, Mrs. T. Mez, the tenant of the property No. 8028 Locust street, did not have authority to authorize or grant to defendant permission to paint a sign on the wall of said premises; and, if you find from the evidence plaintiff to have been the owner of said property during the month of October, 1912, and that while such owner, defendant, by or through its servants or agents, without authority or consent of plaintiff, caused to be painted on the west wall thereof sign described in evidence, then your verdict will be in favor of plaintiff and against defendant for such sum as you may find it entitled to recover under the other instructions.

"(3) If the jury find from the evidence under the other instructions in favor of plaintiff, then you will assess in its favor against defendant such, if any, damages as you may believe from the evidence has been done the property of plaintiff by reason of having painted the sign described in evidence; that is, to what extent, if any, said property has been injured or lessened in value by having said sign painted thereon."

The defendant complained to the giving of each of these instructions on the part of the court.

The defendant's contention is that a tenant in possession of a building has the exclusive right to the use of the outer wall for advertising purposes, and to permit others to use them, if not prohibited by the terms of the tenancy. The leading case upon this subject is *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388, and the court there says:

"Now, it will hardly be contended that the outside wall of a store or house is not essential for the reasonable and proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side; and the removal of the wall removes both sides. If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property. * * * If the lessee deems it more advantageous to employ the walls for advertising the goods or the business of others, receiving payment therefor, than to advertise or expose his own goods upon the wall, it is none of the landlord's business, unless he has restricted and forbidden such use of the premises, or inserted in his lease a covenant against the subletting of them. It would be singular if a landlord, who had leased a building for the

purposes of trade, might occupy the outer walls of the same building for displaying the advertisements of a rival trader; but this result might very probably follow if the lessee might not control the use of the exterior walls."

In *Fuller & Bagley v. Rose*, 110 Mo. App. 344, loc. cit. 347, 348, 85 S. W. 981, 982, the court says:

"In the absence of stipulation to the contrary, the lessee of a building to be used for business purposes acquires, under his lease, title to the whole of the building, including both sides of the outer walls, which, of course, gives him the exclusive right to use the walls for all legitimate purposes, including that of advertising. *Riddle v. Littlefield*, 53 N. H. 503 [16 Am. Rep. 388]; *Baldwin v. Morgan*, 43 Hun (N. Y.) 355; *McAdams on Landlord and Tenant*, § 442; *Witte v. Quinn*, 38 Mo. App. 681. * * * It has been said by some authorities that tenants in buildings of this character, whose rooms are inclosed by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from universal custom—a mere incident to, not a parcel of, the demised premises—and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case, the ownership of the walls remaining in him, he may use their outside surfaces for purposes of revenue."

In *Lowell v. Strahan*, 145 Mass. loc. cit. 9, 12 N. E. 404, 1 Am. St. Rep. 422, the landlord sued the tenant to recover money which the tenant had received from persons to whom the tenant had given a license to place signs on the outer wall of the building. The premises occupied by the tenant consisted of the first floor and front part of the basement. The tenant had given permission to other parties to paint signs on the walls of the first floor. The court said:

"In the case at bar, the words of description naturally include the premises in question, the outer walls. It is plain that the lease grants not merely an interest in the walls, like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for the purposes of business. That right is exclusive. The landlord has no right to use or to let it for such purposes. From the mere demise, without regard to special provisions of the lease, there is no reason that the landlord should be regarded as having rights in the outside different from what he has in the inside of the wall. * * * We can see nothing in the nature of the estate granted, therefore, that should prevent the outer wall from being included as parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of the premises, if the description was doubtful. * * * It is contended that the agreement of the defendant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, was a breach of the covenant * * * not to underlet any part of the premises. But this was a license, and not a lease. It was permission to do a particular act, namely, to affix a sign to the wall, and gave no authority to do any other act upon the premises."

In the case of *Jeanette Fischer Forbes v. John J. Gorman et al.*, 159 Mich. 291, 123 N. W. 1089, 25 L. R. A. (N. S.) 318, 134 Am. St. Rep. 718, the Supreme Court of Michigan,

in speaking of the right of tenant to paint signs on the outside of the property, said:

"The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, including the outer as well as the inner walls. Such lessee obtains the right, in the absence of restrictions, to use such premises, including the walls, for all purposes not inconsistent with the lease. He acquires the right to the use of the outer walls, and can put any sign or signs thereon which work no injury to the freehold. The landlord in such a lease retains no right to permit signs or advertisements of other parties to be placed upon the outside walls of the leased building."

To the same effect are the following cases: *Broads v. Mead*, 159 Cal. 765, 116 Pac. 46, Ann. Cas. 1912C, 1125; *Salinger v. North American Woolen Mills*, 70 W. Va. 151, 73 S. E. 312; 24 Cyc. 1047; *Baldwin v. Morgan*, 43 Hun (N. Y.) 355, loc. cit. 357; *O'Neill v. Manget*, 44 Mo. App. 280; *Witte v. Quinn*, 38 Mo. App. 681. In *McAdams on Landlord and Tenant*, vol. 2, p. 1521, it is said:

"Where a room in a house is rented for occupancy, it does not include the right to occupy the outer walls with signs and advertisements, but when a part of a house, and especially the principal room, is rented as an office for carrying on a professional business as a store, the lease carries with it the right to occupy the walls or other places of the portion rented with signs, calling attention to the lessee's business in the ordinary way. In other words, where a tenant hired a house or rooms for residential purposes, there is no implied authority to put up signs, but where the renting is for business purposes, it is to be presumed that the name and business of the occupant are to appear on the walls of the house; such being the universal custom."

[1] From the above authorities it is therefore plain that the tenant in possession is entitled to the use of the outside of the walls, just as he is entitled to the use of the inside of the walls, and can delegate that use to a third person, and the landlord has no right to the use of the walls for himself, nor to grant to others the permission to use the walls, but the above authorities, as is clearly pointed out in the case of *Jeanette Fischer Forbes v. John J. Gorman et al.*, 159 Mich. 291, 123 N. W. 1089, 25 L. R. A. (N. S.) 318, 134 Am. St. Rep. 718, supra, also clearly establish the rule that the tenant in possession of the property cannot so use the outer wall as to injure the freehold, nor can he use them for a purpose inconsistent with the lawful and reasonable enjoyment of the property.

[2] We believe that in a proper case it might, with much force, be contended as a matter of law that a tenant of a dwelling house, used as a boarding house, could not grant to a third person the privilege of painting a chewing gum sign covering one entire side thereof, because it would be a use of the wall inconsistent with the lawful and the reasonable enjoyment of the property, but as to this we do not rule in this case. But even if that were so, as a matter of law, still in this case the defendant, a third party, would only be liable to the plaintiff in the

event that by the painting of said sign the freehold was damaged, because it is only trespass resulting in substantial damage to the freehold which gives the right of action in the landlord when a tenant is in possession. If a tenant has permitted a third person to unlawfully use a part of the premises, the landlord would have, as between him and the tenant, the right to terminate the tenancy, but the owner or landlord only has a right of action against a third party in the event the freehold is substantially damaged, and so, even though it is an unwarranted or unreasonable use of the premises for a tenant of a dwelling house, operating a boarding house therein, to cover one entire side of the house with a chewing gum sign, if the tenant permitted a third party to paint the sign, the third party is only liable to the owner in the event the sign has done substantial damage to the freehold, and, of course, the sign has done substantial damage to the freehold if immediately upon the placing of the sign upon the building the value of the property materially declines in a substantial amount. But, irrespective of this, the jury by its verdict found that the sign in question did material substantial damage to the freehold. It is plain under the above authorities that the tenant had no authority to so paint a sign on the west wall of the building as to do material damage to the freehold, and it follows that the tenant had no authority to permit others so to do, and the defendant was therefore liable to the owner for the substantial damage it did to the freehold by the painting of the sign.

[3, 4] Instruction No. 1, given for the plaintiff, undertook to cover the entire case and direct a verdict. The instruction is defective, we believe because it did not expressly require by its terms for the jury to find that the property was substantially damaged by the sign before it could find for the plaintiff and against the defendant. We are not unmindful of that class of cases holding that an instruction, which attempts to cover the whole case and direct the verdict, must include every fact necessary to a recovery (*Hall v. Manufacturers Coal & Coke Company*, 260 Mo. 351, 168 S. W. 927, Ann. Cas. 1916C, 375; *Ghio v. Schaper Bros. Mercantile Company*, 180 Mo. App. 686, 163 S. W. 551; *Walker v. White*, 192 Mo. App. 13, 178 S. W. 254; *Wilks, by Next Friend, v. St. Louis & San Francisco R. R. Co.*, 159 Mo. App. 711, 141 S. W. 910), yet, we believe that, in a case like this, where every fact necessary to a recovery is incorporated in the instruction, except the fact that the jury should further find that the property was substantially damaged, and that fact is established by the verdict of the jury, under a proper instruction on the measure of damage, the omission should not be considered reversible error. Every other fact necessary to a recovery by the plaintiff and against the defendant was incorporated in

the instruction, and the instruction ought to have told the jury that they must further find that the freehold had been substantially damaged to have been in accord with the above authorities; but, inasmuch as the jury found in its verdict that the property was substantially damaged, we are at a loss to see how the omission could possibly constitute reversible error. So far as this case is concerned, it is an established fact that the freehold was damaged by the painting of the sign to the extent of \$175, a substantial sum. If at the trial of the case the counsel for the defendant had admitted that by the painting of the sign the freehold was substantially damaged, the instruction would not have been defective in failing to tell the jury that before they could return a verdict for the plaintiff, they must find that the property was substantially damaged. If this be true, when the fact is admitted, certainly the omission would not constitute reversible error, when the fact be found by a jury under a proper instruction on the measure of damages. Believing, as we do, therefore, it is our duty, under sections 1850 and 2082, Revised Statutes of Missouri 1909, to disregard the defect in said instruction.

[5] The second instruction given for the plaintiff told the jury that Mrs. Mez, the tenant, did not have authority to authorize or grant to defendant permission to paint a sign on the wall of said premises. This instruction must, of course, be taken to refer to the sign involved in this case, a sign which the jury found did substantial damage to the freehold. Viewed in this light, while the instruction, perhaps, was not accurately drawn, we do not believe that the giving of it constitutes such error as requires the reversal of this case. The instruction ought also to have required the jury to find that the freehold was substantially damaged, but what has been said above with reference to instruction No. 1 applies here, inasmuch as the jury found that there was substantial damage under these two instructions, both of which expressly refer to the instruction on the measure of damage. The court at the instance of defendant gave an instruction to return a verdict for nominal damage in the event that no damage was done to the property by the painting of the sign. With this instruction on behalf of the defendant and instruction No. 3 on behalf of the plaintiff, the jury found that the property had been substantially damaged.

[6] The defendant also complained of an instruction given on behalf of the plaintiff, authorizing a recovery of punitive damages; but, inasmuch as the jury returned no punitive damages against the defendant, it has no cause for complaint in this respect.

[7] The defendant complains because the court admitted, over its objection, evidence tending to show that the value of the property was decreased by the sign, because its rental

value would be decreased. We think that there was no error in allowing this evidence, or any other evidence which would tend to show that the value of the property was substantially decreased immediately upon the painting of the sign. In fact it appears that the defendant's theory of damages, in the event that plaintiff was entitled to recover, was the difference in value of the property immediately before the sign was painted and immediately after the sign was painted, and any evidence directed to that subject at that time, tending to show those values, was competent evidence.

[8] The defendant also offered evidence that after the sign had been painted, another building was placed on the lot immediately to the west of the property involved in this case, which covered up the sign. This evidence was excluded, and defendant complains of it. This evidence, we believe, was properly excluded. When the sign was placed upon the building, it was either immediately damaged or it was not damaged. If it was immediately damaged and declined, then the plaintiff would be entitled to recover the difference between the value of the property before and after the sign was placed thereon. Any subsequent action of any person which would either increase the value of the property or decrease the value of the property would be immaterial, because the measure of damage is to be determined between the values of the property at the time of the act complained of. Finding no reversible error, the judgment of the circuit court is affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

ISRAEL v. WABASH R. CO. (No. 11373.)
(Kansas City Court of Appeals. Missouri.
April 3, 1916. On Rehearing, Dec. 18, 1916.
Further Rehearing Denied Dec. 29, 1916.)

1. PLEADING \S 64(2) — DUPLICITY — JOINDER OF CAUSES OF ACTION — ORDINARY NEGLIGENCE AND VIOLATION OF ORDINANCE.

In a count in an action against a railroad for personal injury, based on the negligent moving of its cars so as to close an opening at a crossing, without warning, the pleading of an ordinance against the blocking of the crossing and the violation thereof did not state a separate cause of action, but merely an unauthorized act by which plaintiff was induced to leave the street and attempt to go through the opening in the cars, merely pleaded to show that under the circumstances he was not a trespasser but an invitee, did not render the count bad for duplicity in joining different causes of action in one count; since, where the several specifications of negligence are of the same general nature, either or all of which may have caused the injury, they may be joined in one count.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 134-137; Dec. Dig. \S 64(2).]

2. PLEADING \S 64(2) — DUPLICITY — JOINDER OF CAUSES OF ACTION — ORDINARY NEGLIGENCE AND HUMANITARIAN RULE.

The joinder in one count of defendant's negligent movement of its cars so as to close the

opening in the cars without warning to plaintiff, and an allegation of negligence under the humanitarian rule, did not render the count duplicitous, where the facts alleged to support such rule were not inconsistent or contradictory of the ordinary negligence in closing the opening without warning.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 134-137; Dec. Dig. \S 64(2).]

3. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—INSTRUCTIONS.

In an action for personal injury while crossing between an opening in freight cars alleged to have been closed without warning, wherein the petition alleged defendant's duty to "keep a watchful lookout for persons on said track at this point," but did not allege defendant's duty to place a man there, either on top of the cars or elsewhere, or that defendant failed to place a man there, and where the evidence showed that the brakeman was on the ground at the crossing, an instruction that, if defendant's servants caused the cars to close the opening without ringing the bell or sounding the whistle or giving any warning and "without having a lookout on the east end of said cars to warn persons of the intention to move said cars forward," the verdict should be for plaintiff, was prejudicial error, as though the jury might find that, even though defendant's servants were keeping a careful watch, yet if there was no one on top of the car the injury would not have occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

Johnson, J., dissenting.

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Cleo E. Israel, by guardian, Edward Israel, against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

J. L. Minnis, of St. Louis, J. M. Davis & Sons, of Chillicothe, and Jones & Conkling and G. C. Jones, all of Carrollton, for appellant. Paul D. Kitt and Frank W. Ashby, both of Chillicothe, for respondent.

TRIMBLE, J. This is a suit to recover damages for personal injuries sustained by Cleo Israel, a boy six or eight years old. It is claimed that, in going south on Brunswick street in Chillicothe, the boy came to the Wabash crossing and, finding it blocked by freight cars, waited about 30 minutes for the crossing to be cleared; that then, observing other persons crossing the railroad through an opening between the cars a few feet east of the street at a point where there was a path frequently used by pedestrians in traveling south across the railroad, the boy attempted to cross at that point; and that, while he was in the act of doing so, defendant's servants suddenly and without warning of any kind closed the opening in the cars by moving those on the street crossing against the cars standing east thereof, thereby knocking down and dragging the boy for a short distance and then cutting off his right leg close to the hip. The case was submitted to a jury, resulting in a verdict and

judgment for \$5,000, and defendant has appealed.

[1] Defendant, believing that plaintiff had improperly united several causes of action in one count of his petition, filed a motion to require plaintiff to elect, which was overruled. This is now assigned as error.

The several matters in the petition which defendant thinks are distinct and separate causes of action are as follows: (1) The violation of an ordinance of the city of Chillicothe forbidding the obstruction of a street crossing by a train for more than five minutes. (2) That while plaintiff was attempting to cross the railroad at the opening between the cars, defendant suddenly, and without ringing the bell or giving any signal or warning of any kind whatever, closed the opening by moving the west cars up against the others. (3) That the place where plaintiff attempted to cross was much used as a thoroughfare, and defendant's servants had no right to expect a clear track at that point, and the infant plaintiff's position in attempting to cross was a dangerous one, and his danger could and should have been seen by defendant's employes in time to have warned plaintiff and prevented the injury, and that they negligently failed to do so.

The gist of defendant's complaint on the point under consideration is that a cause of action based upon the violation of a city ordinance cannot be united with one based upon negligence under the common law. Without going into an exhaustive examination of all the decisions affecting this point, we may say that, under the later rulings of our Supreme Court, the mere fact that the petition in one count alleges the violation of an ordinance as one specification of negligence and some other act or omission of duty as another specification of negligence at common law does not, *ipso facto*, render the pleading bad. *White v. St. Louis, etc., R. Co.*, 202 Mo. 539, loc. cit. 559-561, 101 S. W. 14; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186; *Rapp v. St. Louis Transit Co.*, 190 Mo. 144, loc. cit. 153, 88 S. W. 865; *Haley v. Missouri Pacific Railroad*, 197 Mo. 15, loc. cit. 23, 93 S. W. 1120, 114 Am. St. Rep. 743; *Clark v. St. Joseph Terminal Railroad Co.*, 242 Mo. 570, loc. cit. 595, 596, 148 S. W. 472. The remarks made in other cases where a different rule seems to be announced must be construed solely with reference to the facts in each of such cases. A petition is not to be held duplicitous merely because it contains in the same count a specification of ordinance negligence and a specification of common-law negligence; but, when such a petition is held bad, it is because of other reasons pertaining to the nature and effect of the different specifications. For instance, because they relate to distinct, independent, and unconnected matters. *Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1149. Or because the

different specifications contradict each other, in which case the petition is a *felo de se* so to speak. But where the several specifications of negligence are "of the same general nature, all of which may be true, and either of which or all of which may have caused the accident or injury," they may be placed in one count of the petition. *Clark v. Railroad, supra*, 242 Mo. loc. cit. 596, 148 S. W. 472.

The petition in the case before us does not contain separate, distinct, and wholly unrelated matters or things contradictory of each other. In reality, the petition deals with but one matter as a cause of action and which is alleged to have caused the injury. That one matter is the negligent movement of the cars in closing the opening without giving a warning to plaintiff. It is true, the petition pleads the ordinance and the blocking of the crossing in violation thereof, but this is stated, not as a separate cause of action, but merely as an unauthorized act by which plaintiff was induced to leave the wagon road in the center of Brunswick street and attempt to go through the opening in the cars a few feet east thereof at the path hereinbefore mentioned. It is pleaded in order to show how plaintiff came to cross at the place he did and that under the circumstances he was not a trespasser, but, in a sense, was invited by the opening and the path, and the sight of others doing so, to use that point as a place of crossing. In other words, the violation of the ordinance was not pleaded, nor was it submitted as constituting, of itself and alone, the cause of plaintiff's injury, but merely as one of the circumstances joining with the others in producing it.

[2] We do not understand defendant as objecting to the mingling in one count of a specification of negligence under the humanitarian rule with a specification of ordinary negligence, since in the brief it is urged, in dealing with one of plaintiff's instructions, that a case under the humanitarian rule was not pleaded in the petition. However, if such inconsistent position is taken, we may say we see no reason why such pleading may not be made provided the facts supporting the two kinds of negligence are not inconsistent or contradictory of each other. *Clark v. Railroad*, 242 Mo. 570, loc. cit. 596, 598, 148 S. W. 472.

Whether the third above-mentioned specification of negligence properly states a cause of action under the humanitarian rule or not, it seems to us the allegations of the petition which appear to attempt to state such a cause may be considered as a part of the ordinary negligence alleged against defendant in moving said cars, because the allegations that the place where plaintiff attempted to cross was a thoroughfare, that the defendant had no right to expect a clear track there, that it was their duty to keep a watchful lookout when they started to close the opening, that when the boy got on the track

under the circumstances he was in a place of danger, and his position was such that the operatives of the train could have seen him and his danger, or might have seen him had they exercised care, in time to have warned him of the intended movement of said train and in time to allow said infant to reach a place of safety before being run over, can be considered as exemplifications of defendant's negligence in not warning, and in not taking precautions so as to be able to warn, plaintiff that the opening was going to be closed. In other words, as hereinabove stated, the petition may be, and we think should be, considered as pleading one cause of action, namely, negligence in closing the opening without warning when, under all the circumstances, the trainmen were bound to know that a warning was necessary in order to observe ordinary care.

We are therefore of the opinion that defendant's motion to elect was properly overruled, and hence we need not go into the question whether, as plaintiff claims, defendant waived the right to claim any benefit of said motion by answering to the merits after said motion was ruled upon.

[3] Complaint is made of plaintiff's instruction No. 1, in that it tells the jury, after requiring them to find that plaintiff attempted to cross at the place and under the circumstances which we have herein indicated, that if they find that defendant's servants in charge of the cars caused them to back up and move eastward, without ringing the bell, or sounding the whistle, or giving any signal or warning whatever of the starting and moving of said cars, and "without having a lookout on the east end of said cars to warn persons of the intention to move said cars forward," etc., then the verdict should be for plaintiff. The objection is to the words included in quotation marks.

We are of the opinion that the inclusion of these words worked prejudicial error. In the first place, while the petition alleged that it was the defendant's duty to "keep a watchful lookout for persons on said track at this point," it nowhere alleged that the defendant's duty was to place a man at the very spot in question either on top of the cars or elsewhere on the ground, nor did it allege that the defendant failed to place a man there. Indeed, the inference from the petition is that there was a man at some place where plaintiff could have been seen and warned, since it says the operatives of the train could and should have seen him, and would have done so had they exercised

ordinary care, but that they negligently failed to look. The evidence of the defendant was to the effect that one of the brakemen was on the ground at the street crossing just a few feet from where the plaintiff attempted to cross, but it was conceded by both sides that there was no one on top of the car at that point. Now, the instruction was so worded as to lead the jury to believe that the failure to place a man on top of the car was negligence for which plaintiff could recover regardless of whether the train operatives stationed elsewhere were duly watching and in the exercise of the care demanded of them. Under the instruction, the jury might well say the operatives were maintaining a careful watch, but, if there had been a man on top of the car at the east end thereof, the injury would not have occurred, and, since the court says it was negligence not to have a man there, and the defendant admits no one was there, the finding must be for plaintiff. And this would be the case although there was no allegation in the petition showing that proper watch could be maintained only by a man on top of the car, but facts were alleged which, by inference, showed that the operatives were where they could have seen plaintiff had they looked.

Complaint is also made of plaintiff's instruction No. 2. As the case will have to be retried anyway, it is not necessary to go into a discussion of the points raised against it, because the plaintiff can avoid all criticism now made against said instruction either by amending the petition or by changing the instruction.

The judgment is reversed, and the cause remanded.

ELLISON, P. J., concurs. JOHNSON, J., dissents.

On Rehearing.

An opinion, reversing and remanding the cause for error in an instruction, was handed down herein at the March term. A rehearing was granted, and the case again has been gone over and carefully considered. The result has been that we are now more than ever firmly convinced of the correctness of the former opinion, and the result therein reached is adhered to.

The judgment is therefore reversed and remanded.

ELLISON, P. J., concurs. JOHNSON, J., dissents.

STEINBRUEGGE v. PRUDENTIAL INS. CO. OF AMERICA. (No. 14526.)

(St. Louis Court of Appeals. Missouri. Dec. 80, 1916. On Motion for Rehearing, Jan. 16, 1917.)

1. LIMITATION OF ACTIONS \Leftrightarrow 180(2)—**PLEADING—DEMURRER.**

The statute of limitations can be invoked by special demurrer where the petition, on its face discloses that the action is barred, and nothing is pleaded as an exception relieving against the bar of the general statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 671; Dec. Dig. \Leftrightarrow 180 (2).]

2. LIMITATION OF ACTIONS \Leftrightarrow 177(2)—**PLEADING—AVOIDANCE OF BAR.**

If a cause of action is barred by the statute of limitations, except for an exception to the operation of the statute, plaintiff must plead the facts bringing the case within such exception.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 664; Dec. Dig. \Leftrightarrow 177 (2).]

3. JUSTICES OF THE PEACE \Leftrightarrow 91(1)—**PLEADING—TECHNICAL RULES.**

Under Rev. St. 1909, § 7412, providing that no formal pleadings by either party shall be required in a justice's court, etc., technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-309, 323; Dec. Dig. \Leftrightarrow 91(1).]

4. JUSTICES OF THE PEACE \Leftrightarrow 76—**PLEADING—STATUTE OF LIMITATIONS.**

Plaintiff's statement in justice court, showing his cause of action barred by the general statute of limitations, need not allege facts showing an exception to an operation of the statute in order to adduce proof of such facts.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 246; Dec. Dig. \Leftrightarrow 76.]

5. JUSTICES OF THE PEACE \Leftrightarrow 76—**PLEADING—LIMITATIONS.**

If defendant, in action before justice of the peace, wishes to raise the point that plaintiff's statement shows his cause of action is barred, he must do so either by pleading the statute relied on or by invoking the same in some appropriate manner at the trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 246; Dec. Dig. \Leftrightarrow 76.]

On Motion for Rehearing.

6. JUSTICES OF THE PEACE \Leftrightarrow 174(22)—**APPEAL—PLEADINGS—AMENDMENT.**

Where an action originates before a justice of the peace and is appealed to the circuit court, the sufficiency of the statement or petition, although amended in the circuit court after appeal, is to be determined by the requirements of the law applicable to statements filed before justices of the peace.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 688; Dec. Dig. \Leftrightarrow 174 (22).]

7. JUSTICES OF THE PEACE \Leftrightarrow 162(2)—**APPEAL—RULES OF PRACTICE.**

When a case is appealed from a justice of the peace to the circuit court, the general rules of practice in the circuit court govern.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 605; Dec. Dig. \Leftrightarrow 162 (2).]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by Annie Steinbruegge against the Prudential Insurance Company of America. From judgment for defendant, plaintiff appeals. Reversed and remanded.

James J. O'Donohoe, of St. Louis, for appellant. Fordyce, Holliday & White, of St. Louis, for respondent.

ALLEN, J. This is an action upon three "industrial policies" of insurance. The suit was instituted, on September 19, 1911, before a justice of the peace, where plaintiff prevailed. Defendant appealed to the circuit court, and, when the cause came on for trial there, defendant's counsel objected "to the introduction of any evidence under the petition on the ground that it shows on its face that the claim is barred by the statute of limitations." The court sustained this objection. Plaintiff's counsel then sought to make an offer of proof, but the court declined to permit him to do so; and, after a spirited colloquy between the court and plaintiff's counsel, plaintiff took an involuntary nonsuit with leave to move to set the same aside; and, after an unsuccessful motion to set aside the nonsuit, plaintiff duly perfected her appeal to this court.

The petition, or statement of plaintiff's alleged causes of action, is in three counts; each predicated upon one of the three policies sued upon. From the allegations thereof it appears that the three policies were issued by defendant in the city of St. Louis, one on April 8, 1895, another on July 8, 1895, and the third on April 5, 1897, insuring the life of one David Cahill, the brother of plaintiff; and that plaintiff sues upon the policies as being within the "facility of payment" clause contained in each thereof, alleging also that it was agreed by and between her and the defendant and the insured that the insurance would be payable to her. In each count it is averred that David Cahill, the insured, died on or about the 6th day of June, 1899, leaving no wife or child surviving him and no estate on which to administer. In each count it is further averred that, at the time of the death of the insured, he had duly performed all conditions in the policy by him to be performed; that within a few weeks after his death plaintiff notified defendant thereof, but that defendant failed and neglected to furnish blanks on which to make proofs of death until the year 1904; that on or about January 8, 1904, plaintiff duly furnished defendant with proofs of death and surrendered to defendant the policy of insurance sued upon in each count, and the receipt book showing the payment of premiums thereon, upon defendant's promise that each policy would be paid immediately; but that payment was not made, and that the policy and receipt book

were not returned until October, 1911. It is further alleged in each count that about the month of June, 1907, and again during the months of July and August, 1907, defendant disclaimed all liability under the policy sued upon, upon the sole ground that the insured was not dead, whereby, it is alleged, defendant waived the delay in filing proofs of death, and likewise waived all limitations as to the time within which suit might be brought on the policy; and that until June, 1907, defendant had led plaintiff to believe that it would pay the policy, and from time to time promised to do so. The prayer of the first count is for judgment for \$98, with interest, and for 10 per cent. thereof as damages and an attorney's fee of \$25 as for vexatious refusal of defendant to pay the amount of the policy. Such is likewise the prayer of the second count. The prayer of the third count is for \$168, with interest, with 10 per cent. thereof as damages, and an attorney's fee of \$25 as for vexatious refusal to pay.

Evidently the trial court sustained defendant's objection to the introduction of any evidence upon the theory that plaintiff's petition, or statement, shows upon its face that the demand was barred by the general statute of limitations applicable, and that, if plaintiff was relying upon some exception or exceptions such as would operate to relieve against the bar of the statute, it was plaintiff's duty to plead such exception or exceptions. Plaintiff (appellant here) asserts that her proof, had it been received, would have shown an exception or exceptions such as would have operated to prevent the bar of the statute—for one thing that plaintiff is a married woman, though this was not pleaded. And appellant further contends that the petition or statement does plead facts sufficient, if true, to relieve against the bar of the statute.

[1-3] It is quite true that the rule now established in this state is that the statute of limitations can be invoked by means of a special demurrer, where the petition, on its face, discloses that the action is barred, and nothing is pleaded as an exception relieving against the bar of the general statute; that, if the cause of action is such that the bar of the general statute may be obviated by some exception thereto, plaintiff must plead the facts bringing the case within such exception. See *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1066; *Garth v. Motter*, 248 Mo. loc. cit. 482, 154 S. W. 733. Whatever uncertainty as to this may have existed by reason of some of the earlier decisions of our Supreme Court is removed by the decision in *Burrus v. Cook*, supra. But in applying this doctrine the trial court must, we think, have overlooked the fact that the suit was one instituted before a justice of the peace, where the technical rules of pleading do not prevail. Our statute, namely, section 7412, Rev. Stat. 1909, provides that "no formal pleadings up-

on the part of either plaintiff or defendant shall be required in a justice's court," etc. This statute has time and again been considered and applied by our courts, and it has uniformly been held that technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice of the peace. See *Connelly v. Parrish*, 189 Mo. App. 1, 176 S. W. 546; *Dalton v. United Rys. Co.*, 134 Mo. App. 392, 114 S. W. 561. Numerous authorities might be cited in this connection, but to do so would be entirely useless. It has been repeatedly said that a very liberal rule is to be applied when testing the sufficiency of a statement filed before a justice of the peace; and that any statement is sufficient if it serves to reasonably apprise the opposite party of the nature of the claim asserted against him, and is sufficiently specific and definite to bar another action on the same demand. See *Connelly v. Parrish*, supra, 189 Mo. App. loc. cit. 4, 176 S. W. 546; *Dalton v. Railways Co.*, supra, 134 Mo. App. loc. cit. 395, 114 S. W. 561; *Rundelman v. Boiler Works Co.*, 178 Mo. App. 642, 161 S. W. 609; and authorities to which these cases refer.

In *Connelly v. Parrish*, supra, it is said:

"Justices' courts are popular tribunals before which ordinary disputes can be adjusted without the aid of attorneys; and it would defeat the end of their organization if the rules of practice and pleading found necessary in courts of record were applied to their proceedings."

In *Van Cleave v. St. Louis*, 159 Mo. loc. cit. 579, 60 S. W. 1091, it is said:

"In favor of that popular tribunal which has been characterized as 'the people's court,' where those unacquainted with the technical rules and forms of pleading may and do go, without counsel, to settle and adjust their differences, this court has ever held that the requirements of the statute have been met and fulfilled, when the statement filed with the justice, however informal and awkward in expression, was sufficient to reasonably advise the opposite party of the nature of his or her claim, and sufficiently specific to be a bar to another cause of action, with the further qualifications suggested in some of our cases, as to the first test, that resort may be had to reasonable implication to support the statement."

[4] Granting that plaintiff's statement of her cause of action shows that the general statute of limitations had run against her claim unless she could establish facts showing some exception operating to relieve against the bar thereof, is it necessary for her to plead such exception in order that the statement be sufficient as a pleading in a cause originating before a justice of the peace? We think not. The statement on file fully advises the defendant of the nature of the claim asserted against it, and is sufficiently specific to bar another action on the same demand. Nor do we think that it can be said that it wholly fails to state a cause of action—when measured by the standard by which it must be here tested—because of the fact, if true, that it shows that the general statute of limitations has run against

the cause of action unless there is some exception thereto within which the case may fall when the evidence is adduced. The statement does not conclusively show that the cause of action is barred by the statute of limitations. As said in *Burrus v. Cook*, supra, there are many exceptions which will relieve against the bar of the statute; and it would seem to be contrary to the entire spirit of our law respecting proceedings before justices of the peace to hold that a plaintiff is bound to observe a technical rule of pleading requiring one or more of such exceptions to be pleaded, in order that the statement may be sufficient in law. As suggested, there was at one time some uncertainty, at least, as to the rule in this state on the subject, and it is not followed in some of the states. It appears not to have been the original common-law rule, but that which prevailed in equity and which was generally adopted in the Code states. See 25 Cyc. 1394, 1395. A layman instituting his own action before a justice of the peace could not be expected to know of the existence of the rule of pleading invoked and relied upon by respondent. Nor do we think that the law contemplates that he is to be held to be precluded from showing that his case is within an exception to the statute by failing to observe such rule.

There appears to be a wide distinction between a case such as this, where the statute involved is presumably the general statute of limitations, and one where the statement shows upon its face that the action is barred by a special statute of limitations governing it, which is absolute and without exception. But whether a defendant could invoke such a statute in the precise manner in which defendant here attempted to invoke the general statute, we do not decide. *Revelle v. St. Louis, I. M. & S. Ry. Co.*, 74 Mo. 438.

[5] It is suggested by appellant's counsel that the objection interposed by defendant, and which the court sustained, was one in the nature of a demurrer; and that a demurrer is a thing unknown in proceedings in cases instituted before a justice of the peace. And it is further suggested that if a defendant be permitted to take advantage of the statute in this manner, where the action originated before a justice of the peace, then he should be required to specify the particular statute upon which he relies, as he would if demurring in an action begun in the circuit court. *Knisely v. Leathe*, 256 Mo. loc. cit. 359, 166 S. W. 257. But we need not here give consideration to these suggestions.

We are of the opinion that plaintiff filed a sufficient statement of her cause of action, invulnerable to the attack made upon it; that she is privileged to adduce proof at the trial, if she can, going to show the existence of some such exception or exceptions as will relieve against the bar of the statute of limitations; and that, on the other hand, if defendant wishes to raise the point in question, it must do so by either pleading the statute upon which it relies or by invoking the same in some appropriate manner at the trial.

For the reasons indicated, we ruled that the trial court erred in sustaining defendant's objection and thereby forcing plaintiff to a nonsuit; and it becomes unnecessary to discuss other questions adverted to in the briefs.

The judgment is reversed, and the cause remanded.

REYNOLDS, P. J., and THOMPSON, J., concur.

On Motion for Rehearing.

ALLEN, J. Respondent insists that in our opinion filed herein we inadvertently overlooked the fact:

"That the petition before the court for consideration in this case is not a statement filed in the justice court, but an amended petition filed in the circuit court after appeal from the justice court."

[6, 7] It is true that the statement or petition which we had under consideration was not the original statement filed before the justice of the peace, but was an "amended petition" filed by plaintiff after the case reached the circuit court. We did not overlook this, but deemed it unnecessary to state that where an action originates before a justice of the peace, and is appealed to the circuit court, the sufficiency of an amended statement or petition in the circuit court is to be determined by the requirements of the law applicable to statements filed before justices of the peace. See *Conn Company v. Orr et al.*, 150 Mo. App. 705, 131 S. W. 765. When a case is appealed from a justice of the peace to the circuit court, the general rules of practice in the latter court govern, but not the rules of pleading applicable to causes originating therein. See *Wendleton v. Kingery*, 110 Mo. App. 67, 84 S. W. 102. As to matters of pleading, the case remains one wherein no formal pleadings are required, and the rule is not altered by the fact that an amended statement is filed in the circuit court.

With the concurrence of the other Judges, the motion for a rehearing is overruled.

GRIFFITH v. GRIFFITH. (No. 12204.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)1. DIVORCE \Leftrightarrow 240(2)—ALIMONY—ESTATE OF HUSBAND.

A gift of a note by a husband to his sister on the eve of separation from his wife, obviously done for the purpose of reducing alimony, should not be listed as a liability in determining his estate for the purpose of fixing the amount of alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 676, 680; Dec. Dig. \Leftrightarrow 240(2).]

2. DIVORCE \Leftrightarrow 306—ALIMONY—MAINTENANCE OF CHILD.

In a wife's action for divorce, in which plaintiff has been adjudged the innocent and injured party and has been awarded custody of a minor child, whether alimony in gross or monthly alimony be allowed, such amount should include an allowance for the maintenance of the child, and plaintiff should not be compelled to resort to a separate action to enforce the father's common-law duty to support his child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. \Leftrightarrow 308.]

3. DIVORCE \Leftrightarrow 240(5)—ALIMONY—AMOUNT.

In a wife's action for divorce, where plaintiff was awarded custody of a minor child, if alimony in gross be awarded including maintenance of the child, an amount equal to a moiety of defendant's net worth of \$3,000 would not be excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 678, 680; Dec. Dig. \Leftrightarrow 240(5).]

4. DIVORCE \Leftrightarrow 240(4) — ALIMONY — SUFFICIENCY.

Where a wife was awarded a divorce and custody of a minor child, it appearing that defendant's net worth was \$3,000 and his net annual income \$900 an allowance of \$20 per month without allowance for the maintenance of the child was inadequate and not a reasonable judicial expression of the discretion vested in the trial court, and should be at least \$30 per month.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 678; Dec. Dig. \Leftrightarrow 240(4).]

Error to Circuit Court, Bates County; C. A. Calverd, Judge.

"Not to be officially published."

Suit for divorce by Hanna Griffith against Lawrence M. Griffith. From a judgment awarding plaintiff \$20 per month alimony without allowance for maintenance of a minor child, plaintiff brings error. Reversed and remanded.

Smith & Chastain, of Butler, for plaintiff in error. Silvers & Dawson, of Butler, for defendant in error.

JOHNSON, J. The parties were married in 1901, and lived together as husband and wife until July 7, 1914, when they separated, and plaintiff, with their infant daughter, returned to her father's home, where they have since resided.

On August 31, 1914, plaintiff brought her suit in the circuit court of Bates county for a divorce and for the custody of the child. She also prayed for temporary and permanent alimony for the support of herself and

child. The court awarded a divorce and the custody of the child to plaintiff and allowed her suit money in the sum of \$100, but refused to make any allowance for permanent alimony. On proceedings in error, prosecuted by plaintiff from the judgment touching alimony, we said:

"We cannot give our sanction to the conclusion that plaintiff is entitled to no alimony for the support of herself and minor child. * * * Where the wife secures a decree of divorce, she is entitled to a judgment for alimony regardless of the * * * willingness of her kin and friends to come to her aid. This liability of the husband arises out of his legal obligation to support her and could not be destroyed or lessened by his own culpable conduct which gave her ground for divorce. It was the duty of the court to make her a reasonable allowance out of defendant's estate, small as it is, and not to leave her dependent upon the generosity of her father."

And we reversed the judgment and remanded the cause for further proceedings in accordance with the views expressed. Griffith v. Griffith, 180 S. W. 411.

Pursuant to this decision, the learned trial judge heard evidence relating to the issue of alimony, and on April 5, 1916, rendered judgment:

"That plaintiff have and recover of and from defendant the sum of \$20 each month hereafter until the further order of the court."

No allowance was made for the support and maintenance of the child. Deeming this judgment inadequate, plaintiff again brought the case to this court by writ of error.

The parties live at Rich Hill, where defendant owns a two-story brick business building and a half interest in a grocery store which appears to be doing a safe and profitable business. The building is worth \$3,800, and the net value of defendant's half interest in the grocery business may be safely estimated at \$1,700. The building has been continuously occupied by a tenant for the past ten years at a rental of \$50 per month which is its reasonable rental value. The profits of the grocery business, of course, vary to some extent; but we gather from all the evidence that the average annual profit will not fall below \$1,000. Defendant has no other sources of income and, as a result of years of dissipation, appears to have become incapacitated from pursuing any useful and profitable vocation. He owns two shares of stock in a corporation which owns and operates a live stock ranch in Kansas, but these shares have produced no dividends and their value does not exceed \$840. Defendant therefore owns property worth approximately \$6,300, which produces and may be relied upon to produce a gross annual income to him of \$1,100.

[1] He owes a note of \$750, which with accrued interest amounts to \$900, and which is secured by a deed of trust on the building; a note of \$1,000 to his mother, on which the accrued interest is \$780; another interest-

bearing note of \$250; and still another of \$100 making a total of \$3,030 including accrued interest of interest-bearing obligations. In addition, he owes \$300 on account of this case. On June 12, 1914, on the eve of separation from his wife, he executed a note of \$900 to his sister as a gift, but this was done for the obvious purpose of reducing alimony and should not be listed as a liability. *Stone v. Stone*, 18 Mo. 389; *Hach v. Rollins*, 158 Mo. 182, 59 S. W. 232; *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605.

[2-4] On this showing it is reasonable to figure defendant's net worth at \$3,000 and his net annual income at \$900. Considering the facts that plaintiff has been adjudged the innocent and injured party, has been awarded the custody of the child, and is praying in her petition for alimony for herself and for the maintenance of the child, we think whether alimony in gross, or monthly alimony, be allowed, such amount should include an allowance for the maintenance of the child, and that plaintiff should not be compelled to resort to a separate action or actions to enforce this father's common-law duty to support his child. If alimony in gross be awarded, an amount equal to a moiety of defendant's net worth would not be excessive. *McCartin v. McCartin*, 37 Mo. App. 471; *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400; *Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579; *Smith v. Smith*, 192 Mo. App. 99, 180 S. W. 568. And if the court should deem it more just and expedient to allow monthly alimony for the support of plaintiff and her child, we are of the opinion that a total allowance of less than \$30 per month would not be reasonable.

We regard the present judgment as not a reasonable judicial expression of the discretion vested by law in the trial court, and reverse the judgment, and remand the cause for further proceedings in accordance with the views expressed. All concur.

MUNROE et al. v. DOUGHERTY et al. (No. 14520.)

(St. Louis Court of Appeals. Missouri, Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. JUDGMENT \S 92—"DEFAULT JUDGMENT"—DEFAULT IN APPEARANCE.

In an action on a note before a justice court in which defendants, after judgment, appealed to the circuit court, a judgment of that court against defendants because of their failure to appear and upon plaintiff's waiver of a jury and the hearing of evidence was not a "default judgment."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. \S 92.

For other definitions, see Words and Phrases, First and Second Series, Default Judgment.]

2. JUDGMENT \S 143(2)—DEFAULT—SETTING ASIDE—GROUNDS.

To justify a trial court in setting aside a judgment by default, it is necessary for the mov-

ants to show that they had good reason for failing to appear when judgment was rendered, and that they had meritorious defenses.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 270; Dec. Dig. \S 143(2).]

3. APPEAL AND ERROR \S 957(1)—JUDGMENT \S 139—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT JUDGMENT—REVIEW.

The matter of setting aside a default judgment is largely in the discretion of the trial court, and the Court of Appeals can only interfere where it clearly appears that the trial court has abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. \S 957(1); Judgment, Cent. Dig. §§ 265-268; Dec. Dig. \S 139.]

4. APPEAL AND ERROR \S 957(2)—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT—MISUNDERSTANDING AS TO EMPLOYMENT OF COUNSEL.

The Court of Appeals could not say that the circuit court abused its discretion in failing to set aside its judgment for plaintiff on defendants' appeal rendered on defendants' failure to appear, where it did not fully or reasonably appear from defendants' motion that they were warranted in believing that they had employed counsel to look after their interest, or that they had good reason for not appearing at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. \S 957(2).]

5. JUDGMENT \S 143(10)—DEFAULT JUDGMENT—FAILURE TO APPEAR—NEGLECT OF COUNSEL.

If defendants appealing from a judgment for plaintiff had employed an attorney to appear for and represent them and he had neglected to look after the case, his neglect would have been their neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 281; Dec. Dig. \S 143(10).]

6. JUDGMENT \S 143(7)—DEFAULT JUDGMENT—SETTING ASIDE—MISUNDERSTANDING AS TO EMPLOYMENT OF COUNSEL.

A defendant cannot ordinarily procure the setting aside of a judgment against him on the ground of a mistaken belief that he has obtained an attorney to protect his interests, but he must see to it that the attorney understands and accepts the retainer; otherwise his failure to personally see to the case is inexcusable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 276; Dec. Dig. \S 143(7).]

7. APPEAL AND ERROR \S 429—NOTICE OF APPEAL—WAIVER—JURISDICTION OF APPELLATE—STATUTE.

Rev. St. 1909, § 7584, providing that, where appellant fails to give notice of appeal at least ten days before the second term of the appellate court after the appeal is taken the judgment shall be affirmed or the appeal dismissed at the option of the appellee, does not deprive the appellee of the right to waive notice of appeal and enter his appearance in the circuit court and of having the cause tried de novo, since the purpose of serving notice of appeal is to confer jurisdiction on the circuit court over the person of the appellee, and, if such jurisdiction is given by waiver of notice and entry of appearance, it has such jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. \S 429.]

8. JUSTICES OF THE PEACE \S 188(2)—APPEAL—TRIAL DE NOVO—STATUTE.

Under Rev. St. 1909, § 7579, providing that upon the return of the justice being filed in the clerk's office the court shall be possessed of the cause and shall proceed to hear and determine it anew without regarding any error in the orig-

inal summons or the service thereof, or in the justice's proceedings, and where appellee, by appearance, has waived the notice of the appeal required by section 7584, the circuit court, upon the failure of the appealing defendants to appear, having jurisdiction of the cause and of the parties, was required to hear the appellee's evidence and to render judgment thereon, and was not bound to dismiss the appeal or to affirm the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 723; Dec. Dig. ¶188(2).]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by O. M. Munroe, continued after his death pending the appeal by Robert B. Munroe and another, administrators, against James P. Dougherty and others. Judgment for plaintiffs, motion to set aside judgment overruled, and defendants appeal. Affirmed.

W. G. Carpenter, of St. Louis, for appellants. Joseph L. Hornsby, of St. Louis, for respondents.

THOMPSON, J. This was an action on a promissory note brought by O. M. Munroe against the defendants. The plaintiff had judgment in the circuit court, and upon a motion to set aside said judgment being overruled, defendants appealed. The note sued on is in words and figures as follows:

"\$ 16 (Red)

\$385

Fenton, Mo., Sept. 22, 1904.

\$401 (Red)

"Six months after date I promise to pay to O. M. Munroe, of Jefferson County Bank of De Soto, Mo., or order, three hundred eighty-five dollars, for value received, with interest from date at the rate of 8 per centum per annum until paid, and I agree to pay same at Jefferson County Bank of De Soto, Mo.

"Principal: James P. Dougherty.

"Securities: O. Dougherty.

E. J. Dougherty."

This suit was instituted on the above promissory note before a justice court in St. Louis, Mo., and judgment was rendered in said court in favor of the plaintiff and against all of the defendants on October 6, 1913, at which time all of the defendants appeared in person and by their attorney. Thereafter, on the 15th day of October, 1913, all of the defendants took an appeal to the circuit court of St. Louis, having filed proper affidavit and appeal bond, and thereafter, on the 29th day of November, the defendants paid the docket fee of the circuit court of St. Louis, and duly filed therein a transcript of all the proceedings before the justice court, and the said cause was duly assigned to division 6 of the said circuit court. Thereafter, on April 20, 1914, the case was called for trial in division 6 of the circuit court of St. Louis. The plaintiff was present and ready for trial, but the defendants did not appear, although called; whereupon plaintiff, waiving a jury, submitted his case to the court, introduced his evidence and proofs, and the court, having heard and duly considered the same, found in favor of the plaintiff and against the defendants, and rendered a judg-

ment against the defendants in the sum of \$581.30.

Thereafter, on the 21st day of May, 1914, and at the same term of court at which the above-named judgment was entered, that is, the April term, 1914, the separate motion of James P. Dougherty was filed to set aside said judgment, and on the same day the joint motion of Cornelius and E. J. Dougherty was likewise filed to set aside the said judgment. Both of these motions were passed to the June term, 1914, and on June 5th both of said motions were overruled. The defendants have perfected their appeal to this court, and since that time the original plaintiff, O. M. Munroe, died, and this action has been revived by consent of the parties in the name of Robert B. Munroe and J. L. Hornsby, his administrators. The said motion of the defendant James P. Dougherty to set aside the judgment was as follows:

"Comes now James P. Dougherty, and for his separate motion to set aside a default judgment heretofore granted in this case on April 20, 1914, respectfully shows to the court that he had no notice or knowledge of the setting of this case on the said April 20, 1914, or any other such time.

"That he employed or believed he employed W. G. Carpenter as his attorney to look after and take charge of the said case, for him to appear therein and act as attorney, and to represent him in said cause, but the said W. G. Carpenter did not so understand that he was so employed, hence failed to look after the matter, and the said cause was not properly cared for on his part.

"That the said James P. Dougherty so filing this motion appealed from the judgment of the justice of the peace against him as rendered on the sixth day of October, 1913, for \$442.20 because he believed he had a just and meritorious defense to said cause of action, in that he has records of payments made on the said note which go to reduce the amount from the amount of the judgment so rendered against him, and your petitioner herein respectfully represents to the court that the judgment as rendered herein against him for \$531.30, being \$89.10 greater than the judgment rendered against him in the justice court, has deprived him of still further and additional credits which should be applied upon the said note as herein filed; that your petitioner has book records of the payments which should be so applied on the said note, and none of which are herein credited; all of which are good and valid matters of defense of which petitioner should not be deprived. And your petitioner further respectfully shows that the judgment as rendered by the court upon his failure to appear his course of action should have been to dismiss the appeal or affirm the judgment of the justice court that this court has no right of jurisdiction to hear anew. This course of action to make another or different finding from the justice court on default of its appellate worth.

"Petitioner prays that the said default judgment so granted be set aside and defendant granted a new trial herein.

"James P. Dougherty.

"State of Missouri, City of St. Louis—ss:—

"Subscribed and sworn to before me this 18th day of May, 1914.

"[Seal] W. G. Carpenter, Notary Public."

The joint motion of E. J. and Cornelius Dougherty to set aside the judgment was as follows:

"Comes now Cornelius Dougherty and E. J. Dougherty, defendants in the above-styled cause, and implore the court to set aside the default

judgment granted against them on April 20, 1914, for the following reasons, to wit:

"The said petitioners herein had no knowledge or notice of the setting of this said case or the trial of same, but understood that they had employed an attorney, W. G. Carpenter, to appear for them, look after and take care of their interests in said cause, but the said W. G. Carpenter did not so understand said employment, did not understand that he was to take care of their interests, and so did not give proper attention to the case, and the same was called and heard without any notice or knowledge of these defendants.

"That these defendants have a good and valid defense to the claim of plaintiff in the following manner, to wit: That said note which is the basis of this action they had signed as sureties for defendant James P. Dougherty, which note was made and executed on the 22d day of September, 1904, and was to become due six months after date. That the said note has, without their consent and without their knowledge, received many and various extensions thereon, at many and various times since the said September 22, 1904, and at no time were they ever consulted nor did they ever give their consent to such extensions, but at all times they refused to consent because at that time the principal of said note, James P. Dougherty, could have paid same.

"That the said extensions have operated against these petitioners, and they should not now be held liable on said note. Further, your petitioners respectfully state that the judgment as rendered in this cause on April 20, 1914, has failed to give the proper and necessary credits which should be applied upon said note; that the amount so rendered is larger than is now due or owing on said note; and that book entries of other payments on said note are available to be used as evidence. Further, these petitioners show the court that they are appellants in this cause, having appealed from the judgment of the justice rendered on the 6th day of October, 1913, which said judgment as rendered against them was for the amount of \$442.20; that the judgment as rendered by this court on April 20, 1914, for \$531.30 is another and different judgment from that rendered by the justice; that this court has no right of jurisdiction under the statutes of the state of Missouri, where default is made by appellant, to do other than affirm the judgment of the justice or dismiss the appeal.

"Wherefore petitioners herein pray that the said judgment by default be set aside and that they be granted a hearing in this cause.

"C. Dougherty.

"State of Missouri, City of St. Louis—ss.:

"C. Dougherty, being duly sworn, upon his oath states that the facts and matters set forth in the foregoing are true to the best of his information and belief.

C. Dougherty.

"Subscribed and sworn to before me this 18th day of May, 1914.

"[Seal] W. G. Carpenter, Notary Public."

It is contended by the defendants that the lower court ought to have set aside the judgment rendered by it on the ground that the same was due to a mistake in defendants believing that they had employed counsel and in counsel believing that he had not been employed, and that all of the defendants had good and valid defenses to the note sued on, and that the court in overruling said motion abused its discretion. The defendants further contend that the circuit court was not warranted in hearing the case and rendering a judgment upon the failure of the defendants to appear, but ought simply to have dismissed the appeal or affirmed justice judgment; it appearing that the judgment of the

circuit court was some \$89.10 more than the judgment procured by the plaintiff in the justice court.

[1] The defendants have presented the case in this court as if the judgment of which they complain was a default judgment. Strictly speaking, the judgment rendered in the circuit court on April 20, 1914, was not a default judgment. *Armstrong v. Elrick*, 177 Mo. App. 640, 160 S. W. 1019; *Halsey v. Meinrath*, 54 Mo. App. 335. While the judgment is not a default judgment, the defendants defaulted in appearance to the trial.

[2, 3] In order for the trial court to set aside such judgment upon motion, it was necessary for defendants to show: First, that they had good reason for failing to appear at the time judgment was rendered; and, second, that they had meritorious defenses, and the matter is largely in the discretion of the trial court, and this court can only interfere where it clearly appears that the trial court has abused its discretion. In *Parks v. Coyne*, 156 Mo. App. loc. cit. 391, 137 S. W. 339, it is said:

"The authorities in this state are unanimous that, in order to justify a trial court in setting aside a judgment by default, the defendant must show: (1) That he has good reason for the default; and (2) that he has a meritorious defense, and that both these things must appear so clearly as to make it manifest that the refusal of the trial court was arbitrary. *Robyn v. Publishing Co.*, 127 Mo. loc. cit. 390, 391, 30 S. W. 130, and cases cited; *Hoffman v. Loudon*, 96 Mo. App. loc. cit. 189, 70 S. W. 162; *Welch v. Mastin*, 98 Mo. App. loc. cit. 277, 71 S. W. 1090; *Hart v. Handlin*, 43 Mo. loc. cit. 171; *Florez v. Uhrig's Adm'r*, 35 Mo. loc. cit. 519."

In examining the defenses set forth in the motion of the defendants, we believe that some of them at least were meritorious. Certainly the defense that more had been paid upon the note than appeared from the indorsement thereon was a valid and meritorious one. Even though the plaintiff has died since the trial of this case, and the defendants would be incompetent to testify, as argued by plaintiff, it would not necessarily be impossible for the defendants to prove further payment upon the note in suit by other witnesses or other competent testimony.

[4, 5] But, after much consideration, this court has reached the conclusion that it is unable to say that the trial court abused its discretion when it failed to set aside the judgment, because it does not fully and plainly appear that the defendants were warranted in believing that they had employed counsel to look after their interest, and it does not fully and clearly appear that defendants had good reason for not appearing at the trial.

The motion of each of the defendants as set out heretofore simply states that they employed or believed they employed W. G. Carpenter as their attorney to represent them, but that he, W. G. Carpenter, did not so understand that he was employed. No evidence was offered to the trial court on

the subject or at any rate none is preserved in the record. If, as a matter of fact, the defendants had employed an attorney, and he had neglected to look after the case, his neglect would have been their neglect. *Welch v. Mastin*, 98 Mo. App. 277, 71 S. W. 1090; *Robyn v. Publishing Co.*, 127 Mo. loc. cit. 391, 80 S. W. 130; *Gehrke v. Jod*, 59 Mo. 522. The motion states that the defendants believed or understood that they had employed Mr. Carpenter to look after their interest in said cause, but the defendants do not claim, either in their motion or elsewhere, that they had ever spoken with Mr. Carpenter with reference to representing them in this litigation; they do not state that they had retained him as their attorney; they do not state any facts in their motion or elsewhere in the record by which it could be determined that they were reasonable in their belief, or had reasonable grounds to believe that they had in fact consummated an arrangement by which Mr. Carpenter was to represent them. While the fact does not appear of record, Mr. Carpenter in his argument filed in this case states that he did not represent the defendants in the justice court, but that they were represented in the justice court by other counsel. The facts upon which they based their belief that they were represented by Mr. Carpenter are not set forth, and they ought to have been plainly and fully set forth, we believe, in order that the trial court could determine whether they were justified in believing that they had retained Mr. Carpenter. Knowing Mr. Carpenter as we do to be a reputable lawyer of the St. Louis bar, and it appearing that he, a lawyer, did not believe that he represented the defendants or was retained by them, we are the more inclined to believe that the facts, if they had been set forth, would possibly not warrant the defendants in believing that they had retained or employed Mr. Carpenter to look after their interests. It must clearly appear from the facts that the trial court abused its discretion in this class of cases. In the case of *Muth Realty Co. v. John C. Timmerberg*, 178 Mo. App. 654, 161 S. W. 589, it was held that, where a defendant sought to set aside a judgment rendered in his absence, it was not sufficient for him to simply allege that he had a good and meritorious defense, but that he must set forth all the facts showing that he had a good and meritorious defense. We believe, therefore, that before we could say that the lower court abused its discretion in failing to set aside the judgment, the facts ought to have appeared either in the motion or in the evidence which would disclose that the defendants really were warranted in believing that they had employed or retained Mr. Carpenter. Especially is this true, as indicated above, when it appears from their own motion and affidavit that Mr. Carpenter did not believe that he was so retained or employed.

[6] Especially also should all of the facts

190 S.W.—65

have been set up in view of what is said in 23 Cyc. 934, and cases cited thereunder, where the following rule is announced:

"A defendant cannot ordinarily procure the setting aside of a judgment against him on the ground of his mistaken belief that he has obtained an attorney to protect his interests; he must see to it that the attorney understands and accepts the retainer; otherwise his failure to see personally himself to the case is inexcusable."

See, also, the following cases: *Howell v. Glover*, 65 Ga. 466; *Finlayson v. American Acc. Co.*, 109 N. C. 196, 13 S. E. 739; *Davis v. Darling*, 20 Tex. 803.

[7, 8] It is further contended by the defendants that upon their failure to appear in the circuit court the court ought to have either dismissed their appeal or to have affirmed the judgment of the justice court. We cannot agree with this contention. When the defendants appealed from the justice court and paid the filing fee in the circuit court, the circuit court then had jurisdiction of the cause and of the defendants, and when thereafter the plaintiff came into court, at the time of the setting of the case, the court had full jurisdiction over the subject-matter and over all the parties. Upon the defendants failing to appear when the case was called, it was not only proper, but it was the duty of the court, to proceed to hear the evidence of the plaintiff and to render judgment thereon. The statute (section 7579, R. S. Mo.) provides:

"Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

It is true that section 7584, R. S. 1909, provides that, where appellant fails to give notice of appeal at least ten days before the second term of the appellate court after the appeal is taken, the judgment should be affirmed or the appeal dismissed at the option of the appellee. But this statute is not intended to deprive, and does not deprive, the appellee of the opportunity, if he sees fit, to waive notice of appeal and enter his appearance in the circuit court, and of having the cause tried de novo. The purpose of serving notice of appeal upon the appellee is to confer jurisdiction on the circuit court over the person of the appellee, and if such jurisdiction is given by waiver of notice and entry of appearance on the part of the appellee, then the court has the same right to try the case de novo as it has to try any case of which it has original jurisdiction and in which all the parties are before the court. In *Bartschat v. Downey*, 172 Mo. App. loc. cit. 636, 155 S. W. 881, Judge Allen, speaking for this court, said:

"The service of notice of the appeal, however, was indispensable to the conferring of jurisdiction over the person of the appellee, unless waived by the voluntary appearance of the latter. *Drake v. Gorrell*, supra; *Roll v. Cummings*,

117 Mo. App. 812, 93 S. W. 864. That the notice was waived by appellee, by going to trial on the merits, there can be no doubt. Any act whatsoever which implies that the appellee is in the circuit court for general purposes constitutes a waiver of the notice of appeal and confers upon the court jurisdiction as to the person of appellee. *Leeper v. Carter*, 187 Mo. App. 617, 119 S. W. 463; *Ford v. Gray*, 131 Mo. App. 240, 110 S. W. 692; *Morgan v. Lumber Co.*, 105 Mo. App. 239, 79 S. W. 997; *Payne v. Railroad*, 75 Mo. App. 14; *Parmerlee v. Williams*, 71 Mo. 410; *Page v. Railroad*, 61 Mo. 78; *Deatley v. Potter*, 29 Mo. App. 222; *Bates v. Scott*, 26 Mo. App. 428."

In *Wolff v. Coffin*, 46 Mo. App. 190, a case which originated in the justice court and was appealed to the circuit court, and in which no notice of appeal was given and no general entry of appearance made by plaintiff, the appellee, who appeared only for the purpose of filing a motion for affirmance of the judgment, the Supreme Court held that the judgment of the justice should be affirmed—

"If the appellee so elect. * * * The duty to affirm the judgment under such circumstances is mandatory on the circuit court. It has no discretion but to enforce the statute. In the absence of such notice, and the appellee's failure or refusal to enter his appearance to the cause in the appellate court, the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of appeal at the option of the appellee."

In *Daugherty v. Perky*, 177 S. W. 786, a case originating in the justice court, and appealed to the circuit court, and later to the Kansas City Court of Appeals, the latter court in its opinion says:

"The giving of such notice [of appeal] is jurisdictional. The notice is analogous to a summons—is a statutory means by which the appellee is called upon to appear in the circuit court and submit himself to its jurisdiction. That court becomes possessed of jurisdiction over the cause by the filing of the transcript and papers by the justice, but acquires jurisdiction over the person of the appellee by the service of the notice of appeal. * * * Though jurisdiction of the cause has been lodged in the circuit court, jurisdiction of the person of the appellee must be obtained, either by service of the statutory notice, or by his voluntary * * * appearance in court."

In *Munley v. King*, 40 Mo. App. 531, which was a suit in replevin instituted before a justice of the peace and subsequently appealed to the circuit court, where the defendant, appellant, offered to dismiss his appeal, but the court refused to permit this. When the case was called for trial defendant declined further action, and the court proceeded to hear testimony concerning the value of the property detained by defendant and damages sustained by plaintiff, and thereafter rendered judgment ordering defendant to return the property to plaintiff or that the latter have judgment against defendant for the value of the property as ascertained by the court. Defendant thereupon appealed to the Court of Appeals, insisting that the circuit court, in case that defendant declined to prosecute his appeal, could only render a judgment affirming the judgment of the justice, and that the cir-

cuit court erred in hearing evidence as to the value of the property, and based his position on the section of the statute numbered 2273, R. S. 1909, which is found in the General Code under the title of "Costs," and is as follows:

"In all cases where an appeal from a judgment of the county court, probate court or a justice of the peace shall not be prosecuted by the appellant according to law, the judgment should be affirmed, and the costs adjudged accordingly."

The Court of Appeals discusses this section of the statute and concludes by saying (page 535 of 40 Mo. App.):

"If the appellant in such a case fails to prosecute the appeal according to law, then it would be the duty of the circuit court to make such judgment in the case as the law requires"

—thus holding that the circuit court is not limited to an affirmance of the judgment of the justice where it has jurisdiction both of the cause and of the parties thereto. To the same effect is the case of *Carroll v. Hancock*, 57 Mo. App. 228, and in *Meitz v. Koetter*, 51 Mo. App. 370, this court holds that the provision of the section now numbered 2273, R. S. 1909, does not add anything to the statutory requirements in regard to the prosecution of appeals from justice courts, the court saying that the phrase "according to law" in the statute manifestly means according to the statute law governing the appeal in the particular case.

In *Riddle v. Gillespie*, 67 Mo. 627, where the appellant has failed to give notice of his appeal from the judgment of the justice in due time, the Supreme Court held that the appellee had the right, if he saw fit, instead of taking an affirmance of the justice's judgment, to have the cause tried in the circuit court. It is clear, therefore, from the foregoing authorities, that in case of appeal from the justice court to the circuit court, when no notice of appeal is given by the appellant to the appellee, the latter has the right to demand an affirmance of the judgment of the justice or a dismissal of the appeal if he sees fit to move therefor, but when the appellee voluntarily enters his appearance in the circuit court, the cause is then before the court, and it has the power under the statute to try the case de novo and render such judgment as it may see fit. In the case at bar the appellee, when the case was called for trial in its regular order on the trial docket, announced himself ready, and thereby entered his appearance generally in the cause, and the circuit court thereupon became possessed of full jurisdiction of the cause and the parties thereto, plaintiff and defendants, and had the right, as it did, to proceed to hear the cause on trial de novo and to render such judgment as it saw fit.

The judgment of the circuit court is therefore affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

PHILLIPS v. PRYOR et al. (No. 12160.)

(Kansas City Court of Appeals, Missouri.
Nov. 27, 1916. Rehearing Denied
Dec. 29, 1916.)

1. EVIDENCE \S 67(1) — PRESUMPTION — CONTINUANCE OF CONDITION — CITY LIMITS.

Where the ground on both sides of a railroad, where its crossing was located, was shown to be within the city limits, such condition or situation was presumed to continue until the contrary was shown, and, the road's evidence failing to show the contrary, the crossing must be accepted as being within the city.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 87; Dec. Dig. \S 67(1).]

2. DEDICATION \S 20(6) — STREETS — DEDICATION OF RAILROAD CROSSING.

Upon platting of a street north of a railroad track, and its acceptance by the city, the railroad voluntarily opened the street across its right of way to connect the new with the old, coming up thereto, put in a crossing, and built a sidewalk along the street where it crossed the right of way, so that there was a continuous sidewalk along the entire length of the street as prolonged by the platting of the new street. *Held*, that such acts on the part of the railroad constituted a voluntary dedication in pais of the street across the right of way.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 28; Dec. Dig. \S 20(6).]

3. DEDICATION \S 37 — STREETS — USER.

Where the intention to dedicate a street is unequivocally manifested, the dedication is complete, and no user for any definite period is necessary, so that where a railroad voluntarily dedicated a street across its right of way, the street became a lawfully established one, even as to the part on the right of way.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 73, 74; Dec. Dig. \S 37.]

4. RAILROADS \S 95(3) — OBLIGATION TO MAINTAIN STREET CROSSING — STATUTE.

Under Rev. St. 1909, \S 10626, requiring railroads to construct and maintain street crossing planks 24 feet in length on each side of the rails within a city or town, a road must maintain such a crossing at a street voluntarily dedicated by itself to public use, as well as at those streets opened by legal proceedings, or established by user and the expenditure of public moneys.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 276; Dec. Dig. \S 95(3).]

5. RAILROADS \S 348(2) — INJURIES AT CROSSING — PROXIMATE CAUSE — SUFFICIENCY OF EVIDENCE.

In an action against a railroad by the driver of a delivery wagon for injuries when his horse became frightened at a crossing by an engine's letting off steam, evidence *held* to justify finding that the road's failure to have its crossing 24 feet wide was the proximate cause of the injuries.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1139; Dec. Dig. \S 348(2).]

6. RAILROADS \S 337(3) — INJURIES AT CROSSING — LIABILITY — CONCURRING CAUSES.

Where a railroad's locomotive let off steam, and the horse attached to a delivery wagon shied at a crossing that the road maintained less than 24 feet wide in violation of statute, so that the wagon jounced over the rails and threw out the driver, who was not negligent, the road was liable, despite the shying of the horse.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1092; Dec. Dig. \S 337(3).]

7. RAILROADS \S 350(14) — INJURIES AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action against a railroad for injuries at its crossing when its locomotive let off steam, frightening a horse so that its 15 year old driver was thrown out, whether the driver was negligent *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1167; Dec. Dig. \S 350(14).]

8. TRIAL \S 192 — PROVINCE OF JURY — INSTRUCTION AS TO UNCONTRADICTED MATTER.

Where there was no dispute as to the lawful opening of the street at the crossing, nor of the establishment and existence of the street across the railroad, nor of its being within the city, nor of the crossing being only 16 feet wide, whereas statute required the railroad to maintain a crossing 24 feet wide in a city, the court did not err in telling the jury that the law made it the duty of the railroad to construct the crossing 24 feet wide, though it is error to peremptorily instruct as to a fact relied on by one side, which is denied by the pleadings of the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 432-434; Dec. Dig. \S 192.]

9. RAILROADS \S 351(21) — INJURIES AT CROSSING — INSTRUCTION — PROXIMATE CAUSE.

In an action against a railroad for injuries at a crossing, the court instructed that if plaintiff was in the lawful use of the street, exercising ordinary care, and the horse he was driving took fright at an engine and became unmanageable, and drew the left wheels of the wagon off the planks of the crossing and against the projecting rails with such force as to throw plaintiff out of the wagon and injure him, and if plaintiff could have managed his horse so that the wheels of the wagon would not have gone off the planks of the crossing had they been 24 feet long, and that plaintiff would not have been thrown out and injured, then the jury might find the railroad guilty of negligence, and, if they found it guilty of such negligence, and that, in direct consequence, plaintiff, without any negligence on his part contributing thereto, sustained the injury complained of, verdict should be for plaintiff. *Held*, that the instruction was not so misleading, confusing, and unintelligible that the jury could not determine the facts necessary to be found before predicated liability, though in submitting the question of whether the negligence complained of was the proximate cause of the injury, that phrase was not used.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1213; Dec. Dig. \S 351(21).]

10. RAILROADS \S 345(2) — INJURIES AT CROSSING — PLEADING AND PROOF.

The negligence complained of being that the road had not maintained a 24-foot crossing as required by statute in cities and towns, there was no need for any allegation, proof, or finding that a 16-foot crossing maintained by the road was not sufficient to furnish an ordinarily safe way for travel, since the failure to obey the statute was negligence for which the road was liable, if the failure caused the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1114; Dec. Dig. \S 345(2).]

11. RAILROADS \S 351(2) — INJURIES AT CROSSING — INSTRUCTION.

An instruction, referring to the projecting rails in connection with the way the accident happened, and not as submitting that the negligence was in allowing the rails to project above the ground, was not erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1195; Dec. Dig. \S 351(2).]

12. RAILROADS —351(5)—INJURIES AT CROSSING—INSTRUCTION.

Such reference did not require the giving of the road's refused instruction, which said, without qualification or explanation, that the road was not guilty of negligence in permitting the ties and rails to project above the ground.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1198; Dec. Dig. —351(5).]

13. RAILROADS —303(1)—INJURIES AT CROSSING—LIABILITY.

A railroad was negligent per se if it violated a statute by maintaining a street crossing within a city less than 24 feet in width, and, if that violation proximately caused the injury to the driver of a wagon whose horse shied when frightened by a locomotive, the road was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. —303(1).]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

"Not to be officially published."

Suit by Earl Phillips, a minor, by J. D. Nichols, next friend, against Edward B. Pryor and Edward F. Kearney, receivers of the Wabash Railroad Company. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

J. L. Minnis and N. S. Brown, both of St. Louis, and Phillips & Phillips, of Moberly, for appellants. E. O. Doyle, of Moberly, for respondent.

TRIMBLE, J. This is a suit for personal injuries. The plaintiff, a boy of 15, was driving a grocer's one-horse delivery wagon over a railroad crossing. An engine standing down the track a short distance away began letting off steam. The horse, as it went over the crossing, shied to the left to such an extent that the left wheels missed the ends of the crossing boards and went about 2 feet to the left of said ends. The jolting, caused by the wheels passing over the unprotected ties and rails, threw the boy out and broke his leg in such way that it had to be amputated. Upon the boy falling out, the horse wheeled to the right and ran for about a block and stopped.

Plaintiff averred that the crossing was on a public street and in the city of Moberly, and that under section 10626, R. S. Mo. 1909, it was defendant's duty to construct and maintain crossing planks 24 feet in length on each side of the rails, but that the crossing was only 16 feet in width. Said section expressly makes a railroad liable for all damages resulting from a neglect to construct the crossing required.

As submitted, his case was bottomed on the theory that the defendants' crossing planks were not of the required length, that the failure to have them of the proper length was the cause of his injury, and that had it not been for such failure to obey the statute, his injury would not have happened.

Defendants' answer was a general denial and a plea of contributory negligence. The

jury returned a verdict of \$5,000. A new trial being refused, defendants appealed.

One of the points made by the defendants is that the crossing is not one which the statute requires to be 24 feet in width, their contention being that the crossing is not in the city limits. We think this contention is untenable. The city of Moberly was incorporated by an act of the General Assembly, March 3, 1873 (Laws 1873, p. 322). At and long prior to that time, Emerson street was one of the platted streets of the town. It was two blocks inside the west edge of the platted territory and ran from Van Horn street north nine blocks to the right of way of the west branch of the railroad, intersecting at right angles as it went, some eight or more streets in said town. (At Moberly the railroad had and now has two branches, one the west branch going west to Kansas City, and the other the north branch going to Des Moines.) As incorporated, the city included not only the platted territory south of the west branch of said railroad, but also the unplatted ground lying north of said west branch. In 1889, the city, in consideration of the railroad erecting a depot, reduced its city limits by "excluding therefrom all the grounds owned by the Wabash Western Railway between the west branch main line track of its road and the north branch main line track." About six or seven years ago, the owners (individuals) of that portion of the unplatted ground north of the west branch and north of the north end of Emerson street and the blocks through which it ran, platted their ground into Grand View addition to the city, and, in doing so, platted a street north through said addition corresponding to Emerson street as located south of the railroad. This street was named Emerson street and was a prolongation of old Emerson street, making it a straight street north from Van Horn street through Moberly and through Grand View addition to a county road leading into same. The street, as thus prolonged, crossed the railroad. There was no condemnation of the right of way over the railroad, none being required, as the railway company voluntarily put in a crossing over its line, which crossing was 16 feet in width. And thus Emerson street became one continuous and straight street over the crossing in question. The evidence tends to show that it is a much-traveled street, has one business house on it, that the store where plaintiff was employed is only a half block east of Emerson street and two blocks south of the crossing; that the same is a public crossing over which travel of every description passes. If we understand defendants' contention, it seems to be that by the reduction of the city limits, the right of way of the railroad became the north line of the city limits at the point in controversy, and therefore the crossing is not

inside the city, and hence is not such as is required to be 24 feet wide. But whatever effect might result if that were true, yet the evidence does not show that the ground where the crossing is located was excluded from the city limits. It was only the "grounds owned by the Wabash" and between the two branches that were excluded, and there is no showing that these grounds extended as far west as the ground north of the location of the crossing. Indeed, it seems that it did not, since these grounds are referred to as having the roundhouse, foundry, and other company buildings thereon, and the ground covered by Grand View addition was platted by others than the railroad, and there is no showing that this last-mentioned ground was owned by the railroad at the time the limits were reduced.

[1] The ground on both sides of the railroad, at the point where the crossing is located, having been shown to be within the city limits, that condition or situation is presumed to continue until the contrary is shown, and since defendants' evidence fails to show the contrary, the crossing must be accepted by us as being within the city. In fact, the plat filed in this court by agreement shows that the grounds of the railroad between the two branches do not extend west far enough to reach the crossing or the ground north of it. This obviates any need of our discussing the question as to the character of the crossing required had it been on the boundary line of the incorporated limits but inside of the inhabited territory of the town considered as an aggregation of dwellers.

[2, 3] As the crossing was within the city limits, the fact that there was no condemnation across the right of way so as to connect old Emerson with new Emerson street does not affect the width of the crossing required. Upon the platting of new Emerson street north of the track and its acceptance by the city, the railroad voluntarily opened the street across its right of way, put in a crossing and built a sidewalk along the street where it crosses the right of way, so that there was a continuous sidewalk along the entire length of Emerson street as thus prolonged. Such acts on the part of the railroad constituted a voluntary dedication in pais of the street across the right of way. *Melners v. City of St. Louis*, 130 Mo. 284, 32 S. W. 637; *Drimmel v. Kansas City*, 180 Mo. App. 344, 168 S. W. 280. And where the intention to dedicate is unequivocally manifested, the dedication is complete and no user for any definite period is necessary. *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735. The street thereupon became a lawfully established street even as to the part on the right of way, and the crossing required was such as the law demands within a town.

[4] The statute (section 10626) in reference to crossings is dealing with public roads or town streets "now or hereafter to be open-

ed for public use." As said in *Lee v. St. Louis & San Francisco R. Co.*, 150 Mo. App. 175, loc. cit. 182, 129 S. W. 773, 775:

"There is no word here indicating that the obligation was enjoined only in respect to such roads (or streets) as were opened by legal proceedings or established by both user and the expenditure of public moneys thereon."

The case is unlike those where the railroad has never done anything to open a road or street across its right of way, and either the municipality is seeking, without condemnation, to compel the putting in of a crossing, or it is sought to hold the road liable for not putting in a statutory crossing at a place where there is no road or street established. Such cases are not in point here where the railroad clearly evinced an intention to dedicate by acts in pais. Even in one of the cases of the above character cited by defendants, the court say:

"There is nothing to evidence an intent on the part of the appellee (railroad) to dedicate this crossing between the two sections of Thomas street to the public as a highway. The record does not disclose any act or declaration on the part of the agents or officials of the railway company showing any such purpose." *City of Atlanta v. Texas & P. R. Co.*, 56 Tex. Civ. App. 226, 120 S. W. 923, 926.

It is urged that the shying of the horse and not the lack of width of the crossing was the proximate cause of the injury. The evidence in plaintiff's favor on this point is that there were three tracks at the crossing; that he drove the horse onto the crossing in the middle of the planks; that in this manner he crossed the first track and came to the second track; that as he got to the second track the steam shot forth from the engine and the horse shied and turned to the left, and would have gone down the railroad, but the driver pulled him back somewhat into his course, and the horse went forward and crossed the second track, but shied over to the left to such an extent that when the third track was reached, the left wheels of the wagon missed the ends of the crossing boards about 2 feet—that is, the wheels on the west side of the wagon missed the west end of the boards about 2 feet, while the right-hand wheels stayed on the boards; that it was the running of the left wheels over the third track rails immediately west of these boards where the ties were above the ground and the rails were on the ties that threw plaintiff out. Plaintiff's testimony was also to the effect that he did not lose control of the horse until he was thrown out of the wagon; that his being thrown out caused him to lose control; that he was thrown out upon the third track and the fall broke his leg necessitating its amputation. After the plaintiff fell from the wagon the horse turned to the right and ran east down the right of way fence for a block and stopped when he ran in between a team and a string of cars.

[5, 6] Under the foregoing evidence the jury could reasonably believe and find that the

shying of the horse was a temporary affair, and that, had the crossing been 24 feet in width, plaintiff would have gone over in safety and would have speedily regained complete control over his horse; that the lack of width of the crossing caused plaintiff to be thrown out, and that, had it not been for such lack, his injury would not have occurred. If the jury could reasonably find these facts, then they could find that the failure to have the crossing 24 feet wide was the proximate cause of the injury. *Kane v. Missouri Pacific Ry.*, 251 Mo. 26, 27, 157 S. W. 644. And in view of the evidence as to the foregoing facts, if the plaintiff was not shown to be guilty of contributory negligence, the jury could properly hold defendants liable, if the failure to make said crossing 24 feet wide was a violation of the statute. And this is true, notwithstanding the horse shied. *Harrison v. Kansas City Electric Light Co.*, 195 Mo. 606, 623, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Newcomb v. New York*, etc., R. Co., 169 Mo. 409, 422, 69 S. W. 348; *Benton v. St. Louis*, 248 Mo. 98, 111, 154 S. W. 473; *Springfield*, etc., Egg Co. v. *Springfield Ice*, etc., Co., 259 Mo. 664, 692, 168 S. W. 772; *Graefe v. St. Louis Transit Co.*, 224 Mo. 232, 271, 123 S. W. 835; *Vogelgesang v. St. Louis*, 139 Mo. 127, 136, 40 S. W. 653. See, also, in other jurisdictions *Union St. Ry. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012, 1014; *Melsner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130; *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360. In the *Stone Case*, supra, the court says:

"It is urged that there is no liability on the part of the railway company or the city of Winfield for the negligent defect or obstruction of the street, as the runaway team concurred in producing the injuries of Mrs. Stone. This is the rule in Massachusetts, Maine, Wisconsin, and West Virginia, but the contrary is held by the courts of New York, Pennsylvania, Georgia, Missouri, Indiana, Connecticut, New Hampshire, Vermont, and Texas. *Beach, Contrib. Neg.* par. 245. *Elliott*, in his recent work upon *Roads and Streets*, says: 'According to the weight of authority, the city is liable, where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver, and runs away, and comes in contact with some obstruction or defect in the road or street which the city has been negligent in not removing or repairing, if the injuries would not have been sustained but for the obstruction or defect.'"

The boy started in the middle of the crossing, and though the horse shied and turned to the left, yet the driver had sufficient control over him to turn him back toward his course, and to such an extent that the left wheels missed the boards by only 2 feet. If the boards had been 24 instead of 16 feet long, they would have been 8 feet longer at the west end, and the wheels would not have missed them and gone upon the rough ties and rails and jolted the driver out, and had he not been thrown out the inference is rea-

sonable that he would have soon recovered full control of the horse as after being wholly freed of all control, he ran only a block and stopped. *Moberly v. Kansas City*, etc., R. Co., 17 Mo. App. 535; *Day v. Missouri*, etc., R. Co., 132 Mo. App. 715, 112 S. W. 1019.

Was plaintiff guilty of contributory negligence as a matter of law? Plaintiff was 15 years old. He had been delivering groceries for a year. He had driven the horse in question "off and on" for three months and for "a month straight" before the accident. He had driven him every day. He had had much experience, for his age, in driving horses, both in town and at work on the farm. Plaintiff testified that he left the store and went about half a block west to Emerson street and then two blocks north to the crossing, "and when I got there there was either an engine standing across the crossing or right up onto it; and I had some groceries to go down the track, and I took those down there and come back, and there was an engine standing down the crossing about a block; and I started across and got about the second track, and the horse got scared at the steam from that engine." On cross-examination, he said Mr. Nichols, his employer, had told him the horse had run away once when he had left the wagon and had given the lines to some one else to hold, and this person not paying any attention, the lines were jerked out of his hand by the horse getting scared at the steam emitted by an engine coming up on the side. Plaintiff also said that he had driven the horse around where steam was coming from engines and he never offered to run away, and that it was the first time he had ever offered to run away with him. He further said that the horse got scared at the steam popping from the engine; that there was no steam when he drove up there, though he knew it was likely to come from standing engines. He also said:

"Had I seen the steam I would not have crossed. Q. You knew it was not safe with the steam popping from the engine? A. I didn't know for sure, but I knew what Mr. Nichols had said. Q. You would not have gone over there if you had seen the steam? A. I had drove him around where there was steam since (i. e., since his employer's experience) and he had not cut up. Q. But you did say you would not have driven over there if you had seen the steam first? A. Yes, sir. Q. Because it would have frightened him? A. Yes. I don't know for sure, but I would not have taken any chances on him; I did not know it would be unsafe, but I was not going to take any chances while they were popping off steam."

He also testified:

"Q. But you knew it was not safe if there was steam? A. No, sir; if I had known that I would not have started across. * * * Q. You knew then it was not safe to go up there if the engine was popping off steam? A. The engine was not popping off steam. Q. You knew the horse was afraid of engines? A. No, sir. Q. Didn't you say awhile ago you knew he was? A. I knew he was when the steam went out,

but he wasn't afraid of engines. Q. What you mean to say is you knew the horse was afraid of engines if the steam was coming from it, but not if it was not coming from it? A. Yes, and I have drove around where steam comes from engines, and he never offered to run away; it was the first time he ever offered to run away."

[7] With the testimony as above indicated we do not think plaintiff was guilty of contributory negligence as a matter of law. That was a question of fact for the jury, and was properly submitted to them. *Moore v. Kansas City, etc., R. Co.*, 126 Mo. 277, 29 S. W. 9.

The court gave the following instruction for plaintiff:

"The court instructs the jury that it was the duty of the receivers, Edward B. Pryor and Edward F. Kearney, on the 1st day of December, 1914, and prior thereto, to lay or cause to be laid and evenly spiked to the cross-ties, boards, or planks of not less than 10 inches in width, 2 inches in thickness, and not less than 24 feet in length, one each side of the rails where the Wabash railroad tracks cross Emerson street in the city of Moberly. Now, if you find and believe from the evidence that the plaintiff, Earl Phillips, on the 1st day of December, 1914, was in the lawful use of said Emerson street, and at the time exercising ordinary care for his personal safety, and, while exercising such care, and while attempting to cross the tracks of the Wabash railroad at said Emerson street crossing, in a delivery wagon drawn by a single horse, the horse he was driving took fright at an engine being operated by defendants, their agents and servants, near to said crossing, and from such fright became unmanageable, and drew the left wheels of the wagon off of the planks of said crossing and against the projecting rails of defendants' railroad tracks, and if you find the rails did project, with such force as to throw plaintiff out of the wagon, and injure him, and if you believe and find from the evidence that plaintiff could have managed and controlled his horse so that the wheels of the wagon would not have gone off the planks of said crossing had the planks been 24 feet long, if you find that they were not 24 feet long, and that said wheels would not have met with any obstructions, and that plaintiff would not have been thrown out of the wagon and injured, then you may find defendants guilty of negligence; and if you so find defendants guilty of such negligence and that, in direct consequence of such negligence, if any, the said Earl Phillips, without any negligence on his part, contributing thereto, sustained the injuries complained of in his petition, then your verdict should be for the plaintiff."

[8] The first complaint in reference to this instruction is that it peremptorily told the jury that the crossing in question was in the city limits, and that it was on a lawful street. No doubt it is error to peremptorily instruct the jury as to a fact relied on by one side which is denied by the pleadings of the other. For even if there be no countervailing evidence the party denying has the right to the opinion of the jury as to the evidence. But, in this case, the documentary evidence showed that originally the locus of the crossing was within the city limits, and defendants concede that originally it was in the city. They introduced documentary evidence—the ordinance reducing the city limits—in the attempt to show that the locus of the crossing was afterwards taken out of the

city. But, as we have seen, defendants' evidence failed to show this; while on the contrary the city plat, before us by stipulation from both sides, shows that it was not taken out of the city limits. The court could, therefore, correctly say the locus of the crossing was in the city. Documentary evidence, namely, the plat of the city and the plat of Grand View addition, together with the approval of the city indorsed thereon, showed the establishment of Emerson street both north and south of the point of the crossing. Now the evidence of defendant's section foreman, who was a witness for defendant, shows that the railroad ordered him to put in the crossing at the place where Emerson street, as prolonged, crossed the right of way; that just after Grand View addition was platted the railroad company put in a crossing 16 feet in width and also a walk on the west side of the street, at the place in question, for the people to use; and that the crossing had been maintained by the railroad ever since. There was no testimony offered to the contrary. The defendants did not attempt to show that their witness was mistaken or to show otherwise by other testimony. Hence the testimony on both sides showed that the railroad had voluntarily dedicated, by acts in pais, a strip the width of the street across the right of way so as to connect the two streets and make them into one continuous street. There was, therefore, no issue of fact as to the lawful opening of the street at the crossing, nor of the establishment and existence of the street across the railroad, nor of its being within the city, nor indeed of the crossing being only 16 feet wide. Hence the court did not err in telling the jury that the law made it the duty of the railroad to construct said crossing 24 feet wide.

[9] We do not think the instruction was so misleading, confusing, or unintelligible that the jury could not determine the facts necessary to be found before predicated liability. It was negligence per se to maintain the crossing only 16 feet in width when the statute says it must be 24 feet wide. And if that negligence was the proximate cause of plaintiff being thrown out of the wagon and injured, then defendants were liable. It is true, in submitting the question of whether it was the proximate cause, this particular phrase was not used, but the jury were required to find all the necessary facts which, in law, would enable the jury to say the failure to obey the statute was the proximate cause, and then the instruction required the jury to find that plaintiff's injuries were sustained as "a direct consequence" of defendants' negligence and without any contributory negligence on plaintiff's part. This was sufficient.

[10,11] There was no need for any allegation, proof, or finding that a 16-foot crossing was not sufficient to furnish an ordinarily

safe way for travel. The statute says that crossings in cities and towns must be 24 feet wide, and if the statute is not obeyed and one is injured while in the exercise of ordinary care, the failure to obey is negligence for which the railroad is liable if that failure caused the injury. The fact that the ties and rails projected above the ground, forming a rough and uneven surface for travel, was material upon the question whether the failure to obey the statute caused the injury and whether getting off the crossing boards was what threw plaintiff out of the wagon. The reference to the "projecting rails" in plaintiff's instruction was for this purpose, and not for the purpose of establishing that the negligence was in allowing the rails to project above the ground; nor did such reference lead the jury to believe that perhaps allowing the rails, outside of the length of the crossing boards, to project above the ground, was the negligence relied upon. For this reason plaintiff's instruction was not erroneous in referring to the projecting rails.

[12, 13] Nor did such reference require the giving of defendants' refused instruction No. 2 which said, without qualification or explanation, that the defendants were not guilty of negligence in permitting the ties and rails to project above the ground. They were guilty of negligence per se if they violated the statute, and if that violation proximately caused plaintiff's injury, then they were liable. The state in which the rails were left bore on the question whether the boy was thrown out because of the absence of a crossing of the required width. If, however, the projecting rail is the reason for the requirement of the statute, and is, therefore, in a sense, the condition making negligent the absence of the crossing board, still the court could not tell the jury, unqualifiedly, that there was no negligence in leaving the rails to project, without regard to the absence or presence of the required crossing boards.

Perceiving no substantial error in the case, the judgment must be affirmed. It is so ordered. The other Judges concur.

BLACKMER & POST PIPE CO. v. MOBILE & O. R. CO. (No. 14509).

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. CARRIERS \S 163—LIMITATION OF LIABILITY—SHIPPER'S KNOWLEDGE OF RATES.

In an action for damages to shipment of goods, the defense being that the goods were shipped under the lower of two rates, relieving the carrier from liability for damages from breaking, the shipper could not deny its knowledge of the existence of the two rates; such knowledge being conclusively presumed as matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 722-725; Dec. Dig. \S 163.]

2. CARRIERS \S 132—DAMAGE TO SHIPMENT OF GOODS—EVIDENCE.

In action for damages to shipment of sewer pipe, evidence that it was shipped properly packed and in good condition, that it is not broken by ordinarily careful handling, and that upon arrival approximately one-third of the pipe was broken, held evidence of negligence by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 578-582, 605; Dec. Dig. \S 132.]

3. APPEAL AND ERROR \S 1050(1)—HARMLESS ERROR.

In action for damages to shipment of sewer pipe, testimony of consignee's foreman that he looked after the unloading of all cars of pipe shipped during the year of such shipment, and that at various times he would see the railroad negligently switch cars loaded with tile, was not reversible error, where he was thoroughly cross-examined, although on cross-examination he testified he did not know whether the cars thus handled were any of the cars involved in the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1068, 1069, 4153, 4157; Dec. Dig. \S 1050(1).]

4. APPEAL AND ERROR \S 1170(10)—AFFIRMANCE—DAMAGES.

Under Rev. St. 1909, \S 1850, 2082, forbidding reversal for errors not material, where, in action for damages to shipment of sewer pipe, the jury, being instructed to assess only nominal damages on the counts for negligent transportation in case they assess damages on the counts based on common-law liability of the carrier as insurer, assessed substantial damages on the common-law liability counts and nominal damages on the negligence counts, the judgment was not reversible, where damages were recoverable on the negligence counts, although damages were not recoverable on the common-law counts, since the method for computing the actual damages under the common-law counts was the proper method for computing the actual damages on the negligence counts, and the verdict was correct in result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4036, 4544; Dec. Dig. \S 1170(10).]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Action by the Blackmer & Post Pipe Company against the Mobile & Ohio Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

R. P. & C. B. Williams, of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

THOMPSON, J. This is a suit for damages to sewer pipe shipped by the plaintiff over defendant's railroad. It was composed of a shipment of five cars, four cars being included in one bill of lading, shipped September 19, 1903, and one car in another bill of lading, shipped October 15, 1903; both shipments being from St. Louis, Mo., to New Orleans, La. This is the third appeal in this case. The first appeal was by defendant. The case was reversed and remanded, the opinion being reported under the title of Blackmer & Post Pipe Co. v. Mobile & Ohio R. Co., 137 Mo. App. 133, 119 S. W. 13. The second appeal was by the plaintiff and is reported under the title of Blackmer & Post Pipe Co. v.

Mobile & Ohio R. Co., 168 Mo. App. 22, 151 S. W. 164.

The petition is drawn in four counts, two counts upon the damage done to the cars included in each bill of lading. The first count is for damage to four cars of pipe and is drawn upon the theory that the defendant failed to transport safely the pipe, as was its duty; in other words, drawn upon the common-law liability of a carrier as an insurer. The second count is for damages to the same four cars, and is drawn upon the theory that the defendant was negligent in the transportation of the pipe. The third count is in like terms of the first, upon the second bill of lading for damages to one car of sewer pipe, based upon the theory that it was not safely transported, as was the duty of the defendant, arising from the common-law insurance liability. The fourth count is for the damage to one car of sewer pipe upon the second bill of lading, alleging that defendant negligently and carelessly handled the same in transit. There was a verdict for plaintiff on the first count for \$385.59, and on the third count for \$78.77, and for plaintiff on the second and fourth counts for one cent each.

The answer is a general denial, and sets up the affirmative defense that the bills of lading under which the pipe was shipped recited that the rate charged for transportation to New Orleans was a reduced rate, and that the defendant would not be liable for breakage of the pipe, and that the plaintiff, in consideration of the reduced rate on said cars of pipe, did assume all risks for breakage of said pipe in transit, and so relieved this defendant, as well as all other carriers over whose lines said cars of pipe were carried, from liability for breakage, and that liability for damage to said pipe is especially excepted in said bills of lading.

The proof showed that the pipe was delivered at St. Louis, Mo., to the Missouri Pacific Railroad Company, and it delivered its dray ticket or receipt for the pipe. This dray ticket was made out by the plaintiff and states on its face that the pipe was shipped at the risk of the plaintiff, and that it was to be delivered to the Mobile & Ohio Railroad Company. This dray ticket was delivered to the defendant company at its office in St. Louis and a bill of lading issued in lieu thereof. The bill of lading was prepared in the office of the plaintiff company on forms furnished by the defendant company, and it was written in the bill of lading by the plaintiff that the pipe should be carried at the risk of the plaintiff. The bills of lading, in the printed part, contained the following provision:

"The rate named herein is a reduced rate given in consideration of the shipper entering into the contract set out below. If the shipper elects not to accept the said reduced rate and conditions, he should notify the receiving agent in writing at the time his property is offered for shipment, and if he does not give such notice, it will be understood that he desires the property

carried subject to the bill of lading conditions in order to secure the reduced rate authorized. The property not subject to these conditions of this bill of lading will be at carrier's liability, limited only as provided by common law, and the laws of the United States and of the several states in so far as they apply. The property thus carried will be charged 20 per cent. higher, subject to minimum increase of one cent per hundred pounds than if shipped subject to the conditions of this bill of lading."

And said bill of lading further provides:

"In consideration of all of which and especially of said reduced rate, the shipper agrees that every service to be performed by the company hereunder shall be subject to all the conditions herein, all of which the shipper accepts and agrees are just and reasonable."

And it further provides:

"No carrier or parties in possession of all or any of the property herein described shall be liable for any loss thereof or damages thereto by causes beyond its control, * * * or by leakage, breakage, chafing."

And the bill of lading concludes (paragraph 14) as follows:

"In accepting this bill of lading the shipper, owner and consignee of the goods, the holder of the bill of lading, agrees to be bound by all of its stipulations, exceptions and conditions, whether printed or written."

The plaintiff offered evidence tending to show that the sewer pipe involved in both shipments was in good sound condition at the time it was loaded into the cars and was billed, marked, and consigned for shipment to Louisiana, and that the pipe was properly loaded into the cars, and that when these cars were delivered at New Orleans, La., they were in damaged condition; that is to say, the pipe therein was broken and damaged. The freight bill was paid in New Orleans and the cars unloaded there, the rate on the bills being 14 cents. The defendant introduced, without objection from the plaintiff, a certificate from the secretary of the Interstate Commerce Commission. This certificate set out the rules of classification adopted by the railroad and tariffs on file with the Interstate Commerce Commission. These tariffs show that "pipe, viz. earthen and concrete (pipe or tile) same C. L.," was put in class A. This certificate further shows that the joint freight tariff, I. C. C. No. 2810, filed February 26, 1903, and in force at the time of these shipments provided for a rate from St. Louis, Mo., to New Orleans, La., in connection with the New Orleans & Northeastern Railroad on class A merchandise of 25 cents per hundred pounds. The same tariff on file with the Interstate Commerce Commission provided for a "commodity" rate of 14 cents per hundred pounds, with the following stipulation known as rule 5:

"Whenever commodity rates are shown they are intended to apply on shipments made at owner's risk and released. The rates on the same commodities if shipped at carrier's risk, will be regular rates as per classification."

These classifications and rates were shown by the introduction in the evidence by the defendant, without any objection on the part of the plaintiff, of certain extracts from tariffs

filed with the Interstate Commerce Commission prior to the dates of the shipments involved in this case, and which were in force and effect at that time, and spoken of in the evidence as classification No. 140, I. C. C. 2523, filed October 27, 1902, and extracts from Mobile & Ohio Railroad joint freight tariff I. C. C. No. 2810, filed February 28, 1903. The evidence was all one way that these tariffs were filed and posted according to law.

At the close of the evidence, the defendant offered instructions in effect advising the jury that the plaintiff was charged with notice of the contents of the tariffs on file with the Interstate Commerce Commission, and also advising the jury that at the time the cars were shipped there were two rates on sewer pipe from St. Louis, Mo., to New Orleans, La., one a 25-cent rate and the other a 14-cent rate. These instructions the court refused to give, and on its own motion gave the following instruction:

"No. 10. The court instructs the jury that if they believe from the evidence that defendant, at the time of the shipment in question, had two rates on sewer pipe from St. Louis to New Orleans, under one of which rates the pipe was to be carried by the defendant at the risk of the shipper, being a lower rate, and under the other rate the pipe was to be carried at the risk of the defendant, then said provision in the contract of shipment (the bill of lading) that the defendant should not be liable for breakage is valid and binding, and if the jury so find the fact to be, and further find and believe from the evidence that the plaintiff knew that there were such two rates and accepted said lower rate, then said defendant would not be liable for the breakage of said pipe while being transported from St. Louis to New Orleans, unless the jury should further find from the evidence that such breakage was caused by the negligence and carelessness of defendant in handling said shipments."

It was conceded in the lower court, and also in this court, by both sides, that if the defendant had in force a 25-cent rate and a 14-cent rate on sewer pipe from St. Louis, Mo., to New Orleans, La., at the time of these shipments, the defendant, under the bills of lading and under the tariff rules introduced in evidence, would not be liable as an insurer, that is, would not be liable on counts 1 and 3 of plaintiff's petition, but that, if defendant or its connecting carriers were guilty of negligence in the transportation of the sewer pipe, it would still be liable for negligence on counts 2 and 4. In other words, it is conceded that the defendant could by means of a special contract based upon a reduced rate exempt itself from liability as an insurer, but could not so exempt itself from negligence.

[1] The appellant contends that the above instruction, No. 10, was erroneous, in that it allowed the jury to pass upon the question as to whether, if there were two rates, the plaintiff knew of them. In this contention, we believe that the appellant is correct. Under the tariffs mentioned above, which were introduced without objections and without dis-

pute as the tariffs under which these shipments moved, there were two rates upon sewer pipe, one a classification rate of 25 cents and the other a commodity rate of 14 cents. The plaintiff was bound to know of these rates, and should not have been able to say that there were not two rates, or that it did not know of the two rates. In the case of *Kansas City Southern R. R. v. Carl*, 227 U. S. loc. cit. 653, 33 Sup. Ct. 395, 57 L. Ed. 683, the court says: "The shipper's knowledge of the lawful rate is conclusively presumed."

In the case of *Poor Grain Co. v. Railroad*, 12 Interst. Com. R. loc. cit. 470, Commissioner Harlan, delivering the opinion, says:

"A carrier is required by the law to publish the rate and also clearly to indicate the route over which the published rate is applicable. When so published, the rate named and the route designated stand as the law, binding as well upon the shipper as upon the carrier. A schedule of rates published in the manner provided by law speaks with equal authority to the shipper and the carrier, and both are equally chargeable with notice of the rate and of the route over which the rate is made applicable."

In the case of *Texas & Pacific R. Co. v. Cisco Oil Mill*, 204 U. S. loc. cit. 451, 27 Sup. Ct. 360, 51 L. Ed. 562, the court says:

"The filing of the schedule with the commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary."

In the case of *Boston & Maine R. R. v. Hooker*, 233 U. S. loc. cit. 113, 34 Sup. Ct. 529, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, the court says:

"The precise position of the defendant is that, as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent, or even misrepresentation. * * *

"It follows therefore, from the previous decisions in this court, that, if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate, and thus secured the liability of the carrier to the full amount of the value of her baggage."

The *Boston & Maine Case* was followed in the case of *Donovan v. Wells, Fargo & Co.*, 265 Mo. 291, 177 S. W. 839. In this latter case, at page 316 of 265 Mo., page 847 of 177 S. W., the court says:

"So, we think it fairly follows that, where in an interstate shipment an oral contract is made, the terms of which are forbidden by a law, which the shipper and the carrier must both notice, and where a published interstate rate is filed containing regulations prescribing conditions precedent to the acceptance of goods for carriage, he who delivers such goods at the

owner's request for shipment must be held to be authorized by the owner to comply with the law and with all reasonable published regulations as to the terms and conditions of shipment, and that the shipper will not be heard to assert the contrary."

To the same effect, see the recent case of *Stubblefield v. St. Louis & San Francisco Railroad Co.*, 184 S. W. 149.

It follows from what has been said above that the court should not have allowed the jury to pass upon whether or not the plaintiff knew of the existence of the two rates, because, as a matter of law, plaintiff was bound to know of the existence of the rates provided for in the tariffs. Indeed, under the law and undisputed evidence in this case, the jury ought to have been told that the plaintiff was not entitled to recover on counts one and three.

[2] The appellant contends that the plaintiff was not entitled to recover on counts 2 and 4, for the reason that there was no evidence of negligence on the part of the defendant. We cannot agree with appellant in this contention. At the trial the plaintiff offered evidence tending to show that all of the tile placed in the cars at St. Louis was carefully examined and found to be in good sound condition; that it was properly loaded into the cars for shipment from St. Louis, Mo., to New Orleans, La. It appears that this sewer pipe is heavy and hard to break, and that when it is properly packed into cars it will carry over a distance such as the one involved in this case. The evidence further shows that while in the cars, so packed, it will stand considerable rough handling and not break. It further appears from the evidence that plaintiff had shipped great numbers of cars containing the same kind of tile as was contained in these cars over similar distances and even greater distances, and at destination the tile or sewer pipe was found to be in like good order and condition as when shipped. It appears in this case that upon the delivery of these cars at New Orleans, La., approximately one-third of the sewer pipe was broken. We believe that from this evidence the jury was warranted in drawing the conclusion that the sewer pipe was damaged by the negligence and carelessness of the defendant or its connecting common carriers while in transit. In *Heck v. Mo. Pac. Ry. Co.*, 51 Mo. App. 533, 534, plaintiff sued defendant for breaking and damaging a certain leather-splitting machine. Judgment was given for plaintiff on a trial without a jury, and defendant appealed.

"It appeared from the testimony, or, to be more accurate, there was testimony going to show, that the machine was delivered to defendant for shipment in sound condition and well and securely packed, and that it arrived at its destination with the legs broken. There was a special contract exempting defendant from liability in certain instances named, and we will assume that such exemption included machinery such as this was. We will also assume as true a matter about which there was contention between the parties, that the letters indorsed on the freight contract were 'O. R.,' * * * and

were so known to plaintiff. Defendant offered evidence going to show that the car in which the machine was placed was properly and carefully handled, that it received no rough handling, and that no accident happened to it. The case is then left to stand with the onus on plaintiff throughout and with the testimony above stated, and the only question is: Does it make such a case as should be submitted to the triers of the facts? We answer this in the affirmative. When the plaintiff delivered the machine to defendant in good condition, well and securely packed, and it was delivered by defendant at St. Louis, with the legs broken, it was circumstantial evidence from which a reasonable inference of negligence on defendant's part while the machine was in its charge as a carrier could be drawn. It was evidence for the court (trying the case as a jury) to consider in connection with the defendant's testimony, as to the care taken, etc. That consideration has resulted in plaintiff's favor, and we do not feel authorized to disturb it. This case is similar (though stronger for this plaintiff) to the case of *Witting v. Railroad*, 101 Mo. 631 [14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636]. As stated in that case, the onus, in cases of this sort, is on the plaintiff throughout the trial to prove the negligence of defendant; and, though such negligence will not be presumed, it may be inferred from circumstances legitimately appearing in the case. The judgment is with the concurrence of all affirmed."

In the case of *Witting v. St. Louis & San Francisco R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, it is said:

"There is evidence tending to show that the fountain was properly packed, and was delivered to the defendant in good order. It was badly broken when placed in the defendant's warehouse at St. Louis. The evidence of plaintiff and his brother is that the crate was then broken on one side, and that one of the inside stays was broken and the others out of place. All this tends to show want of care on the part of defendant. Had the plaintiff brought this suit in the circuit court by declaring on the contract, setting out its provisions, and founding his case on negligence only, we think the evidence would have entitled him to go to the jury. It will not do to say the evidence shows no more than the simple fact that the apparatus was broken. The very circumstances which disclose this fact tend to show very great negligence on the part of the defendant. It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence. We can say with safety that such a breakage does not ordinarily occur where the property is transported with due care. There is an abundance of evidence to entitle the plaintiff to go to the jury on the issue of negligence, and especially is this so since the means of showing how the accident occurred is with the defendant and not the plaintiff."

[3] Complaint is here made that the court allowed in evidence certain testimony of a foreman in the employ of the consignee at New Orleans, La., who testified that he unloaded all, or looked after the unloading of all, cars of pipe shipped in 1903 from plaintiff to the consignee, being 400 or 500 all together; and that at various times he would see the railroad switch cars loaded with tile around the yard and allow them to bump into other cars; and that the railroad would bump into cars that he was unloading. Upon cross-examination he testified that he did not know whether the cars thus handled were any of the five cars involved in this case.

The testimony of this witness with reference to these cars is not distinctly confined to the cars involved in this case; but the witness was thoroughly cross-examined with reference to it, and we believe that it was for the jury to give such weight to it as it deserved, and even if the evidence was incompetent, under the circumstances of this case, we do not believe that its admission was reversible error.

[4] On the measure of damages the court instructed the jury to the effect that, if they found in favor of the plaintiff on the first and third counts, they should assess plaintiff's damages based upon the difference, if any, in the market value of the sewer pipe at St. Louis in the condition it was shipped and its condition in which it was delivered at New Orleans, and the jury were further instructed that in that event they would find for the defendant on the second and fourth counts of the petition, or, if they did find for plaintiff on those counts also, then their verdict would be for nominal damages only on those counts. As indicated above, the jury found in favor of the plaintiff in the first count for \$385.59, and on the third count for \$78.77, and they further found the issues in favor of the plaintiff on the second and fourth counts and assessed its damages at one cent on each of these counts.

We have heretofore reached the conclusion that, under the evidence in this case, the plaintiff ought not to have been allowed to recover on the first and third counts; that is, under the insurance liability of the defendant as a common carrier. It is evident, however, from this verdict, that the jury reached the conclusion that the plaintiff was entitled to recover on the second and fourth counts; that is, it was entitled to recover upon the liability of the common carrier for negligence because the instruction on the measure of damages told the jury that, if they found in favor of the plaintiff on the second and fourth counts, their verdict should be only for nominal damages in the event they found substantial damages on the first and third counts.

It will be remembered that, under the pleadings in this case and the theory of both sides, the measure of damages in the event plaintiff was to recover was by the terms of the bill of lading to be computed on the difference in value of the good and broken pipe at the time and place of shipment, and the measure of plaintiff's recovery on any of the four counts was exactly the same, as was set

forth in the instruction on the measure of damages. In other words, the measure for a recovery for substantial damages was the same for count 1 as for count 2, and the same for count 3 as for count 4.

Under this instruction, the jury found for the plaintiff on the first and third counts and assessed the actual damages on those counts. They also, at the same time, found for the plaintiff on the second and fourth counts for nominal damages. By this verdict on the second and fourth counts, the jury in reality found that the defendant was negligent in the transportation of the sewer pipe; but the jury could not assess the actual damages also under those counts, because they had already assessed it under the first and third counts. They had computed this actual damages for the first and third counts, using a correct method for this case. This method for computing the actual damages, set forth in the instructions, was also the proper method for computing the actual damages in this case if the jury were to return a verdict for actual damages on the second and fourth counts for negligence of the defendant. So we have here a finding by the jury that plaintiff is entitled to recover on the second and fourth counts, because defendant was guilty of negligence. We have the amount of the actual damages suffered and sustained by reason of this negligence, because the amount of the actual damages had to be the same under the instruction for the first and second counts, and also the same for the third and fourth counts, and therefore, when we have the damages for the first count assessed by the jury, we necessarily have the damages sustained under the second count, and when we have the damages for the third count, assessed by the jury, we necessarily have the damages sustained under the fourth count. The finding of the jury was in effect, therefore, that the plaintiff was entitled to recover for the negligence of defendant on the second count the amount found and assessed by it on the first count, and on the fourth count for the amount found and assessed by it on the third count. Holding this view of the case, it is our duty to allow the judgment to stand. *Hamilton-Brown Shoe Co. v. Wolf*, 240 U. S. 251, 36 Sup. Ct. 289, 60 L. Ed. 629; sections 2082 and 1850, R. S. Mo. 1909.

The judgment is affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

RUCH v. PRYOR et al. (No. 12163.)

(Kansas City Court of Appeals. Missouri.
Dec. 18, 1916.)

1. TRIAL \Leftrightarrow 251(8)—INJURIES TO SERVANT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for personal injuries to a railroad employé when the hose carrying the stream of hot water with which he was washing out an engine boiler burst, an instruction, submitting the issue of the company's negligence in permitting the water to become so hot and the pressure so high as to render the use of the hose unsafe, and adding thereto the issue as to the shutting off of the water by another boiler washer thereby increasing the pressure, which latter issue was not raised in the pleadings, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593; Dec. Dig. \Leftrightarrow 251(8).]

2. APPEAL AND ERROR \Leftrightarrow 1033(5)—PREJUDICIAL ERROR—INSTRUCTIONS—APPLICABILITY TO ISSUES.

The error was not harmless to defendant as imposing an additional burden on plaintiff, since under it the jury might have found that the act of the other washer, which was not negligent, was the proximate cause of the injury and have based their verdict for plaintiff on such act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. \Leftrightarrow 1033(5).]

3. TRIAL \Leftrightarrow 240 — INSTRUCTIONS — ARGUMENTATIVE INSTRUCTIONS — OPINION OF JUDGE.

In an action for injuries to a railroad employé while washing an engine boiler, an instruction, reciting the hypothesis that plaintiff examined the hose and nozzle with ordinary care and found them to be apparently safe and that he used them for some time without accident, was erroneous as tending to be a persuasive argument in favor of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. \Leftrightarrow 240.]

4. EVIDENCE \Leftrightarrow 506, 528(2)—TESTIMONY OF EXPERT—QUESTIONS FOR JURY—CAUSE OF INJURY.

In an action for personal injuries, a physician testifying as an expert may state that plaintiff's rupture might or could result from the injury, but cannot assume the function of the jury by stating that it did so result.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2309-2337; Dec. Dig. \Leftrightarrow 506, 528(2).]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

"Not to be officially published."

Action by John E. Ruch against Edward Pryor and others. Judgment for the plaintiff, and defendants appeal. Reversed and remanded.

J. L. Minnis and N. S. Brown, both of St. Louis, and Phillips & Phillips, of Moberly, for appellants. Hunter & Chamler, of Moberly, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for personal in-

jury received by him while in defendant's employ and engaged in performing interstate commerce service. He recovered judgment in the trial court.

Plaintiff was a boiler washer, and when injured was washing out the boiler of one of defendant's engines. That service was performed by the use of a rubber hose with a nozzle at the end, consisting of the nozzle proper and a neck over which the hose was stretched and clamped. Hot water under pressure was sent through the hose, and the cleaning or washing was done by applying the nozzle to the proper part of the boiler. While thus engaged, the nozzle and metal attachment was caused by excessive pressure and heat of the water to burst asunder from the hose with great violence, striking plaintiff in the side and knocking him against certain tools and scalding different parts of his body.

[1] There are a great many acts of negligence charged, and many of these acts are repeated, so that with the number of them and the frequency of their repetition there is a great tendency to confusion. Among other acts is that the hose itself was old, rotten, and unfit; and much time was wasted on matters that seem finally to have been considered of no moment. So that the case became simplified in plaintiff's instruction No. 1, by reducing the negligence to two points, and one of these is not found among the number set out in the petition. The hypotheses of negligence in this instruction (which was the only one asked by plaintiff, save as to measure of damages) was that if defendant permitted the water to become so hot and the pressure so high as to render the use of the hose unsafe and dangerous, "and that another boiler washer also using the same washout line shut off the water he had been using, thereby increasing the pressure of the water in the hose then being used by the plaintiff," etc., proceeding to submit the explosion and resulting injury. The negligence set out with great particularity in the petition was thus broadened in scope by the submission of this last clause as a new and additional specification. This has been always held a fatal error. *Degonia v. Railroad*, 224 Mo. 564, 589, 123 S. W. 807; *Black v. Railroad*, 217 Mo. 672, 117 S. W. 1142; *Beave v. Railroad*, 212 Mo. 381, 111 S. W. 52; *Mansur v. Botts*, 80 Mo. 658; *Bank v. Murdock*, 62 Mo. 70.

[2] Defendant claims that such an act on the part of another boiler washer would not have been negligence, and we think properly claims that it had no place in the instruction. Plaintiff endeavors to escape this objection by saying it did not harm defendant and only put an additional burden on him. That view cannot be accepted. The jury may have taken the act of the other boiler washer as the real and proximate

cause of the explosion. If such should be the fact, a verdict has been rendered against defendant on an issue inserted in an instruction without being backed by a pleading.

[3] The instruction was also fatally defective, in that it was phrased in such way as to become a persuasive argument. After reciting the hypothesis that plaintiff examined the hose and nozzle with ordinary care to see if they were secured together "and found the same were apparently safe," and "that he used the same for some time without accident," it then proceeds to submit the matters designated as negligence. The tendency of these recitations, in view of the evidence in the case, was to incline the jury to plaintiff's side of the controversy.

[4] A physician was introduced by plaintiff as an expert, and error was committed in permitting him to say, affirmatively, that the injury plaintiff received was the cause of the rupture with which he was afflicted at the trial. An expert may properly say that a certain matter may be, or might or could be, the result of a certain other matter; but he should not say whether it is, in fact, such result. By being allowed to assume such function, he renders the service of a jury unnecessary. *Castanie v. Railroad*, 249 Mo. 192, 155 S. W. 38, L. R. A. 1915A, 1056; *Glasgow v. Street Ry. Co.*, 191 Mo. 347, 89 S. W. 915; *Smart v. Kansas City*, 208 Mo. 202, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932; *Roscoe v. Street Ry.*, 202 Mo. 576, 101 S. W. 32.

Plaintiff insists that, since the occurrence and the injury were practically admitted by defendant, the error is rendered harmless and not reversible, and this view is supported by the Supreme Court in *Taylor v. Street Ry.*, 256 Mo. 191, 207, 165 S. W. 327. But defendant has refused consent to the statement that the rupture has been unchallenged, and in turn claims that the case last cited does not apply. It is unnecessary to decide these claims, since the case is to be retried and more care can be taken in questioning the expert.

There was an irregularity in the form and wording of the verdict which has occasioned discussion by counsel. We need not decide the point, since the parties will see that it does not occur again.

We are asked to reverse the judgment outright on the ground that no case was made for plaintiff. We have examined the evidence and the various suggestions for and against that proposition, and have concluded that we would not be justified in affirming, as a matter of law, that a case has not been made. We reject defendant's suggestion that plaintiff's testimony should be disregarded as being contrary to the physical facts developed in the case.

The judgment is reversed, and the cause remanded. All concur.

RILEY PENNSYLVANIA OIL CO. v. SYMONDS (TRITCH, Garnishee).
(No. 12107.)

(Kansas City Court of Appeals. Missouri. Dec. 18, 1916. Rehearing Denied Dec. 29, 1916.)

1. PRINCIPAL AND AGENT ⇨105(4)—AUTHORITY OF AGENT—SALES AGENT.

A local sales agent has no authority by virtue of his employment to waive the provisions of the Bulk Sales Act (Laws 1913, p. 163).

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 301, 374; Dec. Dig. ⇨105(4).]

2. FRAUDULENT CONVEYANCES ⇨228 — ATTACHMENT—BULK SALE.

Under Rev. St. 1909, § 2294, making a fraudulent conveyance ground for attachment, and Bulk Sales Act (Laws 1913, p. 163), § 1, making sales of a stock of goods without compliance with the act fraudulent, the latter act can be invoked in ordinary attachment proceedings if brought within the ninety day limit fixed by section 4a of the act.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 665-667; Dec. Dig. ⇨228.]

3. FRAUDULENT CONVEYANCES ⇨228—REMEDIES OF SELLER—BULK SALES ACT—"PROVISO."

Bulk Sales Act (Laws 1913, p. 163) § 2, providing that any vendee who fraudulently fails or refuses to comply with the provisions of the act shall upon application of any of the creditors or the vendor become a receiver and be held accountable to the creditors for all the merchandise coming into his possession by virtue of the sale, with a proviso that nothing in the act shall be construed to give any creditor any right to or lien on any merchandise except the goods sold by such creditor, does not prevent an attachment of the goods in the hands of the buyer; the remedy there given, when construed with the proviso, as it must be since a proviso is to restrict or restrain the preceding portion of the statute of which it forms a part, being given only to those creditors who are able to identify the goods sold by them.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 665-667; Dec. Dig. ⇨228.]

For other definitions, see *Words and Phrases*, First and Second Series, *Proviso*.]

4. FRAUDULENT CONVEYANCES ⇨228—REMEDIES OF SELLER—BULK SALES ACT—INCONSISTENT REMEDIES.

The remedies by attachment, under section 1, Bulk Sales Act, and by receivership in favor of creditors who can identify goods sold by them, under section 2 are not inconsistent, since the attaching creditors must be limited to a remedy against those goods which are not identified by some seller or to the excess of the identified goods over the claims of the sellers.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 665-667; Dec. Dig. ⇨228.]

5. APPEAL AND ERROR ⇨170(2)—PRESENTING QUESTIONS BELOW—NECESSITY OF EXCEPTION—CONSTITUTIONAL QUESTION.

A garnishee, who took no exception to the overruling by the trial court of his contention that the statute under which plaintiff was proceeding was unconstitutional, cannot raise the constitutional question on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1037, 1038; Dec. Dig. ⇨170(2).]

6. JUDGMENT §17(11) — JUDGMENT BY DEFAULT—CONSTRUCTIVE SERVICE—GARNISHMENT.

In attachment against a nonresident served only by publication, where no property was seized and the garnishee denied possessing any property of the defendant, it was improper to render judgment by default against defendant before finding that the garnishee possessed property belonging to defendant, since the court would have no jurisdiction over defendant unless the garnishee possessed such property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 33; Dec. Dig. §17(11).]

Appeal from Circuit Court, Adair County; C. D. Stewart, Judge.

Attachment proceedings by the Riley Pennsylvania Oil Company against Thomas W. Symmonds, in which Marvin Tritch was garnisheed. Judgment for the garnishee, and plaintiff appeals. Reversed and remanded, with directions.

Higbee & Mills, of Kirksville, for appellant. Weatherby & Frank, of Kirksville, for respondent.

ELLISON, P. J. Defendant Symmonds owned a stock of merchandise and was indebted to plaintiff. He sold the stock in bulk to Tritch. Neither of them complied with the sales in bulk statute in Laws 1913, p. 163. Plaintiff brought an action by attachment and garnished Tritch. The trial court found for Tritch, and plaintiff comes here for relief.

The case involves a construction of the statute just mentioned. It is provided in section 1 that any sale of the whole or greater part of a stock of merchandise, otherwise than in regular course of trade, shall be fraudulent and void as against all creditors of the vendor, unless the vendee seven days before the sale obtains from the vendor a written statement, under oath, of all of his creditors with the amount due to each; and the vendee shall then, at least seven days before taking possession or paying therefor, notify each of these creditors of the proposed sales, by telegraph or registered letter. The section contains a proviso that if the vendor delivers to the vendee a written waiver of these requirements by the creditors, contained in the verified statement, the statute will not apply.

Section 2 of the act provides that any vendee who shall conform to the provisions of this act shall not be held in any way accountable to any creditor of the vendor for any of the merchandise that has come into the possession of the vendee by virtue of said sale, "but any vendee who shall fraudulently fail or refuse to comply with the provisions of this act, shall upon application of any of the creditors of the vendor become a receiver and be held accountable to such creditors for all the merchandise, * * * that have come into his possession by virtue of said sale." Then, immediately following, is this proviso:

"Provided, however, that nothing in this act shall be so construed as to give any creditor, * * * any right to, or lien on any merchandise, * * * except the goods sold * * * by such creditor."

Section 4a provides that no proceeding at law, or in equity, shall be brought against any vendee to invalidate any sale after the expiration of 90 days from date of delivery to such vendee.

We gather from the record that the trial court was of the opinion that, notwithstanding in making the sale the provisions of this statute were ignored, yet under facts appearing in evidence there was a waiver by plaintiff, or, stated another way, there was an estoppel against plaintiff which deprived it of the right to invoke such statute. The facts bearing on such supposed waiver, or estoppel, are that one Few was plaintiff's local sales agent, who also collected for bills he sold, and that he knew of the sale "a week or ten days before it took place," and was told (verbally) by Tritch to "look after his account," when he replied that he had "a check for a part of it and there was only a small amount left"; that thereupon Tritch paid Symmonds all but \$500 of the purchase money, such sum being the unpaid bills to other creditors, not including any of plaintiff's bill; that afterwards it developed that the check given to Few was worthless.

The evidence in plaintiff's behalf tended to show that the verbal notice to Few was not until after the sale and delivery to Tritch. It is stated that both Symmonds and Tritch have absconded.

It is thus seen that the statute has not been complied with in any particular. The specific provisions of the law as to written lists of creditors verified by affidavit, and written notice to such creditors within certain times, were no doubt made to avoid such disputes and trouble that this case has developed.

[1] The statute (section 1) makes but one provision for a waiver of its terms, and that must be a written one from the creditors. It is, however, unnecessary to say whether any other kind of waiver could be made, or estoppel invoked, since, in this case, the acts of Few claimed to constitute a verbal waiver, were the acts of an unauthorized person. A local sales agent has no authority, by virtue of that employment, to waive the provisions of the act. *Kight v. Stephen Shoe Co.*, 137 Ga. 493, 495, 73 S. E. 740.

[2] But it is insisted by counsel that the bulk sales act cannot be invoked or applied by an ordinary action of attachment provided for by the general statutes. We do not doubt that it can. Under the attachment statute (section 2294, R. S. 1909), a fraudulent conveyance by the debtor as against creditors is ground for attachment; and a conveyance in defiance of the bulk sales act is declared to be a fraudulent conveyance as against creditors,

and thus, by its own terms, becomes a cause of attachment.

The act has been construed in this state as furnishing an additional character of fraudulent conveyance for which an attachment may be had under the general statute. *Supply Co. v. Smith*, 182 Mo. App. 212, 167 S. W. 649. In that case, in the opinion of Judge Farrington, supplemented by the concurrence of Judge Sturgis, is to be found a most interesting discussion of the entire question. Their conclusion that an attachment may be had is in keeping with the views expressed in states with similar statutes to section 1 of our act. *Musselman Grocer Co. v. Kidd*, 151 Mich. 478, 115 N. W. 409; *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; *Carstarphen Warehouse Co. v. Fried*, 124 Ga. 544, 52 S. E. 598; *Interstate Rubber Co. v. Kaufman*, 98 Neb. 562, 153 N. W. 585.

It seems to us that the meaning of the statute is that a vendee who buys and obtains possession of merchandise in bulk, without ascertaining the vendor's creditors and notifying them as required by the statute, becomes a trustee for such creditors, and liable to them in the proportion of their respective claims; that is, he is liable as such trustee to all who may, in obedience to section 4a of the act, institute their proceeding, within the 90 days from the day he accepted delivery of the property. After the expiration of that limited period, he cannot be disturbed in his purchase so far as any violation of that act is concerned.

The latter section is broad, applying against the creditor whether he has been notified or not; for, if not notified, it is justly assumed that the limited period is sufficient time for all diligent creditors to have learned of what has taken place. The intention of the statute is to preserve an equality among the creditors under section 1, during the period limited for proceedings against the sale, and thereby prevent a race for preference which might otherwise result.

We do not mean to be understood as saying that an attachment is the only remedy under section 1, for it has been held that a proceeding on execution may be had (*Mutz v. Sanderson*, 94 Neb. 293, 143 N. W. 302; *Dickinson v. Harbison*, 78 N. J. Law, 97, 72 Atl. 941, and by a bill in equity (*Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401). Though in Georgia it was held that, in cases where the legal remedy was complete without the aid of equity, the latter would be denied; and that would, perhaps, be the view of our courts.

[3] One of the reasons urged why an attachment should not be had is that section 2 of the act (which we have above set out), providing for a receiver, controls the provisions of section 1, and is the only remedy which may be had. We think with the Springfield Court of Appeals, in *Supply Co.*

v. Smith, supra, that the section in no way affects the right to an attachment. The first clause of section 2 could as well have been left out. It only adds emphasis to what we would have known without it; that is, that the vendee who complied with the act should have his goods without being accountable to any creditor. But the second clause, declaring that, if he fraudulently failed or refused to comply with the act, he thereby, on the application of any creditor, became a receiver, does provide for a certain class of creditors another remedy than attachment. When read in connection with the proviso, as it must be, it provides for that class of creditors who may apply for its benefits if they are able to identify the articles they sold to the vendor. The section without the proviso is that the vendee who has failed to comply with the statute shall be held accountable to those creditors who may apply "for all the merchandise"; but the proviso qualifies that expression by saying, in effect, that the vendee shall be liable "for all the merchandise sold and delivered by such creditor." A "proviso," says Judge Graves in *Brown v. Patterson*, 224 Mo. 639, 658, 124 S. W. 1, 6, is "to restrict or restrain the preceding portion of the statute of which it forms a part." Continuing, the judge quotes:

"A proviso in a grant or enactment is something taken back from the power first declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bonds of the proviso."

Applying this to the statute under review, we find that the remedy under section 2 is only open to that class of creditors who may be able to identify the goods sold by them and upon which their claim is founded. The vendee, under this section, is only accountable to "such creditors" as make application asking that he be held to be a receiver.

[4] We think that sections 1 and 2 are not open to the criticism of being inharmonious; for, if some creditors attached under section 1, and others, who could identify their goods, applied for a receivership so as to segregate them, their vendor's lien (if it may be so called) could be enforced against such goods, and the ordinary attaching creditors could proceed against those not identified and any excess of those segregated over the amount of the claim of the identifying creditor. Different interests ought easily to be adjusted by the court. Aside from this provision, we have no recognition in this state of a vendor's lien on personal property. The nearest preference we have given a vendor is found in section 2191, declaring that such property shall not be exempt from execution for the purchase price. In several other states "the sales in bulk" statute contains a section like our section 2, except the proviso. See copy of Michigan statute set out in *Musselman*

Co. v. Kidd, Dater Co., 151 Mich. 478, 115 N. W. 409.

[5] The garnishee claims that the act is unconstitutional. He made that point in the trial court. It was overruled, and he acquiesced by failing to preserve an exception, and must therefore be held to have abandoned it. In *State ex rel. v. Smith*, 176 Mo. 44, 75 S. W. 468, the relator raised a constitutional point which the trial court overruled, but afterwards decided the case in the relator's favor. This judgment was reversed on appeal of the other party to this court. The relator then sought to have the case certified to the Supreme Court on account of the constitutional question; but that court held that he should have excepted to the trial court's ruling, and saved the point for review in some appropriate manner.

[6] Finally, an important point of practice has been presented. It appears that an order of publication was taken against defendant and the attachment writ put in the hands of the sheriff, who served it by summoning the garnishee and making due return of the writ. Then plaintiff, relying upon the law as stated in *Hauptman & Co. v. Whittle*, 85 Mo. App. 188, took judgment by default against defendant which was made final after hearing the testimony in proof of his account; the amount to be levied and made out of defendant's goods "attached in the hands of the garnishee, Tritch." But at this time it had not been ascertained that Tritch had any of defendant's goods in his possession, and afterwards, in answer to interrogatories, he denied that he had. It appears that on order of publication and attachment, with no appearance by the defendant, and no property which has been seized, the court has no jurisdiction except what it may get from the res in any garnishment that may have been served. *Mercantile Co. v. Bettles*, 58 Mo. App. 384; *Typewriter Co. v. Cash Register Co.*, 156 Mo. App. 98, 108, 135 S. W. 992. It therefore seems to be irregular to enter a judgment against the defendant which is only to be made out of the property in the hands of the garnishee, before it is known that there is anything in his hands; and, unless it turns out that he has defendant's property, there being no personal service or appearance, the court has no jurisdiction.

We will therefore reverse the judgment and remand the cause, with directions to set aside the judgment rendered against defendant Symmonds on the 24th of May, 1915, and to enter of record a finding that the garnishee, Tritch, has the property in controversy in his hands liable to garnishment, and that it has been garnished by the sheriff. Then enter the judgment against defendant Symmonds, and then enter the appropriate judgment against Tritch, the garnishee. All concur.

YOUNG v. DUNLAP. (No. 12034.)

(Kansas City Court of Appeals. Missouri. Dec. 30, 1916.)

1. APPEAL AND ERROR ⇐989—REVIEW — SUFFICIENCY OF EVIDENCE—EVIDENCE CONSIDERED.

In passing on the objection that the verdict for plaintiff is not supported by the evidence because plaintiff's evidence was incredible and contrary to the physical facts, the appellate court need examine only plaintiff's evidence, together with the physical facts disclosed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3897; Dec. Dig. ⇐989.]

2. EVIDENCE ⇐588—USE OF STREETS—AUTOMOBILE COLLISION—SUFFICIENCY OF EVIDENCE.

In an action for injuries resulting from an automobile collision at the intersection of two streets, plaintiff's evidence held not so incredible or so inconsistent with the physical facts as to be insufficient to support a verdict in her favor.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. ⇐588; *Witnesses*, Cent. Dig. § 1164.]

3. MUNICIPAL CORPORATIONS ⇐706(8)—USE OF STREETS—AUTOMOBILE COLLISION—INSTRUCTIONS.

In an action for injuries resulting from an automobile collision, where the petition charged that defendant saw, or by the exercise of ordinary care could have seen, plaintiff and the automobile in which she was riding in a position of peril in front of defendant's automobile in time, by the exercise of ordinary care, to have stopped or slackened his speed or have turned to one side and thereby avoided the collision, an instruction, which authorized a finding for plaintiff if her position when seen was anywhere within the intersection of the streets, was erroneous as ignoring the allegations of the petition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ⇐706(8).]

4. TRIAL ⇐251(1)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

An instruction should not be broader than the petition, whatever may be the scope of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587, 588, 594; Dec. Dig. ⇐251(1).]

5. APPEAL AND ERROR ⇐662(1)—AUTOMOBILE COLLISION—EVIDENCE—ORDINANCE—RECORD.

An ordinance, which the record showed was not in force until six months after the collision in which plaintiff was injured, cannot be considered in an action for the injuries notwithstanding plaintiff's claim that there was a mistake in the date as shown by the record, and the testimony of the deputy city clerk that the ordinance was in force at the time of the collision, which was qualified by a statement that the ordinance would show.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2850; Dec. Dig. ⇐662(1).]

6. APPEAL AND ERROR ⇐209(5)—ADMISSION OF EVIDENCE—FAILURE TO OBJECT—WEIGHT OF EVIDENCE.

The failure of a party to object to the admission in evidence of an ordinance not in force when the accident occurred does not preclude him from insisting that it was of no weight in the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1290; Dec. Dig. ⇐209(5).]

7. MUNICIPAL CORPORATIONS \Leftrightarrow 592(1)—USE OF STREETS—VALIDITY OF ORDINANCE.

An ordinance, providing that automobiles should not be driven on the city streets at a rate which is not careful and prudent, and providing that certain rates in different places should be presumed not careful, is a proper exercise of the city's police power to regulate the speed of vehicles on its streets, and is not invalid as an attempt to prescribe what shall be presumptive evidence in the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1311; Dec. Dig. \Leftrightarrow 592(1).]

8. MUNICIPAL CORPORATIONS \Leftrightarrow 705(4)—USE OF STREETS—ORDINANCE—PROVISO.

In an ordinance declaring that automobiles should not be driven on the city streets at a rate which is not careful and prudent and prescribing that certain rates at different places shall be presumed not careful, with a proviso that in passing a street intersection the rate of speed shall not exceed 10 miles per hour when any person or other vehicle is in danger, the proviso must be connected with the rest of the section and does not make an excess over 10 miles per hour absolute negligence, but only presumptive evidence of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1516; Dec. Dig. \Leftrightarrow 705(4).]

9. APPEAL AND ERROR \Leftrightarrow 1064(2)—HARMLESS ERROR—INSTRUCTIONS CURED BY EVIDENCE.

Error in instructing that a speed in excess of 10 miles per hour at such a street intersection was negligence was harmless, where there was no evidence which would excuse the excess speed so as to overcome the presumption created by the ordinance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221, 4222; Dec. Dig. \Leftrightarrow 1064(2); Trial, Cent. Dig. §§ 525, 553.]

10. EVIDENCE \Leftrightarrow 359(1)—PHOTOGRAPHS—CHANGE OF CONDITION.

In an action for injuries resulting from an automobile collision, pictures of defendant's machine, which, in connection with his testimony, were illustrative of the cause of the accident, were admissible, though the condition of the machine had been necessarily changed in order that it might be taken home, since the effect of such changes could be brought out by cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1509; Dec. Dig. \Leftrightarrow 359(1).]

11. EVIDENCE \Leftrightarrow 528(1)—EXPERT TESTIMONY—MANNER OF COLLISION.

In an action for injuries resulting from an automobile collision, testimony of experts, who examined the breakage and marks on defendant's car, as to the manner of collision, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335, 2336; Dec. Dig. \Leftrightarrow 528(1).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by Mary Young against Ike B. Dunlap. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

John E. Wilson, Robinson & Goodrich, and Martin J. O'Donnell, all of Kansas City, for appellant. Strother & Campbell, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for personal injury received in a collision between an automobile being driven by her husband and one

being driven by defendant. She recovered judgment in the circuit court.

[1] Defendant's first objection to the judgment is that the verdict upon which it was rendered is not supported by the evidence in the case. In passing upon that question, we need only examine the evidence given in plaintiff's behalf, together with the physical facts disclosed.

[2] That a collision occurred, at 11 o'clock at night, between the two machines at the intersection of Brush Creek Boulevard and Rock Hill Boulevard in Kansas City, while plaintiff was being driven north on Rock Hill Boulevard and defendant driving east on Brush Creek Boulevard, is not disputed; but which car was run into the other, and which party was at fault, is made a matter of sharp contest in briefs, printed and oral arguments. Plaintiff's machine—that is, the machine in which she was being driven—was much the smaller and lighter of the two. The rubber tire on her machine was a 33-inch tire, while defendant's was a 37-inch. Defendant on his way east was running slightly downgrade from 35 to 60 miles per hour, while plaintiff's machine was going upgrade at the rate of 10 or 12 miles. We think the greater rate stated for the former machine was exaggerated, but it is clear that the jury were authorized to believe it was under high speed. Plaintiff's husband first observed defendant coming east on Brush Creek when the latter was about 150 feet away, and this was as the former "was entering the street"; that is, was entering into the intersection of the two streets. The collision was at the center. The streets were 50 feet in width, so that, while plaintiff was running 25 feet to the center, defendant ran 150 feet to the same point. When plaintiff's husband observed a collision was imminent, he attempted to turn from his northern course to the northeast, which had the effect of throwing his left or west front wheel at an outward angle from the body of the car, when defendant crashed into his car dragging it near 20 feet before stopping. The right front wheel of defendant's car caught in between the left front wheel of plaintiff's and plunged over the axle, breaking down the wheel, and into the engine shield. It was so wedged into plaintiff's car that it required considerable effort to get them apart. Pieces of rubber were found in the engine shield on plaintiff's car in the track of plaintiff's wheel. The right footboard of defendant's car was broken by the collision and also in getting the cars apart.

The trend of a great part of defendant's suggestions and argument is to the effect that the matters stated in testimony in plaintiff's behalf for proof of her case are so incredible and unreasonable that they should not be believed. While some statements made in testimony may be exaggerated, and some com-

parisons may not be apt, the general evidence in support of her case is reasonable in its appearance and, if credited by a jury, would entitle her to a verdict. The question on a challenge to a plaintiff's case should not be whether some parts of the testimony are incredible, but, rather, whether the whole evidence, considered in its entirety, embraces sufficient fact to make out a case. But the principal attack on the case is based on the ground that the evidence in plaintiff's behalf embraces what has become to be known as "physical facts," which it is said overthrow the story of the occurrence as detailed by the witnesses in her behalf. We have carefully examined this phase of the case and find that defendant's position is not sustained by the record. The testimony for plaintiff clearly shows the conditions leading immediately to the collision, and there is nothing unreasonable on the face of it. Nor is the manner of the collision itself unbelievable. As we have already stated, plaintiff's husband, in the smaller car at slow speed, attempted to avoid defendant's rapidly oncoming larger car at high speed, by turning to the right, thus exposing the side of his car at an angle, and defendant crashed into it by going over the front axle, crushing the front wheel, and breaking into the light metal shield of the engine. It serves no purpose, after verdict, to discuss the condition of defendant's car. That was a question for the jury. The fact that a car may appear to be wrecked does not conclusively show that it was not the offending machine in the collision. We conclude the trial court rightly held the case to be for the jury.

[3, 4] Very properly, there were not many instructions in the case; but there was serious error in some of these. The petition charged that defendant saw, or by the exercise of ordinary care could have seen, plaintiff and the automobile in which she was riding "in a position of peril in front of defendant's automobile in time by the exercise of ordinary care to have stopped or slackened the speed, or to have turned to one side," and thereby avoided the collision, etc. It will be noticed that the position in which plaintiff was alleged to be, and the peril in which she was charged to be, and the position in which it is alleged defendant could have seen her, are in front of his machine. Instruction No. 1 for plaintiff ignores these allegations in toto, and authorizes a finding for plaintiff if plaintiff's position was anywhere within the intersection of the streets. This is not a mere technical objection when it is remembered that the collision was in the nighttime when one might very easily see an object in his front, yet he might not be able, the situation considered, to see an object approaching from one side. The instruction should not be broader than the petition, whatever may be the scope of the evidence. *Scrivner v. Railroad*, 260 Mo. 421,

432, 169 S. W. 83; *Degonia v. Railroad*, 224 Mo. 564, 589, 123 S. W. 807; *Ruch v. Pryor*, 190 S. W. 1037 (decided this term), and other cases cited by defendant. As adding emphasis to the substantial nature of this objection to the instruction, we think the jury could very well have believed from the evidence that, after defendant discovered (and there is where his culpability must lie) plaintiff's machine in front of his, he had not time to avoid the collision.

[5] Plaintiff pleaded an ordinance of the city regulating the speed of automobiles approaching intersecting streets. The occurrence in controversy transpired on the night of the 18th of December, 1913; while the ordinance introduced was not adopted and in force until the following July. From this it is manifest that it should not have had any place in the case.

But plaintiff insists that the date of the ordinance must have been a mistake of the stenographer, or of the deputy city clerk, who was the witness with the ordinance in his possession. It would put the determination of cases in appellate courts in great peril if we were to allow a statement of that nature to overturn the facts set forth in the record. The record is absolute verity to us. *White v. Railroad*, 178 S. W. 83. Again, it is said that the deputy clerk testified that he thought the ordinance was in force on the 18th of December, 1913. But he likewise qualified that statement by saying that the ordinance would show. If he had made the flat verbal statement of time when the ordinance was in force, we do not see how that should be allowed to control the ordinance itself which was there present.

[6] But plaintiff suggests that defendant did not object to the ordinance when it was offered. This, however, ought not to be taken as an admission of the effect of the ordinance. When no objection is made to an offer of evidence, the silent party cannot make error out of its being admitted; but that does not preclude him from insisting on its real weight, force or effect.

[7] Upon retrial, the failure of the ordinance to apply to the time of the collision may be cured by some means, and we will therefore answer another objection made to its control or effect upon the case. The ordinance provides that all automobiles shall be driven "in a careful and prudent manner and at a rate of speed that will not endanger the property or life or limb of another; provided that driving in excess of the following rates of speed for a distance of more than two hundred feet shall be presumptive evidence of driving at a rate of speed which is not careful and prudent." This is followed by certain rates at different places, and then follows this proviso:

"Provided however that in passing any street intersection within the limits of the city, the rate of speed shall not exceed ten miles per hour when any person or vehicle is upon said inter-

section with whom or with which there is or may be danger of collision."

Defendant's point against this provision is that, in assuming to regulate what shall be presumptive evidence, it usurps power belonging to the state only; that is, in prescribing what shall be considered presumptive evidence, the city has invaded the right of the courts to be governed by the ordinary law of the state and the procedure of such courts in the administration of justice. We concede, of course, that a city has no power to do that; but we think it has not been attempted by the ordinance in question. The wording of the ordinance is peculiar, but the evident meaning of it is that it prescribes that speed shall be careful and prudent. It then prescribes rates of speed which will be presumed not to be careful and prudent. Now the city, under its police power, has a right to make all needful and reasonable regulations governing the speed of vehicles over the streets. It may prescribe absolutely that a certain speed shall not be exceeded; or it may not desire to prescribe an invariable maximum speed, under all circumstances, and may properly say that the speed named shall be presumed to be negligent, that is to say, not absolutely negligent, but negligent unless excused by circumstances amounting to a good cause.

[8, 9] The proviso above quoted does not have the effect to make driving beyond the limits mentioned therein absolute negligence. It must be connected with the section at large (*Brown v. Patterson*, 224 Mo. 639, 658, 124 S. W. 1; *Riley Oil Co. v. Symmonds*, 190 S. W. 1038, decided this term) which only makes an excess of speed presumptive evidence. Cities in this state have always exercised the power to prescribe rates of speed for vehicles and railroads within their limits, and the courts have declared a violation of such regulation to be negligence per se. The ordinance in question is not different from those, except that this one leaves a way of escape if the circumstances justify it.

It was therefore technical error in plaintiff's second instruction to declare absolutely that defendant was guilty of negligence in exceeding at intersections the 10-mile limit named in the proviso. But as no reason appeared why the limit should have been exceeded the error was perhaps harmless.

[10] We think error was committed in refusing to admit the pictures of defendant's machine, with the explanations of the defendant. He was in the collision. He saw and examined his car at the time, and manifestly the picture, in connection with his statements as to the condition of the car, were illustrative of the affair from his standpoint. *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462; 1 *Wigmore on Evidence*, §§ 790, 792, 794. The reason assigned here to justify the exclusion of this evidence is that the machine was not in the same condition when the picture was taken as it was immediately after the collision. There were some changes made necessary to get the machine home, but these points of difference could be made the basis for cross-examination, thus enabling the jury to give proper weight to the evidence.

[11] Another error was committed against defendant in excluding evidence of experts who examined the breakage, indentations and scars on his car. The opinion of such witnesses concerning the manner of the collision, stated in a proper way, would be admissible evidence. *Patrick v. Steamboat*, 19 Mo. 73; *Commonwealth v. Sturtivant*, 117 Mass. 122, 134, 135, 19 Am. Rep. 401; *Steamboat v. Logan*, 18 Ohio, 375, 394.

The point made by plaintiff that defendant's motion for new trial was not sufficiently specific to save his exceptions to evidence and the instructions must be held not well made under the recent ruling of the Supreme Court in *Wampler v. Railroad*, 190 S. W. 908, not yet officially reported.

The judgment is reversed, and the cause remanded. All concur.

AMERICAN UNION TRUST CO. v. NEVER BREAK RANGE CO. (No. 14505.)

(St. Louis Court of Appeals, Missouri, Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. **BILLS AND NOTES** ⇨188—"WRITTEN" INDORSEMENT—"WRITING."

Under Rev. St. 1909, §§ 10001, 10002, defining when an instrument is negotiated, and providing that indorsement must be "written," the indorsement of the name of a corporation, payee of a note, on the back thereof by means of a rubber stamp was sufficient "written indorsement," where there was substantial testimony that such indorsement was ratified by the officers of the corporation, in view of section 10160, defining "written" as including printed, and "writing," as including print.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 438-444; Dec. Dig. ⇨183.]

For other definitions, see Words and Phrases, First and Second Series, Writing.]

2. **BILLS AND NOTES** ⇨537(6)—ACTIONS—EVIDENCE.

In action on a note, evidence held to carry to the jury the question whether notes were delivered to one as purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. ⇨537(6).]

3. **BILLS AND NOTES** ⇨538(4) — ACTIONS — BONA FIDE HOLDER — INSTRUCTIONS — NOTICE.

In action on a note, an instruction to find for plaintiff, unless when plaintiff purchased the note "it had knowledge or notice" of a certain claimed defense was not erroneous, as permitting plaintiff to recover in the absence of actual notice; the word "actual" not being used therein.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1904; Dec. Dig. ⇨538(4).]

4. **APPEAL AND ERROR** ⇨1002—CONFLICTING EVIDENCE—VERDICT.

A verdict, based on conflicting evidence and determining a question of veracity between two sets of witnesses, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

5. **TRIAL** ⇨260(1)—REQUESTED INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.

The refusal of requested instructions, substantially covered by other instructions given, is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⇨260(1).]

6. **BILLS AND NOTES** ⇨538(2) — ACTIONS — INSTRUCTIONS—CUSTOM.

In action on a note, the defense being that it was indorsed merely by the name of the company stamped with a rubber stamp, the refusal of a requested instruction that if the jury found that it was "unusual and not customary" for business corporations to use the name of the company stamped on the back of notes as an indorsement, then the name of defendant so stamped was sufficient notice that the note was not indorsed to make it the duty of the plaintiff to investigate the authority under which such name was stamped was properly refused, as omitting to state the facts necessary to establish a custom.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1900, 1909; Dec. Dig. ⇨538(2).]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the American Union Trust Company against the Never Break Range Company. From judgment for plaintiff, defendant appeals. Affirmed.

Connett & Currie and O'Hallaron & Lowenhaupt, all of St. Louis, for appellant. Elijah Robinson, of Kansas City, and Collins, Barker & Britton, C. E. Kimball, Jr., and C. K. Rowland, all of St. Louis, for respondent.

REYNOLDS, P. J. Action upon a note executed by the Never Break Range Company, payable to its own order, the note dated May 1st, 1911, due six months after date, with interest from date at the rate of six per cent per annum. The name of the maker, Never Break Range Company, was imprinted in the body of the note with a stamp bearing that name and at the foot of the note and apparently with the same stamp is stamped the name, "Never Break Range Co.," and written below this with a pen, "W. L. Culver, Prest." With the same stamp, apparently, and on the back of the note, is stamped the name, "Never Break Range Co." No individual or official signature, however, follows this.

In the petition upon which the case was tried, it is averred that the defendant negotiated that note and that thereafter and prior to its maturity plaintiff had purchased it for a valuable consideration in the ordinary course of business and it was delivered to plaintiff and that at all times since plaintiff has been the owner and holder of the note in due course. Averring demand for payment of the principal and interest and refusal to pay, and setting up why a copy of the note is filed instead of the original, judgment is prayed for the amount of the note, interest and costs.

The answer of the defendant denies the execution of the note or that defendant ever assigned it by indorsement prior to maturity thereof or at any time; denies that plaintiff is the owner and holder of it or that it had purchased any note of the defendant for a valuable consideration; alleges that the note had not been indorsed by the defendant; that it was a non-negotiable instrument; that defendant never received any consideration for it; that plaintiff now and at the time before the alleged or pretended purchase of the note, knew that the defendant had received no consideration therefor, and that the note was not negotiable and that it had not been indorsed by the defendant and knew that the note was improperly, unlawfully, fraudulently and surreptitiously obtained from defendant, and that no indorsement of the note was made by the defendant, all of which, it is averred, plaintiff knew or had notice thereof.

Another defense was to the effect that the note had been replevied by defendant and was now in its possession, and that the action in replevin had not been tried and de-

terminated but was still pending, and defendant asked that all proceedings on this note be stayed until the determination of the action in replevin. As no attention seems to have been paid to this defense, it is unnecessary to notice it further. This answer was duly verified.

On a trial before the court and a jury, a verdict was rendered in favor of plaintiff for the amount of the note and accrued interest, and judgment following, defendant duly perfected its appeal.

Without dealing with the evidence in detail further than hereafter noticed, it is sufficient to say that it was directly contradictory on almost every material fact in the case. There is substantial evidence on behalf of plaintiff to the effect that the defendant company, desiring to raise money, made out three notes, of which that in suit was one, each for \$5000, all signed and indorsed alike, and that a Mr. Churchman, acting for defendant, sent them by mail to one Sims, who was a note broker and representative of a bank in Memphis, Tennessee. As to whether they were delivered to Sims, as agent, to dispose of them, or as purchaser, is not clear; the evidence is both ways as to that. Sims handed two of them to a man named Bonds, in Kansas City, the president of the Night and Day Bank, to submit them to the board of directors of his bank there. Bonds took these two notes and disposed of one of them to the Night and Day Bank in Kansas City on or about May 3rd, 1911. Bonds turned over the proceeds of that note to Sims, but retained the other note. When Sims asked him to return it, he refused to do so, saying he would keep it for a few days and pay Sims for it, which he never did. In point of fact he negotiated it on his own account with the plaintiff trust company in Kansas City and kept the money, apparently; certainly never paid defendant or Sims any of it. Sims disposed of the third note to a Mr. Hendrey for \$5000 in cash and bonds. According to the testimony for plaintiff, Mr. Richardson, the president of the respondent company at Kansas City, when Bonds, about May 2nd, 1911, presented this note for sale, called up the defendant company at St. Louis over the long distance telephone. The testimony of that president as to the conversation over the telephone with the representative of defendant will be set out later. As the result of that conversation the president of plaintiff company submitted the note to the finance committee of his company on May 3rd, 1911, the day after Bonds had left the note with him, and the finance committee, on the strength of the assurances which its president testified he had received from Mr. Culver and Mr. Churchman, bought the note, paying Bonds \$5000 cash for it. Bonds disappeared and defendant, as stated, has never received anything for the note, except so far as it was included with the \$10,000, and possibly some other securities that were

turned over to it by Mr. Sims on account of the purchase, as he says, of the three notes calling for \$15,000. That is practically the case.

There are five points relied upon for reversal. Of these in their order.

[1] First, the refusal by the court of the defendant's request for a directed verdict, it being claimed that there was no evidence upon which plaintiff was entitled to judgment or "at least the judgment should have been for the defendant," citing sections 10,001 and 10,002, Revised Statutes 1909. These sections are in our Negotiable Instrument Law. Section 10,001 defines an instrument as negotiated when transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. Section 10,002 provides that the indorsement must be written on the instrument itself or upon a paper attached thereto, the signature of the indorser, without additional words, being sufficient indorsement. We are unable to appreciate the force of the argument of the learned counsel for appellant that these provisions of the statute demanded and, under the evidence in the case, authorized a directed verdict for the defendant. There is substantial evidence to the effect that the name of the defendant was stamped on the face of the note by an agent authorized to stamp it and that the signature following the stamped indorsement of the name of the defendant on the face of the note is the signature of the then president of the defendant, whose authority to execute the note is not challenged. The same party who stamped the name of the defendant on the body of the note impressed that stamp on the back. It is true that no officer of the defendant, or any person representing defendant, attested the stamped name of defendant on the back of the note, and it is true that in a literal sense the indorsement of the name of defendant on the back is not "written." There is, however, substantial evidence in the case to the effect that before the plaintiff purchased this note it called up Mr. Culver, the president of the company, and asked him concerning the note, calling his attention to the indorsement on the back as only being with a rubber stamp and not signed by any officer of the company, and that Mr. Culver stated to Mr. Richardson, then the president of the plaintiff company, that it was all right; that they were willing to supply the indorsement but that Mr. Churchman was handling the matter directly, and Mr. Culver asked Mr. Richardson to hold the telephone for a moment until he (Culver) called Churchman. Mr. Churchman, according to Mr. Richardson, thereupon took up the telephone conversation and stated to Mr. Richardson that the

paper was all right; that they (defendant) had issued it, and would supply the indorsement on the back if Mr. Richardson's company desired it; that they, that is defendant, did not think it necessary but were willing to have an officer of the company supply the indorsement. Mr. Richardson further testified that Mr. Culver said to him over the telephone on that occasion, that they had made a great number of notes that way; that it was all right but if the plaintiff company wanted the indorsement of an officer of the defendant company, they were willing to supply that indorsement but they considered it all right, and according to the testimony of Mr. Richardson, Mr. Culver said substantially the same thing.

Moreover, an attorney, also an officer of the Night and Day Bank of Kansas City, testified that Mr. Sims, on the 2nd or 3rd of May, 1911, had in his possession these three notes of the Never Break Range Company, signed and indorsed as before stated and had offered one of them to his bank. This officer called for Mr. Culver, president of the defendant at St. Louis, over the long distance telephone and the operator informing him that she had Mr. Culver on the line and that he was ready to talk, the attorney talked to a party at the other end of the line who said he was W. L. Culver, president of the defendant. The attorney told Mr. Culver that Mr. Sims had the three notes above described; that one of them had been offered to the Night and Day Bank for sale, and called his attention to the fact that the stamped indorsement of the name of the defendant company was not authenticated by any officer of defendant. Whereupon Mr. Culver said that if the bank purchased the note and would send it down he would put his signature as president under the rubber stamp indorsement; that it was an oversight that it had not been done; that the notes were all right and Mr. Sims was authorized to sell them. Whereupon the Night and Day Bank purchased one of the notes, paying for it in cash and bonds and these proceeds were turned over, through Mr. Sims, to the defendant. Mr. Culver, asked concerning this alleged conversation over the telephone with a representative of the Night and Day Bank of Kansas City, said that he did not remember having had but one conversation over the long distance telephone with any one at Kansas City, undoubtedly referring to the conversation which he admitted he had with Mr. Richardson. While it is true that there is no clear identification of Mr. Culver as the party with whom the Kansas City gentleman had this conversation, it does appear that on the strength of it, one of these notes, which had been in the hands of Sims, was purchased by the bank or some customer of the bank, and the note afterwards being presented to Mr. Culver, the stamped name of the defendant on the back as indorser was attested by him

as president. That also occurred as to another of these three notes.

This was substantially the testimony in behalf of plaintiff of the fact that the indorsement on the back of this note in the name of the defendant company with a rubber stamp was an authorized indorsement by defendant, and if desired by plaintiff would be further verified and authenticated by the signature of an authorized officer of the defendant company.

That this indorsement was not "in writing" in the literal sense of the word "writing" is entirely immaterial. It has been many times held that affixing a rubber stamp to an instrument is sufficient in law to fulfill the requirement that the indorsement or the name must be written or in writing, if the stamp is affixed with the intent of using it as an indorsement. For illustration, see *Horne v. Missouri Pac. Ry. Co.*, 70 Mo. App. 285, 291. In that case our court said:

"The word 'writing,' in law, not only means words traced with a pen or stamped, but printed or engraved or made legible by any other device," citing *Henshaw v. Foster*, 9 Pick. (Mass.) 312.

In that case the Supreme Judicial Court of Massachusetts had before it the question as to whether a certain ballot, which had been tendered by a voter at an election, conformed with the Constitution of that state (chapter 1, § 3, art. 3), which provided: "Every member of the House of Representatives shall be chosen by written votes." The elector had tendered a printed ballot, as it appears, and the court held that this was sufficient compliance with the constitutional requirement that the ballot or vote should be written.

Section 2783, Revised Statutes 1909, part of our statute generally referred to as the statute of frauds and perjuries, provides that no action shall be brought in certain cases named, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." This is substantially the English statute of frauds (29 Car. II, c. 3). Construing this, it has been held that a printed or stamped name is a sufficient signature, if adopted or intended as such. 20 Cyc. p. 275, subd. 3, and authorities there cited under note to that subdivision.

Our negotiable instrument Act, however, section 10,160, Revised Statutes 1909, puts this question beyond debate, for it is there enacted that unless the context otherwise requires, "'Written,' includes printed, and 'writing' includes print." All the elaborate argument by the learned counsel for appellant, therefore, that this was not a written indorsement as required by the law, is without merit, and whether this stamped name of the defendant on the back of the note con-

stituted an indorsement by defendant depended upon the evidence as to the acts of the defendant in connection with placing its stamped name on the back of this note and subsequently so handling the note as to put it into circulation. That it did so, that it ratified its stamped name on the back of this note as its act, there is substantial evidence. Under substantial evidence in the case, to the effect that this indorsement by stamp had been ratified by defendant's proper officers, its effect, under section 9980, Revised Statutes 1909, it being an indorsement in blank, is to make the instrument payable to bearer.

Learned counsel for appellant argue with great earnestness that this note never became negotiable paper, and was never negotiated, as negotiable paper is defined in section 10,001, Revised Statutes 1909. But if it was indorsed with a stamp and that stamp held out to be put there as the act of the defendant and as an indorsement, and there was substantial evidence to that effect, then the note was negotiated when passed over by defendant to a third party, if that was done.

We rule this first point against appellant.

[2] The second point urged by the learned counsel for appellant is that three instructions given at the request of plaintiff are erroneous in that it is claimed that they do not state the law correctly, and that there is no basis for them in the facts of the case. One of the principal objections made is that by these, or one of them, the jury are told they can find for plaintiff, if, among other things, they find and believe from the evidence that the defendant delivered the three notes, which had been issued at the same time, that in controversy being one of them, to one Sims, "either as purchaser thereof, or as defendant's agent to effect a negotiation thereof for defendant's benefit." Those learned counsel contend very strenuously that there is not a particle of testimony in the case to show that Sims was the purchaser of these notes. That contention is disposed of adversely to the claim of those counsel by the testimony of Mr. Sims, which, as far as this point is concerned, is set out verbatim in the supplemental abstract furnished by respondent. Mr. Sims, as noted, was the man to whom these three notes, the one in suit being one of them, were delivered by Mr. Churchman, the financial agent in the matter for the defendant. Mr. Sims was asked for what purpose Mr. Churchman had delivered these notes to him. He answered that he had bought the notes from Mr. Churchman. Asked, "You bought the notes from Mr. Churchman? A. Yes, sir." Further along Mr. Sims being asked if he had made any payments or given any consideration to any one for those notes at the time, testified that he had paid Churchman part on the notes, paid him \$10,000; not for any particular one of the three notes but on account of all of them, which totalled \$15,000,

and asked if he had contracted to take these three notes and pay \$15,000 for them, he answered, "Yes," that he had paid \$10,000 on the three notes. Whereupon Churchman had delivered the three notes to him. That was a negotiation of them, if he purchased, as he said, and they were delivered to him. So that there was no error in this instruction in so far as it submitted to the jury the question as to whether the notes had been delivered to Sims, "either as purchaser thereof, or as defendant's agent to effect a negotiation thereof for defendant's benefit."

[3] Counsel further contend that the first and second instructions given on behalf of plaintiff contain matter not at all pertinent to the case. We are unable to concede that. In the first one, after submitting to the jury the question as to whether these notes had been delivered to Sims either as purchaser or as defendant's agent to effect a negotiation thereof, the instruction is to the effect that if the jury found that thereupon the note in controversy was delivered by Sims to one Bonds, the person who sold the note to the respondent, along with another note of the defendant for the purpose of giving Bonds an opportunity to determine whether or not he or the bank with which he was connected might purchase the notes or one of them, and if the jury also found and believed from the evidence that the plaintiff bought the note from Bonds before maturity and for a valuable consideration and in the usual course of its business, the jury should find their verdict for plaintiff unless they further believed from the evidence that at the time plaintiff purchased the note it had knowledge or notice that the negotiation of the note by Bonds was wrongful and in derogation of the rights of defendant. This latter part of the instruction is criticized because it is said that it required the purchasing bank, plaintiff here, to have had actual knowledge or notice that the negotiation of the note by Bonds was wrongful. We do not think that the instruction is subject to this construction. The word "actual" is not used in it and a jury of intelligent men were certainly capable of understanding that the fact of actual notice or knowledge was not required to be found. We do not think that either of these instructions are subject to the criticism made.

[4] Practically the same criticism was made of other instructions given at the request of plaintiff, and that is the third point made by the learned counsel for appellant. We see no error to the prejudice of appellant in any of them. One of them, the third, told the jury that if they found and believed from the evidence that the rubber stamp placed on the back of the note in suit was made by or under the direction of some officer or agent of the defendant authorized to use the stamp as an indorsement of the note, their verdict must be for plaintiff, unless they found from the evidence that before the negotiation of the note defendant notified plaintiff that de-

defendant did not consider the rubber stamp indorsement binding. Another instruction (the fifth) also complained of, was to the effect that if the jury found from the evidence that before the plaintiff purchased the note in suit it called up over the telephone the office of the defendant company and talked with one Churchman, an employé or agent of the company, to whom plaintiff was referred by the president of the defendant company, and if the jury found from the evidence that Churchman told plaintiff that the rubber stamp indorsement was all right, and that defendant would supply other indorsement if desired but that they did not think it was necessary, "then, under such circumstances, your verdict must be for the plaintiff, provided you further find that said Churchman had been authorized by the defendant to negotiate said note." We see no error in either of these instructions. There was substantial evidence to the effect that the stamp had been placed on the back of the note by one authorized to do so. Churchman, according to substantial evidence, was an employé of defendant and acting as its financial agent in these matters; was the one who had affixed this stamp on the back of the note, and there was substantial testimony that Mr. Culver as president, had ratified it. It is true that Mr. Culver and Mr. Churchman, the clerk or financial agent of defendant, most emphatically denied this telephone conversation, as also one said to have been had between Richardson, Culver and Churchman at the Planter's Hotel in St. Louis, in which, according to Richardson, both of these gentlemen said the stamped name was all right and if Richardson required it to be done they would have an officer of defendant attest it. That left it a question of veracity between two sets of witnesses, depending on the credit which the jury gave them, and it is not for us, as an appellate court, to disturb a verdict where evidence is conflicting as here. The weight and effect to be given to that testimony is primarily for the jury, then for the trial court, and is in no manner with us as an appellate court in this action at law, so long as there is substantial testimony to support the verdict.

[5] Error is assigned to the refusal of the court to give three instructions asked by defendant, numbered 3, 6 and 8. Number 3, in effect, told the jury that the name, "Never Break Range Co.," stamped upon the back of the note, raises no presumption of an indorsement of the note by the company, and it must be proved by a preponderance of the evidence that that name stamped on the back of the note was ratified and accepted by a duly authorized agent as the indorsement of the company, or their verdict must be

for defendant. The substance of this instruction, so far as it goes, was fully covered by other instructions given, and its refusal is not reversible error. It was also unnecessary, for it appears that plaintiff, not satisfied with it, inquired about its validity.

The sixth instruction asked by defendant and refused was to the effect that Churchman had no power to indorse the note sued upon and that the name of the defendant stamped on the back thereof by him is not an indorsement thereof by the defendant, and the verdict must be for defendant, unless it had been proved by a preponderance of the evidence that such stamped name was ratified and approved by W. L. Culver, president of the defendant, as an indorsement by defendant. That instruction was properly refused. It was misleading as to the authority of Churchman to stamp the name on the back. There was evidence tending to show that he had such authority. As far as the rest of the instruction is concerned, going to the matter of ratification, it was fully covered, and correctly, in other instructions.

[6] The eighth instruction asked by defendant and refused is to the effect that if the jury found from the evidence that it was unusual and not customary for business corporations to use the name of the company stamped upon the back of notes as an indorsement, then the name, "'Never Break Range Co.," stamped upon the note, * * * was sufficient notice to the plaintiff that said note was not indorsed to make it the duty of plaintiff to ascertain whether or not said name was stamped upon or ratified by a duly authorized officer or agent of defendant as an indorsement of said note by the defendant." As said with reference to the other instructions, so far as this was correct, the points covered by it were covered by other instructions. Furthermore there was evidence, as before noted, that plaintiff had made inquiry. The facts necessary to establish a custom are entirely omitted. The instruction was properly refused.

The last point made is that defendant's given instructions do not cure the error in plaintiff's instructions. In the first place, we have discovered no reversible error in the plaintiff's given instructions, and next, taking them in connection with the ones given at the instance of defendant, they correctly placed the law of the case before the jury on the facts in evidence.

We see no reversible error to the prejudice of appellant.

The judgment of the circuit court should be and is affirmed.

ALLEN and THOMPSON, JJ., concur

VAN ZANDT v. ST. LOUIS WHOLESALE GROCER CO. (No. 14475.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1916. Rehearing Denied Jan. 16, 1917.)

1. CORPORATIONS — 513(1, 2) — EMPLOYMENT—QUANTUM MERUIT—SUFFICIENCY OF PETITION.

A count of a petition in quantum meruit, alleging that defendant company was a domestic corporation engaged in wholesale grocery business, and that on January 1, 1911, and thereafter, the individual defendants were seeking to organize among retail grocers a corporation on the co-operative plan to be known by the name of the company; that at their special request plaintiff undertook to organize and promote the company among retail grocers and explain the plan to them and secure their patronage and subscriptions to the company's stock and attended to the preliminary organization so that the company was incorporated and engaged in the wholesale grocery business, the individual defendants being its officers; that the company approved and accepted of plaintiff's services and assumed liability therefor, and the payment of their reasonable value, and his expenses amounting to \$10,000, and that defendants refused to pay him more than \$1,700—stated a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2018, 2041, 2044; Dec. Dig. — 513(1, 2).]

2. NEW TRIAL — 18—GROUNDS—DEFECTS IN PLEADING.

Defects in a pleading are not ordinarily reached by a motion for a new trial, but are reached either by objection to the reception of any evidence, or by demurrer or by motion in arrest; and may even be reached in some cases for the first time in the appellate court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. — 18.]

3. TRIAL — 191(11)—INSTRUCTION — EMPHASIZING PARTICULAR FACT.

On a count in quantum meruit against a corporation and its officers for services in promoting it, selling its stock, and organizing it, and for expenses which the defendants had assumed to pay, seeking to recover the balance over the \$1,700 paid plaintiff, an instruction that, if the corporation accepted plaintiff's services and plaintiff continued soliciting subscriptions to its stock and completed its organization, defendants were liable for the reasonable value of his services not exceeding \$10,000, deducting from the expenses the \$1,700 already paid him, was erroneous, where the evidence was conflicting as to what the \$1,700 was paid for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 431; Dec. Dig. — 191(11).]

4. TRIAL — 252(20) — INSTRUCTIONS — EVIDENCE TO SUSTAIN.

Such instruction was also erroneous in that there was no evidence tending to prove what expenses plaintiff was put to or had paid.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. — 252(20).]

5. TRIAL — 253(5, 10) — INSTRUCTIONS — OMITTING DEFENSES.

Such instruction, purporting to cover the whole case, was also erroneous as entirely omitting any reference to the defense either as pleaded or in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 617, 621, 622; Dec. Dig. — 253(5, 10).]

6. CORPORATIONS — 521—ACTION FOR SERVICES—QUANTUM MERUIT—QUESTION FOR JURY.

In an action against a corporation and its officers, etc., with a count in quantum meruit for services and expenses in promoting the corporation, selling its stock, and organizing it, held, that a demurrer to the evidence should have been sustained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. — 521.]

7. TRIAL — 139(1)—DEMURRER TO EVIDENCE—BURDEN OF PROOF.

To warrant the court in submitting the case to the jury, there must be substantial evidence on the part of the plaintiff tending to establish the claim which he makes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. — 139(1).]

8. CORPORATIONS — 30(1) — "PROMOTERS" — PARTIES.

Parties with whom plaintiff claimed to have made his original contract for services in promoting, selling stock in, and organizing a corporation, who were holding themselves out as officers of the corporation before it was organized, were no more the corporation than plaintiff himself, but were all mere "promoters."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 97; Dec. Dig. — 30(1).]

For other definitions, see Words and Phrases, First and Second Series, Promoter.]

9. CORPORATIONS — 448(1)—SERVICES OF PROMOTER—LIABILITY.

As a general rule, a corporation is not liable for services rendered by a promoter, though the promoter may recover for services where it appears that he expected to be compensated therefor, that his services were rendered at the request of or under contract with the associate promoters or a majority of them, and where the acts done were necessary to the organization and its objects and the corporation received and enjoyed the benefits.

[For other cases, see Corporations, Cent. Dig. §§ 1709, 1789, 1792; Dec. Dig. — 448(1).]

10. CORPORATIONS — 521—PROMOTERS—ACTION FOR SERVICES—QUANTUM MERUIT—EVIDENCE.

A promoter bringing an action at law on a quantum meruit for services in promoting a corporation, selling its stock, etc., was not entitled to go to the jury, where there was no evidence to show the value of any services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. — 521.]

11. CORPORATIONS — 448(1) — SERVICES OF PROMOTER—RECOVERY.

A corporation, by the mere act of accepting incorporation, does not accept the benefit of the promoters' services in obtaining subscriptions to its capital stock at the request of a few of its promoters so as to be liable for such services; and it is not within the power of any promoter to incur the corporation's whole property by contract to pay for a promoter's services.

[For other cases, see Corporations, Cent. Dig. §§ 1709, 1789, 1792; Dec. Dig. — 448(1).]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by N. L. Van Zandt against the St. Louis Wholesale Grocer Company and others. Judgment for defendants on the first count, and for plaintiff on the second count, in quantum meruit against the St. Louis Wholesale Grocer Company. Its motions for new trial and arrest were overruled, and it appeals. Reversed.

Collins, Barker & Britton and A. P. Wagner, all of St. Louis, for appellant. Emerson E. Schnepf, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff commenced his action against the defendant and three individuals.

The petition contained two counts, the first count sounding in damages for breach of an express contract of employment. As there was a verdict and judgment for the defendants on that count, and plaintiff has not appealed, it is unnecessary to set out that count in full, but we will hereafter have occasion to refer to it.

The second count avers that the defendant St. Louis Wholesale Grocer Company, is a corporation organized and existing under and by virtue of the laws of this state, engaged in the wholesale grocery business; that on January 1st, 1911, and thereafter, the defendants Kelly, Lukenbill and Vandeloecht were seeking to organize among retail grocers a corporation on the co-operative plan for the purpose of engaging in the wholesale grocery business in the city of St. Louis, to be known as the St. Louis Wholesale Grocer Company; that at the special instance and request of the defendants, plaintiff undertook the work of organizing and promoting that company among the retail grocers of St. Louis and the surrounding country of Illinois and Missouri; that beginning on or about January 1st, 1912, and at the special instance and request of defendants (meaning the individual defendants), plaintiff began to and did visit the retail grocers in St. Louis, throughout central and southern Illinois, eastern and southern Missouri, and all other territory contiguous to St. Louis; that he explained the co-operative plan of the proposed company to the retail grocers, secured their patronage and good will and solicited and procured their subscriptions to stock in the company defendant, attended the preliminary organization and meetings of that company, frequently consulted with and advised the officers thereof, of which preliminary organization the defendant Kelly was president, defendant Lukenbill secretary, and defendant Vandeloecht treasurer, and that plaintiff did all things needed and necessary for the complete organization of the corporation, so that in February, 1912, by reason of the work and services of plaintiff as above set out, the St. Louis Wholesale Grocer Company was incorporated under the laws of Missouri with a capital stock of \$50,000, one-half fully paid, and at once engaged in the wholesale grocery business in the city of St. Louis, and at the time of the institution of this action, was and is engaged in that business. It is further averred that the defendant Kelly was and is the president of the corporation, and the defendant Vandeloecht was and is its treasurer, and that the defendant Lukenbill and the two individual defendants above named, were and

are three members of its board of directors. It is further averred that immediately after its organization, the St. Louis Wholesale Grocer Company, hereafter for brevity called the corporation or company defendant, "approved of and accepted all the work and services of plaintiff in the promotion and organization of said corporation as aforesaid, assumed all liability therefor, and the payment to plaintiff of the reasonable value thereof; that thereafter under the directions and approval of defendant corporation, plaintiff continued the work of soliciting and procuring subscriptions for the capital stock of said company as aforesaid until about May 7th, 1912." Plaintiff then avers "that he devoted all of his time from January 1st, 1911, to about May 7th, 1912, and his best efforts to the aforesaid work; that he has paid all his expenses of every kind during said time; that defendants promised to pay him the reasonable value of said services so performed as aforesaid, and his expenses, which is \$10,000," but that defendants now refuse to pay plaintiff that sum or any part thereof except \$1700 heretofore paid to him by them. Judgment is demanded in the sum of \$8300 with costs.

The defendant corporation, answering this second count of the petition, admits that the defendant, at the date of the filing of the petition in the case, was a corporation organized and incorporated and with the capital stock averred; admits that Kelly was its president, Vandeloecht its treasurer, and Kelly, Vandeloecht and Lukenbill, three members of its board of directors immediately after its incorporation; admits that plaintiff received \$1700, but denies that that sum was received by plaintiff in the manner or pursuant to the contract or agreement, as alleged in plaintiff's petition, but alleges that that sum was paid to and accepted by plaintiff in full for all services, if any, rendered by plaintiff to the defendant corporation or to the other defendants, and in full for any and all matters relating in any way to any and every understanding or agreement, if any, which plaintiff might have had with the defendants Kelly, Lukenbill and Vandeloecht, or with the defendant corporation.

As a further answer and defense to this second count of the petition, the defendant corporation says that it believes, and therefore alleges as a fact, that plaintiff had no such agreement with the defendants Kelly, Lukenbill and Vandeloecht as in plaintiff's second count of his petition is alleged, and this defendant specifically denies that immediately after its incorporation, or at any other time, it approved, accepted and assumed liability, or any liability for and payment to plaintiff under the alleged agreement set out in the petition, or under any other agreement. The defendant corporation further specifically denies that after its incorporation, plaintiff worked for it in soliciting sub-

scriptions for its capital under the terms of the alleged contract or agreement.

For further answer and defense to this second count, the corporation defendant alleges that there was no consideration to support the alleged approval, acceptance and assumption of all or any liability by this corporation defendant to plaintiff for and on account of the alleged agreement set out by plaintiff, specifically denying that this defendant approved, accepted or assumed any liability on account of the alleged contract or agreement, and avers that the alleged approval, acceptance and assumption is void and of no binding effect.

The defendant corporation further avers that plaintiff has been fully paid for any and all alleged services and expenses, alleged and set out in this petition, and that this defendant is in no way indebted to plaintiff, specifically denying that any services were rendered or expenses incurred by plaintiff under the alleged contract or agreement, and denying that there was such a contract or agreement. Then follows a general denial of all and singular the other allegations in the petition.

There was a trial before the court and a jury. We will notice the evidence, as far as necessary, hereafter. At the close of the plaintiff's evidence in chief and again at the close of all the evidence, the defendant interposed demurrers, which were overruled. There was a verdict in favor of all the defendants on the first count of the petition, as before noted, and in favor of the individual defendants, but against the defendant St. Louis Wholesale Grocer Company for \$2000 on the second count. Judgment followed accordingly, and the corporation defendant filing its motion for a new trial, as also one in arrest, and these being overruled and exceptions saved, the Wholesale Grocer Company has duly appealed.

There are three specifications of error made by the learned counsel for appellant, these again subdivided.

[1, 2] Under the first specification of error an attack is made on the second count of the petition, which attack may be summarized as urging that that count, by reason of omission of various averments, fails to state a cause of action, and it is urged that for this reason the motion for a new trial should have been sustained. We might dispose of this by saying that defects in a pleading are not ordinarily reached by a motion for new trial. They are reached either by objection to receipt of any evidence, or by demurrer, or by motion in arrest. Failing these, they may even be reached and raised, in some cases, even for the first time, in the appellate court. But, considering this point as if properly made, we think this second count of the petition not obnoxious to any of the objections made to it. It does state a cause of action.

The second assignment or specification of

error is that the demurrer to the evidence, interposed by the defendant grocer company at the close of the case, should have been sustained. However that may be, that defendant did not stand on this demurrer but introduced evidence of its own and plaintiff endeavored to meet this by rebutting evidence. As, however, the defendant demurred to the evidence at the close of the case, and raises it here, we may assume that the points made under this second assignment are intended to cover the issue raised by that demurrer and we will presently consider it.

[3-5] The third assignment of error is that the court erred in giving plaintiff's instruction which was directed to this second count of the petition. It is complained of that instruction that it assumes material and controverted facts, unduly and improperly emphasizes the erroneous theory that the \$1700 paid to plaintiff was not paid for services and expenses but for expenses alone, or even a part payment for expenses; that it ignores the complete and uncontroverted evidence of plaintiff himself that his expenses were paid for in full, and instructs the jury that they may find additional expenses as part of the plaintiff's damage, and that it ignores the defenses of the Wholesale Grocer Company, and while purporting to cover the whole case, does not cover all the issues raised by the pleadings. That instruction is very long and it will serve no useful purpose to set it out in detail. It is to be said of it, however, that it is certainly open to the objection urged as to that part of it which covers the payment of the \$1700. Referring to that part of the instruction here challenged, after telling the jury that if they found there was an implied promise by the promoters, by acceptance of the services of plaintiff in the organization of the company, it proceeds to instruct the jury that if they find that the corporation accepted the organization and promotion work and services in its behalf and that plaintiff continued the services of soliciting subscriptions for stock, "fully completing the aforesaid organization of defendant corporation until on or about May 7th, 1912, then all the defendants are liable to plaintiff for the reasonable value of the aforesaid organization and promotion services rendered by him, and you should assess his damages at such sum, not exceeding \$10,000, as you may believe from the evidence such services were reasonably worth *and his expenses*, deducting, therefrom \$1700 already paid him and adding thereto interest at six per cent. per annum from the date of the institution of this suit, September 20th, 1912, to the present time." The words we have italicized are those particularly attacked.

The evidence as to what this \$1700 was paid for may be said to be conflicting, it being claimed on the part of plaintiff that this \$1700 was a general payment to him on ac-

count of services, while on the part of defendant the evidence tended to show that it was paid him as his commission on the sale of stock in the defendant corporation and that under the contract between plaintiff and the defendant corporation or its promoters, plaintiff was to pay his own expenses as well as render his services for this \$1700, that is he was to receive \$8 out of every \$25 collected on subscriptions in the city of St. Louis, and \$10 on all such subscriptions received outside of St. Louis, and that the difference in these amounts, that is the difference between the eight and ten dollars made between the city and country work, was with the express purpose of covering expenses necessarily incurred outside of the city. In point of fact plaintiff himself testified that the eight and ten dollars he was to receive on stock subscriptions obtained by him were to cover his expenses, he however claiming that these amounts were not to cover his services, and that he had never rendered any account for expenses to either the promoters or to the company. Furthermore, plaintiff himself admitted that all his expenses have been paid. This part of the instruction was error. It is also erroneous in that there is no evidence even tending to prove what expenses plaintiff was put to or had paid.

It is further erroneous in that, while purporting to cover the whole case, it entirely omits any reference to the defense of the company and the individual defendants either as pleaded or in evidence. For these errors in this instruction the judgment would have to be reversed, but as our decision will be placed on another proposition, going to the root of the case, we do not discuss this instruction any further.

[8] This brings us to a consideration of the demurrer to the evidence. It will be noticed that this second count of the petition is apparently based entirely upon quantum meruit and not upon express contract. The first count of the petition was founded on the breach of a specific contract. On that issue the jury found in favor of all of the defendants and against plaintiff.

A very careful reading of all of the testimony fails to convince us that plaintiff made out any case entitling him to go to the jury on this second count of his petition.

It appears from the evidence in the case that plaintiff had been engaged in cities other than St. Louis in organizing retail grocers into a company from which they, as members of the corporation, would obtain their merchandise, in a way a wholesale house, which would give the stock holders owning it the opportunity of buying direct without the intervention of a third party and in that way effect a saving to them in the cost of the merchandise. Plaintiff came to St. Louis and through the intervention of an attorney, obtained permission to address the Retail Grocers' Association of St. Louis, an unincor-

porated body made up of grocers in that city and possibly of other merchants not exclusively in the grocery business, and at a meeting of that association asked permission to present his scheme. This permission was granted and plaintiff, with his attorney, attended a meeting of the Retail Grocers' Association held in December, 1910, and laid before that body his scheme, which was to organize a corporation made up of retail grocers with a capitalization of \$150,000, the stock holders and subscribers to it being confined to retail grocers, the shares in it to be \$50 a share, the subscribers to take five shares each, no one subscriber to take more than five shares and each subscriber, at the time of his subscription, to pay in 10 per cent. of that amount, that is \$25, out of which plaintiff was to receive as commission and as covering all of his expenses \$10 on each subscription so made and paid and one-half of one per cent. on the gross sales of the corporation for a period of five years after it was organized. The proposition as made to the Retail Grocers' Association at this first meeting was not acted upon. After the meeting adjourned, however, a number of the gentlemen who had been at the meeting, as we gather some twenty or more of them, possibly, adjourned to a neighboring café or saloon and discussed the matter further with plaintiff. The proposition, according to plaintiff, was favorably considered by these gentlemen, among those present being the defendant Lukenbill and Vandeloecht, Mr. Kelly, however, not being present, and it was proposed that a temporary organization be formed for the promotion of the plan. According to the testimony of the defendants and of several other witnesses who were present at this meeting in the café, however, plaintiff was distinctly told that that part of his plan which contemplated the payment of one-half of one per cent. on gross sales for a period of five years would not be entertained. There was evidence tending to show that this objection to the plan had been made by several of the gentlemen at the meeting of the Retail Grocers' Association. At all events at this first meeting in the café nothing very definite appears to have been agreed upon. About two weeks after that there was another meeting of the Retail Grocers' Association at which plaintiff was present and again presented his plan. As all of the witnesses for defendants testified, the Retail Grocers' Association, as a body, turned down the proposition, and refused, as a body, to have anything to do with it. According to plaintiff's testimony there was no formal action taken at that meeting, but he does not claim that his plan was accepted by the Retail Grocers' Association. At all events, after this second meeting of the Retail Grocers' Association a number of the gentlemen, who were members of that association and had attended the meeting, again accompanied plaintiff to

the café or saloon in the neighborhood and took up with him his proposition. According to plaintiff, he again stated that if they accepted his proposition for the promotion and organization of the proposed corporation that he was to receive \$10 on each \$25 paid on subscriptions which he secured to stock, and one-half of one per cent. on the gross sales of the proposed corporation for a period of five years. Each of the individual defendants and practically every other witness in the case testifies that this last part of the proposition, that is the part for the payment of one-half of one per cent. of the gross sales, was absolutely and unequivocally rejected. These promoters, as we may call them for brevity, meaning by that the individual defendants and the others associated with them in the preliminary negotiations and plans, did agree, however, to go into a corporation as proposed by plaintiff, he to solicit stock holders or members for it and all parties finally agreeing, according to the individual defendants and their witnesses, that for his services, expenses, and labors in connection with soliciting subscriptions to the capital stock of the proposed corporation plaintiff was to receive \$8 on each \$25 collected in the city of St. Louis and \$10 for each subscription secured by him outside of the city of St. Louis. There was evidence to the effect that in these meetings in the café and at other places afterwards, some of the gentlemen with whom plaintiff was negotiating had distinctly asked plaintiff if he was still adhering to his claim of receiving one-half of one per cent. on gross sales, and that plaintiff told them that that part of the plan had been abandoned and that his compensation as covering his services and expenses was to be \$8 in the city and \$10 in the country on each subscriber obtained by him. After an unsuccessful effort to obtain subscribers in the city to the number expected, in point of fact only about twenty having been there obtained, plaintiff succeeded in obtaining subscriptions outside of St. Louis from about 127 stock holders, a total of 147, according to the exhibit of names introduced by plaintiff. Up to this time it was contemplated by all the parties that a corporation with a capitalization of \$150,000 was to be organized, \$75,000 to be common stock and \$75,000 to be preferred stock, and there is evidence that plaintiff had assured the promoters that he would be able from his past experience to obtain the necessary subscriptions to this \$150,000 proposed corporation in about six months. After the plaintiff had been at work for some 16 or 17 months he succeeded in securing subscriptions to the amount of only \$36,500, whereupon the promoters concluded to abandon the effort to raise \$150,000 capital, and in March, 1912, organized and incorporated the defendant corporation on a capital of \$50,000, \$25,000 paid in cash. To enable plaintiff to solicit subscriptions and at his

suggestion, the promoters, how many of them is not clear, but apparently ten or more, who had agreed to go into the matter, and apparently also on the suggestion of plaintiff, organized themselves into what they called a "paper association" and elected what they called "paper officers," of whom the defendant Kelly was elected president, Vandeloecht, treasurer, and Lukenbill, secretary, and at plaintiff's suggestion, in March, 1911, he was given a paper reading thus:

"M. Kelly, Jr., President. H. Vandeloecht, Treasurer.

"St. Louis Wholesale Grocer Company.

"Office of

"J. D. Lukenbill, Secretary.

"3866-68 Folsom Ave.

"St. Louis, Mo., March 8th, 1911.

"To Whom It May Concern: We are organizing a wholesale grocer house in St. Louis to be owned and controlled by retail grocer stockholders of Missouri and Illinois.

"This will introduce Mr. N. L. Van Zandt, who is our authorized representative, to explain the proposition fully and to solicit your membership, and collect the first payment, 10 per cent. of subscribed stock \$25.00. Check to be made payable to H. Vandeloecht, Treas.

"Yours respectfully,

"M. Kelly, Jr., President.

"Countersigned: J. D. Lukenbill, Secretary."

Plaintiff was also furnished with a form of receipt to be given to those persons who subscribed to the stock, as follows:

"M. Kelly, Jr., President. J. D. Lukenbill, Secretary.

"H. Vandeloecht, Treasurer.

"St. Louis Wholesale Grocer Co.

"St. Louis, Mo.

"Capital Stock \$150,000.00

"\$75,000 common. Fully paid. \$75,000 preferred.

"Shares \$50.00 each.

"I hereby subscribe for five (5) shares common stock in the St. Louis Wholesale Grocer Co., payable \$5.00 per share now, and balance, \$45.00 per share, when ready to begin business.

"_____

"_____

"Make checks payable to H. Vandeloecht, Treasurer.

"Received of _____ \$25.00, being first payment of five (5) shares of common stock in the St. Louis Wholesale Grocer Co., payable \$5.00 per share now, and balance, \$45.00 per share, when ready to begin business.

"St. Louis Wholesale Grocer Co.

"St. Louis, Mo.

"By _____, Authorized Representative."

As before stated, while plaintiff commenced his work in January, 1911, the capital with which to start the \$50,000 corporation, that is to say the defendant St. Louis Wholesale Grocer Company, was not secured until March, 1912. The corporation thereupon commenced business about March 15th, 1912, and continued in business for a year, when it sold out to another concern, some of the stockholders in the old company becoming stockholders in the purchasing company. During this year of its existence, the gross sales of the corporation amounted to \$176,270.94. The promoters' organization, or "paper organization" had continued and plaintiff worked under their direction in

soliciting subscriptions to the stock, apparently until the organization and incorporation of the defendant corporation in March, 1912. The corporation was organized with thirteen directors, of whom the defendant Kelly was one and the president, Lukenbill another and treasurer, and Vandeloecht, a director. Who the remaining ten directors were does not appear. After the organization of the corporation, the plaintiff having been paid \$1700, as he says "on general account for services and expenses," but according to the defendants and all witnesses testifying for them, "in full for all his services in the promotion of the company," plaintiff asked one or more of the members of the board of directors of the corporation defendant to present his claim to the board "for additional compensation." Whether he asked that of the corporation on the basis of one-half of one per cent. of the gross sales, or for what amount, in no manner appears. This was at the very beginning of its legal organization and commencement of business by the corporation. The claim of plaintiff for compensation in addition to the \$1700, then being presented to the board of directors, plaintiff himself being present, the board of directors declined to make any further payments to him, denying that plaintiff was entitled to any compensation beyond what he had earned and received on sales of stock, and claiming that he had been paid in full in accordance with the understanding for all services that he had rendered and that the corporation owed him nothing.

There was no evidence of the amount of expenditures of plaintiff, beyond his statement that in going from town to town he paid his railroad fare and hotel bills. How much these amounted to, does not appear, nor was there any evidence offered or introduced as to the value of the services on his promotion work.

While this is but a summary of a mass of testimony, we think it is a substantially correct statement of the evidence in the case. It must be borne in mind that when evidence was offered and introduced, both counts of the petition were before the court and jury and the court instructed on both.

The verdict on the first count, which sounded in damages for breach of a specific contract, as before noted, was in favor of all the defendants, both the individuals and the corporation, and the verdict against the corporation rests entirely upon the second count—that seeking recovery as on quantum meruit. We are concerned with the second count alone.

We are therefore to determine whether on that evidence plaintiff made out his claim for compensation under the second count.

[7] As is said by the Supreme Court of Arkansas in *Little Rock & Ft. Smith R. R. Co. v. Perry*, 37 Ark. 164, loc. cit. 194:

"It is certainly the duty of the party having the *onus* to produce a preponderance of proof; otherwise, matters should stand as they are. The degree of preponderance is immaterial, but there must be *some*, of which the jury should judge."

We refer to this case because it is cited on another proposition by the learned counsel for the respondent. Our Missouri decisions are to the same effect; that is, there must be substantial evidence on the part of the plaintiff, tending to establish the claim which he makes, to justify and warrant the court in submitting the case to the determination of the jury. In the case at bar, we find no such substantial evidence as justifies a verdict against the defendant corporation on the second count.

[8] Learned counsel for respondent places great reliance upon the decisions of our Supreme Court in *Taussig v. St. Louis & Kirkwood Ry. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674, and *Taussig v. St. Louis & Kirkwood R. R. Co.*, 186 Mo. 269, 85 S. W. 378, as also, among others, on *Little Rock & Ft. Smith R. R. Co. v. Perry*, supra, and *Bell's Gap R. R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39. On their facts we find no analogy between these cases and that at bar. In the first place, the parties with whom plaintiff claims to have made his original bargain were no more the corporation than was plaintiff himself. They were all mere promoters. Paraphrasing what is said by Judge Graves in *Taylor v. St. Louis National Life Ins. Co.*, 266 Mo. 283, loc. cit. 290, 181 S. W. 8, it stands out in bold faced type that Kelly and the other individual defendants were not and could not have been president, secretary and treasurer of the defendant corporation at the time of the alleged employment of plaintiff. Further along in the opinion in that case, Judge Graves says (266 Mo. loc. cit. 293 et seq. 181 S. W. 11), and referring to an alleged contract between the plaintiff there and what is called the "organization committee":

"All the proceedings seem to appear in the name of the organization committee, until the time came when, as they thought, all the proposed charter capital had been subscribed, whereupon they all met, adopted the proposed charter, selected the board of directors, and such board in turn selected the officers, which we have named. This, however, was all done subsequent to the alleged employment of plaintiff. At the time of plaintiff's employment, neither S. nor his committee had any stock to sell."

[9] As a general rule, a corporation is not liable for services rendered by a promoter. There are cases, however, which hold that a promoter is entitled to recover for services rendered by him in promoting the corporation.

"But in such cases it should be made to appear: (a) That he himself expected to be compensated for his services; (b) that such services were rendered at the request of, or under contract with the associate promoters, or a majority of those; and (c) that the acts done were necessary to the organization and its objects, and that the corporation received and enjoyed

the benefits." 1 Thompson on Corporations (2d Ed.) §§ 88 and 89.

It is true that our Supreme Court has said in *Taussig v. St. Louis & Kirkwood Ry. Co.*, 166 Mo., loc. cit. 38, 65 S. W. 971, 89 Am. St. Rep. 674, referring to services in the preparation of articles of incorporation and in connection with procuring the incorporation:

"That for such services the plaintiff may recover upon an implied promise to pay their reasonable value is also sustained by the weight of authority, unless the understanding was that they were to be gratuitous."

Judge Brace cited a number of authorities, including that of *Bell's Gap R. R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39, of which he says that the rule is there well stated, and quotation is made of the first of the syllabi of that case. When we turn to the Pennsylvania decision itself (79 Pa. loc. cit. 59, 21 Am. Rep. 41), we find the law more fully stated than in the syllabus thus:

"We do not desire to controvert the principle, established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterwards, then if the body for whom the projectors assumed to act does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform. Conceding to this principle its full force and effect, we are unable to see its application to the facts of this case. It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits cum onere, and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to, evidently must be a majority at least of such persons, and not one, two, or three, or a small minority thereof. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized. In this case the two or three persons who it is alleged promised the plaintiff to see him paid, bound no one but themselves."

See further on this *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163; *State ex rel. Hadley v. People's United States Bank*, 197 Mo. 574, loc. cit. 591, 94 S. W. 953; *Taylor v. St. Louis National Life Ins. Co.*, supra; *Van Noy v. Central Union Fire Ins. Co.*, 168 Mo. App. 287, loc. cit. 295, 153 S. W. 1090; *Royal Casualty Co. v. Puller*, not yet officially reported, but see 186 S. W. 1099.

It does not appear in the case at bar how many were associated with these three individual defendants in acceding to the proposition which plaintiff claims. It does appear, however, affirmatively, that there were more than the three individual defendants associ-

ated together in this preliminary work, and it most certainly does not appear that the three individual defendants here, whose agreement is here relied on, constituted a majority of such parties. No one of these individual defendants was in the position of the officer who had made the arrangement with Mr. Taussig as in the *St. Louis & Kirkwood Railway Company Cases*, supra, and the services there rendered were of a totally different kind and scope than these at bar. So that the decision of our Supreme Court in the *Taussig Cases* is to be taken in connection with the facts there present, which were entirely absent in the case at bar. That may be said of the case of *Little Rock & Ft. Smith R. R. Co. v. Perry*, supra. An examination of that case discloses a state of facts entirely different from the case at bar. Moreover, while the Supreme Court of Arkansas there states the rule as developed in the English courts of chancery as an equity doctrine and applicable in actions at law *ex aequo et bono* as preventing fraud and imposition, after an examination of the authorities at page 191 of 37 Ark., sums up the rule to be derived from them:

"That, in order to recover, in an action at law, the plaintiff must show either an express promise of the new company, or, that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. From these circumstances an affirmance would be implied."

The Supreme Court of Arkansas held that there must be some showing of ratification or, more correctly speaking, adoption, by the corporation when organized, beyond the mere fact that by being organized at the time it was it became entitled to the benefit of the land grant which plaintiff's efforts had saved to the company.

These cases which we have cited from the Pennsylvania and Arkansas Supreme Courts are leading cases on the subject. Another case in which the authorities are very fully collected is that of *Cushion Heel Shoe Co. v. Hartt*, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979. It is held in that case, quoting from the syllabi:

"A promoter, in bringing about the organization of a corporation, and securing stock subscriptions, occupies a fiduciary relationship towards the corporation, the stockholders, and those who are expected to buy stock, and where he expects to be paid for his services that fact should be disclosed to them in advance."

It is further there said:

"In the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporation only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim."

That is what we practically held in *Royal Casualty Co. v. Puller*, supra.

[10] Another point to be here borne in mind is, this is an action at law on quantum meruit as set out in this second count. Not a particle of testimony was given or offered to show the value of any services, so upon what basis the jury awarded plaintiff \$2,000 is impossible of ascertainment. The learned counsel for respondent attempts to meet this proposition by saying that even if there was no evidence of the value, which, however, that counsel denies, the case could nevertheless have gone to the jury. In support of this, counsel cites some cases which he thinks sustain him. We do not think they cover services of the kind here involved.

In *Bradner v. Rockdale Powder Co.*, 115 Mo. App. 102, 91 S. W. 997, where it appeared that no proof was adduced to show the reasonable value of the services of plaintiff rendered in selecting a suitable site for the erection of a powder magazine, plaintiff insisting that the value of such services came within the reasonable common knowledge of ordinary men and that the jury might settle on that value without evidence to aid them, our court said:

"The reasonable value of such services as plaintiff rendered is not a matter of such common knowledge that testimony on the subject may be dispensed with. * * *. The very essence of a case quantum meruit is the reasonable value of the work or property in dispute; and when the case is such that the inquiry as to the value is susceptible of proof by testimony, proof must be made."

We followed this in *Woodward v. Donnell*, 146 Mo. App. 119; 123 S. W. 1004, where other authorities bearing on the same proposition are collated.

Without going further into the authorities and referring to those which are so fully reviewed in the cases which we have cited, it is sufficient to say that it does not appear in the first place that the three individual defendants, who are alleged to have employed plaintiff, were a majority even of the promoters; in the next place, the testimony is entirely too indefinite to constitute substantial testimony to the effect that even these parties may be said to have availed themselves of the services of the plaintiff with any sort of understanding that he was to receive, in addition to his commissions on the sale of stock, one-half of one per cent. on the gross sales of the corporation when formed for a period of five years, or any other sum. That depended on the contract set up in the first count of the petition and the verdict of the jury against plaintiff and in favor of all the defendants negatives the existence of the contract there alleged. Furthermore, it does affirmatively appear that when the matter of the services of plaintiff was first called to the attention of the directors of the corporation after its organization, they not only denied any such understanding as to payment of one-half of one per cent. on the gross

sales of the company for five years, or any other sum, but explicitly claimed that plaintiff had been paid in full for all the services which he had rendered in connection with the sale of stock.

It is to be borne in mind that there is no pretense that the plaintiff in this case rendered any services whatever in connection with the organization of the corporation, beyond soliciting and receiving subscriptions to its proposed capital stock. None of the facts present in the *Tausig Cases*, or in the *Arkansas, Indiana and Pennsylvania Cases* are here present. In each one of these cases, visible, tangible property, which had been secured or procured by the promoter, had been turned over to the corporation after its organization and was retained by it, and in the *Tausig Cases* the defendant had availed itself of the professional services of the plaintiff in effecting its organization, he even undertaking in its behalf, defense of suits that were brought affecting the property in which the corporation was to become interested.

[11] In the *Royal Casualty Company Case*, supra, as before noted there was a distinct adoption of the contracts of the promoters, made by the corporation after its organization, with a full knowledge of all the facts connected with it. If we are to allow the plaintiff to prevail in this case, we must hold that by the mere act of accepting incorporation—by the mere act of becoming a corporate body, the corporation, as an entity, had accepted the benefit of the services of the plaintiff in obtaining subscriptions to its capital stock. Of course, it could not lawfully engage in business, under our law, until at least one-half of the stock is subscribed and paid for in cash or its equivalent. *Laws 1911, p. 148.* Beyond this soliciting and placing of subscriptions to stock, the plaintiff here does not pretend to have rendered any services whatever in connection with the organization of the corporation. Yet to enable plaintiff to recover, we must hold that three of the promoters had power to pledge the whole income of the corporation to be formed to a payment to this plaintiff for his services in procuring subscriptions to its stock, and that by the mere act of incorporation, accepting the subscriptions and going on with its business, the corporation bound itself to pay for obtaining the subscriptions. Until the organization of the corporation, the only parties concerned in securing subscriptions to the proposed corporation were the promoters, of whom plaintiff himself was one, and all the work plaintiff performed and all the services he rendered, were for the promoters and not for the corporation. The corporation, as such, prior to its organization, was not concerned in that. We are unwilling to hold that by the mere fact of accepting incorporation and proceeding as a corporate body, the corporation, as such, could be made liable on any such contract by a few of its promoters, and we venture to

go further and say that we do not believe that it was within the power of any promoter, in any such manner as here claimed, to encumber the whole property of the corporation—all of its business. We are aware that there are some cases which seem to hold that mere services in procuring the sale or subscriptions to the capital stock of a proposed corporation are such services, when rendered at the instance of the promoters, as imposes an obligation on the corporation, when formed, to pay the reasonable value of those services. We in effect held to the contrary in *Royal Casualty Co. v. Fuller*, supra. We find no authority in our state authorizing any such conclusion, and in the absence of controlling decisions of our own courts, we are unwilling to sanction such a rule. Here we have nothing to carry knowledge to the stock holders as a body, or even a majority of them, nor is there any proof even tending to show ratification by the stock holders of any agreement by which the assets of the corporation, which they were invited to become a part of, were subject to any burden for preliminary work of organization, a burden which might have "killed" the organization at its start.

On the grounds we have stated, plaintiff is debarred from any recovery, and the demurrer to the evidence should have been sustained.

The judgment of the circuit court must be reversed. It is accordingly so ordered.

ALLEN and THOMPSON, JJ., concur.

C. H. ALBERS COMMISSION CO. v. VOGELSANG. (No. 15203.)

(St. Louis Court of Appeals. Missouri. Dec. 30, 1913. Rehearing Denied Jan. 16, 1917.)

1. EXECUTORS AND ADMINISTRATORS § 251—PRESENTATION OF CLAIMS—PLEADING.

As against a claim in probate court, an executor need not plead the statute limiting time in which to present claims, Rev. St. 1909, § 191, as amended March 13, 1911 (Laws 1911, p. 81); it being sufficient to raise the point in such a way as to make it clear to court and counsel that the executor is relying upon the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 896-900; Dec. Dig. § 251.]

2. APPEAL AND ERROR § 173(1), 882(8)—ESTOPPEL TO ALLEGE ERROR—INCONSISTENT POSITION.

A claimant against an estate could not object that the newspaper publishing notice limiting time to present claims was not a proper newspaper, where he himself put in evidence the affidavit of publication relied on by the executor, and the point was first raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079, 1093, 3597, 3598; Dec. Dig. § 173(1), 882(8).]

3. EXECUTORS AND ADMINISTRATORS § 223—PRESENTATION OF CLAIMS—LIMITATIONS.

Rev. St. 1909, § 191, as amended by Laws 1911, p. 81, barring claims against estates not

presented within one year from date of letters, where notice is published within ten days after letters, is not affected by Rev. St. 1909, § 82, as amended by Laws 1911, p. 79, giving form of notice for publication, which states that if such claims are not exhibited within one year from the date of the last insertion of such publication they shall be barred.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 767; Dec. Dig. § 223.]

4. EXECUTORS AND ADMINISTRATORS § 223—PRESENTATION OF CLAIMS—LIMITATIONS—WAIVER.

The effect of Rev. St. 1909, § 191, as amended by Laws 1911, p. 81, to bar within one year from date of letters where notice is published within ten days after granting such letters, all claims against an estate, is not affected by publication in the form prescribed by Rev. St. 1909, § 82, as amended by Laws 1911, p. 79, which states the limitation as one from the date of last publication.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 767; Dec. Dig. § 223.]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by the C. H. Albers Commission Company against Louis E. Vogelsang, executor. From judgment for defendant, plaintiff appeals. Affirmed.

S. Mayner Wallace, Wm. R. Orthwein, and Shepard Barclay, all of St. Louis, for appellant. Henry H. Oberschelp, of St. Louis, for respondent.

ALLEN, J. This is an action to enforce against the estate of Henry B. Vogelsang, deceased, a claim founded upon two promissory notes; one note being for \$2,158.65, with interest, upon which it is alleged that nothing has been paid, and the other being for \$1,300, on which a credit of \$1,000 appears, leaving a balance of \$300, and interest, claimed to be due thereon. The probate court allowed the claim against the estate, and the defendant executor appealed to the circuit court, where, upon a trial de novo, the court, at the close of plaintiff's case, peremptorily directed a verdict for defendant upon the ground that plaintiff's claim had not been presented to the executor within the time allowed by law but was barred by the special statute of limitations, to wit, section 191, Revised Statutes 1909, as amended in 1911. See Laws 1911, p. 81. The jury returned a verdict for defendant in accordance with the peremptory instruction; and, from a judgment entered accordingly, plaintiff prosecutes the appeal before us.

The record discloses that Henry B. Vogelsang died on May 20, 1912; that on August 29, 1912, letters testamentary upon his estate were granted to the defendant executor; and that within ten days thereafter, to wit, on September 7, 1912, the executor began publication of the notice to creditors hereinafter referred to, which notice was published once a week for four consecutive

weeks, the last publication being on September 28, 1912. Notice of plaintiff's demand was served on the defendant executor on September 25, 1913. At the trial in the circuit court plaintiff's counsel stated that these facts were admitted by the parties; and that it was further admitted that a certain "publication affidavit of one G. S. Pollard of the St. Louis Times is a correct statement of the publication to creditors on the part of said executor and is marked as defendant's Exhibit A." This affidavit, in which appears a copy of the notice to creditors, was thereupon admitted in evidence. The notice thus shown to have been published by the defendant as such executor is as follows:

"Notice is hereby given that letters testamentary on the estate of Henry B. Vogelsang, deceased, were granted to the undersigned by the probate court of the city of St. Louis, on the 29th day of August, 1912.

"All persons having claims against said estate are required to exhibit the same to the undersigned for allowance, within six months after the date of said letters, or they may be precluded from any benefit of said estate, and if such claims be not exhibited within one year from the date of the last insertion of this publication, they shall be forever barred."

When these facts had thus come into the case by way of admissions, defendant's counsel objected to the introduction of any further evidence on the ground that the facts so disclosed showed "that neither of the claims were presented within the required time and that they are barred by the statute." A colloquy between court and counsel then ensued; and plaintiff's counsel attempted to withdraw his "admission" because of the alleged failure of defendant's counsel to abide by an oral agreement said to have been entered into by counsel. The court ultimately overruled defendant's objection; and plaintiff adduced proof going to show that the notes were valid obligations of the deceased, and that the respective amounts claimed were due and payable thereon.

At the close of plaintiff's case, the court, at defendant's request, gave the peremptory instruction above mentioned, indorsing thereon the following notation, viz:

"Given upon the ground that plaintiff's claim is barred by the special statute of limitations, section 191, R. S. 1909, as amended March 13, 1911."

From what we have said above it will be seen that the trial court proceeded upon the theory that, since the defendant executor, in compliance with the law, began the publication of the notice to creditors within ten days after the issuance of the letters, the one-year period of limitation provided by the statute, as amended in 1911, began to run from the date of the issuance of such letters, to wit, August 29, 1912; and as plaintiff did not serve the defendant with notice of its claim until September 25, 1913, the demand was barred by the statute. Plaintiff, appellant here, contends, on the other hand, that under

the statute, as amended, when correctly interpreted and applied to the facts of this case, the one-year period of limitation did not begin to run until the date of the last insertion of the publication of the notice aforesaid, to wit, September 28, 1912; and that consequently plaintiff's claim was not barred when notice thereof was served on the executor on September 25, 1913.

Before considering the question thus presented, we shall dispose of certain points raised by appellant's learned counsel.

[1] It is said, for one thing, that the bar of the statute was not properly invoked at the trial. But we are not persuaded that there is any merit in this suggestion. That it is unnecessary to plead the statute, in a case originating in the probate court, is not disputed. And it appears that the point was raised in a way such as to make it clear to court and counsel that defendant was relying upon the special statute. See *Wencker, Adm'r, v. Thompson's Adm'r*, 96 Mo. App. loc. cit. 66, 69 S. W. 743. Indeed, it appears from statements of defendant's counsel in the trial of the case below that defendant proceeded upon the theory that this was the only defense to be asserted; and the court, in giving the peremptory instruction, noted thereon that it was given upon the ground that the claim was barred by section 191, Rev. Stat. 1909, as amended in 1911.

It is urged that the evidence adduced sufficed merely to make the question respecting the bar of the statute an issue to be determined by the jury. But we cannot assent to this. The facts that came into plaintiff's case, in the manner above shown, left no issue of fact to be determined respecting the matter. It only remained for the court to interpret the provisions of the special statute of limitations and apply the same to the undisputed facts. It is true that some of the facts thus developed need not have been shown by plaintiff to make out a *prima facie* case, but they were shown; plaintiff's counsel proceeding, it seems, upon the theory that plaintiff's claim would be contested only on the ground that notice thereof had not been given the executor in due time, and that counsel had agreed as to the facts. The subsequent statements of plaintiff's counsel, viz.: "I will withdraw our admission," "We aren't admitting anything now"—did not have the effect of effacing the record that had then been made. Nor was plaintiff's case prejudiced by the course which its counsel pursued; for, if defendant's position be correct, it is clear that plaintiff could not have escaped the bar of the statute invoked.

[2] In this connection, it is argued that no proof was adduced tending to show that the *St. Louis Times* is a newspaper published in the city of St. Louis; and it is said that neither the trial court nor this court can take judicial notice of that fact. But plain-

tiff itself produced and put in evidence the affidavit of publication, as showing the due publication of the notice to creditors; and the point now sought to be raised was in no manner suggested below. It is unnecessary, therefore, to here give the matter any further consideration.

[3] We come then to the controlling question in the case, viz. whether the one-year period of limitation began to run from the date of the issuance of the letters to the defendant executor, or from the date of the last insertion of his publication of notice to creditors. In considering this question, we must have regard to the precise language of the sections of the statute involved. Section 191, Rev. Stat. 1909, as amended March 13, 1911 (Laws 1911, p. 81), is as follows:

"Sec. 191. All demands not thus exhibited in one year shall be forever barred, saving to infants, persons of unsound mind or imprisoned, and married women one year after the removal of their disability, and *said one year shall begin to run from the date of the letters where notice shall be published within ten days, after letters are granted, and in all other cases said one year shall begin to run from the date of the last insertion of the publication of the notice.*" (Italics ours.)

The notice to creditors, published as above stated, was drawn in precise conformity to section 82, Rev. Stat. 1909, as amended March 13, 1911 (Laws 1911, p. 79), which is as follows:

"Sec. 82. Within ten days after letters are granted the executor or administrator shall publish in some newspaper published in the county where letters of administration have been granted, and if no paper is published in such county, then in a paper published in any other county in the state nearest to the county where such letters of administration have been granted for three weeks, a notice that letters testamentary or of administration have been granted to him, stating the date, and requiring all persons having claims against the estate to exhibit them for allowance to the executor or administrator within six months after the date of letters, or they may be precluded from any benefit of such estate; and that if such claims be not exhibited within one year from the date of the last insertion of such publication, they shall be forever barred."

From a reading of section 191, supra, as amended, it quite clearly appears that the lawmakers therein stated with certainty and precision the date from which the one-year period of limitation shall begin to run in each of the two instances mentioned; that is to say, that, if the notice to creditors be published within ten days after the granting of letters, then the one year shall begin to run from the date of such letters, but that, if such notice be not published within ten days from the granting of the letters, then the one-year period shall begin to run from the date of the last insertion of the publication of the notice. In the case before us, the notice was published within ten days from the date of the issuance of the letters. Therefore, under section 191 as amended, the one-year statute began to run from the date of the granting of the letters to the defendant

executor; unless it be that section 82, as amended, which prescribes the form of the notice to creditors, is to be taken as controlling the matter, and as having the effect of prescribing that the one-year period shall in every instance begin to run from the date of the last insertion of the publication of notice to creditors, despite the provisions of section 191, as amended, to the contrary; or unless it be that an executor or administrator who publishes notice to creditors in conformity with section 82, as amended, stating that, if claims "be not exhibited within one year from the date of the last insertion of this publication, they shall be forever barred," is bound by such notice, though the publication was begun within ten days from the issuance of the letters, and despite the specific provision of section 191, as amended, applicable where the publication is so begun.

[4] We regard it as clear that section 191, as amended, which is the limitation statute, must control the matter in hand. Its provisions are explicit and clear; and there appears to be no room for the contention that it is to be regarded as altered or modified by section 82, as amended, which merely provides the form that the notice to creditors shall take. Nor in view of the provisions of section 191 as amended, do we think that an executor or administrator who publishes notice to creditors in the form prescribed by section 82 as amended, though such publication is begun within ten days from the issuance of letters, is bound thereby, in the sense that, in behalf of the estate upon which he is administering, he is precluded from asserting that claims are barred within one year from the granting of the letters. Section 82, as amended, purports to prescribe one general form for the notice to creditors, to be employed in all cases, regardless of the time when the publication may begin. It is unfortunate that in enacting this section regard was not had to the alternative provisions of section 191, supra, as amended; but it cannot be said that an executor or administrator is in any wise at fault if he follows literally the terms of the statute providing precisely what his notice shall contain; nor that the estate upon which he is administering must on that account lose the benefit of the provisions of section 191, as amended, when the publication is begun within ten days from the issuance of the letters. It is said by plaintiff's learned counsel that this view ascribes to the Legislature the intention of providing for a notice, in cases such as that before us, which is false and misleading (if not fraudulent) on its face. It is true, as said, that the lawmakers, in prescribing the form of notice, unfortunately failed to reckon with the fact that the limitation section (section 191 as amended) distinctly provides that the time when the period of limitation shall begin to run shall

depend upon whether the publication of the notice is begun within ten days of the granting of the letters or otherwise. But it is pertinent to here inquire whether a claimant is entitled to rely solely upon the form of notice published by the executor. We think that he must be held to a knowledge of all of the statutory provisions to be reckoned with in the premises, that section 191, as amended, prescribes with certainty the time when the one year shall begin to run in each of the instances therein mentioned, and that the publication of the notice in the form prescribed by section 82 as amended is apparently made necessary, in every case, by the terms of that section.

There is nothing to suggest that plaintiff did in fact rely upon the form of the notice published, and was thereby misled; but we do not mean to say that evidence tending to show this would in any wise alter the situation, or would be competent evidence in the case.

An argument is advanced by appellant predicated upon the wording of section 195, Rev. Stat. 1909, as amended in 1911 (Laws 1911, p. 82). This section need not be here quoted. A scrutiny of it discloses that the language employed, referring to section 191, *supra*, tends to support, rather than militate against, the views expressed above.

In support of appellant's contention that the period of limitation here began to run from the date of the last insertion of the publication, and not from the date of the granting of the letters, we are referred to the opinion of this court by Bakewell, J., in *Spaulding v. Suss*, 4 Mo. App. 541. But the language which appellant quotes therefrom (4 Mo. App. loc. cit. 543, 544), having reference to section 19 of article 2, Wagner, Stat. p. 86, was unnecessary to a decision in the case, and when the entire opinion is reckoned with we do not regard it as authority in support of the argument advanced by appellant.

In support of the insistence that we ought to construe the sections of the statute here under consideration so as to resolve any ambiguity in favor of the longer period of limitation, we are referred to the case of *Hawkins v. Ridenhour*, 13 Mo. 130. It was there said that since the notice to creditors, in that case, was not published until 81 days after the date of the letters of administration, it was not a compliance with the statute which required publication within 30 days; the court adding:

"As the law authorizing it has a tendency to destroy rights, we shall require a strict compliance with its provisions."

We perceive nothing in this to sustain appellant's position; and in view of the clear and explicit provisions of section 191 as amended in 1911, prescribing with certainty that, under circumstances such as are here present with respect to the publication of the notice, the one-year period of limitation shall begin to run from the date of the issuance of the letters, there appears to be no room for a construction of the statute in favor of a longer period of limitation.

Other authorities cited in the briefs need not be discussed. For the reasons indicated, we are of the opinion that the one-year period of limitation began to run against plaintiff's claim on the date of the granting of the letters testamentary to the defendant executor. In this connection, see *Wilkinson v. Thom*, 185 S. W. 552. And as the claim was not lawfully exhibited to the executor within such period, we must hold that it was barred, and that, under the circumstances of the case, it was proper to give the peremptory instruction, on this ground, at the close of plaintiff's case.

It follows that the judgment below should be affirmed, and it is so ordered.

REYNOLDS, P. J., and THOMPSON, J., concur.

PATTON v. STEWART.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. PUBLIC LANDS \S 151(7)—PATENTS—INTERFERENCE.

Where the boundary of a later patent laps over upon an earlier patent, the later patent, in so far as it interferes with the prior patent, is void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. \S 433; Dec. Dig. \S 151(7).]

2. ADVERSE POSSESSION \S 14—INTERFERING PATENT—TITLE.

The only way by which a title may be acquired by the patentee of a patent lapping over upon or interfering with an earlier patent is by an actual occupancy of the land covered by the lap, or a part of it, claiming to its well defined and marked boundaries continuously and adversely for the statutory period of 15 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 77-81; Dec. Dig. \S 14.]

3. ADVERSE POSSESSION \S 27—OVERLAPPING PATENT—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title, evidence held not to show plaintiff's adverse possession of a lap over or interference between his later patent and an earlier patent, part of which included the land involved.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 121, 122, 652, 664, 664; Dec. Dig. \S 27.]

4. ADVERSE POSSESSION \S 43(2) — TACKING POSSESSION.

A later patentee whose patent overlaps an earlier patent cannot tack to his possession of the earlier patent his claim to the boundary of his later patent.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 214, 221; Dec. Dig. \S 43(2).]

5. JUDGMENT \S 252(2) — CONFORMITY TO PLEADING—QUIETING TITLE—"ACTION FOR THE RECOVERY OF LAND."

Civ. Code Prac. \S 125, subd. 2, providing that defendant, in an action for the recovery of land claiming any part of it, must set up that fact in his answer showing what specific part he claims, while resorted to more frequently in ejectment, extends to a suit to quiet title which is to all intents "an action for the recovery of land," so that, where defendant by his answer merely denied the allegations of the petition in a suit to quiet title entitling plaintiff to relief, a judgment for defendant was erroneous.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. \S 252(2).]

For other definitions, see Words and Phrases, First and Second Series, Action for Recovery of Real Estate.]

6. APPEAL AND ERROR \S 1073(1)—HARMLESS ERROR—JUDGMENT—ACTION TO QUIET TITLE.

In a suit to quiet title wherein defendant did not set up in his answer a showing of the specific part he claimed, as required by Civ. Code Prac. \S 125, subd. 2, an erroneous adjudication of the land to him which would bar plaintiff's renewal of his cause of action was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4240; Dec. Dig. \S 1073(1).]

Appeal from Circuit Court, Knott County.
Action to quiet title by Obert Patton against Willie Stewart. Judgment dismissing

the petition and adjudging the defendant to be the owner of the land and to be entitled to its possession, and plaintiff appeals. Reversed, with directions to enter a judgment dismissing the petition only.

H. T. Bailey, of Hindman, for appellant.
Smith & Combs and H. H. Smith, all of Hindman, for appellee.

THOMAS, J. The appellant, as plaintiff below, filed this suit in the Knott circuit court against the appellee, as defendant below, alleging that he was the owner and in possession of 25 acres of land in that county, and that the defendant had entered upon it and had marked a number of trees and was giving it out and claiming that he was the owner of the land, and plaintiff asked that his title thereto be quieted.

The answer consists of but one paragraph, which is a denial only of the allegations of the petition. After preparation on the issues thus made and submission of the cause, the trial court dismissed the petition, and further adjudged the defendant to be the owner of the land which is described in the judgment, and that he is entitled to the possession of it. From this judgment, the plaintiff prosecutes this appeal.

[1, 2] The evidence shows that for many years previous to 1890 the plaintiff was living upon and occupying a portion of a tract of land in Knott county which was patented to Louis Mosley in 1859. In the former year the plaintiff procured a patent from the commonwealth to other land which he claims lies contiguous to that portion of the Mosley patent upon which he had theretofore resided, and it is his contention in this case that the land in controversy is a part of that covered by his patent of 1890. As to whether this be true, the evidence produces in our minds great doubt; but, whether true or not, it is shown beyond dispute that the particular 25 acres involved in this suit lies within the bounds of a patent for 21,800 acres issued to E. C. Duff on April 18, 1873, which was surveyed on October 17, 1872, and that, if the boundary of plaintiff's 1890 patent does include the land involved, it is within the interference which the latter patent makes with the Duff patent by lapping over on it. Under repeated rulings of this court, which have been made so often as to not call for a citation of authorities, the subsequent patent (of 1890), in so far as it interferes with the prior (or Duff) patent, is void. The only way, then, by which a title may be acquired by the patentee of the interfering patent to the land covered by the lap is by an actual occupancy of it, or a portion of it, claiming to its well defined and marked boundaries continuously and adversely for the statutory period of 15 years. *Brewer v. War Fork Land Company*, 172 Ky. 598, 189 S. W. 717, and the long list

of authorities cited therein at 172 Ky. 602, 603, 189 S. W. 717.

[3, 4] The evidence in the record fails to show any such adverse possession by the plaintiff of the interference between the two patents, a part of which is the land involved. It is true he claimed the land in controversy by adverse possession, but he seeks to tack on to his possession of the Moseley patent his claim to the boundary of his 1890 patent, and this is the very thing which the case referred to says he may not do.

Some time after the obtention of his patent in 1890 the plaintiff constructed a new dwelling somewhat removed from his old one, and there is a feeble effort to show that this dwelling into which he immediately moved was located upon the patent which he obtained in 1890, but the evidence wholly fails to show that the new dwelling was upon that patent. On the contrary, it shows directly the opposite. It is true that in a way the plaintiff testified that his new residence was on the land covered by the patent issued to him, but it is perfectly manifest that his testimony upon this point is merely the expression of a belief which he entertained, and is not based upon any substantial fact. His son, who is a man over 40 years of age, and who assisted in making the survey for the 1890 patent, shows by his testimony that the new residence is not within its boundary, and a surveyor who testified in the case shows the same fact. We conclude, then, that the plaintiff failed to establish title in himself in the land in controversy, and the court therefore properly dismissed his petition.

[5] We fail, however, to find any authority by which the court was justified in adjudging the land to belong to the defendant. Under section 125 of the Civil Code of Practice, subsec. 2, the defendant in an action for the recovery of land, if he claims any part of it, must set up that fact in his answer, showing what specific portion he claims. It is true that the provisions of this section are resorted to more frequently in technical

suits of ejectment than other character of suits in which the title is involved, but the remedy sought in this case is one provided for the purpose of establishing the plaintiff's title to land, and is to all intents and purposes a suit for the recovery of land, and we are unable to draw any distinction which would permit the provisions of the section of the statute, *supra*, to apply to the one case, and not to the other.

[6] It might be insisted that the judgment, in so far as it adjudged the land to belong to defendant, although erroneous, cannot affect the plaintiff, and is therefore not prejudicial to him, and that the judgment should not be reversed because of the error, if any. This would be true if the effect of the judgment as rendered could be confined to only a denial of the right of the plaintiff to recover under the facts presented, but it cannot be so confined, because, as between the plaintiff and the defendant, the land is forever adjudged to belong to the latter, although the defendant makes no claim to the land in his answer. The only facts which he attempted to combat by the answer which he filed were those alleged in the petition entitling the plaintiff to the relief; they being plaintiff's ownership and possession of the land. A failure to establish either of these would have authorized a dismissal of the petition. Subsequent occurrences might happen which would perfect his right to the relief sought, but he could not renew his cause of action under the judgment determining the defendant to be the owner of the land. It was therefore prejudicial error to have extended the judgment beyond the dismissal of the petition.

Under the circumstances of this case, and the relief which each party obtains, from this court, the cost of this appeal will be equally divided between the parties, which the clerk of this court is directed to do in the taxation of it.

Wherefore the judgment is reversed, with directions to enter a judgment dismissing the petition only.

**LOUISVILLE & N. R. CO. v. PERRY'S
ADM'R.**

(Court of Appeals of Kentucky. Jan. 17, 1917.)

1. RAILROADS \S 400(8) — OPERATION — DUTY TO STOP TRAINS — EVIDENCE — SUFFICIENCY. Evidence held to present a question for the jury whether the engineer, after seeing deceased on the track, could, in the exercise of ordinary care and with the means at his command, have stopped the engine in time to have avoided injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1375; Dec. Dig. \S 400(8).]

2. RAILROADS \S 376(4) — OPERATION — DUTY TO STOP TRAINS.

When a locomotive engineer discovers, while 200 feet or more from a pedestrian, that he was unconscious of the approach of the engine, it is then his duty at once to use ordinary care, with the means at his command, to stop the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1279; Dec. Dig. \S 376(4).]

3. RAILROADS \S 398(3) — OPERATION — DUTY TO STOP TRAINS — EVIDENCE — SUFFICIENCY.

Where one in charge of a locomotive was not the regular engineer, but a fireman temporarily in charge, his evidence that he exercised all means at his command to stop the engine before striking deceased is not conclusive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1359; Dec. Dig. \S 398(3).]

4. RAILROADS \S 357 — OPERATION — DUTIES TO LICENSEES — "ORDINARY CARE."

When it is said that an engineer must use "ordinary care" with the means he has at hand, this implies such care as a competent engineer would exercise, and the doing of such things as a capable engineer would do.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1235; Dec. Dig. \S 357.

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

5. RAILROADS \S 379 — OPERATION — DUTIES AS TO DEAF PERSONS.

In determining the degree of care to be exercised by an engineer who discovers a person walking on the tracks in front of the engine oblivious of the approach, it is immaterial whether the person has good or bad hearing, sight or health.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1233, 1234; Dec. Dig. \S 379.]

Appeal from Circuit Court, Knox County.

Action by the administrator of Ebb Perry against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Black & Owens, of Barbourville, and B. D. Warfield, of Louisville, for appellant. J. M. Robison, of Barbourville, and M. A. Gray, of Corbin, for appellee.

CARROLL, J. Ebb Perry, while walking on the track of the Louisville & Nashville Railroad Company near Corbin, Ky., was struck by one of its engines and killed. In this suit by his administrator to recover damages for his death, there was a judgment in favor of the administrator for \$1,000, and a reversal of this judgment is asked on the sole ground that the court should have directed

the jury to return a verdict in favor of the defendant.

It is conceded that Perry, at the time he was struck and killed, occupied the attitude of a licensee on the track, and that the company owed him the duty of warning, lookout, and reasonable speed. But it is insisted in behalf of counsel for the company that the evidence showed conclusively that the engineer in charge of the engine that struck Perry exercised all the care demanded to prevent striking him, and, this being so, the trial court should have taken the case from the jury.

It appears from the evidence that Perry was walking south on the ties on the main track on the outside of the rail on what may be called the right-hand side of the track, or the engineer's side in the direction in which he was going. The engine that struck him was running without any cars attached to it, at a speed estimated by eyewitnesses of from 15 to 20 miles an hour, and by the engineer at from 12 to 15 miles an hour, and was going to make a stop, or, at any rate, slow down to go into a switch, about a hundred feet south of where Perry was struck. Perry, who, as shown by the evidence, was quite deaf, was walking with his back to the approaching engine, and the track for several hundred yards north of where Perry was struck was straight, there being nothing to obstruct Perry as he was walking down the track from the view of the engineer, who was situated in his cab on the same side of the track on which Perry was walking.

P. C. Jenkins, the postmaster at South Corbin at the time of the accident, was so situated on the right-hand side of and near to the track that he had a full and unobstructed view of the engineer in his cab, as well as of the engine and Perry, until the engine got within 100 feet or less of the place where it struck Perry. He testified that when the engine came about this close to Perry, Perry went into a cut that obstructed him from his view. Jenkins further testified that he had worked on railroads and operated engines and was acquainted with the duties of an engineer, the speed at which trains run, and the movements that an engineer would make in stopping an engine. He said that, when the engineer commenced sounding the alarm whistle, the engine was 300 feet or more from the place where Perry's body was found after he was killed; that his attention was directed to the scene by the constant sounding of the whistle; that when the engine was between 200 and 250 feet, or at any rate over 200 feet from the point where Perry was struck, he saw the engineer reverse his engine and put his hand on the air valve, and that the engine could have been stopped with safety to the persons on the engine within 100 feet from the place where he saw the engineer reverse his en-

gine, but that the engine ran over 200 feet from the place where the engineer applied his emergency brake before it struck Perry.

There is other evidence to the effect that the engine ran about 70 feet beyond the point where Perry was struck.

Cooper, an experienced railroad engineer on this line of road, testified that the engine that struck Perry at the time and under the circumstances related could have been stopped, in the exercise of ordinary care and with safety to the persons on the engine, in 100 or possibly a little over 100 feet from the place where the engineer first made an effort to stop it. He further said that an engineer has two means of stopping the engine in an emergency, one known as the engineer's brake valve, that operates the air brake, and the other the reverse lever, but that a quicker stop could be made by using either one of the methods than by using both of them; that it was against the rules of the company to apply the air valve and also reverse the engine at the same time; and, besides, that this method would cause the wheels to slide.

Hauck, who was in charge of the engine, said that he had an unobstructed view of Perry, and that when he first noticed him he was about 250 or 350 feet from where he was struck; that when he first saw him walking down the track in front of and with his back to the engine, he sounded the alarm whistle when he was about 250 feet from him, at which time the engine was running from 12 to 15 miles an hour; that he continued to sound the whistle until he got within about 100 feet or more of Perry, when he discovered that he did not appear to have heard the approach of the train or to have taken any notice of the sounding of the alarm whistle; that when he discovered that he was not heeding the signal, "he applied the brakes in emergency and reversed the engine, applied the air with one hand, reversed the engine with the other, and continued to blow the whistle, and done that as quick as possible;" that there was no other means on the engine at that time that he could have used to stop it. He further said that he could stop the engine quicker by using both of these means, that is, by applying the air brake and reversing the engine, than he could by using one alone, and that there was nothing else that he could have done that he did not do to avert the accident. On cross-examination he said that he was about 150 feet from Perry when he first observed that he did not give any attention to the approach of the train or the alarm signal, that Perry was about 350 feet in front of him when he began to blow the alarm whistle, and that he ran about 100 feet before he undertook to apply the brakes and reverse the engine, and that the engine ran about 200 feet or more after he applied the air brakes before it stopped. He further said that he was looking at Perry from the

time that he first discovered him, and that he did not give any indication that he knew of the coming engine, nor did he make any effort to get off the end of the ties and out of the way of the engine, which he could have done by taking one or two steps.

Ellis, the brakeman who was on the pilot or cowcatcher of the engine, and of course had a plain view of Perry, said that the engine commenced to slow down when it was in 150 or perhaps 200 feet of Perry. This witness also said that Perry did not give any indication that he heard the engine approaching or the whistle sounding.

[1] Under the well-known rule of this court, applicable to cases like this, that if the evidence on the subject of the negligence of the defendant is of such a nature as that there might be reasonable difference of opinion whether the defendant was guilty of negligence or not, or if the reasonable inference from the facts tends to indicate that it was guilty of negligence, the case should go to the jury, we are of the opinion that the trial court did not commit error in submitting this case to the jury. Considering the evidence of the engineer in connection with that of the other witnesses, we think there was ample room for reasonable difference of opinion as to whether the engineer, in the exercise of ordinary care and with the means at his command, could have stopped the engine after he discovered that Perry did not hear the approach of the engine, or the sounding of the whistle, or the ringing of the bell. There is evidence upon this point tending to show that the engine could have been stopped in about 100 feet after the engineer discovered that Perry was not going to leave the track and undertook to stop the engine, and there is also evidence tending to show that when the engineer made this discovery, and when he undertook to stop the engine, it was between 200 and 250 feet from Perry, or, at any rate, over 200 feet.

[2] It is true that the engineer testifies that as soon as he discovered that Perry was not going to leave the track, he used all the means at his command to stop the engine, and if there were no evidence on this subject except that of the engineer, it might well be said, in the absence of satisfactory circumstantial evidence contradicting that of the engineer, that his evidence would warrant the court in directing a verdict in favor of the defendant. But in this case we are not confined to circumstances tending to show that the engineer could have stopped the engine after he undertook to stop it before striking Perry, because Jenkins, who was qualified to speak on the subject, said he saw the engineer reverse his engine and put his hand on the air valve when the engine was between 200 and 250 feet, or, at any rate, over 200 feet from the point where Perry was struck. Now when the engineer dis-

covered, while he was some 200 feet or more from Perry, that he was unconscious of the approach of the engine, it was then his duty to at once use ordinary care, with the means at his command, to stop the engine. That was his duty, and his whole duty, under the circumstances. And in the performance of that duty, as the evidence shows, he did not exercise ordinary care, for if he had, he could certainly have stopped his engine in less than 200 feet.

[3, 4] Under the circumstances of this case, the evidence of the engineer that he did exercise all means at his command to stop the engine, is not to be taken as conclusive. The man who was running the engine was not the regular engineer, but a fireman temporarily in charge of the engine, and it is fair to assume that he did not have sufficient experience or qualifications to use the means at his command in such a manner as a capable engineer would have done, because we are sure that he did not purposely mean to strike or kill Perry. When we say that an engineer must use ordinary care with the means he has at hand, this implies such care as a competent engineer would exercise and the doing of such things as a capable engineer would do. Some persons who undertake to and do run engines might exercise the utmost care they were capable of and do everything that in their opinion could be done, and yet they might not be able to stop an engine in near so short a distance as a competent engineer could.

If, however, Hauck should be treated as a competent engineer and as one who understood the duties and requirements of his position, there is sufficient evidence to show that he could have stopped the engine before striking Perry. We may put the case upon this single issue and confine the negligence to the failure of the engineer, after he actually discovered that Perry was not going to leave the track, to stop his engine in time to avert the accident.

[5] In considering the case we have given no attention to the evidence as to the defective hearing of Perry or any other ailment with which he was afflicted. It is wholly immaterial, in disposing of the case from the point of view from which we have considered it, whether Perry's hearing was bad or good, or whether he was in good health or bad health, for when an engineer actually discovers that a person on the track in front of his engine is not going to leave the track and is not giving any attention to the approach of the engine, he is under precisely the same measure of duty to save him if he can, by the exercise of ordinary care with the means at his command, whether he be old or young, or have good hearing or bad, or good eyes or bad eyes, or be sick or crippled, or strong and healthy.

The judgment is affirmed.

FORD v. MAY.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. GUARDIAN AND WARD §108 — CONVEYANCE BY GUARDIAN—CONSTRUCTION.

Where a guardian having an interest in land, together with his wards, sued to confirm a contract whereby he exchanged the land, and, by the judgment, the commissioner was ordered to execute deed of special warranty on behalf of the infants and the guardian, and the caption of the deed itself named the infants, the guardian, and the commissioner as parties, and the deed provided that the commissioner and an infant and others covenanted that they would warrant and defend the title of the land against the claims of the infants and the guardian, whatever interest the guardian had in the land passed under the commissioner's deed, though it was void as to the infant defendants.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 369, 395-398; Dec. Dig. §108.]

2. HUSBAND AND WIFE §14(4) — CONVEYANCE TO—CONSTRUCTION.

Where a father conveyed land to his daughter and her husband, the caption of the deed named the daughter and the husband as parties of the second part, the granting clause was to the parties of the second part, their heirs and assigns forever, the habendum clause was "to have and to hold the same, together with all appurtenances, unto the party of the second part, their heirs and assigns forever," and the warranty was to the parties of the second part, and their heirs and assigns forever, though the deed showed on its face that it was an advancement to the daughter, and provided that the conveyance should not be liable for the debts of the husband, and should not be sold by him in any wise without the consent of his wife, to whom it was intended to convey a separate estate, the daughter and her husband each took an undivided one-half interest in the land, and, on the death of the daughter, prior to the Weissinger Act of 1894 (Laws 1894, c. 76), the husband became entitled to a life estate in her half.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 76; Dec. Dig. §14(4).]

Appeal from Circuit Court, Pike County.

Suit by Samuel M. Ford and others against W. R. May, wherein Thomas J. Ford petitioned to be made a party, and for such relief as he appeared entitled to. From the judgment, Thomas J. Ford appeals, and May prosecutes a cross-appeal. Judgment affirmed on original appeal, and reversed on cross-appeal, and cause remanded for proceedings consistent with the opinion.

See, also, 157 Ky. 830, 164 S. W. 88.

York & Johnson and Roscoe Vanover, all of Pikeville, for appellant. J. S. Cline, of Pikeville, for appellee.

CLAY, C. On July 11, 1884, Thomas P. May executed and delivered to his daughter, Nancy Miriam Ford, and her husband, Thomas J. Ford, a deed, which, omitting the description of the land conveyed, is as follows:

"This deed of conveyance made and entered into this the 11th day of July, 1884, between Thos. P. May and Elizabeth M. May of the county of Pike, and state of Kentucky, parties of the first, and Thos. J. Ford and Nancy Miriam Ford, his wife, parties of the second part, witnesseth: That said party of the first part, for

and in consideration of the sum of \$1,200 as an advancement to the said May Miriam Ford, late May, and our daughter, and for the further consideration of the love and affection we have for our said daughter do hereby sell and convey to the parties of the second part, their heirs and assigns, forever, the following described property, to wit: One tract of land on John's creek in Pike county and state of Kentucky and on the east side of said creek and bounded as follows, to wit: [Here follows description]. To have and to hold the same, together with all the appurtenances thereunto belonging unto the party of the second part, their heirs and assigns, forever, and the said party of the first part hereby covenants with the said parties of the second part that they will warrant the title of the property hereby conveyed unto the said party of the second part and their heirs and assigns forever. The restrictions placed on this conveyance by the grantors is that the same shall in no wise be liable for the debts or liabilities of the said Thos. J. Ford, and shall not be sold by him in any wise without the consent of his wife to whom this is intended to convey a separate estate."

Prior to the year 1890, Nancy Miriam Ford died, leaving surviving her several children. Thereafter Thomas J. Ford was appointed and qualified as their guardian.

On September 11, 1896, Thomas J. Ford brought suit against his children for the purpose of confirming a contract, by which he had exchanged the land embraced in the above deed for another tract of land belonging to W. R. May and located on John's creek in Pike county. On final hearing the chancellor adjudged that the exchange would be beneficial to the infants, and entered an order directing the commissioner to make conveyance to W. R. May. The deed was made by the commissioner, conveying all of the interest of Thomas J. Ford and the infant defendants to W. R. May. At the same time May and wife executed and produced in court a deed conveying to Thomas J. Ford and the infants the tract of land for which the exchange was made. Thereupon this deed and the deed from the commissioner to May were approved and the exchange confirmed.

On March 23, 1912, Samuel M. Ford and others, children of Nancy Miriam Ford, brought suit to recover the land conveyed to May, on the ground that the judgment confirming the exchange was void, and to recover the difference in the rental value of the two tracts of land. A demurrer was sustained to the petition, and the petition dismissed.

On appeal to this court, it was held that there is no statute in this state giving to courts of equity authority to approve an exchange of land made by the guardian of infants, or to divest infants of their title for the purpose of perfecting such an exchange, and that a judgment approving such an exchange is void. It was also held that as the infants had no estate, except an estate in remainder, they were not entitled to recover the difference in the rental value of the two tracts of land. The court declined to pass on the estate which Thomas J. Ford, under

the deed which Thomas P. May made to him and his wife on July 11, 1884. The judgment was reversed, with directions to overrule the demurrer to the petition as amended. 157 Ky. 830, 164 S. W. 88. On the return of the case, Thomas J. Ford filed a petition, asking to be made a party, and that he be adjudged such relief as he appeared entitled to. May filed an answer, pleading in substance that Thomas J. Ford, under the deed from Thomas P. May and wife, took either an estate for life in the land thereby conveyed, or a fee simple to one half thereof and an estate for life in the other half. He further pleaded that whatever estate Thomas J. Ford had in the land conveyed to him by the commissioner was vested in him by the commissioner's deed. Thomas J. Ford pleaded that he never claimed any estate in the land conveyed to May, except an estate by the curtesy, and that his title thereto did not pass to May by virtue of the commissioner's deed. On final hearing the chancellor cancelled the commissioner's deed to May and the deed from May and wife to the Fords. He further adjudged that Thomas J. Ford took, under the deed from Thomas P. May and wife to Thomas J. Ford and wife, dated July 11, 1884, a life estate in the whole of the land conveyed; that such estate passed to May under the conveyance made by the commissioner; and that May was entitled to occupy said tract of land during the lifetime of Thomas J. Ford, and should surrender said tract on his death to the children of Thomas J. Ford. The judgment also provided that Thomas J. Ford should hold possession of and occupy the tract conveyed to him and his children by May during his lifetime, and at his death this tract of land should be surrendered to May. From this judgment Thomas J. Ford appeals, and May prosecutes a cross-appeal.

[1] 1. For purposes of convenience, the tract of land conveyed by the commissioner to W. R. May and wife will be designated as the "May farm," while the tract conveyed by W. R. May and wife to Thomas J. Ford and wife will be designated as the "Hatfield farm." It is insisted on the original appeal that Thomas J. Ford's interest in the May farm did not pass under the commissioner's deed. We find, however, that by the judgment rendered in the proceedings in which the commissioner's deed was made, the commissioner was ordered and directed to execute "deed of special warranty on behalf of said infants and the plaintiff Thomas J. Ford to the defendant W. R. May and wife." After setting out the order, the caption of the deed is as follows:

"This indenture, made and entered into this the 14th day of November, 1896, between S. M. Ford, Louisa M. Ford, Birdie L. Ford, Willie T. M. Ford, John H. Ford, and Bayard Ford, and the plaintiff Thos. J. Ford, by A. P. W. May, master commissioner of the said court of the first part, and W. R. May and his wife of the second part."

In addition to the foregoing, the deed contains the following provision:

"A. P. W. May, master commissioner of the said court, of the first part, and S. M. Ford, and others, hereby covenant with the parties of the second part, that they will warrant and defend the title of the land and premises hereby conveyed against the claims of Sam M. Ford, Louisa M. Ford, Birdie L. Ford, Willie T. M. Ford, John H. Ford and Bayard Ford, and plaintiff Thos. J. Ford."

This conveyance was made pursuant to an exchange of lands theretofore made by Thomas J. Ford. To carry out the exchange, W. R. May and wife executed a deed conveying the Hatfield farm. The purpose of the latter deed, as recited by the deed itself, was to vest in the grantees the same right, title, claim, and interest in the land conveyed as was vested in Thomas J. Ford and wife by the deed from Thomas P. May and wife, dated July 11, 1884. It is not only clear, therefore, that the object of the proceedings in which the commissioner's deed was made was to vest in W. R. May and wife not only all the title which the infant defendants had in the land, but all the title which Thomas J. Ford had in the land. Not only so, but the commissioner's deed itself actually conveyed to W. R. May and wife all the title which Thomas J. Ford had in the May tract of land, and specially warranted such title. This deed was void only as to the infant defendants. It was not void as to Thomas J. Ford. The chancellor did not err, therefore, in holding that whatever interest Thomas J. Ford had in the May tract of land passed under the commissioner's deed to W. R. May and wife.

[2] 2. The next question is, What interest did Thomas J. Ford take in the May farm under the deed from Thomas P. May and wife, dated July 11, 1884? The question is one of law and is not controlled by Thomas J. Ford's opinion. He cannot now defeat May's title by claiming less than the deed gave him. We find that in the caption of the deed in question Thomas P. May and wife are parties of the first part, while Thomas J. Ford and Nancy Miriam Ford, his wife, are parties of the second part. The granting clause is: " * * * To the parties of the second part, their heirs and assigns, forever." The habendum clause is: "To have and to hold the same, together with all the appurtenances thereunto belonging unto the party of the second part, their heirs and assigns, forever." The warranty is: " * * * Unto the said parties of the second part, and their heirs and assigns, forever." Notwithstanding these provisions, it is insisted that because the deed shows that the land was an advancement to Thomas J. Ford's wife and was intended as her separate estate, we

must hold that no actual interest passed to Thomas J. Ford under the deed. But little weight need be given to the fact that the land was an advancement to the wife. At that time it was not unusual for land intended as an advancement to the wife to be conveyed to the husband alone, or to the husband and wife jointly. We know of no rule of law by which an estate once actually granted may be altogether defeated by a subsequent clause of ambiguous meaning. Deeds should be construed as a whole, and apparently inconsistent provisions harmonized if possible. Were we to hold that the provision that the land should not be liable for the debts of Thomas J. Ford and should not be sold by him without the consent of his wife, to whom it was intended to convey a separate estate, is absolutely controlling, we would have to ignore completely all the other provisions of the deed by which the estate of a grantee is usually measured. On the other hand, if we construe the provision, "to whom this is intended to convey a separate estate," as applying, not to the entire tract, but to the half interest actually conveyed to the wife, we give effect not only to the restrictive clause, but to the other clauses of the deed. We therefore conclude that Thomas J. Ford and his wife each took an undivided half interest in the May farm, and that upon the death of his wife, which occurred prior to the Weissinger Act of 1894, (Laws 1894, c. 76), Thomas J. Ford became entitled to a life interest in her half. It results that his children by Nancy Miriam Ford are entitled to only a remainder interest in half of the May farm after the termination of Thomas J. Ford's life estate. It likewise follows that the deed from the commissioner to W. R. May and wife and the deed from W. R. May and wife to the Fords should not have been canceled, except in so far as the title of the children of Thomas J. Ford and Nancy Miriam Ford is concerned. When this is done, W. R. May and wife should be adjudged an undivided one-half interest in the May tract and Thomas J. Ford's life interest in the other half. They should also be adjudged an undivided one-half interest in the remainder in the Hatfield farm, subject to Thomas J. Ford's life interest therein. On the other hand, Thomas J. Ford should be adjudged an undivided one-half interest in the Hatfield farm and a life interest in the other half, while the children should be adjudged an undivided one-half interest in the May farm, subject to Thomas J. Ford's life interest therein.

Judgment affirmed on original appeal, and reversed on cross-appeal, and cause remanded for proceedings consistent with this opinion.

CONSOLIDATION COAL CO. v. SPRADLIN.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. MASTER AND SERVANT \Leftrightarrow 296(10) — INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In action by coal miner for injuries from fall of slate, where plaintiff's theory, supported by some evidence and presented concretely by an instruction, was that the duty of keeping the mine roof safe where he was working had been assumed by the company by refusal of the mine boss to allow him to make the roof safe and the promise of the boss to keep it safe for him, and defendant's theory, supported by some evidence, was that the mine boss told plaintiff to fix the roof if necessary, thus putting on plaintiff the duty of inspection to ascertain its condition as the work progressed, defendant was entitled to have its theory of the case presented by a concrete instruction that if the jury believed the mine boss told plaintiff to "shoot down" the roof whenever it became necessary, and that he failed to comply with these instructions, and by reason thereof was injured, to find for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1187; Dec. Dig. \Leftrightarrow 296(10).]

2. TRIAL \Leftrightarrow 252(11)—ABSTRACT INSTRUCTIONS.

Refusal to give such requested instruction, and giving, in lieu thereof, an instruction not stating in concrete form what acts would constitute contributory negligence, but defining it only in general terms, authorizing a finding for defendant, even though negligent, if plaintiff could, by the exercise of ordinary care, have avoided the injury, and plaintiff failed to use such care, was reversible error, since the instruction given left to the jury to decide whether or not the facts proven by defendant as its defense constituted contributory negligence; that being a question of law for the court and not for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. \Leftrightarrow 252(11).]

3. MASTER AND SERVANT \Leftrightarrow 296(11) — INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In such action, refusal to submit the proposition that if the plaintiff's place of work was dangerous and unsafe without shooting down the roof, and such danger was so imminent and obvious that an ordinarily prudent man would not have worked thereunder without shooting it down, verdict should be for defendant, was error; such proposition not being presented by any instruction given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1188; Dec. Dig. \Leftrightarrow 296(11).]

Appeal from Circuit Court, Johnson County.

Action by W. E. Spradlin against the Consolidation Coal Company. From judgment for plaintiff, defendant appeals. Reversed for proceedings conforming to opinion.

O'Rear & Williams, of Frankfort, and Fogg & Kirk, of Paintsville, for appellant. John W. Wheeler, of Paintsville, and C. B. Wheeler, of Ashland, for appellee.

CLARKE, J. On the Friday before the Tuesday upon which the accident complained of happened, appellee, who had had two years' experience in such work, began work with his brother-in-law, Blackburn, upon a contract theretofore made with appellant, to

construct a break-through between two air passages in a coal mine. Their duties were to cut, shoot down, and load out the coal in the break-through, which was about 8½ feet high, about 9 feet wide, and the distance between the air passages was 25 or 30 feet. A breast machine was used in making the cuts across the face of the coal, which made a cut about 4½ feet deep. Two such cuts had been made by other parties, and the coal shot down and removed, when appellee and Blackburn began work, so that about 9 feet of the break-through had already been constructed. Appellee and Blackburn had made one such cut across the face of the coal, shot down and removed the coal, and had made a second cut, shot down the coal, and were engaged in removing same, when, while appellee was loosening the coal with a pinch bar at the face, a large piece of slate fell from the roof, some 3 or 3¼ feet back from the face which struck and broke one of appellee's legs, as a result of which he was confined in a hospital for a time, and the broken leg has been left about 1½ inches shorter than his other leg, and continues to give him pain and interfere with his work. To recover for these injuries, alleging that they resulted from the negligence of appellant in failing to furnish and maintain a reasonably safe place in which for him to do his work, appellee filed this action and recovered a judgment against appellant for \$1,000; and appellant has appealed from that judgment, basing its right to a reversal upon the sole ground that the trial court erred in refusing its offered instruction upon the question of contributory negligence.

As the slate which struck appellee and inflicted his injuries fell from the roof about 3 feet from the face of the coal, and as appellee had extended the break-through by the two cuts of 4½ feet each, or about 9 feet in all, it is apparent that the slate fell from that part of the roof which had been exposed by appellee's work, and was a result of a failure to keep the place safe during the progress of the work rather than from a failure of appellant to make the place safe in the beginning. An issue was made in both the pleadings and the proof as to whose duty it was to keep the place safe as the work progressed. Ordinarily that duty, in such work, is upon the employé who shoots down and loads the coal, but, to avoid that consequence for his work in this instance, appellee alleged, and offered proof in support thereof, that, by the contract under which he was working, appellant had assumed that duty, and that, in doing such work as was reasonably necessary to keep the place in a reasonably safe condition, he was working under the orders of the mine boss. This theory of the case was presented to the jury by instruction No. 1, which stated, concretely, appellee's right to recover.

The instruction given upon contributory negligence, which was appellant's only affirmative defense, does not state in concrete form the acts of appellee, shown in the evidence, which would constitute contributory negligence, but defines same only in general terms, and authorizes a finding for appellant, even though negligent, "if the jury shall further believe from the evidence that plaintiff, Spradlin, could, by the exercise of ordinary care on his part, have avoided the injury to himself, and that he failed to use such care." The evidence shows that, the day before, and again about an hour before, the accident, appellee reported to the mine boss, Jerry Hager, that he was afraid the roof where he was working was going to get bad, and asked permission to shoot it down; but he did not, upon either occasion, represent or claim that the roof was bad or in a dangerous condition, but only that he thought it would get bad. As to the answer of the bank boss to appellee, upon these occasions, there is a conflict in the evidence. Appellee states the bank boss refused to allow him to shoot down the roof, and told him to go on with his work, and that, if the roof does get bad, "we will shoot it down." This evidence authorized the jury to believe that, in doing such work as was necessary to keep the place safe, appellee was working under the orders of his superior, who refused to permit him to shoot down the roof and directed him to go on with the work, with the promise that "we will shoot it down if it gets bad," and that appellee was thereby relieved of any duty of inspection or to shoot down the roof, even when it got bad, and made out his case under instruction No. 1, which presented his theory; and the jury may have assumed that he had exercised ordinary care for his own safety, in reporting to the boss the opinion that the roof would get bad.

[1] The evidence of the bank boss, Hager, and the mine superintendent, who was present at the conversation, which took place about an hour before the accident, is that, when appellee reported that the roof would get bad, Hager told him that he did not want to shoot the roof down, unless it was necessary, but, if it did get bad, to go ahead and shoot it. In this version of the conversation he is partially corroborated by Blackburn, appellee's brother-in-law and companion in the work. This evidence, if true, gave to appellee, who claimed to be working under orders of Hager in keeping the place safe, not only authority, but directions, to

shoot down the roof, whenever, in his judgment, it became necessary, and put upon him the duty of inspection to ascertain its condition, as the work progressed, under which state of case he was, manifestly, guilty of contributory negligence if he failed to obey these instructions of the mine boss. Under this proof, we think the jury should have been instructed to the effect that, if they believed Hager told appellee to shoot down the roof whenever it became necessary, and that he failed to comply with these instructions, and by reason thereof was injured, they should find for the defendant; and that the refusal to give such an instruction, concretely stating the defense thus presented, is reversible error.

[2] While it is not always reversible error to refuse to include in the instruction on contributory negligence the particular facts constituting the defense, it is now the established rule, in this state, to give instructions presenting, in specific and concrete form, each party's theory of the case, and the failure to do so is reversible error, whenever it is left to the jury to decide whether or not the facts proven by the defendant as his defense constitute contributory negligence, which is, of course, a question of law for the court and not for the jury, and such is the case here. *L. & N. R. R. Co. v. King's Adm'r*, 131 Ky. 347, 115 S. W. 196; *I. C. R. Co. v. Dallas' Adm'r*, 150 Ky. 442, 150 S. W. 536; *Peerless Coal Co. v. Copenhagen*, 165 Ky. 195, 176 S. W. 1002; *L. & N. R. R. Co. v. Shoemaker's Adm'r*, 161 Ky. 746, 171 S. W. 383; *L. & N. R. R. Co. v. Crutcher*, 135 Ky. 381, 122 S. W. 191; *Jellico Coal Mining Co. v. Lee*, 151 Ky. 53, 151 S. W. 26; *Paek v. Camden Interstate Ry. Co.*, 154 Ky. 535, 157 S. W. 906.

[3] And it was also error for the court to refuse to submit to the jury the proposition that, if the place was unsafe and dangerous without shooting down the roof, and such danger was so imminent and obvious that an ordinarily prudent man would not have worked thereunder without shooting it down, they should find for the defendant, which proposition was also incorporated in the offered instruction and not present in any instruction given. *North East Coal Co. v. Setzer*, 169 Ky. 245, 183 S. W. 553; *Concannon's Adm'r v. Strassel Paint & Roofing Co.*, 167 Ky. 141, 180 S. W. 86.

For the reasons stated above, the judgment is reversed for proceedings conforming to this opinion.

HARDAWAY v. WEBB.

(Court of Appeals of Kentucky. Dec. 6, 1916.)

1. BOUNDARIES \S 36(3)—EVIDENCE—ADMISSIBILITY.

An original survey or plat constituting the basis of a patent is admissible, with other evidence, to explain a mistake or ambiguity in the description in the patent or to supply the omission of a course, distance, or object necessary to correctly determine and fix its boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 167; Dec. Dig. \S 36(3).]

2. BOUNDARIES \S 37(2) — CONTROL OF PATENT—PLATS—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to show that the patent erroneously described a course and distance, so that the original plat controlled.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186-189; Dec. Dig. \S 37(2).]

3. BOUNDARIES \S 47(1)—EXTENT OF LAND CLAIM—ESTOPPEL TO CLAIM.

The mere fact that a party entertained some doubt as to his boundary some 17 years prior to litigation would not change the true location of the boundary line, where for more than 15 years he consistently claimed the entire amount which the deeds from his ancestors purported to convey.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 227; Dec. Dig. \S 47(1).]

4. DEEDS \S 118—PROPERTY CONVEYED—EVIDENCE.

Evidence held to sustain conclusion of the chancellor that certain deeds embraced the land in controversy.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. \S 118.]

5. BOUNDARIES \S 37(1)—EXTENT OF CLAIM—ESTOPPEL—EVIDENCE.

Evidence held insufficient to establish plea of estoppel as against claimant of land under patent and deeds purporting to convey the land involved.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-189, 192, 194; Dec. Dig. \S 37(1).]

6. APPEAL AND ERROR \S 1009(3)—CONFLICTING EVIDENCE—CHANCERY CASES—EFFECT.

Where the evidence is conflicting, some weight will be given to the chancellor's finding, and if on the whole case the mind is left in doubt as to the truth, his judgment will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. \S 1009(3).]

Appeal from Circuit Court, Letcher County.

Suit by H. Hardaway against Ben R. Webb, wherein defendant filed a counterclaim. From a decree for defendant, quieting title in the land in controversy, plaintiff appeals. Affirmed.

Nickell & Tynes, of Hazard, for appellant. Jno. C. Eversole, of Booneville, and Felix G. Fields, of Whitesburg, for appellee.

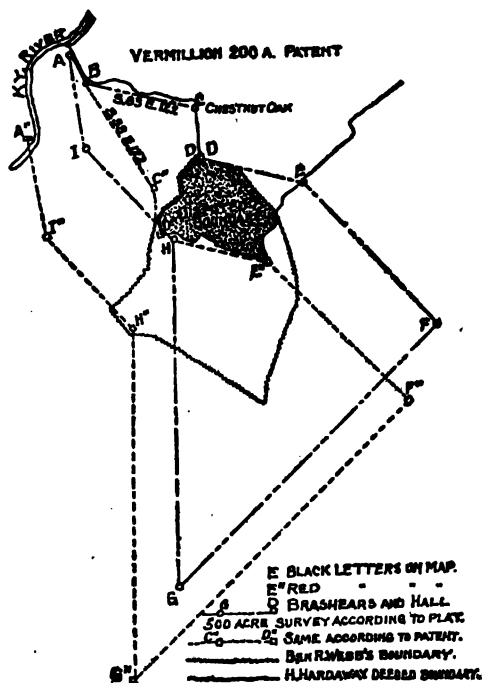
SETTLE, J. By this action, instituted in the Letcher circuit court, the appellant, H. Hardaway, sought to recover of the appellee, Ben R. Webb, damages for cutting timber from a certain tract of land described in the petition, of which appellant claims to be the

owner. Appellant also prayed an injunction, restraining appellee from the further cutting of timber from the land. The lands described in the petition and claimed to be owned by appellant embrace about 400 acres. The appellee's answer denied appellant's ownership of the timber or the land from which it was cut and alleged title to both in himself; that is, that he owns a tract or tracts of land containing about 200 acres with which appellant's land described in the petition interferes to the extent of 50 or 60 acres, from which interference the timber was cut, and that his title to the 200 acres, including the 50 or 60 acres in controversy, is superior to that of appellant. The answer was made a counterclaim against appellant, and judgment was asked against him for the value of the timber, which, though cut by appellee from the land in controversy, had been removed and appropriated by appellant under an order of delivery. The latter's reply controverted the affirmative allegations of the answer, and pleaded an estoppel based upon the following facts: That at the time appellant was negotiating for the purchase of the lands now owned by him, and when he was investigating the title thereto, the appellee, upon being asked by appellant's agent whether he owned any part of the land in controversy, disavowed all claim of ownership thereto, and stood by and saw appellant purchase and pay therefor without objection and without asserting any title thereto. The plea of estoppel was controverted by rejoinder. Upon the issues thus formed the parties took proof. Following the submission of the case the court below, by its judgment, declared appellee to be the owner of the 50 or 60 acres of land in controversy, quieted his title thereto, and awarded him \$100 as the value of the timber taken by appellant from the land under the claim or order of delivery after it had been cut by appellee. Appellant complains of that judgment; hence this appeal.

It appears from the record that appellant claims title to the land in controversy under a 100-acre patent issued to D. I. Vermillion April 12, 1872, and also under a deed from Alfred Hall to D. I. Vermillion made July 16, 1860. Appellee claims title under a 500-acre patent issued to Ezekiel Brashears and Alfred Hall, April 10, 1849, and a deed from Adam Hall to Simpson Adams, March 15, 1854. Hall had previously been conveyed by Ezekiel Brashears his entire interest in the 500-acre tract of land patented to Ezekiel Brashears and Alfred Hall. The tract of land conveyed by Alfred Hall to Simpson Adams March 15, 1854, containing 50 or 60 acres, was conveyed September 13, 1869, to appellee by deed from Simpson Adams. The deed from Alfred Hall to D. I. Vermillion of July 16, 1860, conveyed to the latter all the interest Hall owned in the Brashears and

Hall 500-acre patent, except the 50 or 60 acres conveyed Simpson Adams by Alfred Hall, March 15, 1860. The above-mentioned title papers, together with the several deeds showing appellant's chain of title back to D. I. Vermillion, were introduced in evidence. As the patent to Ezekiel Brashears and Alfred Hall, the deed from Brashears to Hall and the deed from Hall to Simpson Adams are of older date than the D. I. Vermillion patent or the deed from Alfred Hall to D. I. Vermillion, it necessarily follows that appellee was entitled to recover the land in controversy if the Brashears and Hall patent and the deed from Alfred Hall to Simpson Adams and that from the latter to Ben R. Webb cover the land in controversy.

An elaborate map or plat, marked "B. R. W. No. 5," showing the respective contentions of the parties as to the location of the lines of the Brashears and Hall patent and other boundaries involved in this case, is here inserted in the opinion. According to the



contention of appellee, the boundary of the Brashears and Hall patent is indicated on this map by the black letters A, B, C, D, E, F, G, H, I, and A. As claimed by appellant, the boundary of that patent is indicated by the black letters A, B, and the red letters C, D, E, F, G, H, I, and A. The 50-acre tract of land conveyed appellee by Simpson Adams and to the latter by Alfred Hall is indicated by the yellow lines on the map. The D. I. Vermillion 100-acre patent of April 12, 1872, is indicated by the blue lines on the map, beginning at black letter B and running to red letters C, D, E, then to black letters D, C, B.

The only difficulty presented is in locating the second line of the Brashears and Hall patent. If the lines are followed according to the calls of the certificate of survey or those of the patent, the patent does not cover the land in controversy, but if run according to the original plat made of the survey, the patent will cover the land in controversy. The difficulty referred to arises out of a mistake in the call of the second line. The beginning corner at black letter A and the corner at black letter B, are admitted by appellant to be correct; but in running from B to the object called for, a chestnut oak on the top of a hill, the line calls to run S. 38° E. 122 poles, when in fact it should be S. 83° E. 122 poles. In the original plat it is given as S. 83° E. 122 poles, but in the certificate of survey and the patent it is S. 38° E. 122 poles. The plat, certificate of survey, and patent agree as to all the other lines. The question to be determined is: Is the alleged mistake thus made in the second line of the patent so evident as to authorize its correction?

The plat of the survey for the Brashears and Hall patent must have been made at the conclusion of the survey and the field notes according to the plat, but in transcribing the field notes in later making out the certificate of survey, the surveyor made the mistake of transposing the figures in the second call by making them "38" instead of "83." Naturally this mistake was carried into the patent which, when issued, was made to conform to the calls contained in the certificate of survey. The error is patent from the following facts: (1) To run the second line on a course S. 38° E. 122 poles, instead of S. 83° E. 122 poles, would not carry it to the chestnut oak called for on top of the hill, the stump of which is still there and was fully identified, but to a point in a flat at red letter C, as shown on the map where no chestnut oak was or could be found; (2) by making the necessary correction in the second line, and running it from black letter B, S. 83° E., 122 poles to the chestnut oak on the top of the hill at black letter C, and then in accordance with the further admittedly correct calls of the patent, would make the patent properly close with the last line running from black letter I to black letter A; whereas, to run the second line from black letter B, S. 38° E., 122 poles, to red letter C, and thereafter according to the further calls of the patent as claimed by appellant and shown by the red letters D, E, F, G, H, I, A, it would lack 108 poles of closing.

Quite a number of witnesses besides appellee himself, many of them elderly men, all residents of the neighborhood and well acquainted with the corners and lines of the Brashears and Hall patent, testified to the correctness of the boundary of the patent as claimed by appellee. Some of these witnesses had seen the patent surveyed by Stephen

Fields and others by Newt. Lewis; still others by Nehemiah Webb, all of whom established the second line from black letter B to black letter O by following the call in the original plat, S. 88° E. 122 poles, which invariably carried the line to the object called for, the chestnut oak on top of a hill. Some of these witnesses also saw the line run from black letter D to black letter E, which led to the stump of a chestnut oak called for in the patent, certificate of survey and original plat, known as a corner of the Brashears and Hall patent.

[1, 2] The admissibility as evidence of the original survey or plat constituting the basis of a patent has long been recognized in this jurisdiction as competent, with other evidence on the subject, to explain a mistake or ambiguity in the description given, by the patent of the land granted, or to supply the omission by such description of a course, distance, or object necessary to correctly determine and fix its boundary. Thus, in *Mercer, etc., v. Bate, etc.*, 4 J. J. Marsh. 340, we said:

"The original plat is not only admissible as evidence, but it is intrinsically one of the most potent facts which can be adduced; and hence it has been often admitted by this court as always either preponderating or alone conclusive."

In *Bell County Land & Coal Co. v. Hendrickson, etc.*, 68 S. W. 842, 24 Ky. Law Rep. 371, we also said:

"The original plot of the survey may be always used in evidence to show the position of the land, and is evidence of the most potent mind in determining the original location of the lines and corners. *Alexander v. Lively*, 5 T. B. Mon. 160 [17 Am. Dec. 501]; *Mercer v. Bate*, 4 J. J. Marsh. 340."

In *Hogg v. Lusk*, 120 Ky. 419, 86 S. W. 1128, 27 Ky. Law Rep. 840, it appears that there were several erroneous calls and an omitted line, in the patent relied on by appellant to show his title. In holding that the errors could be corrected and the missing line supplied by resort to the surveyor's plat, we said:

"Appellant admits, and it is obviously true, that if his patent is sought to be established by the courses and distances of its calls, it runs wild, and can in no way be so closed as to constitute a valid muniment of title; and if these calls must be adhered to, the judgment of the chancellor must be affirmed. But he insists that certain of the calls are evidently clerical errors, which can be corrected by reference to the plat in the surveyor's certificate, and that when so corrected his patent will be established so as to embrace from 80 to 100 acres of the land within the lines of appellee's 800-acre patent. The calls in the surveyor's certificate are the same as those in the patent, and therefore contain the same errors, and if they are to be corrected, this must be done alone by the plat drawn by the surveyor. * * * It must be presumed that the state, the surveyor, and the grantees intended to establish a valid patent, and not to do merely a vain and useless act; and therefore we must conclude that the two erroneous calls, and the omitted line, which make the work abortive, should be corrected as shown by the plat, and the patent established. We know that such mistakes are readily made, and easily escape detection when read over. But when we observe the

completed figure of the plat, which shows what the surveyor intended to accomplish by his calls, there is no room for mistake; an omitted line is detected by the eye at a glance, and an erroneous direction wholly destroys the figure. By the aid of the plat we have no difficulty in correcting the manifest error made in transcribing the field notes. The principle is that the intent of the parties must be effectuated, if possible, and the mere mistakes of the officer should not be allowed to frustrate this intention if there is evidence by which they may be corrected. This evidence we have in the surveyor's plat, which plainly points out the errors. The patent of appellant, when thus corrected, clearly laps on the Lusk patent, and to the extent of the interference the land is the property of appellant."

It will be found that the following additional authorities are to the same effect: *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Patrick v. Spradlin*, 42 S. W. 919, 19 Ky. Law Rep. 1038; *Zimmerman v. Brooks and Carter Co. v. Brooks*, 118 Ky. 85, 80 S. W. 443, 25 Ky. Law Rep. 2284; *Steele's Heirs v. Taylor*, 8 A. K. Marsh. 225, 18 Am. Dec. 151.

Viewed as a whole, the evidence in this case and the application to it of the rule approved by the authorities *supra* convincingly sustains the finding of the chancellor that the Brashears and Hall 500-acre patent embraces the land in controversy.

[3, 4] We are also of opinion that the chancellor's further conclusion that the deed from Alfred Hall to Simpson Adams and that from Simpson Adams to the appellee embrace the land in controversy is also sustained by the weight of the evidence. While it appears from the proof that 18 or 20 years before the institution of this action, and when one W. W. Baker cut and removed a small quantity of timber from the land in controversy, appellee himself entertained some doubt as to whether it was embraced by the deeds in question, the existence of such doubt could not and did not change the true location of the lines bounding the land conveyed by these deeds; and we learn from his testimony that he has consistently claimed to own the land for more than 15 years before the institution of appellant's action. His testimony also shows his familiarity with its boundary, and that since the cutting of the timber by Baker he has had it surveyed both by Newt. Lewis and Stephen Fields, each of which surveys established the boundary as shown by the yellow lines on the map, and that these lines have been marked, or in part marked, ever since the date of the deed from Alfred Hall to Simpson Adams. Appellee further testified that he resides about the middle of the boundary of the land conveyed by Alfred Hall to Simpson Adams, and by the latter to him, and has so resided since 1864, and in addition had a tenant upon another part of the land for several years; also that he has had inclosed for a good many years about 60 acres of the land, and that his claim of ownership and actual adverse possession of the land has continued and existed, to the extent of its boundary, for

more than 15 years before the institution of appellant's action. This testimony of appellee is substantially corroborated by that of Ira Hall, a son of Alfred Hall, whose acquaintance with the boundary of appellee's land began with its sale and conveyance to Simpson Adams by his father. Appellee's testimony is further corroborated by that of Stephen Fields, an admittedly competent surveyor of Letcher county, by whom the land was once surveyed. His familiarity with its boundary is fully shown by his deposition, and that it is correctly represented on the map by the yellow lines. It also appears from Fields' testimony that the boundary of the land conveyed by Alfred Hall to Simpson Adams and by the latter to appellee was ascertained and located, not only by his survey of that boundary, but also from surveys he made of adjoining deeds and patents. He gave it as his opinion that the land in controversy is included in the boundary of land conveyed by the deed from Alfred Hall to Simpson Adams and by the deed from Simpson Adams to appellee.

[5, 6] The only question remaining to be decided is, should the appellant's defense of estoppel have been sustained? As previously remarked, his plea of estoppel was based upon the alleged fact that when he was negotiating for the purchase of the lands described in the petition, and before his purchase thereof, appellee, in reply to an inquiry from his agent as to whether he claimed the land in controversy, disavowed any claim to or ownership thereof. The testimony of appellant's agent as to this conversation falls short of showing that his principal was induced by the statement of appellee in question to purchase the land in controversy, or that he was misled by such statement to act to his prejudice. The only other evidence offered to support that of the agent as to the alleged statements made by appellee was furnished by the testimony of Baker and one or two of his employes, and which only went to show that some 17 or 18 years previous to the institution of this action by appellant, appellee had not objected to the cutting of timber on the land in controversy by Baker. Saying nothing of the remoteness of the transaction mentioned by these witnesses, in view of the doubt of his ownership that appellee admits then existed in his mind, the testimony of Baker and his employes must be regarded as of little value. Even if appellee had then been convinced that he did not own the land, such conviction could not have affected the true location of its boundary, or militate against his right to thereafter become convinced that he did in fact then own it, or against his right to consistently claim, as he did, the ownership and maintain actual adverse possession thereof to its well-defined boundary for more than 15 years before the institution of the action.

Appellee's specific contradiction of appellant's agent as to the conversation to which the latter testified, together with other evidence furnished by the record tending to corroborate him, seems to have been sufficient in the estimation of the chancellor to outweigh that of appellant's witnesses and satisfy him of its truth. The evidence as to the question of estoppel was conflicting, but the action was brought in equity, and, each of the parties having asked that his title to the land in controversy be quieted and all proceedings quia timet being of equitable cognizance, we must follow the rule obtaining in equitable actions in this jurisdiction, which is, that, where the evidence is conflicting, some weight will be given to the chancellor's finding, and if on the whole case the mind is left in doubt as to what the truth is, his judgment will not be disturbed on appeal. *Gragg v. Barton's Adm'r*, 161 Ky. 210, 170 S. W. 621; *Meece v. Colyer*, 166 Ky. 581, 179 S. W. 579; *Gambill v. Grigsby*, 166 Ky. 716, 179 S. W. 822; *Landis v. McCreary & Co.*, 167 Ky. 128, 180 S. W. 59; *Weddington v. Weddington*, 169 Ky. 339, 183 S. W. 897; *Fields v. Couch*, 169 Ky. 554, 184 S. W. 894; *Herzog v. Gipson*, 170 Ky. 325, 185 S. W. 1119.

Under the above rule the finding of the chancellor on the issue of fact raised by the plea of estoppel will not be disturbed; and, as on the other issues involved, the chancellor's conclusions are sustained by the weight of the evidence, the judgment must be and is affirmed.

BATES v. CITY OF MONTICELLO.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. APPEAL AND ERROR ⇨1194(1)—CONCLUSIVENESS OF DECISION—MATTERS CONCLUDED.

A judgment on appeal is conclusive only of the matters and things raised by the pleadings and presented to the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4648-4650, 4656, 4660; Dec. Dig. ⇨1194(1).]

2. APPEAL AND ERROR ⇨1097(2) — FORMER APPEAL — CONCLUSIVENESS OF DECISION — MATTERS CONCLUDED.

Matters decided in a former opinion on appeal are not open on another appeal under the rule that a final adjudication between the same parties in the same case is conclusive whether sound or not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4360; Dec. Dig. ⇨1097(2).]

3. APPEAL AND ERROR ⇨1212(1)—REMAND—PROCEEDINGS IN TRIAL COURT — MATTERS CONCLUDED.

After a judgment on appeal and on return of the case to the circuit court, the defendant has the right to rely as a defense on any matter not presented or determined by either of the former opinions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4713; Dec. Dig. ⇨1212(1).]

4. ESTOPPEL \S 62(8) — ENFORCEMENT OF ORDINANCES.

Since the body enacting a measure can repeal it only in the same manner as that in which it was enacted, the city by acquiescence in violation of an ordinance cannot be estopped to enforce the ordinance.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 153; Dec. Dig. \S 62(8).]

5. MUNICIPAL CORPORATIONS \S 122(3) — ORDINANCES — VALIDITY OF ENACTMENT — EVIDENCE.

Under Ky. St. § 3638, providing that the enacting clause of all ordinances shall read, "The city council do ordain as follows," and that every ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper in such city and posted in three public places, and section 3636, providing that no ordinance, resolution, or order shall be valid unless passed by votes of at least three members of the council, since the record of the council is evidence of no facts except those required to be shown by such sections, vitiating facts showing the invalidity of an ordinance can be shown by evidence outside the record.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 287; Dec. Dig. \S 122(3).]

6. MUNICIPAL CORPORATIONS \S 105 — ORDINANCES — VALIDITY OF ENACTMENT.

Since no municipality has any authority except expressly or impliedly given by charter, the power to enact ordinances must be exercised in the manner pointed out in such sections, and, if not so exercised, the purported ordinance is void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 223, 224; Dec. Dig. \S 105.]

7. MUNICIPAL CORPORATIONS \S 122(2) — ORDINANCES — BURDEN OF PROOF.

If city ordinances appear to be regular, the burden is on one denying their validity to show the irregularity of their enactment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 284-286; Dec. Dig. \S 122(2).]

Appeal from Circuit Court, Wayne County. Suit by the City of Monticello against Harrison Bates. Judgment against defendant after demurrer to his answer was sustained and on his refusal to plead further, and he appeals. Reversed.

Duncan & Bell and J. P. Harrison, all of Monticello, for appellant. O. B. Bertram, of Monticello, for appellee.

THOMAS, J. This case is no stranger to this court. It began its visits about two years ago, and has continued them as regularly and as frequently as the law would permit. What we said about it on the first occasion will be found in the case of City of Monticello v. Bates, 163 Ky. 88, 173 S. W. 159, and the entertainment which we gave it on the second occasion is reported in same styled case, 169 Ky. 258, 183 S. W. 555. The matters involved, as well as the facts in the case, will be found fully stated in those two opinions: but, briefly, they are that the city of Monticello is one of the fifth class, and in 1904 it passed an ordinance, known in

this record as No. 16, which was supplemented or amended by another one passed in May, 1906. Each of these ordinances is set out in the second opinion.

The first ordinance was directed toward preventing the erection or construction of any building within the limits of the city without permission of the city council to do so. This also included the repairing of any building within the corporate limits of the city and imposed a fine for the violation of the ordinance. Section 3 of the first ordinance specified the material with which newly constructed roofing should be made, and provided that it should not be made with other than noncombustible material. The second ordinance prescribed a fire limit within the city, and provided that no building should be erected or repaired "except of brick or stone to be covered with a metal or slate roof" within such boundary. After the passage of the second ordinance, the appellant, who is the defendant, applied to the city council for a permit to construct within the defined fire limits a building to be used as a garage. In the application he made specification of the building which, omitting dimensions, was to be a veneered brick building with a metal roof. This permit was given by a written order entered upon the minutes of the council proceedings. Both the application and the permit will be found copied in full in the second opinion, supra. The building was constructed according to the dimensions specified in both the application and permit, but its outside was not covered with the noncombustible material mentioned in the application or permit. On the contrary, it was of wooden, and therefore combustible, material. The ordinances provided the imposing of a fine of \$100 upon any one who might violate them. The city, desiring a more effectual remedy than a prosecution, filed this suit to force the defendant by proper process of law to remodel his building so as to comply with the permit, or if he should fail within a reasonable time, to require him to remove it out of the fire limits.

A special demurrer was filed to the petition upon the ground that the circuit court had no jurisdiction, as this was possessed exclusively by the police court of the city. This position was taken because, as was contended, the rights of the parties grew out of an ordinance of the city, the enforcement of which, and all rights growing out of it, is given exclusively to the jurisdiction of the police court. The special demurrer was sustained, and upon appeal that judgment was reversed by the first opinion from this court, supra. Upon a return of the case the defendant filed an answer consisting of two paragraphs, the first of which was a denial that the ordinances were duly or at all passed, or that they had at any time been in

force or effect. It was admitted in this paragraph that the building had been constructed in the manner complained of. In the second paragraph it was attempted to be shown that since the passage of the ordinances, especially the one creating the fire limit, the city had on divers and sundry occasions and almost continually acquiesced in and permitted constant violations of said ordinances, and that to enforce them against the defendant would be an undue and unjust discrimination against him, and that the city by its alleged conduct was estopped from insisting upon an enforcement of the ordinances mentioned. Later, and on December 3, 1915, an amended answer was filed, in which the defendant alleged that by reason of the facts set up in the second paragraph of his original answer he was led to believe, and did believe, that the city would not attempt to enforce the ordinance against him and would not require him to erect his building in accordance with the provisions of the ordinances, and that he so believed, and in good faith constructed the building as it is, and that the city is therefore estopped from insisting on an enforcement of the ordinances against him. A demurrer was filed to the answer as amended, which, upon motion of the defendant, was carried back to the petition, and, being sustained, the petition was dismissed, from which judgment the second appeal was prosecuted by the city, the opinion therein being the second case, *supra*.

After the return of the case following the second opinion, the demurrer to the petition, in obedience to the mandate of this court, was overruled, and the defendant filed his second amended answer on July 4, 1916, in which he attacks the validity of the two ordinances in this language:

"(1) That said ordinances were not published as required by law, in that they were not published at least once in a newspaper published in the city of Monticello or written or printed and posted in at least three public places therein.

"(2) That said ordinances were not passed by the votes of three members of the city council."

A third paragraph of this last amended answer attacked the constitutionality of the ordinances:

"In that they undertook to deprive him of his property without due process of law by vesting in the said council the arbitrary and unlimited power and authority to prevent the defendant from erecting on his own land any sort or character of building, however safely constructed and of whatever material built, without first securing the permission of the said council so to do."

A demurrer was then filed by the city to the answer and to all of the amendments, which was sustained by the court, and, the defendant declining to plead further, a judgment was entered requiring him to either complete the building so as to conform to the ordinance and permit given him to construct it, or to remove the building from the fire limits of the city on or before November 1,

1916, and to reverse that judgment the case is again before us on this appeal.

[1, 2] The trial court rendered no opinion, but we gather from the briefs that his judgment sustaining the demurrer was because the validity of the ordinances had been adjudicated by the former opinions, and that they were no longer open to attack by the defendant. The error in this position is that neither of the previous opinions of this court dealt with any of the facts presented by the answer, or any amendment thereto, except those shown by the petition and by the contents of the ordinances, both of which were copied into the petition and certified copies of them filed with it. Only such facts as thus appeared, with the law arising therefrom, were adjudicated by the former opinions. If any such facts or legal deductions are attempted to be relied upon by the responsive pleading, they are not open to the defendant under the well-recognized rule of universal application that a final adjudication between the same parties in the same case is conclusive, whether such adjudication be sound or unsound. *Mutual Benefit Life Ins. Co. v. Emig's Adm'r*, 145 Ky. 660, 141 S. W. 38; *Junior Order United American Mechanics v. Ringo*, 146 Ky. 602, 143 S. W. 22; *Upton's Committee v. Gaddie*, 147 Ky. 281, 144 S. W. 26; *Gossett v. Ky. Mfg. Co.*, 153 Ky. 101, 154 S. W. 897; *Borderland Coal Co. v. Kerns*, 171 Ky. 626, 188 S. W. 783, and cases therein referred to.

When the mandate which issued from the last appeal was filed in the trial court, it became the duty of that court to set aside the order sustaining the demurrer to the petition and to overrule same, which it did, and which made the case then stand as if no answer had ever been filed. *Macklin, etc., v. Trustees, etc.*, 88 Ky. 592, 11 S. W. 657; *Hunt v. Hunt*, 157 Ky. 835, 164 S. W. 102. There are numerous cases that might be cited in support of this rule of practice.

The identical point now being considered was before this court in the last case referred to, wherein the contention was made that the opinion on a former appeal barred the defendant of the right to file any defensive pleadings, and in denying the contention we said:

"When the demurrer to the petition was overruled upon appeal to this court, the situation of the case when it returned to the circuit court was precisely what it would have been if the circuit court had in the first instance overruled the defendants' demurrer to the petition. When their demurrer to the petition was overruled, the defendants had the right to tender an answer. This they did. There is nothing in the opinion of this court preventing the filing of the answer. The case was here simply on demurrer to the petition. We only held that the petition showed a cause of action. But the defendants may plead to the cause of action thus shown by the petition just as they might have done if the circuit court had in the first place rendered the same opinion which we rendered."

[3] The defendant, then, upon the last return of the case to the circuit court had a

right to rely as a defense upon any matter not presented or determined by either of the former opinions. That part of his pleadings which sought to contest the constitutionality of the ordinances because of depriving him arbitrarily of his property, etc., was fully presented upon the second appeal and determined adversely to his contentions, but which he is again trying to present by certain paragraphs and parts of the amended answers.

Under the rule, *supra*, as to the effect of a former adjudication between the same parties, the demurrer should have been sustained to so much of the defendant's pleadings as attempted to raise this same question; but, if there was no occasion to apply such rule, the constitutionality of the ordinances have been many times upheld by this and other courts, as will be seen from the authorities referred to in the two former opinions in this case which we do not deem necessary to here repeat.

[4] As to the second paragraph of the original answer, wherein it is claimed that the city is estopped because of acquiescence in the violation of the ordinances, it needs only to be said that the authority having the right to enact a law can repeal it only in the same manner by which it was enacted. The nonenforcement of the law has never at any time or anywhere been construed to have the effect of repealing it. Such a principle, if upheld, would strike a blow at the very vitals of government and render it possible for our present civilization to be supplanted by lawlessness even to barbarity, through the negligence, carelessness, or indifference of officers whose duties are to enforce the law, or by them corruptly entering into league with those who are the enemies of society and who do not respect the law, thus enabling such lawless element to become legislators for the purpose of repealing and annulling all laws offering restraints to their unscrupulous deeds, thereby placing the upright and the law-abiding at the mercy of the mob. The proposition is not only illogical, unsound, and monstrous, but it is even unthinkable. Under our form of government, the remedies for violating the criminal and penal laws, whether they be a part of the common law or created by the enactment of a statute or ordinance, and whether the remedy be a prosecution or civil proceeding, may be invoked through the application of any citizen to the proper tribunal and compliance with the forms prescribed by the particular jurisdiction. If the many violations of the ordinances in question were committed, as set out in the second paragraph of the answer, the plaintiff himself could have caused the apprehension and trial of the violators thereof. He could, no doubt, also have set in motion the machinery of the law for the abating of the nuisance created by such violations upon proper showing of a refusal of the city to do

so after reasonable request. By his failure to do so he in this way, at least, is as much responsible for the nonobservance of these ordinances as any other citizen. But, however this may be, it is perfectly apparent from all principles of government, and from what has been said, that the public cannot be estopped from enforcing its criminal or penal laws or any right growing out of their nonobservance, because of the negligence or derelictions of any of its officers with respect thereto. We conclude, then, that the demurrer should be sustained to the answer and amendments, or any portions thereof seeking to rely upon this defense. This leaves for consideration only the two paragraphs of the last amended answer quoted above wherein the validity of the passage of the ordinances is called in question.

[5] Before considering this point, it is intimated in brief that it is not competent to raise this question collaterally, or rather to show the vitiating facts by evidence allunde the record of the city council. A complete answer to this, if the question was a new one, is that a record such as the city council is required to keep is evidence of no facts except those which the law requires it to contain, and there is nothing in any statute requiring the record to show that an ordinance was published in the manner required by law to make it legal; but the point has been decided many times by this and other courts to the contrary. See *Bybee v. Smith*, 61 S. W. 15, 22 Ky. Law Rep. 1684; *Muir v. City*, 120 Ky. 739, 87 S. W. 1096, 27 Ky. Law Rep. 1150; *Comith v. Williams*, 120 Ky. 814, 86 S. W. 553, 27 Ky. Law Rep. 695; *City of Bardwell v. Tegethoff*, 148 Ky. 545, 146 S. W. 1093; *Spalding v. City of Lebanon*, 156 Ky. 37, 160 S. W. 761, 49 L. B. A. (N. S.) 387. There are other cases from this court where the question was raised with reference to ordinances passed by cities of a different class than the fifth, the one to which Monticello belongs. Manifestly the proposition is so clear as to leave no room for doubt. Section 3688 of the Kentucky Statutes, being a provision of the charter of cities of the fifth class, reads:

"The enacting clause of all ordinances shall be as follows: 'The city council of the city of * * * do ordain as follows.' Every ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper published in such city, or written or printed, and posted in at least three public places therein, and shall be in force from and after the publication thereof."

Section 3686, being a part of the same charter, provides that:

"No ordinance, resolution or order shall have any validity or effect unless passed by the votes of at least three members of the city council."

[6] It will thus be seen that, in order to give the proposed ordinance drawn in question by this suit any validity as such, they must be passed and given publicity in the

manner pointed out by those two sections, for no municipality has any authority except that which may be expressly or impliedly given by its charter, and such authority must be exercised in the manner therein pointed out when it is attempted to be prescribed. If this is not done, that which was attempted to be made an ordinance becomes a nullity, and no rights and no authority may be exercised thereunder. See authorities, *supra*. So, if the ordinances in question possessed the vice alleged by the defendant in the first and second paragraphs of his last amended answer, which was admitted by the demurrer, they are of no force whatever, and the city has no right to base any action upon anything contained in either of them. As its right to maintain this suit is based upon and only upon the authority given by the ordinances, if they are invalid its authority to proceed does not exist.

[7] The ordinances appearing to be regular, the burden is upon the defendant to show the irregularity of their enactment, as was determined by this court in the cases of *Weatherhead v. Cody*, 85 S. W. 1099, 27 Ky. Law Rep. 631, and *Muir v. City of Bardstow*, 120 Ky. 739, 87 S. W. 1096, 27 Ky. Law Rep. 1150.

We conclude, then, at this, the ending of the third chapter of this case, that the court erred in sustaining the demurrer to the first and second paragraphs of the third and last amended answer, and the judgment is reversed for proceedings consistent with this opinion.

CALDWELL v. RYAN et al.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. CONTRACTS §54(1)—CONSIDERATION.

Where directors of an insolvent bank, in consideration of the stockholders' releasing them from liability for negligence, stipulated to make an arrangement with the creditors of the bank, whereby their claims should be satisfied or paid by the directors, such stipulation rested on sufficient consideration to bind the directors to perform their part of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 233; Dec. Dig. §54(1).]

2. BANKS AND BANKING §57—INSOLVENCY—RIGHTS OF CREDITORS.

The creditors of an insolvent bank had the right, not only to subject its directors as stockholders and the other stockholders to their statutory double liability, but had the right to seek indemnity from the directors if they had been guilty of negligence in the management of the bank, and such negligence resulted in loss to the creditors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 108-110; Dec. Dig. §57.]

3. CONTRACTS §187(1) — CONSTRUCTION — AGREEMENT TO PAY CREDITORS OF BANK.

Where the directors of an insolvent bank, in consideration of its stockholders releasing them from liability for negligence, stipulated to make an arrangement with the creditors of the bank, whereby their claims should be satisfied or

paid by the directors, and the stockholders released from paying anything under the double liability statute, and the stipulation did not limit the directors' liability to such creditors as they should settle with on terms of 75 per cent., a director was liable to a creditor of the bank, who refused to make a 75 per cent. composition agreement, for the full amount of the debt.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 798; Dec. Dig. §187(1).]

Appeal from Circuit Court, Logan County.

Suit by C. H. Ryan, executor, and others, against David W. Caldwell and another. From a judgment for plaintiffs, the named defendant appeals. Judgment affirmed.

W. P. Sandidge, of Owensboro, for appellant. Sims, Rodes & Sims, of Bowling Green, for appellees.

CARROLL, J. In 1896 a controversy arose between Katie G. Ryan and H. B. Caldwell as to the ownership of a certain fund, and on October 20, 1901, the Logan County Bank received this fund under a written agreement stipulating as follows:

"Now the said Logan County Bank hereby acknowledges that the said Bowden, on October 2, 1901, deposited with it the sum of \$2,314.57, which sum with interest thereon from said date at six per cent. per annum it agrees to pay to the said Katie G. Ryan if it shall be finally decided that she is entitled to the said judgment or its proceeds, or to the said H. B. Caldwell if it is finally decided that he is entitled thereto."

In August, 1902, the Logan County Bank made an assignment for the benefit of its creditors. The litigation of Caldwell and Mrs. Ryan as to which was entitled to this fund was brought before this court in the case of *Ryan v. Logan County Bank*, 132 Ky. 625, 116 S. W. 1179, 119 S. W. 768, in which it was decided, in an opinion that was handed down in March, 1909, that Mrs. Ryan had a prior lien on this fund for \$1,255, with interest, and the bank was directed to pay her this amount of money. The assignee of the Logan County Bank some time after the decision of the case by this court, perhaps before—it is not material which—paid to Mrs. Ryan a portion of the amount due her, but there was unpaid about \$800 after exhausting the ability of the assignee to pay any more on the debt. In 1912, Mrs. Ryan having died, her executor brought this suit against Mrs. Raetz and D. W. Caldwell, but as Mrs. Raetz is no longer concerned in the suit, it is not necessary to again refer to her. In this suit the executor sought to recover the amount left unpaid by the Logan County Bank from Caldwell upon the ground that he became liable for its payment by virtue of certain agreements entered into which we will later set out. Some time about December 1, 1902, a large number of the depositors and creditors of the bank signed a paper, reciting that:

"We, the undersigned creditors of the Logan County Bank of Russellville, Ky., hereby agree with each other and the directors of the Logan County Bank to accept 75 cents on the dollar for our respective claims against said bank 50%

thereof to be paid on or about January 1, 1902, and the remaining 25% thereof ninety days thereafter, and upon payment of said sum we agree to assign our said claims to David W. Caldwell, of Russellville, Ky."

This paper was circulated and signed upon the idea that the directors, of whom David W. Caldwell, was one, would personally raise the money to pay the 75 cents on the dollar to the depositors who entered into the arrangement. On December 1, 1902, this proposition, submitted to the directors by the depositors and creditors, or such of them as signed it, was accepted by the directors, including Caldwell. But Mrs. Ryan did not sign this paper, nor would she accept 75 per cent. of her claim against the bank on account of the money that had been deposited in the bank under the agreement heretofore mentioned. It should, however, be here noticed that at the time this arrangement between the depositors and the directors was entered into, it was not known whether Mrs. Ryan was entitled to the money on deposit in bank, as the litigation between her and H. B. Caldwell as to who was entitled to this deposit was then pending and remained unsettled until the opinion of this court was handed down in March, 1909. It also appears that the stockholders of the bank and the directors entered into a written agreement, reciting that:

"In consideration of D. W. Caldwell, W. F. Browder, John G. Orndorff, John W. Caldwell, and H. B. Caldwell, directors of the Logan County Bank, making an arrangement with the creditors of the said bank, whereby their claims are to be satisfied or to be paid by said directors and we are released from paying anything under what is commonly known as the double liability statute, we, the undersigned stockholders of said bank, hereby agree with said directors and with each other to release said directors from any and all liability which said directors may be or are supposed to be under to us as said stockholders by reason of the manner in which the affairs of said bank have been managed and conducted by said directors."

And on December 1, 1902, the directors accepted this proposition of the stockholders in a writing which recited that:

"In consideration of the signing of the within contract by the stockholders whose names are attached thereto, we hereby release said stockholders from all liability as shareholders of said bank, this December 1, 1902."

It will thus be seen that by these agreements made between the creditors, the directors, and the stockholders, the creditors who signed the paper agreed to accept in full satisfaction of their claims against the bank 75 per cent. of the amount due, and further agreed to turn over to D. W. Caldwell their claims against the bank, and that the creditors of the bank agreed to release the stockholders from their double liability, and the stockholders, in consideration of the directors "making an arrangement with the creditors of the said bank, whereby their said claims are to be satisfied or to be paid by said directors," and the release of the stockholders from their double liability, agreed

to release the directors from all liability which they might be under to the stockholders by reason of the negligent manner in which the affairs of the bank had been conducted by the directors.

It is very apparent from these writings that the directors of the bank were anxious to be released from their liability for negligence in the conduct of the affairs of the bank which brought about its failure, and the stockholders, while willing to lose the amount they had invested in the stock of the bank, were anxious to be relieved from the payment of the double liability attaching the ownership of the stock, and the creditors, at least those who signed the paper, were willing to accept 75 per cent. of the amount of their claims in consideration of the speedy payment of this sum.

As before stated, this suit was brought against Caldwell upon the theory that he and the other directors, in agreeing with the stockholders to make an arrangement with the creditors whereby their claims were to be satisfied, became liable to Mrs. Ryan for the balance due on her debt against the bank. Or, to state it in another way, the contention of Mrs. Ryan is that this contract was made for the use and benefit of all the creditors of the bank, and that any one of the creditors might sue David W. Caldwell, who apparently was the only solvent director, and recover the full amount of his debt against the bank. It may also be here stated that no issue is raised as to the right to sue Caldwell alone and recover from him the amount due Mrs. Ryan if the directors are liable at all to her for any part of the amount sued for.

On this appeal it is the contention of counsel for Caldwell that, as the three papers we have set out were executed simultaneously, the agreement of the directors to make arrangements with the creditors of the bank whereby their claims should be satisfied by the directors had reference to and was limited to those creditors who had signed the agreement to accept 75 per cent. of the amount of their claims, and did not constitute an obligation on the part of the directors to pay all the creditors of the bank, or any creditors of the bank except those who had signed this paper. In other words, it is insisted that this contract on the part of the directors was not made for the benefit of any of the depositors or creditors of the bank except those who signed the agreement to accept 75 per cent. of the amount of their debts. On the other hand, it is insisted by counsel for Mrs. Ryan's estate that this contract was made for the benefit of all the creditors of the bank, whether they signed this composition agreement or not, and, it being admitted that Mrs. Ryan was a creditor of the bank, and that there was due on her claim against the bank the amount sued for, she or her personal representative had the right to proceed against Caldwell as one

of the directors to recover, as she did do, the amount of her claim against the bank left unsatisfied after exhausting the assets of the bank.

It will be observed from this that the whole case turns on the proper construction to be given to the stipulation in the arrangements made between the stockholders and the directors by which the directors, in substance and effect, agreed to settle the claims of the creditors of the bank. This agreement does not specify what creditors the directors are to pay, or limit their liability to pay any class of creditors, or even mention indirectly those creditors who had signed the agreement to accept 75 per cent. of the amount of their claims. On the face of the paper it appears to be simply an agreement between the stockholders and the directors by which the stockholders, in consideration of the directors settling with the creditors of the bank, agreed to release the directors from any liability for the management of the bank that brought about its failure, and the directors agreed to pay the creditors of the bank and also release the stockholders from their double liability in consideration of the stockholders releasing the directors from liability for the mismanagement of the bank.

[1] This paper, we think, was rested on a sufficient consideration to bind the directors to perform their part of this contract, and if the agreement of the creditors to accept 75 per cent. of the amount of their claims should be put entirely to one side, there would seem to be no obstacle in the way of Mrs. Ryan's estate as a creditor of the bank recovering from Caldwell the amount adjudged; nor do we think that this agreement, signed by the creditors, can have the effect claimed for it by counsel for Caldwell, or the effect of releasing the directors from their obligation to pay such creditors of the bank as did not sign the composition agree-

ment. Perhaps it may have been in the contemplation of the directors when they entered into this contract with the stockholders that they were liable only to pay such creditors as signed the composition agreement, but we do not see how this can affect the rights of the creditors who did not sign this composition paper.

[2] The creditors of the bank had the right, not only to subject the directors as stockholders, and the other stockholders, to the double liability clause, but they had the right to seek indemnity from the directors if they were guilty of negligence in the management of the bank and this negligence resulted in loss of them.

[3] Mrs. Ryan, or any other creditor who did not sign this composition agreement, could have pursued either or both of these courses, but when the directors said to the creditors, "We will pay you your debts," there was no reason why the creditors should resort to the remedies they had against the directors or the stockholders. They had a right to look to this paper for indemnity. Plainly the paper was executed for the benefit of the creditors, and it was based on a sufficient consideration.

It seems entirely probable that when the directors assumed this liability they anticipated that they might be able to settle with all the creditors on the 75 per cent. terms, but they did not limit their liability to such creditors as they could settle with on these terms. If it was understood between these stockholders and the directors that the liability of the directors should be limited to this class of creditors, it is singular that this limitation was not expressed in the contract, which is very simple, and broad enough to embrace all the creditors of the bank.

It seems to us, therefore, that the judgment of the lower court was correct; and it is affirmed.

NATIONAL SURETY CO. v. REDMON.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. INSURANCE \S 665(4) — BURGLARY INSURANCE—EVIDENCE.

Although it is not necessary to establish the corpus delicti by direct testimony in an action on a policy of burglary insurance, it is essential to show facts from which the inference of a loss by burglary reasonably and naturally follows.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1722; Dec. Dig. \S 665(4).]

2. INSURANCE \S 646(6) — BURGLARY INSURANCE—PRESUMPTIONS.

In an action on a policy of burglary insurance, it is incumbent upon the plaintiff to show a loss by burglary, and no presumption in his favor will arise from the failure of defendant to introduce evidence on the question, although it has made an investigation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1657; Dec. Dig. \S 646(6).]

3. INSURANCE \S 665(4) — BURGLARY INSURANCE—EVIDENCE—SUFFICIENCY.

In an action on a policy of burglary insurance, where plaintiff, although insured against loss by burglary, theft, or larceny, based his entire case on the claim of burglary, evidence of marks on a window screen and footprints on the roof, discovered three weeks after the loss, held insufficient to take the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1722; Dec. Dig. \S 665(4).]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by G. Lee Redmon against the National Surety Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Robert F. Vaughan and Baskin, Duffin, Kinkead, Sapinsky & Duffin, all of Louisville, for appellant. Edward Bloomfield and Edwards, Ogden & Peak, all of Louisville, for appellee.

CLAY, C. The National Surety Company issued to G. Lee Redmon a policy of burglary insurance, indemnifying him against loss by burglary, theft, or larceny of watches, diamonds, jewelry, etc., while located in his premises. While the policy was in force, Redmon lost a diamond pin of the alleged value of \$550. Alleging that the loss was due to burglary, committed some time during the night of May 16th, or the morning of May 17, 1915, Redmon brought this suit against the company to recover on the policy. From a verdict and judgment in his favor for \$500, the company appeals.

The evidence for plaintiff is in substance as follows: Redmon was the general manager of the White Mills & Lynndale Distilleries Company, and resided with his family at 120 West Burnett street in the city of Louisville. He owned a diamond stud, which weighed $2\frac{1}{2}$ carats. On Sunday morning, May 16, 1915, he went to the Audubon Country Club and remained there during the entire day playing golf. When he went to the country club the stone was in his tie. When

he dressed to play golf he took the stone out of his tie and placed it in his pocket. When he dressed in the evening he screwed the stone into his tie. Thereafter he met his wife and returned home early in the evening. Being fatigued, he went to his room, which is located in the front of his residence and on the second floor, and retired early. Connecting with his bedroom was a large hall, which led to the rear of the building. On one side of the hall in the rear is a toilet room, and on the other side a guest room. Both of these rooms overlook a 12-foot shed in the rear of his premises. On the eaves of this shed was swung a rope swing, about which his children were wont to play. When Redmon retired he unscrewed the stone from his tie and laid it on a tray on the dresser, which was used by his wife for sundry small articles. The next morning he arose early, did some work about the yard before breakfast, took a car about 8:30, and went directly to his office. During the morning he had occasion to visit several places on business, one of which was Wabnitz's saloon. While passing a mirror in the saloon he noticed that his stud was not in his tie. Thereupon he telephoned home and started an immediate search for the stone. The stone was never found. He then notified both the local agent of the company and the company itself of the loss. On May 18th, he filled out a form given him by the company's agent for the purpose of presenting his claim, in which he said:

"I have no knowledge of the manner in which the burglary, theft or larceny of my diamond stud was committed. Burglars might have gained entrance over a back shed to the second story some time during the night, at which time my diamond stud was stolen from the dresser in my bedroom on the second floor."

In response to the question in the blank, "How was entry effected?" he said, "As stated above, I have no knowledge of how entrance was effected." Upon receipt of this statement the company sent a Pinkerton detective to Louisville to investigate the loss. The detective arrived about three weeks after the loss was reported. The detective and Redmon made an examination of the premises. They discovered marks on the screen which had been made by some blunt instrument used in prizing up the screen, also footprints on the roof. He did not count the footprints, but there was evidence of more than one, and they appeared to be going up the shed. He did not look for any footprints going down. About May 1st, Redmon had had his house painted. The roof and screens were included in the job. The paint on the molding on the window frame was prized off clear down to the wood. The wood was exposed and seemed to be fresh. The mark on the screen was made with such pressure as to go clear through the paint. While Redmon says that he is positive that he put

the pin in his tie, on the morning that he discovered the loss, he admits that he would not have been so positive about it if he had not made the subsequent investigation. Redmon's stenographer and bookkeeper says that although she never noticed the absence of the stone before, she did notice on the morning of May 17th that Mr. Redmon did not have the stone in his tie. She further says that Redmon told her before he left the office that he had missed the stone, though Redmon himself says that he did not miss the stone until after he left the office. Another employé of the distilleries company merely says that he never noticed the stone on Mr. Redmon on May 17th. He further says that he could not swear positively that Redmon did not have the stone on.

The company insists that the foregoing evidence was insufficient to take the case to the jury, and that the trial court erred in overruling its motion for a peremptory instruction.

[1] While plaintiff might, under the policy, have predicated his recovery on a loss by burglary, theft, or larceny, he saw fit to base his entire case on the claim of burglary alone, and his evidence is directed solely to the establishment of that fact. It may be conceded that in a case of this kind it is not necessary to establish the corpus delicti by direct testimony, for such a rule would in effect nullify the policy. *Miller v. Massachusetts Bonding Co.*, 247 Pa. 182, 93 Atl. 320, L. R. A. 1915D, 615. We take it, however, that, in order to recover for loss by burglary, it is essential to show some facts from which the inference of such a loss reasonably and naturally follows. Even if we admit that the evidence is sufficient to show that the loss occurred during the night of May 16th, or the morning of May 17th, and while the stone was on the premises, and not after the plaintiff left home and while riding down town on the street car, or engaged in going about the city on business, the question whether the loss occurred by burglary remains a matter of pure speculation. The only proof of burglary is the marks on the screen and the footprints on the roof of the shed. The only proof of the time that the marks and footprints were made is that they were made between the time the house was painted on May 1st and the time they were discovered about three weeks after the loss. Whether they were made between May 1st and the night of the loss, or on the night of the loss, or between the night of the loss and the time of their discovery, is not

shown. Whether made by a burglar or some one else, or, if by a burglar, whether the burglar carried away the diamond, is a matter of mere guesswork. While it may be true that a loss followed by physical evidence of an entrance from the outside of the premises on the occasion of the loss may be sufficient to justify the inference of loss by burglary, and therefore to take the case to the jury, we are not prepared to say that marks on a window screen and footprints on a roof, discovered three weeks after the loss, are sufficient for that purpose. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made upon remote inferences. Where it is sought to base an inference on an alleged fact, the fact itself must be clearly established. If the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it. *Sutton's Adm'r v. Louisville & N. R. Co.*, 168 Ky. 81, 181 S. W. 938; *A. T. & S. F. Ry. Co. v. De Sedillo*, 219 Fed. 686, 135 C. O. A. 358; *Chamberlayne's Modern Law of Evidence*, § 1029; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707. Here no reasonable connection between the established facts and the loss itself is shown. The evidence merely presents a few circumstances about which one might theorize as to the cause of the loss. Any conclusion that the loss occurred by burglary would be mere conjecture, and conjecture affords no sound basis for a verdict. But it is suggested that because the company sent detectives to investigate the loss and failed to introduce them as witnesses, this circumstance may be taken into consideration for the purpose of supplementing plaintiff's case, on the theory of the presumption that had the detectives been introduced they would have testified to facts tending to establish plaintiff's case.

[2] We find no merit in this contention. In a case like this, it is incumbent on the plaintiff to show loss by burglary. The defendant has a right to stand on the case made out by the plaintiff, and no presumption in favor of plaintiff will arise from the failure of the defendant to introduce evidence on the question.

[3] Being of the opinion that the evidence was insufficient to take the case to the jury, it follows that the trial court should have directed a verdict in favor of the defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

EDELSTON v. EDELSTON.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. APPEAL AND ERROR \S 627(2) — TIME FOR FILING TRANSCRIPT — STATUTE.

Under Civ. Code Prac. \S 738, providing that appellant shall file the transcript in the office of the clerk of the Court of Appeals at least 20 days before the first day of the second term of such court next after granting of the appeal, unless the court extend the time, where appellant failed to file his transcript in the office of the clerk of the Court of Appeals 20 days before the first day of the second term thereof next after the granting of the appeal by the circuit court, appellee's motion to dismiss the appeal must be sustained, since the provisions of the statute are mandatory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2744-2747, 2749, 3126; Dec. Dig. \S 627(2).]

2. APPEAL AND ERROR \S 627(2) — TIME FOR FILING TRANSCRIPT — DISMISSAL — PREVENTION.

Where appellant failed to file transcript in the office of the clerk of the Court of Appeals 20 days before the first day of the second term thereof next after granting of the appeal by the circuit court, as required by Civ. Code Prac. \S 738, dismissal of the appeal granted by the circuit court, as moved by appellee, cannot be prevented by appellant's asking that an appeal be granted him by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2744-2747, 2749, 3126; Dec. Dig. \S 627(2).]

3. APPEAL AND ERROR \S 629 — FAILURE TO FILE TRANSCRIPT — GRANTING OF APPEAL BY CLERK OF COURT OF APPEALS — STATUTE.

Under Civ. Code Prac. \S 734, providing that an appeal shall be granted as matter of right to a party or privy against a party or privy by the clerk of the Court of Appeals on application of either party or his privy upon filing in the office of the clerk a copy of the judgment appealed from, and section 745, allowing an appeal to be granted by the clerk at any time within two years next after the right to appeal first accrued, dismissal of the appeal granted by the circuit court for appellant's failure to file transcript, as required by section 738, will not prevent appellant from being granted an appeal by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2765; Dec. Dig. \S 629.]

4. APPEAL AND ERROR \S 621(2) — GRANTING BY CLERK — FILING OF TRANSCRIPT — STATUTE.

Where an appeal is granted by the clerk of the Court of Appeals, pursuant to Civ. Code Prac. \S 734, the transcript must be filed in the office of the clerk at least 20 days before the first day of the second term of the court next after the granting of the appeal, as required by section 738.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2728; Dec. Dig. \S 621(2).]

5. APPEAL AND ERROR \S 624 — MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT — AUTHORITY OF COURT TO SUSTAIN.

Where a purported appellant has no appeal pending because of his failure to file transcript with the clerk of the Court of Appeals 20 days before the second term next after granting of the appeal by the circuit court, and has not filed in the office of the clerk a copy of the judgment or transcript of the record, or been granted an appeal by the clerk, the Court of Appeals is without authority to sustain his motion for an

extension of time for filing the transcript in the office of the clerk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2737-2742; Dec. Dig. \S 624.]

6. COSTS \S 260(2) — APPEAL — DISMISSAL — DAMAGES.

Notwithstanding the superseding of the judgment by appellant, in the absence of a recovery of money by the judgment appealed from, the awarding of damages to appellee upon dismissal of the appeal is not permissible.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 984, 986; Dec. Dig. \S 260(2).]

7. DIVORCE \S 197 — COSTS TO WIFE — ATTORNEY'S FEE — STATUTE.

Under Ky. St. \S 900, compelling the husband, in an action for alimony or divorce, to pay the wife's costs, as well as his own, unless it be made to appear that she is in fault and has ample estate, the wife may be properly allowed, as a part of her costs, a reasonable attorney's fee, which the husband must pay.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 582, 583; Dec. Dig. \S 197.]

8. COSTS \S 263 — AFFIRMANCE OR DISMISSAL — DAMAGES.

On affirmance or dismissal of an appeal, 10 per cent. damages will not be allowed on the costs adjudged appellee by the lower court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 1001; Dec. Dig. \S 263.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Esther R. Edelston against Samuel A. Edelston. From a judgment for plaintiff, defendant appealed, and plaintiff moves to dismiss the appeal, with 10 per cent. damages, and defendant moves that an appeal be granted him by the Court of Appeals and for an extension of time within which to complete and file a transcript of the record. Motion to dismiss sustained, but motion for damages overruled, and defendant's motion for an appeal and extension of time for filing transcript also overruled.

Chas P. Johnson, of Louisville, M. M. Logan, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for appellant. Burwell K. Marshall, of Louisville, for appellee.

SETTLE, C. J. On January 5, 1917, the appellee, Esther R. Edelston, entered in this court a motion in writing to dismiss, with 10 per cent. damages, the appeal granted the appellant, Samuel A. Edelston, by the Jefferson circuit court, chancery branch, second division, from a judgment rendered therein April 22, 1916, filing in support of the motion a certified copy of the judgment and supersedeas bond. Appellant, having received due notice of the motion, objected thereto, and at the same time filed a written motion, of which appellee was given notice, that he be granted an appeal by this court from the judgment in question, and an extension of time within which to complete and file in this court a transcript of the record.

[1] The motion of appellee to dismiss the

appeal must, for the reason urged by her, be sustained, viz. because of the failure of the appellant to file the transcript in the office of the clerk of this court 20 days before the first day of the second term thereof, next after the granting of the appeal, as required by section 738, Civil Code, which provides:

"The appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time; as, for cause shown, the court may do."

The provisions of section 738 of the Code are mandatory. *Western Union Telegraph Co. v. Johnson*, 100 Ky. 589, 38 S. W. 1043, 18 Ky. Law Rep. 982; *Langhorne v. Wiley*, 120 Ky. 511, 87 S. W. 266, 27 Ky. Law Rep. 908; *Sandy River v. Candell*, 108 Ky. 197, 56 S. W. 18, 21 Ky. Law Rep. 1647; *Blablock v. Atwood*, 148 Ky. 828, 147 S. W. 748; *Beavers v. Bowen*, 111 Ky. 608, 64 S. W. 494, 23 Ky. Law Rep. 826; *L. & N. R. Co. v. Lucas*, 120 Ky. 359, 86 S. W. 682, 27 Ky. Law Rep. 769.

Although the judgment here involved was entered of record April 22, 1916, the appeal therefrom, as shown by a supplemental order, was not prayed by appellant nor granted by the circuit court until May 1, 1916. As the second term of the Court of Appeals next after the granting of the appeal was the present or January term, which began January 2, 1917, appellant, to have availed himself of the benefit of the appeal granted by the circuit court, must have filed the transcript in the office of the clerk of the Court of Appeals at least 20 days before January 2, 1917. This he did not do; nor did he, as he might have done before the expiration of the time fixed by section 738 of the Code, *supra*, for filing the transcript, obtain an extension of time for filing it as allowed by its provisions. Section 740 of the Code prevents the clerk of the Court of Appeals from docketing the appeal, if the appellant fail to file the transcript within the time allowed by section 738.

[2, 3] The dismissal of the appeal granted by the lower court, as moved by appellee, cannot be prevented, as here attempted, by the appellant's asking that an appeal be granted him by this court. But the dismissal of the appeal granted by the lower court will not prevent him from being granted an appeal by the clerk of this court (*Fuson v. Lambdin*, 64 S. W. 448, 23 Ky. Law Rep. 840; *L. & N. R. Co. v. Lucas*, 120 Ky. 359, 86 S. W. 682, 27 Ky. Law Rep. 769); for section 734 provides that an appeal "shall be granted, as matter of right, to a party or privy against a party or privy, by the court rendering the judgment, on motion made during the term at which it is rendered, or thereafter by the clerk of the Court of Appeals, on application of either party or his privy, upon filing in the office of said clerk a copy of the judgment from which he appeals"; and sec-

tion 745 allows an appeal to be granted by the clerk at any time within two years next after the right to appeal first accrued.

[4] But where the appeal is granted by the clerk of the Court of Appeals, the transcript must also be filed in the office of the clerk as required by section 738 of the Code. In other words, this section applies to appeals granted by the clerk of the Court of Appeals, as well as those granted by the circuit court, and in either case the appellant must file the transcript in the office of the clerk of the Court of Appeals at least 20 days before the first day of the second term of the Court of Appeals next after the granting of the appeal by the circuit court, or by the clerk of the Court of Appeals, unless an extension of time is obtained of the Court of Appeals for filing it. *Rush, Committee, etc., v. Handley*, 97 S. W. 726, 30 Ky. Law Rep. 170.

[5] Here the appellant has lost his right to prosecute the appeal granted by the circuit court because of his failure to file the transcript in the office of the clerk of the Court of Appeals 20 days before the second term of the Court of Appeals next after the granting of the appeal. Nor has he filed in the office of the clerk of the Court of Appeals a copy of the judgment or transcript of the record, or been granted an appeal by the clerk of the Court of Appeals. The Court of Appeals, therefore, is without authority to sustain his motion for an extension of time for filing the transcript in the office of the clerk thereof, as he has no appeal pending.

It is apparent, however, that appellant yet has ample time within which to take an appeal from the judgment of the lower court by filing the transcript in the office of the clerk of the Court of Appeals at any time within two years next after the judgment of the circuit court was rendered, in which event the appeal will be granted by the clerk.

Appellee is not entitled to damages upon dismissal of the appeal. The judgment is not for the recovery of money. It merely granted appellee a divorce from appellant, restored to each of the parties the property that may have been obtained from the other during or by reason of the marriage, gave appellee the custody of their infant child, and awarded her her costs, including a reasonable attorney's fee.

[6] Notwithstanding the superseding of the judgment by appellant, in the absence of a recovery of money by the judgment appealed from, the awarding of damages upon the dismissal of the appeal is not permissible. Kentucky Statutes, § 900, compels the husband, in an action for alimony or divorce, to pay the wife's costs, as well as his own, unless it be made to appear the wife is in fault and has ample estate to pay the same.

[7] The wife may properly be allowed as a part of her costs a reasonable attorney's fee, which the husband must pay. *Whitney v. Whitney*, 7 Bush, 520.

[§] It is well settled that on the affirmance or dismissal of an appeal, 10 per cent. damages will not be allowed upon the costs adjudged the appellee by the lower court. *Bergen v. Farmers' & Traders' Bank*, 9 Ky. Law Rep. 184.

For the reasons indicated appellee's motion to dismiss the appeal is sustained, but her motion for 10 per cent. damages is overruled; and appellant's motion for an appeal and extension of time for filing transcript is also overruled.

COOPER v. WEST et al.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. INSURANCE §585(5) — LIFE INSURANCE — RIGHTS OF BENEFICIARY.

Where a life insurance policy gave the insured the right to change the beneficiary, and on maturity of the policy to withdraw cash value, take an annuity, or withdraw profits and continue policy as a paid up participating policy, the insured might after the maturity of the policy take its cash surrender value without the consent of the beneficiaries.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1465; Dec. Dig. §585(5).]

2. INSURANCE §585(5) — LIFE INSURANCE — ELECTION OF BENEFITS.

Where insured in a policy of life insurance was informed at its maturity of three alternatives which he could take, his reply by letter: "I have decided to accept the cash value of same. Kindly forward check therefor"—was an election to take the cash surrender value of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1465; Dec. Dig. §585(5).]

3. INSURANCE §590—ATTACHMENT OF PROCEEDS OF POLICY.

Where the insured in a policy of life insurance had accepted the cash surrender value of the policy, and the company had forwarded a check to its agent to be delivered upon the execution of a proper release, the fund was subject to attachment in the hands of the agent as the property of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1479, 1482, 1485; Dec. Dig. §590.]

Appeal from Circuit Court, Christian County.

Action by W. T. Cooper against P. E. West and others. From a judgment for plaintiff but discharging an order of attachment in so far as it affected the fund attached, plaintiff appeals. Reversed and remanded, with directions.

Alvan H. Clark and Linton & Clark, all of Hopkinsville, for appellant. C. H. Bush and Hunter Wood & Son, all of Hopkinsville, for appellees.

SAMPSON, J. The appellant, W. T. Cooper, instituted this action in the Christian circuit court against P. E. West upon a note for \$200 and interest, and at the same time sued out an order of attachment which was served upon the appellee West and the Fidelity Mutual Life Insurance Company of Philadelphia, Pa., and its local agent W. H.

Wicks in Hopkinsville, Christian county. The defendant P. E. West does not deny the indebtedness, but resists the attachment.

Several years ago the insurance company named above issued a policy of life insurance for \$2,000 to the appellee P. E. West, and this policy matured on April 1, 1915, and had a cash surrender value of \$1,068, subject, however, to a loan of \$430.92 which had been made by the company to the insured, and which was a lien upon the policy, leaving the actual surrender value to the insured \$637.08. On the maturity of the policy the company, by letter, called attention of Dr. West to the fact that the policy contained an option which he as the insured might exercise, which is as follows: (1) The withdrawal of a guarantee cash value of \$1,068, together with the profits apportioned thereto; or (2) the conversion of the entire cash value (consisting of guaranteed cash value stated above together with the profits) into a life annuity; or (3) the withdrawal of the profits in cash, and the continuation of the policy for its full amount as a paid up participating life policy."

Answering this letter with reference to exercising the option, Dr. West wrote the company the following letter:

Hopkinsville, Ky., May 17, 1917.

The Fidelity Mutual Life Insurance Co., Philadelphia, Penna.—Gentlemen: Replying to your letter of recent date relative to settlement of matured policy, O. L. P. 176482 P. E. West, I will say that I have decided to accept the cash value of same. Kindly forward check therefor and greatly obliged.

Yours very truly,

P. E. West.

Thereupon the company forwarded to W. H. Wicks, its local agent at Hopkinsville, check for \$637.08 made payable to P. E. West, with instructions to deliver same to P. E. West when proper receipt was executed by West and the beneficiaries named in the policy who were "his wife, Ethel West, and his surviving children, share and share alike." The attachment aforesaid was served upon the agent, also West and the insurance company, after the check had been received at Hopkinsville and before its delivery. The agent then declined to deliver the check to West, and West and the beneficiaries, his wife and four children, declined to sign the release required by the company. Shortly thereafter, Mrs. West and the children named as beneficiaries filed a petition to be made parties in the court below, setting up claim to the fund attached on the ground that they were the beneficiaries in the policy and that P. E. West was acting for and on their behalf at the time he wrote the letter directing the insurance company to forward check, and that the fund was to come to them and to be invested for their interest, and that P. E. West did not claim the money, but was only acting as the agent of the beneficiaries. Issue was joined, and the case went to trial. The circuit court, without the intervention

of a jury, made a finding of both fact and law adjudging plaintiff Cooper to be entitled to recover of the defendant P. E. West the sum of \$211 with interest until paid, and sustained the attachment in so far as it related to P. E. West, but discharged the attachment in so far as it affected the insurance company, its agent Wicks, and the fund attached, and adjudged the cross-petitioners, Mrs. West and the four children, to be entitled to the \$637.08 free from the claim of the plaintiff Cooper, on the ground that these persons were the beneficiaries in the policy and that P. E. West was their agent and acting for and on their behalf, at the time he directed the insurance company to forward the check.

The policy of insurance contains the following provision:

"Sec. 9. The insured, with the written approval of the president or vice president, may upon the surrender of the policy change the beneficiary, or with such approval, it may be assigned."

The first question to be determined is: Did the act of the insured, P. E. West, in writing the letter of May 17, 1915, directing the insurance company to forward check to him, amount to an election on his part under the option in the policy to accept the surrender value thereof, and did he have the power to make such election so as to preclude the beneficiaries? Appellees contend that it did not amount to an election under the option, and further that it did not lie in West to make such election, on the theory that appellees held a vested interest not subject to be defeated by the acts of the insured. It must be conceded, however, under the contract of insurance, that the insured had the right, and indeed had exercised it without the consent of the beneficiaries, of hypothecating the policy to secure a loan from the company and to that extent and thereby extinguished \$430.92 of the \$1,068, the amount that would otherwise have been due and a part of the cash surrender value at that time. Reasoning from this, he might likewise have extinguished the whole amount without the consent of the beneficiaries named in the policy, thus wholly defeating their rights.

Aside from this, the insured had the privilege, personal to him under the terms of the contract of insurance, and a privilege not granted to the beneficiaries, to change the beneficiary named in the policy, and this without the consent of those first named. An exercise of this right might well have barred and tolled the rights of Mrs. West and the children named as beneficiaries. He also had the right, according to the terms of the option in the policy, to con-

vert it into a life annuity, and it follows therefore that, by an exercise of this option in the course of years, he might have drawn and converted to his own use the whole sum due upon the policy.

In the case of *Wrather et al. v. Stacy*, 82 S. W. 420, 26 Ky. Law Rep. 683, where a like provision in a policy of insurance was under consideration, the court said:

"The insured had the right, under the terms of the policy, to change the beneficiary. He could do it with or without reason, because the beneficiary * * * named did not have a vested interest therein."

Also in the case of *Crise v. Illinois Life Insurance Co.*, 122 Ky. 572, 92 S. W. 560, 29 Ky. Law Rep. 91, 121 Am. St. Rep. 489, the court said:

"In the case at bar, the policy in express terms conferred upon the insured the right, with the consent of the company, at any time, 'to assign it, or before assignment, change the beneficiary therein, or make any other change,' and this right is not in any way made to depend upon the consent of the beneficiary named in the policy. * * * After assigning the policy to secure the payment of his note to appellee, the insured voluntarily surrendered it for cancellation, by means of which he paid his note to appellee and received the * * * cash surrender value of the policy which exceeded the amount of the note by \$18. He clearly had the right to so dispose of the policy without the consent of appellant."

[1, 2] This rule having been established by a long line of cases, we conclude that he might after the maturity of the policy under its terms have elected to take its cash surrender value, and this we think he did when he wrote the insurance company the letter of May 17, 1915, in which he said:

"I have decided to accept the cash value of same. Kindly forward check therefor and greatly oblige. Yours very truly, P. E. West."

[3] West having accepted the cash surrender value of the policy, and the company having forwarded the check to its agent at Hopkinsville to be delivered to West upon his executing the proper release, the fund was subject to attachment, and the lower court erred to the prejudice of appellant Cooper in holding otherwise. The attachment of the plaintiff Cooper should have been sustained, and so much of the fund as was necessarily subjected to the satisfaction of plaintiff Cooper's debt, interest, and cost, and the residue, if any, paid to P. E. West.

For these reasons, the appeal sought in this case is granted, because this court is satisfied that the ends of justice require it. This cause is remanded, with directions to sustain the attachment as against the said fund and other proceedings consistent with this opinion. Appeal granted, and case reversed.

ROSS et al. v. RICHARDSON.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. BOUNDARIES \Leftrightarrow 11—CONTROL OF CALLS—ADJACENT OWNERS.

Where the calls of a deed are for an adjoining owner's line, the line of the grantee is controlled by such adjoining line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 92-94; Dec. Dig. \Leftrightarrow 11.]

2. ADVERSE POSSESSION \Leftrightarrow 114(1)—COLOR OF TITLE — POSSESSION — EVIDENCE — SUFFICIENCY.

Evidence held to show that defendant, believing himself to be the owner of certain disputed land, by virtue of purchase and deed, at once took possession and held the land continuously for over 20 years.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683; Dec. Dig. \Leftrightarrow 114(1).]

3. INFANTS \Leftrightarrow 24—PLEA OF LIMITATION — MINORITY OF OWNER.

Where the party's adverse possession began and continued for some time during the life of an adult owner, it was not interrupted by such owner's death, leaving infant children.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 25; Dec. Dig. \Leftrightarrow 24.]

Appeals from Circuit Court, Monroe County.

Two actions by W. E. Ross and Lillie O. Gray and others against H. M. Richardson, consolidated. Judgment dismissing the petitions, and plaintiffs appeal. Affirmed.

H. T. Arterberry, of Glasgow, H. L. Arterberry, of Tompkinsville, and W. L. Porter, of Glasgow, for appellants. Baird & Richardson, of Glasgow, for appellee.

CARROLL, J. Two appeals come up on this record. W. E. Ross is the appellant in one, and Lillie O. Gray and others the appellants in the other, and H. M. Richardson is the appellee in both. The cases involve substantially the same question and were consolidated and heard and disposed of together in the court below on the same evidence. They involve the title to two small tracts of land, one claimed by Ross and other by the Grays. The suits were brought to recover the possession of these lands from Richardson and damages for their detention. The lower court dismisses the petition of the plaintiffs Ross and the Grays, and they have brought the case here.

The Grays, who are the heirs of James D. Gray, deceased, set out in their petition that they are the owners and entitled to the possession of a tract of land that descended to them from James D. Gray. The land of which they claim to be the owners is described in the petition as being on the waters of Meshack creek:

"Beginning at said black oak and mulberry stump, beginning corner, running thence N. 80 E. 7 poles across Meshack creek to a large sycamore and two box elders standing on the east bank of said creek; * * * thence S. 26 W.

6½ poles to a stone planted as a corner between Kirkpatrick and James Black; thence S. 60 W. 46 poles to a dead beech tree and a stone planted in the corner of Isham F. Gerald's fence; thence N. 80 W. 150 poles, to a maple and sycamore on the bank of said creek; thence N. 20 W. 80 poles to the beginning."

In an amended petition they averred that the land in controversy, which contains about seven acres:

Begins at "a black oak and mulberry stump in the mouth of a lane; thence with the old creek bed S. 35 E. 32 poles; thence with the same N. 80 E. 12 poles to the fence; thence with the same S. 47 E. 20 poles; thence with the same S. 10 W. 7 poles; thence with the same S. 52 W. 15 poles; thence with same S. 24 W. 22 poles to the original line; thence N. 20 W. 80 poles to the beginning."

Richardson in his answer denied that the plaintiffs were the owners of or entitled to the possession of the land claimed by them, and averred that he was the owner of a tract containing 360 acres:

"Beginning at a large black oak and mulberry stump on the bank of Meshack creek; thence S. 80½ W. 114 poles to a sugar tree stump and a large planted stone, corner to Leslie; thence N. 118 poles with Leslie's line to two beeches also a corner to Leslie; * * * thence to a stone planted on the brink of the bank of Cumberland river 20 poles above the mouth of Meshack creek; thence N. 1 E. 72 poles to a beech; thence N. 10 E. 245 poles to a maple and sycamore on the bank of the creek; thence with the creek to the beginning, containing 360 acres."

He further set out that he was the owner of a tract of land containing 14½ acres, describing same by metes and bounds, and also a tract containing 52 acres, describing it by metes and bounds, and also the owner of a fourth tract containing seven acres, adjoining the 360-acre tract and bounded as follows:

"Beginning at a black oak and mulberry stump, corner to Kirkpatrick; thence S. 10 E. 275 poles with an old turn row where an old fence once stood to a box elder, maple and sycamore; thence with the meanders of the creek to the beginning."

Ross in his petition described the land of which he claimed to be the owner as:

"Beginning at a maple, elm and sugar tree, corner to Richardson and Gray; thence with Gray's line S. 50 E. 166 poles to where two beeches stood, corner to R. H. Richardson; thence with his line S. 80 W. 30 poles to a stone, corner to same and the river field; thence with its same course 10 poles to creek, corner to same and Henry Richardson; thence with his line up the creek with its meanders to his corner, the bluff of the creek; thence with the same to the beginning."

In an amended petition he described the land claimed by him and which is in controversy as:

"Beginning on a sugar tree, maple and elm, corner to H. M. Richardson and Gray; thence S. 30 W. 12 poles to two willow trees on the bank of creek; thence with Henry Richardson's line, S. E. 60 poles to the creek; thence up the creek with its meanders N. 54 E. 26 poles; up same N. 44 W. 14 poles to a stake on the bank of same; thence N. 2 W. 46 poles to a

stake on the bank of same; thence N. 7½ poles to the beginning."

And it was averred that Richardson wrongfully had possession of about seven acres of this boundary.

Richardson in his answer denied that he had possession of any land owned by Ross and set up the tracts of land that he owned, describing them as he did in the answer in the Gray case. Richardson further set up in his answer in the Gray case, as well as in the Ross case, that he had been in the adverse possession of the land in controversy for 20 years or more. He also averred that the claim of the Grays was within the champerty statute. The claim of adverse holding was put in issue by the Grays as well as by Ross, and the plea of champerty was also controverted by the Grays.

It appears that the land in dispute joins on the east the 360-acre Richardson tract which was conveyed to him by Kirkpatrick, and that the Grays and Ross have title to land adjoining this disputed land on the east. This disputed land, according to the maps, lies at two separate places in the bottoms of Meshack creek, each parcel of disputed land containing probably seven acres. Meshack creek, which runs on, over, and between the lands of Richardson on the west and the lands of the Grays and Ross on the east, is a very crooked stream, and each tract of disputed land lies in bends of the creek.

It seems that in January, 1884, Elijah Kirkpatrick and his wife conveyed to Richardson the 360-acre, the 14½-acre, and the 52-acre tracts of land that are now owned by him. These three tracts of land are each described in the deed by metes and bounds, courses and distances. This deed was put to record in the proper office in May, 1884. In this deed the 360-acre tract is described as "beginning at a large black oak and mulberry stump on the bank of Meshack creek." The other descriptions in the deed relate to lines about which no question is made until we come to the southern corner of the eastern line of this tract, which is described as being:

"A stone planted on the brink of the bank of Cumberland river 20 poles above the mouth of Meshack creek; thence N. 1 E. 72 poles to a beech; thence N. 10 W. 245 poles to the beginning."

And the disputed land lies along the land between the black oak and mulberry stump on the bank of Meshack creek at one end and the stone planted on the bank of the Cumberland river near the mouth of the Meshack creek on the other.

It also appears that in December, 1884, Kirkpatrick sold to the ancestors of the Grays a body of land containing 470 acres, less the 52 acres previously sold to Richardson, which was excepted from this boundary. This deed was put to record in the proper office in May, 1885. This deed described the 470 acres as "beginning at said black oak

and mulberry stump, corner of lot number one in the division of the land of Hugh Kirkpatrick." From this point the courses of this deed do not touch the line in controversy until they get to "a stone planted in the corner of Isham F. Gerald's fence, thence N. 30 W. 150 poles to a maple and sycamore on the bank of said creek; thence N. 20 W. 80 poles to the beginning."

It will be observed that both the Richardson deed of 360 acres and the deed to Gray called for the black oak and mulberry stump as a beginning corner. From this point the Richardson lines run west and north and then south to the stone on the bank of the Cumberland river, and from there north 1° east 72 poles, north 10° west 245 poles to the beginning at the black oak and mulberry stump, while the lines of the Gray land, starting at the black oak and mulberry stump, run north and east and then south to a corner at which they turn north 30° west 150 poles, north 20° west 80 poles, to the beginning at the black oak and mulberry.

There is no dispute that the black oak and mulberry at the north end and the stone on the Cumberland river at the south end are established corners in the Richardson deed, nor is there any dispute that the beech on the line of the Richardson deed between the black oak and mulberry stump at one end and the stone at the other is an established corner. It also appears that the lines of the Gray deed do not touch the lines of the Richardson deed all the way from the stone to the black oak and mulberry stump.

South of this Gray land and joining the Richardson land on the east is the Ross land. It seems that Ross obtained the land that he now claims from W. B. Milam by a conveyance made in 1907, which was recorded in 1910. His deed calls for the beginning corner at a maple, elm, and sugar tree corner to Richardson and Gray. The courses of this deed then run in an easterly direction, finally coming again to the Richardson line, and then with his line to the beginning.

[1] It will be noticed that the title to the Gray land and the Richardson land was derived from the same source—Elijah Kirkpatrick. The Ross title does not appear to have been derived from Kirkpatrick, but the deed to Ross, which was made in 1907, calls for the Richardson line, and this, of course, makes his line dependent upon the location of the Richardson line.

Counsel for Richardson concedes that Richardson's deed does not embrace the disputed land, and so the right of Richardson to this disputed land depends on his adverse holding. It appears from the evidence of Hugh K. Bedford that the deed he made to Richardson, acting as agent for Kirkpatrick, by oversight or mistake, did not include all the land Richardson bought, or this disputed land which was owned by the Kirkpatricks, and which Bedford intended to and did, in fact, sell to Richardson. Bedford testifies

that the first information he had that the deed did not cover this land was when Richardson came to see him about it. He says he told Richardson it did not make any difference whether his deed covered it or not, as he had bought, paid for, and been put in possession of it. Bedford further says that he sold the land to Gray, and that Richardson was in possession of this land in dispute when Gray bought it; that he did not sell the land in dispute to Gray, nor did Gray buy it or pay for it; and that if Gray's deed covers this land it was a mistake. This witness further said that Richardson always had possession of the land in dispute, and he had never heard any question of his right to it until this suit came up, although he lived in the immediate neighborhood.

Richardson testifies that he took possession of the land in controversy in 1884, and had had it in possession ever since through himself, tenants, and cultivation. It also appears that Kirkpatrick in 1849 got a patent to land which covers this land in dispute, and that Richardson thought his deed covered the land embraced in this patent, but that, when he found out it did not, he asked Bedford about it, and Bedford told him it did not make any difference, that he had bought it and could hold it under the patent. He further said that this patent land had been used as a part of the farm which he purchased from Bedford ever since the patent was issued, and that when he bought the land from Bedford he took possession of the land covered by this patent, and that it had been continuously in cultivation since 1886. Marion Coulter, John Scott, J. R. Head, James H. Milam, William Gerald, and Turner Bradley, all testify that this land in dispute had been claimed by Richardson for more than 20 years and cultivated by him and his tenants and was spoken of generally as the Richardson land. There is further evidence in behalf of Richardson that this land in controversy was inclosed by fencing.

[2] On the other hand, several witnesses who testify in behalf of the Grays and Ross say that Richardson did not have possession of this land or have it in cultivation; but we think the weight of the direct evidence supports the contention of Richardson that, believing himself to be the owner of this disputed land by virtue of his purchase from Kirkpatrick, he at once took possession of it and held it in the same manner that he did the remainder of the land purchased from Kirkpatrick, and that this adverse holding and claim of title continued without interruption from 1884, or shortly thereafter, until the institution of this suit.

[3] It is contended by counsel for the Grays that the plea of limitation is not available because some of the Grays who bring

this suit were infants when Richardson claims he first took adverse possession of the land, and, this being so, the statute did not run against them as they arrived at age less than 15 years before this suit. The evidence, however, shows that James D. Gray, the ancestor of the plaintiffs, lived for several years after 1884, and it was during his life that the adverse claim and holding by Richardson started, and, having started in his life, it was not interrupted by his death or by the fact that he left infant children. Having commenced to run against him, neither his death nor the infancy of the children interrupted it. *Clark v. Trail*, 1 Metc. 35; *Hale v. Ritchie*, 142 Ky. 424, 134 S. W. 474.

On the part of Ross, the contention is made by his counsel that the statute of limitation is not available because it is said that Ross was also claiming to own the land in controversy between him and Richardson. But, while the evidence on this subject is, as we have said, conflicting, the weight of it we think is with Richardson.

It is also suggested that there is no plea of limitation in the Ross case. But we do not so understand the record. On the contrary, we think that, both in his answer to the Gray petition as well as to the Ross petition, Richardson distinctly relies on his adverse holding of the land in dispute for such length of time as to invest him with the title. The fact that Richardson's title papers do not cover this land in dispute is really not a material issue in the case, as he does not claim the land under his title papers, but by adverse possession; and in this connection it may be said that we do not find in the record any contradiction of the evidence of Bedford heretofore set out. It therefore appears that Richardson in good faith took possession of this land in controversy, believing himself to be the owner of it under his purchase from Bedford as the agent of the Kirkpatricks.

There is also a minor dispute between these parties about some trees, and it is shown that some employes or hands of Richardson did, in ignorance of the exact location of the line between the Grays and Richardson, cut some small trees on the Gray land. But it is also shown that the Grays cut some trees on the Richardson land. The lower court on this question of fact as to the timber, as well as to the lands in dispute, held, on the facts, that Richardson was entitled to the land, and that the Grays were not entitled to recover anything on account of timber.

Giving to the judgment of the chancellor the weight usually accorded in cases of fact, we have reached the conclusion that the evidence does not justify us in disturbing his finding, and the judgment in each case is affirmed.

MORTON v. YOUNG.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. APPEAL AND ERROR ⇨335—STATEMENT—PARTIES—"ETC."

In a creditor's bill against the debtor, the alleged fraudulent grantee and mortgagee, to set aside the deed and mortgage, an appeal granted by the clerk of the Court of Appeals in accordance with the statement for an appeal required by Civ. Code Prac. § 739, to "C. P. Morton, etc.," was an appeal by Morton alone; the word "etc." after his name in the statement of parties being insufficient to make any one else a party to the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1864-1867; Dec. Dig. ⇨835.]

For other definitions, see Words and Phrases, First and Second Series, Etc.]

2. FRAUDULENT CONVEYANCES ⇨80 — CONSIDERATION — SUPPORT OF GRANTOR — PRESUMPTION.

A contract by the grantee to support the grantor during his life in consideration of a conveyance of the grantor's property renders the conveyance constructively fraudulent as to the grantor's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 206-209; Dec. Dig. ⇨80.]

3. FRAUDULENT CONVEYANCES ⇨299(11) — CREDITOR'S BILL — SUFFICIENCY OF EVIDENCE.

In a creditor's bill to set aside the debtor's deeds to his daughter and his mortgage to a nephew as being made to defraud creditors in violation of Ky. St. § 1906, evidence held to support a finding that such deed and mortgage were fraudulent as to creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 887; Dec. Dig. ⇨299(11).]

4. HOMESTEAD ⇨177(1)—FRAUDULENT CONVEYANCE—EFFECT.

The cancellation of a deed as being fraudulent as to the grantor's creditors does not deprive the grantor of his homestead, which was exempt from execution and not lost by such conveyance.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 344, 347; Dec. Dig. ⇨177(1).]

Appeal from Circuit Court, Muhlenberg County.

Creditor's bill by W. A. Young against C. P. Morton and others to set aside an alleged fraudulent deed and mortgage. Decree for complainant directing a sale of the property and allowing Morton part of the proceeds in lieu of his homestead, and Morton appeals. Affirmed.

C. A. Denny, of Greenville, for appellant. Taylor, Eaves & Sparks, of Greenville, for appellee.

MILLER, J. On January 6, 1912, the appellant C. P. Morton executed and delivered his note for \$353.25, due one day thereafter, to W. A. Young, for groceries and supplies. At that time C. P. Morton owned a house and lot in Greenville, worth about \$1,000; he owned no other unincumbered real estate, and had personal property of little or no value.

On January 9, 1913, C. P. Morton conveyed

the house and lot in Greenville to his daughter Emma I. Morton. After this conveyance to his daughter, C. P. Morton improved the house at a cost of about \$1,500. In the meantime, Young repeatedly requested Morton to pay the note, but he paid only the sum of \$66.87 thereon. That payment was made on August 24, 1912.

In August, 1913, Young sued Morton and obtained a judgment at the September term of that year. An execution was issued and returned "no property found." Young continued to press Morton for the payment of the debt, and finally notified him that suit would be instituted to set aside the conveyance of the house and lot to Morton's daughter as fraudulent, unless the debt should be promptly paid.

Finally, on January 1, 1914, Young filed this creditor's bill against C. P. Morton and Emma I. Morton, to set aside the deed of January 9, 1913, upon the ground that C. P. Morton had thereby conveyed his house and lot to his daughter Emma for the purpose of defrauding Young and the other creditors of Morton, in violation of section 1906 of the Kentucky Statutes.

Subsequently, on March 9, 1914, Young discovered that on December 31, 1913, the day before the creditor's bill was filed, C. P. Morton and Emma I. Morton, his daughter, had mortgaged the house and lot to D. M. Roll, a nephew of C. P. Morton, to secure the payment of C. P. Morton's debt of \$860 claimed by him to be due Roll, and as indemnity against Roll's liability upon several small notes then in bank, aggregating \$255.50. Roll was made a defendant by an amended petition.

The defendants filed answers traversing the allegations of the petition; and, by an amended answer, C. P. Morton alleged that he occupied the place with his family as a homestead, and that, it being exempt, he had the right to sell it free of Young's claim. He further claimed a homestead of \$1,000 in case the deed should be canceled and the property subjected to the payment of Young's debt.

[1] The chancellor sustained the prayer of the petition and set aside both the deed and the mortgage as being fraudulent, and directed a sale of the property, allowing C. P. Morton, however, \$1,000 of the proceeds in lieu of his homestead, which was given precedence over Young's debt. From that judgment C. P. Morton, Emma I. Morton, and D. M. Roll prayed and were granted an appeal by the circuit court on September 25, 1914. They failed to prosecute that appeal, however, and on February 23, 1916, an appeal was granted by the clerk of this court to "C. P. Morton etc.," in accordance with the statement for an appeal required by section 739 of the Civil Code of Practice. The case has been argued as though all of the de-

feudants were appellants; but, under the authority of *Brodie v. Parsons*, 64 S. W. 426, 23 Ky. Law Rep. 831. C. P. Morton, the only defendant named as an appellant in the statement for an appeal, is the only appellant. The word "etc." after C. P. Morton's name in the statement of parties required by section 739 of the Code is insufficient to make any one else a party to the appeal. *Board of Councilmen v. Farmers' Bank*, 61 S. W. 453, 22 Ky. Law Rep. 1738; *Chinn v. Curtis*, 71 S. W. 923, 24 Ky. Law Rep. 1568.

As Roll, therefore, has not appealed, it is neither necessary nor proper for us to pass upon his rights under the judgment.

[2] The petition alleges that neither Emma I. Morton nor D. M. Roll paid any consideration for their respective conveyances. C. P. Morton testified that Emma was to pay \$50 for the place, and in addition she was to care for her father and mother as long as they lived. On the other hand, Emma I. Morton testified that she was to pay her father \$3,000, and support her father and mother during the balance of their lives, and that she had paid \$300 or \$400 of the purchase money. It has been decided by this court that a contract by the grantee to support the grantor during his life in consideration of a conveyance of the grantor's property renders the conveyance constructively fraudulent as to the grantor's creditors. *Hawkins v. Moffitt*,

10 B. Mon. 81; *Dohoney v. Dohoney*, 7 Bush, 217.

[3] In our opinion it needs little or no argument or explanation beyond what has been said to show that the deed to Emma I. Morton was made by C. P. Morton with the intent to delay, hinder, and defraud his creditors, especially Young. The mere recital of the facts is sufficient to carry conviction of that intent. Indeed, there seems to have been a race upon the part of C. P. Morton to mortgage the property to Roll before Young could file his creditor's bill, and thus further muddy the already disturbed waters. The proof failed to satisfactorily show that Emma I. Morton paid any consideration for her conveyance; and there is no explanation why C. P. Morton joined in the mortgage to Roll after he had conveyed the property to his daughter. If he did not then own the property, there was no reason why he should have joined in the mortgage.

[4] The chancellor properly canceled the deed as being fraudulent as to C. P. Morton's creditors, but that did not deprive Morton of his homestead, which was exempt from execution and was not lost by his fraudulent conveyance. *Dugan v. Massey*, 6 Bush, 81; *Lockett v. James*, 8 Bush, 28; *Kuevan v. Specker*, 11 Bush, 1; *Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705.

The proof fully sustains the finding of the chancellor.

Judgment affirmed.

GARVIN et al. v. THRELKELD et al.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. ADVERSE POSSESSION \S 96—ACTION—INSTRUCTIONS.

Where defendants in ejectment had been in open, notorious, adverse possession of a certain part of the boundary tract in dispute, they were entitled to an instruction that in no event could plaintiffs' recovery include such portion.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 533-536; Dec. Dig. \S 96.]

2. FRAUDS, STATUTE OF \S 70 — AGREEMENT ESTABLISHING BOUNDARY.

Where the dividing line is uncertain and there is a bona fide dispute as to its location between adjoining landowners, who agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law regulating the manner of conveying real estate, since the parties do not thereby undertake to acquire and pass title to real estate, as must be done by written contract or conveyance, but they simply, by agreement, fix and determine the situation and location of the thing that they already own, the purpose being simply to identify, by something agreed on, their several holdings, and to make certain that which they regarded as uncertain.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 112; Dec. Dig. \S 70.]

3. BOUNDARIES \S 46(3)—AGREEMENT—POSSESSION THEREUNDER.

An agreement fixing boundaries, followed by possession with reference to the boundary so fixed, is conclusive on the parties, although the possession may not have been for the full statutory period, it being sufficient to show that the dividing line was actually established and thereafter recognized or acquiesced in by the parties for a considerable while.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 221-225; Dec. Dig. \S 46(3).]

4. BOUNDARIES \S 40(3)—ACTION—QUESTION FOR JURY.

Where there was conflicting evidence in regard to agreement fixing the boundary and its subsequent execution by the erection of a fence, the question of the existence and execution of the agreement was for the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 221-225; Dec. Dig. \S 40(3).]

5. FRAUDS, STATUTE OF \S 70—LOCATION OF BOUNDARY LINE—EXECUTORY AGREEMENT.

A parol agreement that a certain old line was to be established by a surveyor and a division fence erected thereon, which was never executed, but was subject to the subsequent establishment of the line, was within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 112; Dec. Dig. \S 70.]

Appeal from Circuit Court, Oldham County.

Suit by William Threlkeld and others against Alice Garvin and others. From judgment for plaintiffs, defendants appeal. Reversed and remanded.

Edwards, Ogden & Peak, of Louisville, and S. E. De Haven and G. W. Peak, both of La Grange, for appellants. A. T. Ladd, of La

Grange, and Charles Carroll, of Louisville, for appellees.

CLAY, C. William Threlkeld, Sr., and others brought this suit against Alice Garvin and others to recover a tract of $6\frac{1}{2}$ acres of land located in Oldham county. From a verdict and judgment in favor of the plaintiffs, defendants appeal.

While defendants deny plaintiffs' title, it is admitted that plaintiffs have a title of record to the land in controversy, so that phase of the case may be eliminated.

The only grounds on which the defendants relied to defeat a recovery by plaintiffs were: (1) Adverse possession; and (2) a parol agreement, by which the division line between them and plaintiffs was fixed and a partition fence erected thereon. Plaintiffs deny the plea of adverse possession, and further contended that they and the defendants agreed to have the dividing line surveyed and fixed, and to have the partition fence erected thereon; that the fence actually erected was not on the agreed line, but was a mere temporary fence, and it was so understood by the parties.

Plaintiffs and defendants own adjoining tracts. Plaintiffs have title to all of the land west of "Tenant's old line," while the land east of that line is owned by defendants. William Threlkeld, Sr., says that up to about 8 years ago there was some question between the parties as to the true dividing line. He then suggested to Joseph and Henry Garvin, who represented the Garvin estate, that the fence between them be repaired. The Garvins suggested that a new fence be built, and both parties agreed that the old fence as it then stood was not on the true line. It was further agreed between them that one Kemp, a surveyor living in Jefferson county, be employed for the purpose of running the line, each to pay one-half of the expense. Kemp came, but his survey was not satisfactory to either party. Both parties agreed that the true dividing line was an old line known as the "Tenant line." After this, Mr. Drane was employed for the purpose of running and locating the true line, the expense of his work to be borne by both parties. Drane came and succeeded in locating the "Tenant line," and made a survey which showed that all the land in controversy was upon the west side of the "Tenant line." Mr. Drane says that he was employed by William Threlkeld to locate the line between the Threlkeld and Garvin farms. The land in controversy was a tract of about $6\frac{1}{2}$ acres, which both parties claimed. To determine to whom this tract belonged it was necessary to locate the "Tenant line." To do this, he examined a number of records and inquired of a number of the older citizens. He succeeded in locating the "Tenant line," which corresponded with the de-

scription of the old deeds and with its location as fixed by the older citizens. While making the survey he discovered an old fence, which at times was on the true line and at other times off the true line. Mr. Kemp testified that he attempted to locate the line, but at first failed to do so. After this failure he promised to return and locate it. He did not return for several years. During that time Mr. Drane had located the line. With Mr. Drane's data he was enabled to locate the line. He found that the 150-acre farm of plaintiffs included the $6\frac{1}{2}$ acres in controversy, and that the land of the defendants was on the east side of the line. Colonel Jeff Steele corroborated Mr. Drane as to the proper location of the "Tenant line."

For defendants, Henry Garvin, who was 43 years of age, testified that he had lived on the land practically all of his life. From his earliest recollection there had been a fence between the two tracts. He had frequently repaired this fence, and he and his codefendants and those under whom they claimed had been using and cultivating all of the land east of and up to the fence for a period of 30 years or more. During all that time they had been in the continuous, uninterrupted, peaceable, and adverse possession of all the land in controversy, with the exception of that included between the new and the old fence. Joe Garvin, A. F. Cropper, F. S. Barbour, Sam Howard, and Wilson Clore, corroborate Henry Garvin's testimony on the question of adverse possession. F. S. Barbour's testimony covers a period of 50 years, during which time he says that the defendants and those under whom they claimed had cultivated, used, and controlled all of the land east of and up to the old fence. The two Garvins and A. F. Cropper also testified to the effect that about 8 years before their testimony was given plaintiffs and defendants agreed on a division line, and subsequently erected a fence on this line.

William Threlkeld, Sr., testified in rebuttal, and denied that the division line was fixed by parol agreement, and that the fence was built on this line. On the contrary, he says that the fence was built merely for temporary purposes, and that under the agreement the old "Tenant line" was the true dividing line, and whenever that line was established a new fence was to be built thereon. Other witnesses corroborated William Threlkeld, Sr.

Under the court's instructions the jury were authorized to find for plaintiffs if they believed from the evidence that the land in controversy lay within plaintiffs 150-acre boundary. On the other hand, they were authorized to find for defendants if they believed from the evidence that the defendants had been in the adverse possession of the land in controversy for more than 15 years, or that plaintiffs and defendants agreed on the dividing line, and thereafter

built the division fence on that line, pursuant to said agreement.

[1] The purpose of the suit was to recover all of the land in possession of the defendants that lay west of the "Tenant line." The old fence referred to by the different witnesses lies west of this line. Between the "Tenant line" and the old fence are about 2 or $2\frac{1}{2}$ acres of land. While the new fence corresponds with the old fence for a short distance, it runs considerably west of the old fence for the greater portion of the distance. Between the old fence and the new fence are about 4 acres of land. The evidence that defendants have been in the open, notorious, continuous, peaceable, and adverse possession of all of the land in controversy lying between the "Tenant line" and the old fence is uncontradicted. The defendants offered an instruction to the effect that in no event could the jury find for plaintiffs more than $4\frac{1}{2}$ acres of land. Viewed in the light of the facts of the case, this instruction was equivalent to a peremptory instruction to find for the defendants as to the land lying between the "Tenant line" and the old fence. In view of the uncontradicted evidence on the question of adverse possession, defendants were entitled to such an instruction, and the court erred in not giving the offered instruction, or one similar in effect.

[2, 3] In view of a reversal of the case, another question is necessarily presented, namely, the validity of the two parol agreements relied on by the parties. It will be observed that the Garvins testify that the division line was agreed on by the parties and the fence subsequently erected on that line. On the other hand, this agreement was denied by the Threlkelds, who claim that the division line was to be established on the old "Tenant line" when fixed, and that a new fence was to be erected on this line. These alleged agreements were made about 8 years before the parties testified. While the validity of parol agreements to settle disputed boundaries was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute, it is now settled that, where the dividing line is uncertain and there is a bona fide dispute as to its location and the parties agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such an agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate. The reason for the rule is that the parties do not undertake to acquire and to pass the title to real estate, as must be done by written contract or conveyance. They simply by agreement fix and determine the situation and location of the thing that they already own, the purpose being simply by something agreed on to identify their several holdings

and to make certain that which they regarded as uncertain. 9 C. J. § 175; *Evans v. Bates*, 155 Ky. 68, 159 S. W. 612; *Gordon v. Simmons*, 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 305; *Warden v. Addington*, 131 Ky. 296, 115 S. W. 241; *Fields v. Sizemore*, 105 S. W. 438, 32 Ky. Law Rep. 237; *Berry v. Evans*, 89 S. W. 12, 28 Ky. Law Rep. 22; *Higginson v. Schanback*, 66 S. W. 1040, 23 Ky. Law Rep. 2230; *Campbell v. Campbell*, 64 S. W. 458, 23 Ky. Law Rep. 869; *Duff v. Cornett*, 62 S. W. 895, 23 Ky. Law Rep. 297; *Gayheart v. Cornett*, 42 S. W. 730, 19 Ky. Law Rep. 1052; *Ferguson v. Crick*, 23 S. W. 668, 15 Ky. Law Rep. 461; *Grigsby v. Combs*, 21 S. W. 37, 14 Ky. Law Rep. 651; *Jamison v. Pettit*, 6 Bush, 669; *Threlkeld v. Winston*, 2 Ky. Law Rep. 63, 10 Ky. Op. 956; *Elms v. Hunt*, 6 Ky. Op. 361. As stated in the case of *Boyd v. Graves*, 4 Wheat. 513, 4 L. Ed. 628:

"Adjoining owners who adjust their partition line by parol do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct. After their boundary line is fixed by consent, they hold up to it by virtue of their title deeds, and not by virtue of a parol transfer."

See, also, *Amburgy v. Burt & Brabb Lumber Company*, 121 Ky. 580, 89 S. W. 680, 28 Ky. Law Rep. 551.

While it is true that in a number of cases, where the executed agreement fixing the dividing line was followed by acquiescence of each of the parties, or their adverse possession for the statutory period of 15 years, this fact was adverted to in the opinion as an element of considerable weight (*Grider v. Davenport*, 60 S. W. 866, 22 Ky. Law Rep. 1455; *Robards v. Rogers*, 48 S. W. 154, 20 Ky. Law Rep. 1017; *Hay v. Pierce*, 144 Ky. 768, 139 S. W. 941; *Mosley v. Eversole*, 148 Ky. 685, 147 S. W. 426; *Deskins v. Williams*, 145 Ky. 355, 140 S. W. 546; *Abrams v. Wild*, 120 S. W. 357; *Hocker v. Keeton*, 115 S. W. 784; *Turner v. Dixon*, 106 S. W. 814, 32 Ky. Law Rep. 621; *Fields v. Sizemore*, supra; *Lost Creek Coal Co. v. Napier*, 89 S. W. 264, 28 Ky. Law Rep. 369; *Crutchlow v. Beatty*, 23 S. W. 960, 15 Ky. Law Rep. 464), we have never held that where the agreement was actually executed by the parties it was not valid if not acquiesced in or followed by adverse possession for a period of 15 years. On the contrary, we distinctly held in the case of *Frazier v. Mineral Development Company*, 86 S. W. 983, 27 Ky. Law Rep. 815, that an oral agreement, fixing the boundary lines, may be enforced in equity if the parties have recognized the line and treated it as the true division, without a showing that it had been so recognized for 15 years. Indeed the great weight of authority is to the effect that the agreement, when followed by possession with reference to the boundary so fixed, will be conclusive on the parties, although the possession may not have been for the full statutory period. *Boyd v. Graves*, supra; *Malone v. Mobbs*, 102 Ark.

542, 145 S. W. 198, 146 S. W. 143, Ann. Cas. 1914A, 479; *Gornton v. Wilson*, 141 Ga. 597, 81 S. E. 860; *Clayton v. Feig*, 179 Ill. 534, 54 N. E. 149; *Olin v. Henderson*, 120 Mich. 149, 79 N. W. 178; *Vosburgh v. Teator*, 32 N. Y. 561; 9 C. J. § 182.

[4] This view of the question accords with the further view that such agreements are not prohibited by the statute of frauds or the statutes regulating the manner of conveying real estate. Clearly, if such agreements are valid, then acquiescence and adverse possession for the statutory period are not essential to their validity. There are cases, however, where the original parol agreement cannot be shown by direct evidence. In such cases, the only way of proving the original parol agreement is to show that the established line was long acquiesced in by the parties, and the longer the acquiescence the more valuable such evidence becomes. We, therefore, conclude that, in order to establish the parol agreement relied on by the Garvins, it was not necessary to show that the line claimed to have been established by that agreement was followed by the acquiescence or adverse possession of the parties for a period of 15 years. All that was necessary was to show that the dividing line was actually established, and thereafter recognized or acquiesced in by the parties for a considerable while. In view, however, of the conflicting evidence in regard to the agreement itself, and its subsequent execution by the erection of the fence on the alleged dividing line, we conclude that the question was properly one for the jury.

[5] When we come to consider the alleged parol agreement testified to by the Threlkelds, a different question is presented. While they denied the parol agreement relied on by the Garvins, they further testified that the parol agreement actually made by the parties was to the effect that the "Tenant line" was to be established by a surveyor and the division fence erected on that line. It will thus be seen that the location alleged to have been agreed on was not marked or fenced, but was subject to the subsequent establishment of the line. In other words, the agreement was never executed, and was therefore clearly within the statute of frauds. *Warden v. Addington*, supra; *Robinson v. Corn*, 2 Bibb, 124. While the testimony of the Threlkeld was admissible for the purposes of disproving the parol agreement relied on by the Garvins, it was not sufficient to establish the validity of the parol agreement on which they themselves relied.

If, upon the return of the case, the evidence on the question of adverse possession be substantially the same, the trial court will direct a verdict in favor of the Garvins for the land lying between the "Tenant line" and the old fence. The court will also instruct the jury, in substance, to find for plaintiffs as to the land lying between the old

fence and the new fence, unless they believe from the evidence that the plaintiffs and defendants agreed upon the location of the line between their respective lands and built the dividing fence thereon pursuant to said agreement, and thereafter acquiesced in such location for a considerable period of time, in which event they will find for the defendants.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

FUSON et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 16, 1917.)

1. LARCENY — §81 — CHARGE OF GRAND LARCENY — SUFFICIENCY — STATUTES.

An indictment which accused the defendants of grand larceny, an offense denounced by Ky. St. § 1194, by stealing chickens of the value of more than \$2, an offense denounced by section 1201c, was sufficient to support conviction of having stolen chickens of the value alleged.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 76-80; Dec. Dig. § 31.]

2. CRIMINAL LAW — §1172(2) — APPEAL — HARMLESS ERROR — INSTRUCTION.

In a prosecution for chicken stealing, where defendants did not testify, an instruction that, if on the whole case the jury had a reasonable doubt from the evidence "of" the defendants, or either of them, having been proven guilty, then the jury should find them, or the one about whom they entertained such doubt, not guilty, was harmless, as the jury could not have been misled in believing that they could have no reasonable doubt from evidence of others than defendants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8155; Dec. Dig. § 1172(2).]

3. CRIMINAL LAW — §1207 — INDETERMINATE SENTENCE LAW.

Defendants, accused of chicken stealing in March, 1916, were entitled to be tried under the indeterminate sentence law (Ky. St. § 1186), in force when the offense was committed, and it was error to instruct under the law enacted at the 1916 session of the Legislature, which did not become effective until June, 1916 (Acts 1916, c. 39), repealing the indeterminate sentence law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3278; Dec. Dig. § 1207.]

4. CRIMINAL LAW — §1172(9) — APPEAL — HARMLESS ERROR.

Where the court erroneously instructed the jury under the law enacted at the 1916 session of the Legislature, repealing the indeterminate sentence law, but which did not become effective until June, 1916, the crime having been committed in March, 1916, but discovered the error in the instruction, and sentenced defendant to confinement in the penitentiary for the indeterminate period of not less than a year nor more than a year and a day, the least punishment that could have been inflicted by the jury, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3162; Dec. Dig. § 1172(9).]

5. INFANTS — §68 — JUVENILE OFFENDER — DUTY OF COURT — STATUTE.

It was the duty of the court, when the possible minority of a defendant was brought to its attention, to hear proof of and determine his age, and to enter judgment in accordance therewith, and, minority being found to exist, to commit him to the house of reform for boys until he became 21, in accordance with Ky. St.

§ 2095b, which is mandatory in its provisions that infants convicted of crime shall be confined in the reform schools rather than in the penitentiary, and that proof of the age of a convicted juvenile may be heard by the court after trial.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 174, 175; Dec. Dig. § 68.]

6. CRIMINAL LAW — §1144(17) — APPEAL — PRESUMPTIONS FAVORING COURT BELOW.

Where judgment sentencing a defendant to the house of reform for boys until he should become 21 recited that defendant's age, as fixed, was shown by the evidence heard, in the absence of contrary showing, the Court of Appeals will assume that the evidence was heard by the court after trial, and that it sustains the finding as to defendant's age.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2768, 2769, 2901, 3035; Dec. Dig. § 1144(17).]

7. CRIMINAL LAW — §408 — EVIDENCE — SETTLEMENT.

In a prosecution for chicken stealing, the note for \$3 executed by a defendant to the owners of the stolen chickens for the amount which they claimed the fowls to be worth was competent against its maker.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 785; Dec. Dig. § 408.]

8. LARCENY — §46 — VALUE OF PROPERTY.

The market value of stolen chickens, and not the price at which they were sold, or their value for eating purposes alone, was the proper standard of their value.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 138; Dec. Dig. § 46.]

Appeal from Circuit Court, Whitley County.

Tom Ned Fuson and Joe Fuson were convicted of chicken stealing, and they appeal. Judgments affirmed.

Rose & Pope, of Williamsburg, for appellants. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CLARKE, J. On the 12th day of October, 1916, an indictment was returned in the Whitley circuit court against appellants, Tom Ned Fuson, and Joe Fuson, accusing them of—

"grand larceny by stealing chickens of value of more than \$2, committed in the manner and form as follows, viz: The said Tom Ned Fuson and Joe Fuson on the 10th day of October, 1916, before the finding of this indictment, and in the county and state aforesaid, did unlawfully, willfully, and feloniously take, steal, and carry away chickens of the value of more than \$2, the personal property owned jointly by Esom Davis and Mike Wilson, with the felonious and fraudulent intent then and there to convert the same to their own use and to permanently deprive the said Davis and Wilson of their property therein, and that without the consent of the said Davis and Wilson."

Upon a trial defendants were found guilty, and their punishment fixed by the jury at confinement in the penitentiary for one year and one day. Their motions for a new trial having been overruled, the court entered a judgment against Tom Ned Fuson ordering his confinement in the state penitentiary at Frankfort for an indeterminate period of

not less than one year nor more than one year and one day, and a judgment against defendant Joe Fuson adjudging that he was 18 years of age on the 10th day of October, 1916, and committing him to the house of reform for boys at Greendale until he arrives at the age of 21 years. To reverse these judgments this appeal is prosecuted.

[1] 1. The first objection urged is that the court erred in overruling the demurrer to the indictment; it being insisted that the indictment accuses the defendants of the crime of grand larceny, whereas it describes the offense as that of stealing chickens of the value of more than \$2. It is argued that the crime charged is that of grand larceny, denounced under section 1194 of the Kentucky Statutes, while the acts described by the indictment and in the proof constitute the offense of stealing chickens of the value of more than \$2, a distinct offense denounced by section 1201c of the statutes, and that the defendants were therefore accused of one, but tried and convicted of another, crime.

This court considered the same question, upon similar facts, in the case of *De Boe v. Com.*, 146 Ky. 696, 143 S. W. 39, in which the indictment charged the defendant with the offense of being an accessory before the fact to "feloniously, willfully, and maliciously committing arson by setting fire to and burning the storehouse of Herman Friedman." It was argued in that case that, since arson and house burning are distinct offenses and separately treated under our statutes, the indictment was insufficient to support a charge of house burning, because of the use of the word "arson" in the accusatory part of the indictment. This court, in disallowing the claim that the indictment was insufficient on that ground, said:

"But the meaning of the charge as a whole is clear. He is accused of being an accessory before the fact to the felonious burning of the storehouse, and that this is called arson does not affect the sufficiency of the indictment. The facts are shown. The error of law does not vitiate the rest of the charge. The indictment sets out fully all the facts as to the commission of the offense, and the defendant could not be misled by it when read as a whole."

The facts are entirely similar here, and what is said in that case applies with equal force to this, and the trial court did not err in overruling the demurrer to the indictment.

[2] 2. It is next urged that the following instruction, given by the court, is erroneous and prejudicial, to wit:

"If upon the whole case you have a reasonable doubt from the evidence of the defendants, or either of them, having been proven guilty, then you should find them, or the one about whom you entertain such doubt, not guilty."

The defendants did not testify, and it is insisted that, by the wording of this instruction, the reasonable doubt which would prevent a conviction was limited to such a doubt as the jury might entertain from the evidence of the defendants, and that, as the defendants did not themselves testify or offer

any testimony in their behalf, the jury could not have had any reasonable doubt from their testimony, and the defendants were therefore denied the benefit of the reasonable doubt of their guilt from the evidence heard by the jury. The instruction, properly punctuated, does not seem to us to be subject to this construction; but, even if it be conceded that it would have been in better form if it had read, "If you, upon the whole case, have a reasonable doubt from the evidence that the defendants," etc., rather than, "If upon the whole case you have a reasonable doubt from the evidence of the defendants," etc., as insisted by counsel, we are sure that the jury could not have been misled by the instruction, and that the verdict was not the result of their failure to give the defendants the benefit of any reasonable doubt, from the evidence heard, of their guilt.

[3] 3. The offense is alleged and proven to have been committed in March, 1916, at which time section 1136 of the Kentucky Statutes, known as the indeterminate sentence law, was in effect, but the jury were instructed under the law enacted at the 1916 session of the Kentucky Legislature which repealed the indeterminate sentence law, but which did not become effective until June, 1916 (Acts 1916, c. 39). Defendants were entitled to be tried under the law in force when the offense was committed, and it was error for the court to instruct the jury under the law that did not become effective until June, 1916. *Coleman v. Com.*, 160 Ky. 87, 169 S. W. 595; *Albritten v. Com.*, 172 Ky. 274, 189 S. W. 204; *Teague v. Com.*, 172 Ky. 665, 189 S. W. 908; Kentucky Statutes, § 463.

But it has been held by this court that a reversal cannot be ordered because of this error, under section 340 of the Criminal Code, unless defendant's substantial rights have been prejudiced thereby. *Futrell v. Com.*, 141 Ky. 310, 132 S. W. 556; *Pipes v. Com.*, 148 Ky. 174, 146 S. W. 38; *Waters v. Com.*, 171 Ky. 457, 188 S. W. 490. The penalty for the crime of which defendants were charged is fixed at confinement in the penitentiary for not less than one year nor more than five years. Had the jury been properly instructed under the indeterminate sentence law, having found defendants guilty, they would have had to fix a minimum term and a maximum term for their confinement in the penitentiary, not less than one year nor more than five years, and the least punishment they could have fixed would have been an indeterminate period of not less than one year nor more than one year and one day.

[4] The trial court, when he came to pronounce judgment against defendants, having evidently discovered the error in this instruction, sentenced the defendant Tom Ned Fuson to confinement in the penitentiary for the indeterminate period of not less than one year nor more than one year and one day, which is the least punishment that could have been inflicted by the jury; and defend-

ant was therefore not prejudiced by the instruction, and, under the authorities cited above, is not entitled to a reversal therefor.

As to the other defendant, Joe Fuson, a different question is presented. The record contains a complete transcript of the evidence heard upon the trial before the jury, in which there is no evidence whatever as to his age; yet the judgment against him adjudges that he was 18 years of age on the 10th day of October, 1918, and commits him to the house of reform for boys until he becomes 21 years of age. This judgment was authorized upon the verdict, under section 2095b of the Kentucky Statutes, if Joe Fuson was 21 years of age or under when the crime was committed, as he is adjudged to have been. This court, in the cases of *Washington v. Com.*, 143 Ky. 602, 136 S. W. 1041, and *Calico v. Com.*, 145 Ky. 641, 140 S. W. 1036, held that the juvenile act is mandatory in its provisions that infants convicted of crime shall be confined in the reform schools rather than the penitentiary, and that proof of the age of a convicted juvenile may be heard by the court after trial.

[5] The trial court was therefore not only authorized, but it was its duty, when the matter was brought to its attention, to hear proof of and determine the age of defendant, and enter a judgment in accordance therewith.

[6] The judgment recites that the age of defendant, as fixed, was shown by evidence heard, and, in the absence of a showing to the contrary, this court will assume that the evidence was heard by the court after

trial, and that it sustains the finding as to defendant's age, which also sustains the judgment for his confinement in the house of reform during his minority.

[7] Defendants also complain that incompetent evidence was admitted, over their objection, and that the verdict is contrary to the evidence. The admitted evidence of which complaint is made is a note for \$3 which it is proven Tom Ned Fuson executed to the owners of the stolen chickens, for the amount which they claimed to be the value of the chickens, in payment for same. The note was clearly competent against defendant Tom Ned Fuson. Counsel cite no authority to sustain their contention, and we know of no rule of law which would exclude this evidence.

[8] The basis for the contention that the verdict is contrary to the evidence is the fact that the defendant Tom Ned Fuson sold the three chickens for \$1.25, and the evidence of the party to whom he sold them, that for eating purposes they were worth 50 or 60 cents each; but it is proven by at least two witnesses that the stolen chickens were hens of fine stock, used for breeding purposes, and that they were of the reasonable market value of \$1 each. Their market value, and not the price at which they were sold or their value for eating purposes alone, was the proper standard, and the jury were authorized upon the evidence in finding that the stolen chickens were worth more than \$2.

For the reasons indicated, the judgments against both Tom Ned Fuson and Joe Fuson are affirmed.

CAMPBELL v. IRVINE TOLL BRIDGE CO.
et al.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. INJUNCTION ¶18 — RIGHT TO REMEDY — INSOLVENCY.

Ordinarily the solvency or insolvency of defendant is not important where the injunction is sought on the ground of the impossibility of measuring the injury in terms of money, or where the remedy at law is inadequate, however responsible defendant may be.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 17; Dec. Dig. ¶18.]

2. INJUNCTION ¶17—ADEQUATE REMEDY AT LAW—DAMAGES.

Where damages will fully compensate for breach of contract and the defendant is solvent and able to respond, no injunction should issue, but plaintiff must resort to an action at law for the damages sustained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 16; Dec. Dig. ¶17.]

3. INJUNCTION ¶59(1)—GROUNDS—IRREPARABLE INJURY.

In an action for a mandatory injunction to require a toll bridge company and its vice president to accept plaintiff as a lessee of the bridge for one year at a fixed rental by reason of his highest bid therefor at a public auction, alleging that irreparable loss would result if the injunction was not granted, but not alleging that the company was insolvent, and where the profits could be readily ascertained, there could be no irreparable injury from the failure to grant the injunction sought, and the plaintiff's remedy at law was adequate, so that a motion to dissolve a mandatory injunction would be granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114, 116; Dec. Dig. ¶59(1).]

Action by Brock Campbell against the Irvine Toll Bridge Company and another. Motion to dissolve a mandatory injunction compelling defendants to accept plaintiff as a lessee. Motion sustained, and injunction dissolved.

Kelly Kash, of Jackson, and F. L. A. Eichelberger and J. L. Carpenter, both of Irvine, for plaintiff. Hugh Riddell, of Irvine, for defendants.

SETTLE, C. J. This action, brought in the Estill circuit court by the plaintiff, Brock Campbell, against the defendants, Irvine Toll Bridge Company, a corporation, and O. W. Witt, its vice president, is before the writer of this opinion, a judge of the Kentucky Court of Appeals, upon a motion made by the defendants to dissolve a mandatory injunction issued by the judge of the Estill circuit court, compelling them to accept the plaintiff as lessee, for a term of one year, at a rental of \$3,050, of a bridge spanning the Kentucky river at West Irvine, Ky., and tollhouse attached thereto, owned by the defendant Irvine Toll Bridge Company; to accept of him a bond providing for the rent of \$3,050; to deliver to him the possession of the tollhouse and bridge and permit him to collect the tolls thereon for such year.

It is, in substance, alleged in the petition that the defendant Irvine Toll Bridge Company is authorized by its articles of incorporation to own and operate the bridge in question, collect tolls for its use, and to lease or sell to others the right or privilege to operate it and collect tolls for its use, which right it is the defendant's custom to annually sell or rent at public auction to the highest and best bidder; that on December 4, 1916, after the advertisement thereof, the defendant Irvine Toll Bridge Company offered for rent at public auction to the highest and best bidder the privilege to operate the bridge at West Irvine, and collect tolls for the use thereof by pedestrians and passengers, and to occupy the tollhouse, for a period of one year, beginning January 1, 1917, at which time plaintiff bid \$3,050, whereupon the auctioneer announced that his bid was the highest and best offered for the privilege in question and declared him the purchaser; but that, notwithstanding that fact, the defendants refused to accept of him the bond with sufficient security required of him by the terms of the sale as lessee, which he immediately tendered, and also refused to recognize him as lessee or surrender to him the possession of the bridge or tollhouse, and yet refuses to do so.

It is also alleged in the petition that the defendant O. W. Witt claims some kind of right or authority to take charge of and operate the bridge, and that he and the Irvine Toll Bridge Company are jointly acting in attempting to prevent the plaintiff from obtaining possession of the bridge or receiving the tolls thereon.

The petition contains the usual allegations for an injunction—that is, that if refused the injunction plaintiff would suffer irreparable loss; that he has no other adequate remedy; and that a multiplicity of suits would be required to assert such legal remedies as he might enforce in a court of law.

After filing a demurrer to the petition, which the circuit court overruled, the defendants filed an answer of two paragraphs, the first containing a traverse, and the second alleging that as the result of fraud and collusion between plaintiff and the auctioneer, and to enable the former to rent the bridge at less than its fair rental value, the bid of plaintiff for the renting of the bridge was pretended to be accepted, contrary to defendants' express instructions, without notice or opportunity to others then present, intending to make larger bids, which was well known to both plaintiff and the auctioneer; and that when the foregoing facts were discovered by the defendant Irvine Toll Bridge Company, it immediately caused the auctioneer to again cry for sale the leasing of the property, tolls, privileges, etc., and it was then bid in for the bridge company by the defendant O. W. Witt, its vice president, at the price of \$3.

335, and which bid was duly accepted by the auctioneer.

[1, 2] For the purposes of the motion before us, we need not consider the grounds of defense interposed by the answer. Looking alone to the averments of the petition, we find them insufficient to authorize the granting of the injunction. The relief apparently sought by the plaintiff is to prevent the defendant Irvine Toll Bridge Company from violating its alleged contract with him. It is not alleged that the bridge company is insolvent, or that any difficulty would be encountered by plaintiff in collecting of it by execution the amount of any judgment for damages he may be able to obtain against it for a breach of the contract. Ordinarily, the solvency or insolvency of the defendant is not important, where the injunction is sought on the ground of the impossibility of measuring the injury in terms of money, or where the remedy at law is inadequate, however responsible the defendant may be. It is, however, a well-recognized rule in this jurisdiction, as elsewhere, that where damages would fully compensate for the injury, and the defendant is solvent and able to respond, no injunction should issue. In such case the plaintiff must resort to an action at law for the damages sustained. The foregoing principles are too well settled to require the citation of authority.

[3] While here the plaintiff alleges that irreparable loss will result to him if the injunction is not granted, in view of the admitted solvency of the bridge company, it is patent that this allegation is without foundation in fact. It is equally clear from the facts alleged in the petition that there can be no difficulty in the way of plaintiff's measuring the injury he claims to have sustained, in money, for it is alleged therein that \$1,200 is the net profit he would have realized from operating the bridge during the year of the alleged lease. Such profit can, of course, be readily arrived at, because it would consist in the amount of money collected in tolls from operating the bridge, less the rental of the property and the cost of maintaining it for the year, which it is admitted would have to be paid by the lessee.

So the case here presented is clearly not one that entitles the plaintiff to an injunction, for the defendant is entirely solvent, the certainty of measuring the damages sustained is obvious, and the remedy at law entirely adequate. In brief, there can be no irreparable injury from the failure to grant the injunction sought. 22 Cyc. 773; Devou v. Pence, 82 Ky. Law Rep. 697, 106 S. W. 874; Knight's Adm'r v. Schroader, 148 Ky. 610, 147 S. W. 378.

For the reasons indicated the defendants' motion to dissolve the injunction is sustained, and the injunction dissolved.

Judges CARROLL, THOMAS, and CLARKE sat with me in the consideration of this motion, and all concur in the conclusion expressed in the opinion.

TOWN OF WALTON v. DIERS et al.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

MUNICIPAL CORPORATIONS ~~§~~302(3) — CONSTRUCTION OF SIDEWALK — LIABILITY OF ABUTTING OWNER—STATUTE.

Under Ky. St. § 8706, part of the charter of municipalities of the sixth class, authorizing the board of trustees to order necessary work to be done upon the sidewalks, etc., payable out of the general fund of the town, and providing that the original construction of any sidewalk may be made at the exclusive cost of abutting owners, and be equally apportioned by the board according to frontage, upon the petition of a majority of the abutting owners, and that the board may cause the work to be done without such petition upon the vote of four members at a regular meeting, or by majority vote at any regular meeting may cause such improvement to be made upon the ten-year bond plan, the board, where the improvement was not ordered on the ten-year bond, time, or upon any petition, had no authority to order it to be done at the cost of the abutting owners except when at a regular meeting when at least four members voted in favor of so doing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 805; Dec. Dig. ~~§~~302(3).]

Appeal from Circuit Court, Boone County.

Action by Town of Walton against J. V. Diers and others. Judgment for defendants dismissing the petition on demurrer, and plaintiff appeals. Affirmed.

Chas. Strother, of Walton, for appellant.
Tomlin & Vest, of Walton, for appellees.

HURT, J. The appellant, town of Walton, is a municipality of the sixth class, in Boone county, Ky. It appears from the petition that on the 6th day of November, 1914, the board of trustees made an order as follows:

"On motion and second, the clerk was instructed to notify Mrs. J. V. Diers to build a concrete walk on the north side of High street, the entire length of her property, same to be 4 feet wide and in accordance with the ordinance dated September 2, 1902, limit of time, November 10, 1914."

The petition alleges that this notice was delivered to the appellee, but that she refused to build the sidewalk, and thereafter the appellant, by its board of trustees, caused it to be built at a cost of \$52.92, and that a statement showing its cost, by order of appellant, was presented to the appellees and payment of it demanded, but they failed and refused to pay, and that appellant has a lien, upon the abutting property owned by the appellees, to secure the payment of the cost of building the sidewalk, and that its cost was less than 50 per cent. of the value of the ground, excluding the value of the

buildings and improvements thereon, and that the lien is a superior lien. The abutting property owned by the appellee J. V. Diers is then described, and the prayer of the petition seeks a recovery against the appellees for the \$52.92 alleged to have been expended in the construction of the sidewalk, with interest thereon from the 12th day of March, 1915, until paid, and the costs of the action, and that appellant be adjudged to have a lien upon the property for the satisfaction of the claim, and that the property be sold in payment of the demand. It also appears from the petition that J. V. Diers is the wife of the appellee H. C. Diers, and that previous to the time of the making of the order above set out an order was made directing H. C. Diers to construct the sidewalk, but, when it was learned that he was not the owner of the property, but that it belonged to the appellee J. V. Diers, the order above set out was made.

To the petition the appellees interposed a general demurrer, which was sustained by the court, and the appellant, declining to plead further, the petition was dismissed, and from that judgment an appeal to this court was taken.

One of the grounds of demurrer relied upon, and which is the only one necessary to be considered, is that the order to build the sidewalk is an order of the board of trustees for the original construction of a sidewalk, at the cost entirely of the owner of the abutting property, and that such order, as appears from the petition, was not made at the regular meeting of the board of trustees; was made upon the initiative of the board; and that four members thereof did not vote for its adoption. The authority of the board of trustees of municipalities of the sixth class to construct sidewalks is derived from the provisions of section 3706 of the Kentucky Statutes, which is a part of the charter of municipalities of that class. The section referred to is somewhat involved, which doubtless arises from the fact that it has been amended twice since it became a law, on July 1, 1893. One amendment to it became a law on March 29, 1902, and another on March 19, 1894, and the section, as now constituted, is made up of the original statute and the two amendments. The statute authorizes and empowers the board of trustees to order done any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways, and public places of such towns. The board of trustees is likewise authorized to cause the cost of the construction or reconstruction of sidewalks, curbing, streets, avenues, highways, sewers, and public places to be paid out of the general fund of the town, or by the owners of lands fronting or abutting thereon, as they may determine. It will be observed that the statute does not define the method to be pursued when it is determined to pay

the costs of the construction or reconstruction of a sidewalk out of the general fund of the town, but it specifically prescribes the method to be pursued, when it is determined that the cost of the construction or reconstruction of a sidewalk is to be paid, exclusively, by the abutting property owners. It fixes the time and manner and circumstances under which the board of trustees shall have the authority and power to do so. No other times or ways are provided for by the statute for the exercise of this power by the board of trustees, and it is confined exclusively to the manner and conditions there prescribed, and such must exist before it has the power to cause sidewalks to be built, at the exclusive cost of the abutting property owners. The portion of the statute referred to is as follows:

"The original construction or reconstruction of any sidewalk, curbing, streets, sewers, avenues, highways, alleys, and public places may be made the exclusive cost of the owners of the lots and parts of lots or land fronting or abutting or bordering upon the proposed improvement be equally apportioned by the board of trustees according to the number of front feet owned by them respectively upon the petition of the majority of the property owners of lots or parts of lots, or land abutting or bordering upon the proposed improvement; or the board of trustees may cause same to be done without such petition upon the vote of four members elect of said board of trustees at a regular meeting thereof; or the board of trustees may, by a majority vote at any regular meeting thereof, cause any such improvement to be made upon the ten-year bond plan."

The section of the statute quoted empowers the board of trustees to construct or reconstruct sidewalks at the cost, exclusively, of the owner of the abutting property in three instances: First. It may be done when a majority of the abutting property owners petition the board of trustees to order the construction or reconstruction. Second. The board of trustees may cause it to be done without any petition from the owners of the abutting property and upon their own initiative, at a regular meeting of the board of trustees, and upon the affirmative votes of four of the members of the board. Third. It may be done by a majority vote of the membership of the board of trustees at any regular meeting of the board, when it is determined to have the sidewalks constructed or reconstructed upon the ten-year bond plan, which is also fully set out in the statute. In the instant case the improvement was not ordered to be made upon the ten-year bond plan, but the payment for it to be made in cash. The construction of the sidewalk was not requested by any abutting property owner, but was made by an order of the trustees without any petition from the abutting property owners, and when it is so done by the express words of the statute the board is without authority or power to cause it to be done at the exclusive cost of the abutting property owner, except when it is done at a regular meeting of the board, and when as

many as four members thereof cast their votes in favor of causing it to be done. It is apparent that the board of trustees are without power to require a sidewalk to be built and paid for exclusively by the abutting property owners, unless the proceedings are had at a regular meeting of the board, and the resolution is voted for by four members of it, where the construction has not been petitioned for by a majority of the abutting property owners, and where it is not ordered to be done upon the ten-year bond plan, as set out in the statute.

The judgment is therefore affirmed.

KELLY v. ANDERSON et al.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. TRUSTS — 191(1) — WILLS — 614(6) — ESTATES CREATED — POWER OF TRUSTEE.

Under a will disposing of all testator's estate, including a farm, and dividing his property among his seven children and directing his executors to sell the farm and distribute the proceeds, along with the balance of the estate, among such children, and devising to a daughter one-seventh of his estate for her natural life and at her death to her children, she to receive the income during her life, such interest to be kept invested, but with the power to sell and reinvest whenever in her judgment it was best, the daughter took the income for life, with the remainder in the corpus to her children, and, in the event she should qualify as trustee for them, power to sell and reinvest the estate, keeping the corpus intact.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. ¶ 191(1); Wills, Cent. Dig. § 1399; Dec. Dig. ¶ 614(6).]

2. TRUSTS — 160(2), 161 — APPOINTMENT OF TRUSTEE — BOND.

Such trust for the daughter's children, if declined by her, would not be allowed to fail for want of a trustee, and at the instance of the executors and on proper application to the court, a trustee would be appointed and required to execute a bond for the forthcoming of the property to the remaindermen.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 207, 209-211; Dec. Dig. ¶ 160(2), 161.]

3. LIFE ESTATES — 6 — BOND TO REMAINDERMEN.

Where a life tenant is to have an income of money or similar property devised, the possession of which is directed to be given her, she may be compelled to execute a bond to the remaindermen that it will be forthcoming at the termination of the particular estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ¶ 6.]

Appeal from Circuit Court, Scott County.

Action by E. A. Anderson and another, executors of the will of H. S. Anderson, deceased, against Mrs. Sue O. Kelly and another, for a construction of the will. Judgment for the plaintiffs and defendant Mrs. Sue O. Kelly appeals. Affirmed.

Jas. F. Askew and Bradley & Bradley, all of Georgetown, for appellant. James Bradley, W. S. Kelly, and H. Church Ford, all of Georgetown, for appellees.

SAMPSON, J. On the 6th day of January, 1913, H. S. Anderson of Georgetown, Ky., made and executed his last will, whereby he disposed of all of his estate, including a farm of 250 acres located in Scott county, dividing his property among his seven children, and appointing two sons E. A. Anderson and Robert H. Anderson executors of the will, and requested the court to require no bond, appraisement, or inventory of them. The will directed the executors to sell the farm, either publicly or privately, at a time that in their judgment seemed best, and to distribute the proceeds therefrom along with the balance of the estate among the seven children as set out in the will. The estate has, according to the terms of the will, been converted into cash and bills receivable. The appellant Mrs. Sue O. Kelly is a daughter of the testator and one of the beneficiaries under the will, and the clause of the will in question, and which this action was brought in the lower court to obtain a construction of, and which directly affects Mrs. Kelly, is as follows:

"To my daughter, Mrs. Sue O. Kelly one-seventh of my estate, to be hers for and during her natural life, and at her death to go to her child or children, but she to receive the income during her life, but the said interest to be kept invested, but with the power to sell and reinvest whenever in her judgment it is best."

A like limitation was placed upon the interest of Mrs. Sallie May Furgeson, another married daughter of the testator. This action was brought by the executors for a construction of the section of the will quoted, stating that the defendants, Mrs. Sue O. Kelly and Mrs. Sallie May Furgeson, have each a child or children in esse, and are therefore, as they are advised, only entitled to a life estate in the property devised, but these two daughters are insisting that they are entitled to the possession of the corpus of the estate coming to them under the will without giving bond or security to the remaindermen that the estate will be forthcoming at the termination of the life estate. The executors, however, say that they are advised and believe that the said two daughters are entitled only to the income from the devise during their natural life, and at their death the corpus of the estate passes to and vests in the child or children of the said defendants, and should the executors deliver the devise (which is now cash and bills receivable) to these daughters, and it should chance to be wasted or lost, they as executors would be liable to the remaindermen, and that while they desire to pass the devise to whomsoever it rightfully belongs at the earliest possible moment, they seek only the direction of the court, so that they may be relieved of responsibility in the future. The lower court construed the section of the will in question to mean a devise for life, with remainder over, to the child or children, and

that Mrs. Kelly is entitled to the income only during her natural life. The court in so holding used this language:

"As a condition precedent to the paying over by plaintiffs as executors of the one-seventh interest in the estate of the testator to the defendant and devisee Mrs. Sue O. Kelly * * * the defendant Mrs. Kelly shall execute bond, with good and sufficient surety, to the commonwealth of Kentucky, for the use and benefit of the child or children of Mrs. Sue O. Kelly, to the effect that the corpus of such estate as may be paid over to the said Sue O. Kelly, as a life tenant, by the plaintiffs as executors, shall be forthcoming for the use and benefit of the child or children of the said defendant Mrs. Sue O. Kelly, at the death of the said Sue O. Kelly."

It is insisted that this judgment required Mrs. Sue O. Kelly to qualify as trustee and to execute the forthcoming bond, but, when read as a whole, the judgment does not necessarily mean that, but it gives Mrs. Kelly the privilege of so qualifying, but in case she does not desire so to do, another trustee may be allowed to qualify.

[1] By the clause of the will above quoted one-seventh of the estate is devised to Mrs. Kelly during her natural life, and at her death "to go to her child or children," "she to receive the income during her life, said interest to be kept invested, with the power to sell and reinvest whenever in her judgment it is best." This can mean only that the testator intended for his daughter Mrs. Kelly to receive the income from one-seventh of his estate during her natural life, and that the corpus of the devise should descend to and vest in her child or children, and in the event she should qualify as trustee for her child or children, she to have

the power to sell and reinvest the estate whenever in her judgment it appeared best, the body of the estate to be kept intact.

[2, 3] In the event she did not desire to become trustee and to execute bond for the forthcoming of the estate, then a trustee should, upon proper application, be named by the court, who would carry out the trust. A trust is never allowed to fail for want of a trustee; and, if Mrs. Kelly does not desire to accept the trust, then at the instance of the executors and on proper application to the court a trustee should be appointed who will be required to execute a bond for the forthcoming of the property, and who will invest the money arising from the interest mentioned in the clause of the will so as to make it earn an income if reasonably possible, and this income, after the payment of the expenses incident to the preservation of the estate and expenses of the trusteeship, be paid to Mrs. Kelly during her natural life. A similar order should be entered with reference to the defendant Mrs. Sallie May Furgeson.

"Where the life tenant is to have an income of money, or similar property devised, the possession of which is directed to be given her, she may be compelled to execute a bond to the remainderman that it will be forthcoming at the termination of the particular estate." *McKee v. McKee's Ex'r*, 82 S. W. 451, 28 Ky. Law Rep. 736; *Powell's Ex'r v. Cosby*, 89 S. W. 721, 28 Ky. Law Rep. 619; *Id.*, 91 S. W. 1183, 29 Ky. Law Rep. 46.

Perceiving no error in the record of the trial court prejudicial to appellants, the judgment is affirmed.

THOMAS B. JEFFREY CO. v. LOCKRIDGE.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. CORPORATIONS — 673—FOREIGN CORPORATIONS — SERVICE — SUMMONS — AGENT — SUFFICIENCY OF EVIDENCE.

In an action against a nonresident corporation, evidence held to show that the party upon whom a copy of the summons was served was not an agent of defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2584, 2535, 2557, 2558, 2650; Dec. Dig. —673.]

2. PRINCIPAL AND AGENT — 1—"AGENT."

An "agent" is one who acts for or in the place of another by authority from him, whenever he undertakes to transact some business or manage some affair for another by authority and on account of the latter and to render an account for it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 1; Dec. Dig. —1.]

For other definitions, see Words and Phrases, First and Second Series, Agent.]

3. APPEARANCE — 9(8)—APPEAL BY DEFENDANT—EFFECT.

Appellant by praying an appeal to the Court of Appeals thereby enters its appearance in the action, and, when the case returns to the court below, it will be before the court for all the purposes of the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 52; Dec. Dig. —9(8).]

Appeal from Circuit Court, Fulton County.

Action by W. S. Lockridge against the Thomas B. Jeffrey Company. Judgment for plaintiff after overruling a motion to quash the return upon the summons, motion for new trial overruled, and defendant appeals. Reversed, and cause remanded, with directions to set aside the judgment.

Herschel T. Smith, of Fulton, and Frederick Taylor, of Kenosha, Wis., for appellant. W. J. Webb, of Mayfield, for appellee.

HURT, J. On the 30th day of June, 1914, the appellee, W. S. Lockridge, filed his petition in the Fulton circuit court against the appellant, the Thomas B. Jeffrey Company, in which he set out a claim that the appellant had in February, 1914, sold to him an automobile of the 1913 Cross-Country model, which it represented to be a rebuilt car and substantially as good as new, but which had turned out to be worthless, and not such car as was represented to him by the appellant, and he sought the recovery of damages against the appellant for such violations of its contract as were alleged in the petition. Summons was issued and served on the day of the filing of the petition on I. H. Read, whom the return stated was the agent of the appellant. The appellant is a corporation engaged in the manufacture and sale of automobiles and supplies for machines of its manufacture at Kenosha, Wis.

At the proper time the appellant appeared in court for the purpose only of moving the court to quash the return upon the summons,

which had been issued upon the petition.

The return was as follows:

"Executed June 30, 1914, by handing a true copy of this summons to I. H. Read, agent Thomas B. Jeffrey Co.

"Bailey Huddleston, S. F. C."

The ground upon which it was sought to have the return upon the summons quashed was that Read, to whom a copy of it was delivered, was not the agent of appellant, and never had been at any time its agent. The court overruled the motion to quash the summons, to which the appellant excepted. The case then proceeded to trial, and resulted in a verdict of the jury and judgment of the court in favor of the appellee for the sum of \$865 in damages. Grounds for a new trial were filed, and motion made to that effect in proper time, but were overruled, and appellant has appealed from the judgment to this court.

[1] Naturally the first subject for consideration upon the appeal is to determine whether the court below was in error in overruling the motion to quash the return upon the summons. If Read was not such an agent as upon whom a summons might be served, the court, while having jurisdiction of the subject-matter of the controversy, did not have jurisdiction of the appellant, and the proceedings against it were erroneous. Upon the hearing of the motion to quash the return on the summons several affidavits were filed, and also oral testimony heard, all of which was duly preserved and brought before us in the bill of exceptions. I. H. Read, the alleged agent, states in an affidavit, that he was not at the time of the service of the summons an agent of the appellant; that he never was an agent of the appellant, and never at any time held himself out as such agent, and that the only dealings which he ever had with the appellant was that in the year 1912 he bought some merchandise from the appellant and paid it therefor; that since November, 1912, he has not bought an automobile or any other thing from the appellant, and that such automobiles of the appellant's make as he has since that time bought and sold he bought from the Prince-Wells Company at Louisville, Ky., and paid it therefor; that the only dealings that he had had with the Prince-Wells Company was to buy machines from it outright that had been made by the Thomas B. Jeffrey Company, and paid the Prince-Wells Company therefor.

The affidavits of H. C. Hill, the assistant sales manager of appellant, and of E. J. Jordan, the secretary and sales manager of appellant, and of George H. Eddy, treasurer of appellant, were filed, and each of them states that Read was not at the time of the service of the summons upon him, nor had he ever been, either before or since that time, an agent of appellant; that he was never employed by appellant to do any kind of business for it or to act in any respect

as its agent, nor to represent it in any matter of any transaction whatsoever, and that the appellant had never, by any act or word, held out Read to the public as an agent or representative of it, and that the only dealing or transaction it had ever had with Read was prior to the month of November, 1912, when it sold to him certain automobiles and equipment in his own name and for his own account, and for which goods he had paid the appellant, and that since November, 1912, the appellant has not had any business dealings or relations of any kind whatsoever with the said Read, and that Read has had at no time any property or goods, under his control or held by him for sale or distribution or otherwise which was the property of the appellant.

I. H. Read was called and gave parol evidence also upon the hearing on the motion. The substance of his testimony was that he had no connection nor employment nor business association with the appellant; that such cars of appellant's make as he sold in Fulton county in the years 1913 and 1914 he bought outright from the Prince-Wells Company at Louisville, Ky., and paid it therefor; that he had a contract with the Prince-Wells Company which gave him the right to sell the cars of appellant's manufacture in the county of Fulton; that he had not ordered to be shipped to him by the appellant any car or any other thing connected with its business during the years 1913 and 1914; that all such things he purchased from the Prince-Wells Company, but the relations which existed between the Prince-Wells Company and the appellant he did not know, but it was an agent; that during the year 1914 he had sold eight cars to persons in Fulton county and surrounding territory, all of which he had bought from the Prince-Wells Company; that a portion of them were shipped to him from the manufacturer at Kenosha, Wis.; that all came with a bill of lading with draft attached, which he paid before the cars were delivered to him; that he also bought supplies from the Prince-Wells Company, which he kept in a garage, and when these supplies were sold that he and the keeper of the garage divided the profits; that when he received cars and paid the draft attached to bill of lading he did not remember to whom the drafts were made payable, though he had paid drafts to both the Thomas Jeffrey Company and to Prince-Wells Company.

The testimony of other witnesses only related to the fact that they had bought cars of the appellant's make from Read and paid him for same, except W. A. Johnson states that he bought a car of the Jeffrey make from Read, as the agent of the Jeffrey Company, but it is evident from the other evidence in the case that it was a mere conclusion on Johnson's part that Read was an agent of the appellant.

While the evidence entirely fails to show

what relations existed between the Prince-Wells Company, of Louisville, and the appellant, the contract in writing between Read and the Prince-Wells Company was put in evidence. In this writing the Prince-Wells Company is called the distributor, while Read is denominated a dealer. The writing provides that the agreement expressed in it shall remain in force from November 3, 1913, to July 31, 1914, and that during the life of the agreement the distributor gives to the dealer the right to sell such motorcars as are manufactured by the appellant in Fulton county, Ky., and in Weekly and Obion counties, Tenn., and agrees to sell and deliver to the dealer f. o. b. cars at Kenosha, Wis., such cars as he may desire to purchase of appellant's manufacture and to refer to the dealer all inquiries for motorcars received from the territory mentioned in the contract. The dealer is to deposit with the distributor \$150 to guarantee the fulfillment on his part of the terms of the contract. The dealer upon his part agrees to pay for the motorcars purchased by him under the contract by sight draft, with bill of lading attached, and to pay in cash for all parts of machines ordered during each month at a date not later than the 25th day of the succeeding month, and that the distributor may at any time apply the deposit made by him for the performance of the contract to the payment of any indebtedness which the dealer may owe the distributor. The distributor agrees to give to the dealer in the sale of cars to him 20 per cent. discount from the list prices of the cars, and to sell and bill the cars to the dealer at prices, which are stated in the writing, and to also give the dealer a discount of 20 per cent. on supplies for cars ordered by him. The dealer agrees to judiciously advertise the appellant's make of car, and not to directly or indirectly make any sale of such cars in any territory other than specified in the contract, and to refer to the distributor all inquiries for the appellant's make of car which he might receive from other territory, and for cars not embraced in the contract, and to give to the distributor each month a list of the names and addresses of the persons to whom he sold cars, and to keep in stock at least one touring car of appellant's make for exhibition purposes. The contract further provided that all motorcars and parts alleged to be defective must be returned, with transportation charges prepaid, to the manufacturer for examination and inspection before any allowance will be made, and that all claims for allowances and for allowances with respect to shipment of parts must be made within ten days after the dealer should receive such parts, and that no claim should be made on the manufacturer for defects in any car or its equipment, other than as provided in the guaranty printed in the manufacturer's catalogue. The dealer also agrees that he will not hold the distributor liable

for any delay in filling orders placed for motorcars arising from causes beyond the control of the distributor and manufacturer, and that the responsibility of the distributor for any loss or damage to motorcars or other goods sold under the contract shall cease upon delivery thereof to the railroad, express company, or other common carrier, or to the dealer's representative. A further provision in the agreement was that the dealer was not in any manner authorized to conduct business in the name or for the account of the distributor or manufacturer, nor in the name of either, nor in behalf of either to enter into any contract or bill of goods to third persons, nor in the name of either to make any promises or representations relative to the manufacturer's goods, other than such as are contained in guaranty in the catalogue issued by the manufacturer. It is further provided that the agreement was not assignable by the dealer until the distributor had first agreed in writing thereunto, and that either party might terminate the contract at any time after its conditions have been fulfilled by the other party, by written notice, giving the reasons for it and the distributor reserves the right to cancel the agreement at any time if the dealer shall not have purchased one Jeffrey or Rambler motorcar by February 15, 1914.

It is impossible to conceive in what way Read could be an agent of the appellant, as there were no relations of a business character existing between them. He did not represent appellant about anything, was not authorized to transact any business for it, neither could he make any contract for it, nor in its name. Neither does it appear that appellant had any knowledge of Read or of his operations. He did not pretend to be an agent or representative of appellant, or authorized to do any kind of business for it. He had no contract of any kind with appellant. He obtained cars and supplies of appellant's make by paying for them, upon delivery, and when he obtained them he could do nothing with them, which any other person was not privileged to do in the same territory who might buy an automobile of the appellant's making. Having no authority to act for appellant or in its behalf, he was not responsible to nor owed any account to appellant for any act of his. So far as appellant was concerned, he was perfectly free to do with the cars and supplies purchased by him from the Prince-Wells Company as he chose. The title of the property passed to him, when it was delivered to him, or put in the custody of a common carrier, consigned to him. The distributor with whom he had his contract had no control over the property after he received it. The persons who purchased from him owed the price to him, and not to appellant, and he was free to sell for such price as he chose or not to sell at all. The appellant was without power to terminate the con-

tract under which he was working, and evidently the business in which he was engaged was his own, and not that of appellant. It might be insisted that the Prince-Wells Company of Louisville, Ky., was the general agent of appellant, with authority to appoint subagents for appellant, but there is nothing in the record from which a conclusion can be drawn that the Prince-Wells Company is an agent of any kind for appellant, and there is no pretense that it has any authority to appoint subagents. However, the terms of the contract between Read and Prince-Wells Company are not such as make him an agent of the appellant, even conceding that the Prince-Wells Company had authority to appoint agents for appellant, and had attempted to do so, which it did not. Read was simply a buyer at a price agreed upon, and selling not for any one except himself. In the conduct of his business he was wholly independent of any one. He was without authority to even bind the Prince-Wells Company, and was without responsibility to any one, except for the price of the cars and supplies, and to give the names of those purchasing from him to the Prince-Wells Company if he made any sales.

[2] In 2 Corpus Juris, 420, it is said:

"An 'agent' is defined to be one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it."

When this rule is applied to the facts of the instant case, it appears at once that Read was not an agent of appellant.

In Barnes v. Maxwell Motor Corporation, 172 Ky. 410, 189 S. W. 444, a question somewhat similar to the question in this case arose. The summons was served upon Carson, who was alleged to be an agent of the Maxwell Corporation. Carson had a contract with the corporation which gave him the exclusive right to sell its automobiles in Ohio county, and provided that, if the corporation itself sold repairs or machines to parties in that territory, Carson should be paid a commission on the same. The title to the machines furnished under the agreement remained in the corporation until paid for, but Carson was required to pay the taxes. The cost of advertising the business was divided between the parties, and the amount of the cost of advertising fixed. Carson was required to make weekly reports of the property sold and that on hand, and to keep on hand and to exhibit certain specified articles. He was required to secure subdealers who should be satisfactory to the corporation, and whose contracts should be on the forms prepared by it and subject to its approval. Upon the termination of the contract the corporation reserved the right to take back at invoice prices parts or automobiles which Carson owned or had on hand. Either party had the right to cancel any portion of the

orders for machines or parts or the entire contract by giving notice to the other party in writing. Each purchaser from Carson was given the standard warranty of the National Automobile Chamber of Commerce. The machines and parts were to be billed to Carson, with certain percentages off of the list prices, and for which payment was to be made in cash, in advance, or sight draft against the bill of lading, and on the Maxwell parts and purchases of parts for obsolete models Carson was allowed a discount of 20 per cent. He was allowed a cash discount of 10 per cent. from the net price of all repairs purchased by him, provided the payment was made in cash on or before the 20th of the month following the shipment, and all invoices on the repairs were due 30 days after date of shipment. The court held that under this contract Carson was engaged in a business of his own, and was in no respect an agent of the Maxwell Corporation.

[3] For the reasons indicated, the court was in error in overruling the motion to quash the return upon the summons, and hence the proceedings thereafter and the judgment appealed from were erroneous. Although, under repeated decisions of this court, the appellant, by praying an appeal to this court, thereby enters its appearance to the action, and when the case returns to the court below, it will be before the court for all the purposes of the action (*Pendleton v. Pendleton*, 112 S. W. 874; *Asher v. Cornett*, 113 S. W. 131; *Foster-Milburn Co. v. Chinn*, 137 Ky. 834, 127 S. W. 476; *Job Iron & Steel Co. v. Clarke*, 150 Ky. 246, 150 S. W. 367; *Southern C. & C. Co. v. Bowling Green Coal Co.*, 161 Ky. 477, 170 S. W. 1185; *Grace v. Taylor*, 1 Bibb, 430), the remaining questions presented in the record are not determined, because the court had not jurisdiction of the appellant, and it will be properly before the court below only after the return of this cause to that court.

The judgment is therefore reversed, and the cause remanded, with directions to set aside the judgment and for other proper proceedings.

FIRST NAT. BANK'S RECEIVER OF LONDON v. BOREING'S ADM'X.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

BILLS AND NOTES — 96 — CONSIDERATION — COLLATERAL SECURITY.

The delivery to the maker of collateral security is not consideration for the execution of an accommodation note, since, to constitute a valid consideration between the parties to the note, the maker must receive something else than the mere chance of not losing if he be called upon to pay the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. — 96.]

Appeal from Circuit Court, Laurel County. Action by Fred W. Weitzel, receiver of the First National Bank of London, Ky., against J. M. Boreing's administratrix. Judgment for defendant approving a commissioner's report, and plaintiff appeals. Affirmed.

Hazlewood & Johnson, of London, for appellant. Williams & Johnson, of London, for appellee.

CLAY, C. The First National Bank of London, Ky., brought suit against J. M. Boreing's administratrix to recover on several notes and for a settlement of his estate. Some time thereafter the bank was closed by an order of the Comptroller of the Currency and placed in the hands of Fred W. Weitzel, receiver, for the purpose of winding up its affairs. About 11 months after his appointment the receiver presented as a claim against J. M. Boreing's estate a note for \$3,260, dated November 13, 1911, and executed by J. M. Boreing to the bank. The claim was referred to the master commissioner of the Laurel circuit court to hear proof and report on its validity. After hearing the evidence the commissioner made the following report:

"The commissioner finds from the evidence that the note for \$3,262, dated November 13, 1911, No. 2530, signed by J. M. Boreing and filed by the claimant herein, was given without any valuable consideration; that it was made as an accommodation to the First National Bank of London, Ky.; that J. M. Boreing received nothing for the execution of said note; that same is not a legal claim against the estate of said J. M. Boreing, and it is disallowed."

The receiver's exceptions to this report were overruled, and the report approved. The receiver appeals.

The facts with reference to the execution of the note in question are as follows: The bank had too much paper of one of its borrowers, and was ordered by the Comptroller of the Currency, or the bank examiner, to reduce the amount of this paper. Thereupon the directors and one outside party executed three notes to the bank for \$2,500 each. These notes were sent to, and discounted by, a Louisville bank. One of the notes was paid, and the amount of the two remaining notes reduced to \$3,262. When these notes became due they were returned to the First National Bank. At that time Mrs. Catching was engaged in building a home, and had on deposit in the bank a sum of money which she was using to pay for the building. Not being in immediate need of her money, she consented for the bank to use it, and the two notes signed by the directors were indorsed to her by the bank, with the distinct understanding, however, that the bank was responsible to her and would furnish her the money on the notes whenever she demanded it. Subsequently Mrs. Catching demanded the money. Not hav-

ing the money on hand, the bank induced J. M. Boreing to execute the note in question, at the same time assuring him that he would run no risk as the notes executed by the directors were perfectly good. Upon the execution of the note by Boreing a portion of the note was placed to the credit of Mrs. Catching. The officers of the bank testified that the notes executed by the directors were supposed to be assigned to Boreing. One of the officers says that the notes were on the desk at the time, and his recollection was that Boreing told Mr. Fitzgerald, the cashier, just to hold them, and Mr. Fitzgerald held the notes, or they were left in the bank. Catching, the president of the bank, says that, in the event Boreing had to pay the note of \$3,262, or any part of it, he was to have as collateral security the notes executed by the directors. It further appears that, while Mrs. Catching got the benefit of the Boreing note in a way, the note was executed for the accommodation of the bank. The two notes executed by the directors were executed with no thought of their ever being paid, and were not carried as assets of the bank. The J. M. Boreing note was carried as an asset of the bank some time, and was then charged off. The witnesses were unable to say that J. M. Boreing knew that his note was executed for the purpose of taking up worthless paper, or that Boreing participated in the fraudulent scheme to increase the assets of the bank.

It will be seen from the foregoing statement of the evidence that the two notes for \$2,500 executed by the directors were payable to the First National Bank and were discounted by a Louisville bank. When the notes matured the Louisville bank demanded payment. The two notes were transferred to Mrs. Catching with the distinct agreement

that they would be taken up and she should be paid her money when she demanded it. When she demanded her money Boreing was persuaded to execute the note in question. Boreing had no dealings whatever with Mrs. Catching. The note which he executed was neither payable to her nor indorsed to her. His transaction was solely with the bank. He was induced to execute the note by the assurance that he would run no risk, as the directors' notes were valid. It is not shown that Boreing gave his note for the purpose of taking up worthless paper held by the bank, or that he was a party to any fraudulent agreement to increase the apparent assets of the bank. While it is true that Mrs. Catching was benefited by the receipt of the proceeds of the Boreing note, the note was not executed for her accommodation. It was executed solely for the accommodation of the bank to enable it to discharge its obligation to Mrs. Catching, and Boreing received no part of the proceeds. There is no claim that Boreing purchased the directors' notes. Boreing was merely supposed to hold these notes as collateral security. Even if the notes had been delivered to and held by Boreing for that purpose, they would not have constituted any consideration for the note which he executed. In order to constitute a valid consideration between the parties, the payor must receive something else than the mere chance of not losing if he be called upon to pay the note. The transaction was neither to the advantage of Boreing nor to the detriment of the bank. He did not gain anything and the bank did not lose anything. Clearly the note was without consideration, and the receiver, who stands in the place of the bank, cannot recover thereon.

Judgment affirmed.

MARKSBERRY v. WEIR.

(Court of Appeals of Kentucky. Jan. 19, 1917.)

1. LIBEL AND SLANDER ¶9(1), 10(6)—WORDS LIBELOUS PER SE—INJURY TO PROFESSION.

Where defendant said of a tobacco grader, an employe of an association, that he also received compensation from a corporation purchasing from the association, such words were actionable per se as imputing unfitness to perform duties and prejudicing him in his trade, and they needed no innuendo to support the action.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80, 90, 96; Dec. Dig. ¶9(1), 10(6).]

2. LIBEL AND SLANDER ¶64—EVIDENCE—ADMISSIBILITY.

Although it is no justification to say that defendant in a slander action merely repeated what he had heard, he can show in mitigation of damages that the rumor was generally known in the neighborhood, although he cannot show in detail conversations with different persons as to the rumor.

[Ed. Note.—For other cases, see Libel and Slander, Century Dig. § 165; Decennial Dig. ¶64.]

3. LIBEL AND SLANDER ¶100(4)—EVIDENCE—ADMISSIBILITY—MITIGATING FACTS.

Mitigating facts may be shown under the general issue in slander as tending to negative the charge of malice and defining the extent of actual damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 250-254; Dec. Dig. ¶100(4).]

4. APPEAL AND ERROR ¶1033(5)—HARMLESS ERROR—INSTRUCTIONS—DAMAGES.

An instruction, that the jury might consider rumors of the same general purport as the alleged slanderous words in mitigation of punitive damages, but not of compensatory damages, while erroneous, was not prejudicial to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ¶1033(5).]

5. LIBEL AND SLANDER ¶124(3)—MALICE—EFFECT ON ALLOWANCE OF DAMAGES.

Since in ordinary slander the question of malice is never submitted to the jury except as to the amount of damages, an instruction requiring the jury to find malice as prerequisite to a verdict for the plaintiff was erroneous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 369; Dec. Dig. ¶124(3).]

6. LIBEL AND SLANDER ¶124(3)—INSTRUCTIONS—WORDS SLANDEROUS PER SE.

In an action for slander by words actionable per se as tending to prejudice the plaintiff in his employment, it was error to instruct the jury that, if it believed that defendant uttered the words and meant to charge or did charge a lack of integrity, a recovery was authorized, as the jury were not to determine his intent, but whether he used the words charged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 369; Dec. Dig. ¶124(3).]

7. LIBEL AND SLANDER ¶38(4)—EVIDENCE—ADMISSIBILITY.

In an action for slander, evidence of what defendant said when before the grand jury was properly excluded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 121; Dec. Dig. ¶38(4).]

Appeal from Circuit Court, Daviess County.

Action by Hiram Marksberry against James Weir. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

W. T. Ellis, J. J. Sweeney, and Little & Slack, all of Owensboro, for appellant. La Vega Clements, Louis I. Igleheart, and Clements & Clements, all of Owensboro, for appellee.

MILLER, J. In this suit for slander by Hiram Marksberry against James Weir, there was a verdict and judgment for the defendant. Marksberry appeals.

The Green River Tobacco Growers' Association is composed of tobacco growers in Kentucky and Indiana; and, through the agency of this association, its members have, for many years, sold their crops of tobacco by "pooling" them with the association. Whenever the pooled tobacco was sold, it was classified and graded by persons skilled in the trade, and known as "graders" who were employed and paid by the association. It was the duty of a grader to fairly and honestly grade the tobacco for the sellers so as to obtain a fair and just price according to its true grade; and it was to the interest of the members of the association to obtain the highest proper grade for their tobacco, and thereby obtain the highest price for it. On the contrary, it would be to the interest of the purchaser to obtain the lowest grade of the same tobacco, and thereby obtain it at the lowest price.

At the times mentioned in the petition, the American Tobacco Company was buying tobacco from the Green River Tobacco Growers' Association, and other like associations in Kentucky and Indiana. The plaintiff Marksberry was employed by the Green River Tobacco Growers' Association as a "grader," at a salary of \$100 per month, and had been so engaged for more than three years next preceding January 1, 1914; and while in this service he was engaged in grading the tobacco which the association had sold to the American Tobacco Company. The petition alleged that, while Marksberry was in that service and while the association was delivering its tobacco to the American Tobacco Company, the defendant, Weir, falsely and maliciously said that:

"Hiram Marksberry, while grading tobacco at Rockport, Ind., for the Green River Tobacco Growers' Association, received \$100 per month from the Green River Tobacco Growers' Association, and at the same time drew \$150 per month from the American Tobacco Company, and that he could prove it."

And that Weir further said:

"He had told the grand jury of Daviess county that Hiram Marksberry, while in the employ of the Green River Tobacco Growers' Association, grading tobacco at Rockport, the year previous, had been receiving \$5 per day from the American Tobacco Company as its grader, and he could prove it."

The petition further alleged that, in making the statements attributed to him, Weir meant to charge that, while Marksberry was employed by the association and receiving a salary from it, he was secretly in the employment of the American Tobacco Company at a salary of \$150 per month, or \$5 per day, for the purpose of grading said tobacco at the lowest grade in order that the American Tobacco Company might obtain the tobacco at a lower price than its actual value, thereby charging Marksberry with having acted corruptly and dishonestly in the performance of his duties as a grader for the Green River Tobacco Growers' Association, and that he had accepted a bribe to betray the association that had employed him. An amended petition further stated that plaintiff was at work for the Green River Tobacco Growers' Association as a grader of tobacco at the time Weir made the statements complained of, and that plaintiff had continued to fill said occupation of grader and to hold himself out for employment as a grader, ever since.

The answer is a traverse of the petition.

1. Appellee insists that the judgment should be affirmed, because the alleged scandalous language is not actionable in the absence of a showing of special damages, which was not attempted.

In *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, 36 L. R. A. (N. S.) 974, Ann. Cas. 1913B, 1151, it is pointed out that slanderous or actionable words are of two kinds: (1) Those that are actionable in themselves, without proof of special damage or injury; and (2) those that are actionable by reason of some actual or special damage or injury sustained by the party slandered. And, in designating the class of words falling within the first class as words actionable per se, the court in *Williams v. Riddle* made the five following specifications: (1) Words, falsely spoken, imputing the commission of a crime involving moral turpitude, for which the party might be indicted and punished; (2) words imputing an infectious disease, likely to exclude him from society; (3) words imputing unfitness to perform the duties of an office or employment; (4) words prejudicing him in his profession or trade; and (5) words tending to disinherit him. In all other cases, spoken words are either not actionable at all, or are only actionable on proof of special damage. *Axton-Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 76, 183 S. W. 269, L. R. A. 1916E, 667.

[1] In view of the fact that Marksberry was a tobacco grader by profession or trade, and was then engaged in employment of that character, it would seem too apparent for serious argument that he brings his case within the third and fourth specifications of the rule above announced. *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432, 14 Ky. Law Rep. 383; *Fred v. Traylor*, 115 Ky. 94, 72 S. W. 768, 24 Ky. Law Rep. 1906; *Spears v. Mc-*

Coy, 155 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033. The words alleged were actionable per se, because they prejudiced Marksberry in his profession and imputed to him unfitness to perform the duties of his employment. Nothing could be more injurious to a grader in the service of the tobacco association than to say of him that he was secretly the paid agent of the American Tobacco Company that was buying tobacco from the association, and whose interest in the grading of the tobacco was sharply antagonistic to the interest of the association. While an innuendo cannot enlarge the meaning of the words spoken beyond their ordinary use and understanding, the words in this case needed no innuendo or inducement to carry the charge of dishonesty against Marksberry in the performance of his duties to his employer. Appellee's motion for a peremptory instruction was properly overruled.

[2] 2. For a reversal it is claimed that the court erred in permitting the appellee and his witnesses, over appellant's objection, to testify that they had heard neighborhood reports and rumors to the effect that appellant was guilty of the charge that had been made by the appellee. There was no error here, since it is well settled in this state that, although it is no justification to say that defendant merely repeated what he had heard, it is competent for the defendant, in an action of this character, to show, in mitigation of damages, that the rumor was generally known in the neighborhood, although he will not be permitted to show, in detail, conversations had with different persons with regard to the alleged rumor.

In the early case of *Calloway v. Middleton*, 2 A. K. Marsh. 373, 12 Am. Dec. 409, Chief Justice Boyle, speaking for the court, said:

"It is perfectly clear that the previous existence of the slanderous report, or the general reputation of the fact, could not amount to a justification of the defendant in reiterating the charge, for every one who gives currency to a slanderous report becomes responsible for its truth; and most certainly neither general report nor general reputation is admissible evidence of the truth of a particular fact. But malice is the gist of the action of slander, and the degree of responsibility of one who publishes slanderous words must be proportioned to the malignity of the motives with which he is actuated in making the publication. Whatever therefore tends to diminish the malignity of the person who utters a slander, though not evidence of its truth, must lessen the degree of his responsibility; and, most indisputably, one who only gives currency to a report, already in existence, cannot be guilty of the same degree of malignity as one who is the prime author or original fabricator of the slander.

"The evidence, therefore, of the previous existence of the slanderous report in question in this case, though not amounting to a justification of the defendant, was admissible in mitigation of damages. The weight of such evidence, and the extent to which it should operate to mitigate the damages, must depend upon the circumstances of the case, and on matters properly and exclusively belonging to the jury to determine, but cannot affect the question of its admissibility. See the case of *Kennedy v. Greg-*

ory, 1 Bin. [Pa.] 85, and the case of *Morris v. Duane* [1 Bin. (Pa.)] 90, in both of which cases a similar question occurred, and was decided in the same way."

Hart v. Reed, 1 B. Mon. 171, 35 Am. Dec. 179; *Nicholson v. Rust*, 52 S. W. 933, 21 Ky. L. Rep. 648; *Nicholson v. Merritt*, 109 Ky. 871, 59 S. W. 25, 22 Ky. Law Rep. 914; *Morgan v. Lexington Herald Co.*, 138 Ky. 637, 128 S. W. 1064; and *Reid v. Sun Publishing Co.*, 158 Ky. 727, 166 S. W. 245—are to the same effect.

[3] 3. Furthermore, mitigating facts may be shown under the general issue, because they would tend to negative the charge of malice and define the extent of actual damages done to the plaintiff. *Hart v. Reed*, supra; *Nicholson v. Merritt*, supra.

In *Nicholson v. Merritt*, supra, the court said:

"The court permitted evidence of general rumor of the plaintiff's unchastity to go to the jury, and gave instruction that such testimony should be considered only in mitigation. This was done under a general denial in the answer of the speaking of the words, and in this respect the case at bar differs from the two cases in which the same appellant was plaintiff, cited supra, in which the answer admitted the speaking of the words, but pleaded a lack of express malice and mitigating circumstances. At common law such testimony might have been introduced under the general issue. *Matthews v. Davis*, 4 Bibb, 173. See, also, 13 Enc. Pl. & Prac. p. 71. Our Code provision (Civ. Code Prac. § 124) which permits the pleading of mitigating circumstances in connection with a plea of the truth of the alleged libel or slander does not seem to us to have changed the common-law rule in this respect, and we think therefore that the mitigating circumstances might properly be shown without a plea setting them forth."

[4] 4. The fourth instruction, however, directed the jury that it might consider these rumors in mitigation of any punitive damages, but that it could not consider them in mitigation of compensatory damages. We do not understand that the rule admitting proof of this character should be confined to the mitigation of punitive damages alone. It should go to the mitigation of damages generally; and, in limiting its effect, as it did, the fourth instruction was erroneous, although not prejudicial to appellant. We have passed upon the question, however, in view of the possibility of another trial.

[5] 5. By the first instruction the court required the jury to believe the words were maliciously spoken before they could find for the appellant; and of this he complains, insisting that this requirement violated the rule laid down in all the cases. The complaint is well founded. In ordinary slander the question of malice is never submitted to the jury except as to the amount of damages. *Newell on Def.* p. 345, § 54.

In *Reid v. Sun Publishing Co.*, 158 Ky.

732, 166 S. W. 247, the rule upon this subject was stated as follows:

"The general rule is that, where the publication is libelous per se, the law presumes malice and authorizes a recovery of punitive damages. *Tanner v. Stevenson*, 138 Ky. 578 [128 S. W. 878], 30 L. R. A. (N. S.) 200; *Pennsylvania Iron Works Co. v. Henry Vogt Machine Co.*, 139 Ky. 497 [96 S. W. 551], 8 L. R. A. (N. S.) 1023 [139 Am. St. Rep. 604, 29 Ky. Law Rep. 861].

"It is not necessary that the publication be made maliciously in order to authorize a recovery of punitive damages. 'If, as a matter of fact, the words published were false, and tended to the injury of plaintiff, and were published recklessly, even without special ill will, defendant is equally guilty, and punitive damages may be recovered.' *Courier-Journal Co. v. Sallee*, 104 Ky. 344 [47 S. W. 229, 20 Ky. Law Rep. 861].

"It must follow therefore that, if the words be libelous per se, it is error for the instructions to require a showing of malice, in order to recover punitive damages, since the malice which the law thus implies is sufficient to authorize such a recovery."

Nicholson v. Merritt, 109 Ky. 869, 59 S. W. 25, 22 Ky. Law Rep. 914, is to the same effect.

[6] 6. The first instruction further authorized a recovery in case the jury should believe from the evidence that the defendant uttered the words charged in the petition, and meant thereby to charge, and did charge, the plaintiff with a lack of integrity, or having acted corruptly or dishonestly in the performance of his duties as a grader, and that the plaintiff had accepted a bribe. In putting this qualification upon appellant's right to a recovery, the first instruction was erroneous. The words charged being actionable per se, it was not for the jury to say what the defendant meant by making the charge; its only duty, in this respect, was to say whether he made the charge. The absence of actual intent to injure furnishes no legal excuse. *Newell's Slander & Libel*, 270, 275; *Nicholson v. Merritt*, 67 S. W. 5, 23 Ky. Law Rep. 2281; 25 Cyc. 371.

In *Triggs v. Sun Printing & Publishing Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 108 Am. St. Rep. 841, 1 Ann. Cas. 326, where a newspaper stated that Prof. Oscar Lovell Triggs, of Chicago University, was illiterate, uncultivated, coarse, and vulgar, with sensational, absurd, and foolish ideas, that he was egotistical and conceited in the extreme, and made himself ridiculous in his method of instruction, and by his public lectures, and that he was unable to name his baby until after a year of solemn deliberation, it was held to be no defense that the publication was made in jest.

[7] Evidence as to what defendant said when he testified before the grand jury was properly excluded.

For the errors contained in the first instruction, the judgment is reversed, and the cause remanded for a new trial.

RAY v. STATE. (No. 4311.)

(Court of Criminal Appeals of Texas. Dec. 20, 1916. Rehearing Denied Jan. 17, 1917.)

1. CRIMINAL LAW ~~451~~(3)—EVIDENCE—CONCLUSION OF WITNESS—ADMISSIBILITY.

A witness may testify, in a prosecution for murder, that another was mad, from his tone of voice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1041; Dec. Dig. ~~451~~(3).]

2. CRIMINAL LAW ~~1091~~(4)—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill, showing that accused objected when the state asked one of its witnesses to state if he heard accused say anything as to deceased, and the witness answered that he did not know whether he referred to deceased, but that he said if he did not get him to-night, he would get him to-morrow, that being the substance of the whole of the bill, except the objections that such evidence failed to show that accused was talking of deceased and it was prejudicial to his rights, is insufficient to present a question for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2816, 2831, 2832, 2931-2933; Dec. Dig. ~~1091~~(4).]

3. HOMICIDE ~~163~~(2)—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, it was proper to exclude questions whether deceased did not inquire where he could get whisky, and if he did not drink quite a lot on the evening of the murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 312-317; Dec. Dig. ~~163~~(2).]

4. HOMICIDE ~~163~~(2)—DISPOSITION OF DECEASED—EVIDENCE—REOTENESS.

Though witnesses stated that they got acquainted with deceased 15 or 20 years before, but did not state what his reputation was at that time, their evidence was not inadmissible as too remote.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 312-317; Dec. Dig. ~~163~~(2).]

5. CRIMINAL LAW ~~829~~(5)—INSTRUCTIONS—PROVOKING DIFFICULTY—INSTRUCTION ALREADY GIVEN.

Where the court submitted self-defense fully and completely, but did not limit the defense by reference to provoking difficulty, and there was no objection to his charge, it was not error to refuse a special charge that the fact that accused carried his razor with him to deceased's wagon did not abridge his right of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ~~829~~(5).]

6. CRIMINAL LAW ~~1144~~(18)—APPEAL AND ERROR—PRESUMPTIONS.

Where the record shows that on motion for new trial the court heard evidence as to newly discovered testimony, but does not show what the evidence was, the court, on appeal, must presume that he was clearly authorized to refuse new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3036; Dec. Dig. ~~1144~~(18).]

Appeal from District Court, Titus County; J. A. Ward, Judge.

Tom Ray was convicted of murder, and he appeals. Affirmed.

John A. Cook and T. C. Hutchings, both of Mt. Pleasant, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder, and his punishment assessed at seven years in the penitentiary.

Appellant and deceased lived near neighbors and had been friendly until just a few days before appellant killed deceased. The road from town to deceased's passed by appellant's. In going from town home deceased had to pass along this road. The Sanders were renters of deceased, and also lived near. A few days before the killing a horse of the Sanders had died, and they and appellant buried it in a branch, on which deceased had a sorghum mill, and it was necessary for him to use the water from this branch in connection with making sorghum. The dead horse greatly polluted the water. Deceased instituted a criminal prosecution against the Sanders for burying said horse where they did. They told appellant that deceased had also prosecuted him for the same thing. This greatly incensed appellant and made him mad at deceased. Appellant went to town with the Sanders on Saturday evening before the killing that night. The deceased and his two grown sons were in town also that evening. Appellant learned deceased was in town, and, according to the state's testimony, hunted him up and had a talk with him, wherein he accused deceased of prosecuting him about said horse, which deceased denied. As a matter of fact, deceased had not prosecuted him, but had instituted criminal proceedings against the Sanders. At this time appellant cursed deceased, according to the state's witnesses, and said to him: "You G—— d—— son of a b——. I will see you to-night"—and, it seems, had his open knife in his hand at the time. Thereupon one of the Sanders who was with him told him not to do that, and he desisted. Another state's witness, in substance, testified that appellant on this occasion said: "If I don't get him to-night or this evening, I will get him to-morrow." Soon afterwards, and before night, appellant went home. Deceased and his two sons did not leave town for home until night. The state's witnesses testified that as deceased and they were passing appellant's house going home that night, appellant halted deceased, had him to stop, stating he wanted to see him. He got his razor out of his trunk at the time, and took it with him when he went down to see deceased. That appellant again accused deceased of prosecuting him about said horse, which deceased denied; and that, without deceased doing anything, appellant put one foot up on the hub of the wagon, got up, caught deceased with his left hand, and with his right cut deceased's throat from ear to ear with the razor, from which deceased died

in a few minutes. Deceased's wagon then went on home. Appellant returned to his house, waited a few minutes, went to the Sanders', and in going threw away his razor. He had the Sanders to telephone for the sheriff to come and get him. According to the appellant and his wife and mother's testimony, deceased called appellant out to his wagon, stating that he wanted to see him, and appellant acted and cut deceased's throat in self-defense. His self-defense was submitted fully in the court's charge to the jury, and, with ample evidence to sustain the finding, the jury found against him on this issue.

[1] Appellant has several bills of exceptions to the admission and exclusion of very brief portions of testimony. It is unnecessary to take them up separately. A witness may testify that another was mad, from his tone of voice. 1 Branch's An. P. C. pp. 73, 74.

[2] Appellant has a bill showing he objected when the state asked one of its witnesses to state to the jury: "If you heard him say anything in reference to Mr. Daniels, tell what it was." To which question and answer he objected, and the witness answered: "Well, sir, I don't know if it was Mr. Daniels he was talking about or not; but I heard him say that if he didn't get him to-night or this evening, he would get him to-morrow."

This is, in substance, the whole of the bill, except his objections, which were because same did not show that the defendant was talking about deceased, and it was prejudicial to his rights and inadmissible. The state objects to the consideration of this bill because it is wholly insufficient under the long and well-established rules announced and adhered to by this court to authorize its review. The state's contention is correct. *James v. State*, 63 Tex. Cr. R. 75, 138 S. W. 612; *Conger v. State*, 63 Tex. Cr. R. 312, 140 S. W. 1112; *Ortiz v. State*, 68 Tex. Cr. R. 528, 151 S. W. 1056; *Best v. State*, 72 Tex. Cr. R. 201, 164 S. W. 996; 1 Branch's An. P. C. p. 134, where he collates a very large number of cases. All the circumstances and testimony satisfactorily show that appellant's said statement had reference to deceased and to no one else. *Howe v. State*, 177 S. W. 498, and *Hiles v. State*, 73 Tex. Cr. R. 21, 163 S. W. 717, and cases therein cited.

[3] Appellant has several other very meager and insufficient bills, wherein he complains that the court sustained the state's objection when he asked several witnesses if deceased, on the evening when he was in town, did not inquire of them where he could get some whisky, and if deceased did not drink quite a lot. The court's action was correct in all these matters.

[4] Appellant introduced several witnesses, who testified to deceased's bad reputation as a violent, quarrelsome, and dangerous man, going back in that respect, it seems, some 15 or 16 years. The state on this point in-

troduced among others, two witnesses. Appellant's bills complain of the testimony of these two witnesses. The bill shows, however, that in answer to questions, they stated that they got acquainted with him 15 to 20 or more years before the killing, but neither bill shows that either of said witnesses testified what deceased's reputation was at that time. Hence they present no error.

[5] The court, as stated, submitted appellant's claimed self-defense in a full and complete charge, to which there was no objection, and without in any way charging on provoking the difficulty, or otherwise limiting his said defense. The court, therefore, did not err in refusing to give his special charge, to the effect that he had a right to get his razor and carry it with him to deceased's wagon at the time he killed deceased, and that so doing in no way abridged his right of self-defense. *Williford v. State*, 88 Tex. Cr. R. 396, 42 S. W. 972; *Harrelson v. State*, 60 Tex. Cr. R. 539, 132 S. W. 783; *Holmes v. State*, 69 Tex. Cr. R. 588, 155 S. W. 205; *Fox v. State*, 71 Tex. Cr. R. 322, 158 S. W. 1141; *Strickland v. State*, 71 Tex. Cr. R. 585, 161 S. W. 110; *Carey v. State*, 74 Tex. Cr. R. 117, 167 S. W. 366; *Ford v. State*, 177 S. W. 1176; and the cases of *Crippen v. State*, 189 S. W. 496, and *Marshall v. State*, 189 S. W. 499, recently decided, but not yet officially reported. The argument of the district attorney was strictly based upon the testimony of the case, and he had the right to base his argument thereon.

[6] Appellant in his motion for new trial alleged some newly discovered testimony. The record shows that when the court heard the motion for new trial he heard evidence on this point. What that evidence was is in no way shown in this record. Hence, under all the authorities, this court must presume that the judge was clearly authorized to refuse a new trial on that ground. See the cases collated in *Graham v. State*, 78 Tex. Cr. R. 28, 163 S. W. 726, and 1 Branch's An. P. C. p. 807.

There is no reversible error presented in this case, and the judgment is affirmed.

WELLS v. STATE. (No. 4307.)

(Court of Criminal Appeals of Texas. Dec. 13, 1916.)

Appeal from District Court, Burnet County: N. T. Stubbs, Judge.

D. W. Wells was convicted of cattle theft, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The record is before us without a statement of facts or bill of exceptions. Nothing in the record can be reviewed, in the absence of exceptions and the facts. The conviction of appellant for cattle theft will therefore be affirmed.

HARPER, J., absent.

MANICCHIA v. STATE. (No. 4323.)

(Court of Criminal Appeals of Texas. Dec. 27, 1916.)

Appeal from Criminal District Court, Dallas County; R. B. Seay, Judge.

Lee Manicchia was convicted of aggravated assault, and he appeals. Reversed and remanded.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$25.Appellant was tried in the criminal district court of Dallas county; a jury of 12 men being impaneled. The verdict was returned by 11 of the jurors—one of the jurors, J. R. Bell, refusing to concur in or sign the verdict. This question was recently before this court in *Cortone-lia v. State*, 189 S. W. 139, and *Renfro v. State*, 189 S. W. 137; and for the reasons stated in these cases this case must be reversed and remanded.

The judgment is reversed, and the cause remanded.

FREEMAN v. STATE. (No. 4321.)

(Court of Criminal Appeals of Texas. Dec. 27, 1916.)

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Oscar Freeman was convicted of assault with intent to murder, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. From a conviction for assault to murder appellant has appealed to this court.

The record contains neither a statement of facts nor bill of exceptions; nor does it contain a motion for new trial. As the record is presented, there is nothing to review, and the judgment is ordered to be affirmed.

FIRST STATE BANK OF TEAGUE v. HARE et al. (No. 7654.)

(Court of Civil Appeals of Texas. Dallas. Dec. 9, 1916.)

1. BILLS AND NOTES — ACCOMMODATION MAKER—RIGHT TO RESCIND.

An accommodation maker of a note had the right, at any time before the payee bank advanced money thereon, to withdraw from and rescind his engagement evidenced thereby.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 63; Dec. Dig. —49.]**2. BILLS AND NOTES — RELEASE—EFFECT ON COSURETY.**

Where one of two accommodation makers of a note before the payee bank had advanced money thereon notified the bank that he desired to withdraw from the note, he did not become a cosurety upon the note, and his release did not release the other accommodation maker.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 71; Dec. Dig. —52.]**3. PRINCIPAL AND SURETY — DISCHARGE OF SURETY—EFFECT ON COSURETY.**

The release of one of two accommodation makers on a note after he had become a cosurety would not release the other accommo-

dation maker, as it would in no manner impair his right of contribution.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 624-626; Dec. Dig. —195.]

Appeal from Limestone County Court; G. W. Fryer, Judge.

Action by the First State Bank of Teague against R. P. Hare and others. From a judgment for plaintiff against named defendant, but for the other defendants, plaintiff appeals. Reformed by rendering judgment against defendant J. R. Thomas, and as reformed affirmed.

See, also, 152 S. W. 501.

D. T. Garth, of Teague, for appellant.

RASBURY, J. Appellant sued appellees, Hare, Thomas, and Stewart, upon their joint and several promissory note. There was jury trial. Verdict was for appellant against Hare and in favor of Thomas and Stewart. Judgment was in accordance with the verdict, from which appellant prosecutes this appeal.

The following facts in support of the verdict of the jury are deducible from the evidence: On May 22, 1909, R. P. Hare, J. R. Thomas, and W. F. Stewart, each as principal, signed a promissory note in usual form by which they agreed jointly and severally to pay to the order of appellant \$200, with interest and attorney's fees, etc. Other provisions unnecessary to detail were part of the note. The note was first signed by Hare. He then requested Thomas to sign, which Thomas did unconditionally. He next requested Stewart to sign, which he also did unconditionally. While both Thomas and Stewart signed the note unconditionally and it recited they were principals, they were in fact accommodation makers. Within an hour or two after signing the note Stewart called at the bank, and inquired of the president if any money had been advanced Hare on the note. Being informed that none had, he advised the president that he desired to withdraw from the note and not to advance any money thereon on his signature. The president agreed not to do so. On the same day, at about 3 o'clock in the afternoon, Stewart informed Thomas of what he had done. Immediately thereafter Thomas communicated with the president of the bank by telephone that he would also not be bound on the note. He was told by the president of the bank that the bank had advanced the money. When Thomas signed the note he was not informed that Stewart was to sign, nor did he sign on condition that Stewart would sign. After several extensions of the note appellant filed suit on same against Hare, Thomas, and Stewart, with the result stated.

It is proper to state that the president of the bank, with whom Stewart and Thomas

had their interviews, testified that he had no recollection of the matters about which each testified. It is also necessary to state that the amount of the principal is not shown in the copy of the note copied in the statement of facts, but all the witnesses testify it was originally for \$200, and we assume such to be true.

[1] The trial judge instructed the jury if appellant released Stewart upon the note, without the knowledge and consent of Thomas, that then they should return verdict for Thomas. The action of the court in that respect is the single issue presented by the record. Stewart, being an accommodation maker, had the right, at any time before the note passed into the hands of a holder for value, to withdraw from and rescind his engagement evidenced thereby. Appellant, the evidence shows, had paid no money thereon when Stewart notified its president he would not be bound, and hence was not a holder for value.

[2] Appellee Thomas, who has not favored us with brief, but as indicated by his pleading in the court below, maintained further that when Stewart withdrew from the note it had the effect of releasing him as well. Such also was the opinion of the trial judge. It may be that, nothing more being shown, the release of one joint maker after delivery of a note for value would also release other joint makers, but we conclude that such a case was not presented upon trial of this cause, and that it is not necessary to decide that question. The pleading and proof here show that both Thomas and Stewart were in fact sureties, and had the consequent right, as we have indicated, to withdraw from the obligation at any time before appellant advanced the money thereon. This Stewart did. Thomas, however, according

to his testimony, did not notify the bank of his intention to withdraw until the money was advanced on the note, and as a consequence he was not released unless his obligation was in some way dependent upon that of Stewart. Such does not appear to be true, since he testified that he signed the note unconditionally; that is, he did not sign it on condition that Stewart would also sign. Thus when the bank advanced Hare the money after Stewart had withdrawn from the note, such act did not impose upon Thomas any greater obligation than he originally undertook, but left his obligation precisely as it was. No question of cosureties and their consequent right of contribution arises, for the reason that Stewart withdrew from the note before he ever became a cosurety.

[3] Even had Stewart become in law a cosurety, his release would not release Thomas, since it would have in no manner impaired any right of contribution. *Bridges v. Phillips*, 17 Tex. 128; *McIlhenny v. Blum*, 68 Tex. 197, 4 S. W. 387; *Clifton v. Foster*, 20 S. W. 1005; *Merchants' Nat. Bank v. McNulty*, 31 S. W. 1091. However, we are not to be understood as holding that Stewart was a cosurety of Thomas. The appellant having been notified by Stewart, an apparent joint maker, that he was in fact a surety and desired to withdraw from the note, and the appellant having, with such notice, advanced the money on the note, the trial court properly went into the real contract of the several parties; and, it having developed that the money was advanced in compliance with Thomas' contract, we conclude he is bound thereon. Accordingly, it becomes our duty to reform the judgment so that appellee Thomas shall be bound for the amount of the note, interest, and attorney's fee.

As reformed, the judgment is affirmed.

TYLER et al. v. MCCHESNEY. (No. 624.)

(Court of Civil Appeals of Texas. El Paso.
Dec. 7, 1916. Rehearing. Denied
Jan. 11, 1917.)

1. PARTNERSHIP ⇨336(2) — SUIT FOR DISSOLUTION AND ACCOUNTING—EVIDENCE.

In a partner's suit for dissolution and accounting, the court properly refused to permit defendants to offer in evidence a trial balance made from the firm's books, which would simply show that the books were in balance or out of balance, and would not properly show net profits.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. ⇨336(2).]

2. APPEAL AND ERROR ⇨926(4)—BILL OF EXCEPTIONS—EXCLUSION OF EVIDENCE—PRESUMPTION.

On appeal in a partner's suit for dissolution and accounting, where defendants' bill of exceptions, to the court's refusal to permit them to offer in evidence a trial balance made from the books of the firm, fails to incorporate the trial balance, the Court of Appeals cannot presume that it would have thrown any light on the subject-matter of the inquiry, the net profits of the firm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2899; Dec. Dig. ⇨926(4).]

3. EVIDENCE ⇨266—CONVERSATION OUTSIDE HEARING OF PARTY.

A conversation between third parties, outside the hearing of plaintiff, ordinarily would not be admissible in evidence against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1051, 1052, 1054-1056, 1058-1060; Dec. Dig. ⇨266.]

4. PARTNERSHIP ⇨328(2)—SUIT FOR DISSOLUTION AND ACCOUNTING—EVIDENCE—MATERIALITY.

In suit for dissolution and accounting by a partner, testimony as to a conversation between a witness and the federal district attorney, who came to investigate the firm's mode of doing business, and who informed the partners that they must do certain things to free themselves from liability to prosecution, was immaterial to any issue.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 780; Dec. Dig. ⇨328(2).]

5. EVIDENCE ⇨471(2)—CONCLUSION OR FACT.

In a partner's suit for dissolution and accounting, where all the books of the firm were offered in evidence, and the court permitted plaintiff, who was a bookkeeper, and other bookkeepers, and also a defendant on behalf of defendants, to explain the purpose of each and every book, and to explain the accounts kept therein, the court properly excluded a general question to a defendant as to what books he went to for a true criterion and guide as to actual cash received and paid out.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2160; Dec. Dig. ⇨471(2).]

6. APPEAL AND ERROR ⇨232(2) — RESERVATION OF GROUNDS OF REVIEW — OBJECTION TO TESTIMONY.

Where the bill of exception to the admission of testimony shows that the objection thereto urged in the trial court was entirely different from the objection urged in the brief, the assignment will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. ⇨232(2).]

7. TRIAL ⇨260(1)—INSTRUCTIONS—REQUESTS—REPETITION.

Where a phase of the case is sufficiently covered by the court's charge, the refusal of a requested special charge on the matter is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⇨260(1).]

8. APPEAL AND ERROR ⇨1068(5)—HARMLESS ERROR—REFUSAL TO CHARGE.

In a partner's suit for dissolution and accounting, where the jury found a charge against plaintiff for the actual cost of doing the clerical work he was supposed to do under the partnership agreement, the refusal to defendants of a requested special charge, instructing that if plaintiff voluntarily left the firm's office, and, under the articles of partnership, he was to keep the books of the company, and, by reason of his failure to do so, it became necessary to have the same done, plaintiff was chargeable with the amount expended, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇨1068(5); Trial, Cent. Dig. § 475.]

9. PARTNERSHIP ⇨333—ACCOUNTING—INDIVIDUAL EXPENSES OF PARTNERS.

In a partner's suit for dissolution and accounting, two cash items, one representing attorney's fees paid for answering in a garnishment suit against defendant partners individually, and the other representing traveling expenses of a defendant on his individual business, were not chargeable against partnership funds.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 792-796; Dec. Dig. ⇨333.]

10. PARTNERSHIP ⇨842—ACCOUNTING—SUFFICIENCY OF VERDICT—CERTAINTY.

Verdict for plaintiff for a third interest of the realty and personalty of the firm, and for a fourth interest in the total net profits, found to be \$19,631.30, subject to a deduction against him of \$709.90, was not insufficient as vague and indefinite.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. ⇨342.]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Suit by A. S. McChesney against J. L. Tyler and another. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

G. H. Culp, of Gainesville, Jno. B. Howard, of Pecos, and E. C. Canon, of Waco, for appellants. Clay Cooke, of Pecos, for appellee.

HIGGINS, J. McChesney brought this suit to dissolve the partnership theretofore existing between himself and appellants, J. L. and R. P. Tyler, doing business under the firm name of Southern Land Development Company; McChesney having a one-fourth interest in the firm, the appellants jointly owning the other three-fourths interest therein. The appointment of a receiver and an accounting of the partnership affairs was also sought.

The Southern Land Development Company was originally organized by McChesney, Brooke Smith, and the Tylers; each having a fourth interest therein. Its business was to cut into town lots certain acreage property and sell same. Subsequent to its organ-

ization, J. L. Tyler acquired the Smith interest. The books of the partnership consist of a ledger and a contract register. The contract register contained the accounts of the various purchasers of lots from the company. In it would be entered the name of the purchaser, his address, number of contract, and payments made by him. The lots were sold on payment of \$10 cash and \$10 per month until \$170 had been paid. The register also showed the amount of agent's commissions paid out of each purchase. This was the only record the company had with its customers and agents, and it was testified to by all parties that it was correct; none of such accounts being in the ledger proper. The ledger proper showed other accounts, viz. the accounts of the individual partners, interest and discount account, furniture and fixture account, expense account, real estate account, and other items outside the sale of lots, which, as stated above, were shown only in the contract register. Both the contract register, showing said receipts, and the ledger, showing all other accounts, were offered in evidence. The totals of the various accounts are testified to and are not disputed, and a summary thereof appears in the statement of facts and is taken as correct by the parties.

The items of the accounts disputed by McChesney were numerous, but on the proof only a few were considered. First, McChesney claimed that \$5,888 paid by the firm to the Tylers as bonus on land conveyed by them to the firm was excessive. Another disputed item was the charge of \$1,400 against McChesney which was charged to him as expense for clerical hire after the dispute between the parties arose and McChesney left the office and a clerk was hired to do the clerical work which he had been doing. Another item was \$250 paid to attorneys for answering in a garnishment suit at Brownwood, Tex. An item of \$50 paid to one Walter Browning, and another item of \$83.70 paid to J. L. Tyler for traveling expenses. All of the witnesses testified to the total amounts of the various accounts in the ledger, and their testimony is not in conflict; but none of the witnesses testified to the receipts as shown by the contract register except McChesney, and his testimony is not disputed.

It appears that the defendants were attempting to settle upon the basis of the amount of money that the firm had in bank, rather than upon the basis of the receipts shown by the contract register. The real issue between the parties was as to the total receipts of the partnership, there being no dispute as to the amount of disbursements except the above items particularly mentioned, and appellants claim that the amount in bank showed the correct net receipts, while McChesney claimed that the contract register showed vastly more receipts than were accounted for by the cash in bank and the

total disbursements as shown by the ledger; there being a variance of \$11,000 or more. The jury returned a verdict in favor of McChesney for a one-fourth interest in the real and personal property of the firm, a one-fourth interest in the net profits which it found to be \$16,958.30. They further found the difference between the cash market value of the real estate sold to the firm and the amount they received from the firm for the same to be \$2,673, which they added to the net profits, making a total net profit of \$19,631.30. One-fourth of this amount, to wit, \$4,907.82, was due McChesney, from which they deducted a charge against McChesney of \$709.90, leaving the net amount due him to be \$4,197.92, which amount they found for him, and for which amount judgment was rendered in his favor, together with a one-fourth interest in the real and personal property of the firm.

[1] Error is first assigned to the court's refusal to permit appellants to offer in evidence a trial balance made from the books of the company. In this there was no error. The issue to be determined was the net profits of the partnership. A trial balance would not show this. A trial balance simply shows that the books are in balance or out of balance as the case may be. It would not properly show net profits. The proper way to obtain the amount of the net profits was to ascertain the company's gross receipts and deduct therefrom all proper disbursements and charges. This a trial balance would not show.

[2] Furthermore, the bill of exception fails to incorporate the trial balance, exclusion of which is complained of, and this court has no way whatever of determining what the trial balance showed. We cannot presume or assume that it would have thrown any light upon the subject-matter of the inquiry, for, as stated, a trial balance, ordinarily, would not do so.

[3, 4] The second and third assignments complain of the court's refusal to permit the witness McAdams to testify that the federal attorney of the Ft. Worth district came out to investigate the Southern Land Development Company's manner and mode of doing business and that they had out their contract, which was a contract to sell a lot and give so many acres of land with each contract, and that at that time they had no acreage save and except a tract cut up into lots, and that the federal attorney informed them it would be necessary to secure acreage property and put it into the name of the Southern Land Development Company; that McChesney was informed of this matter and of what the federal attorney had said and was aware and knew that, unless such acreage property was secured, all the members of the partnership were liable to prosecution. In the first place, a conversation between McAdams and the federal district attorney, outside the hearing of the plaintiff, ordi-

narily would not be admissible in evidence against McChesney; but, aside from this consideration, it is not apparent how the facts which the witness sought to detail would in any wise affect McChesney's right to an accounting, and has no bearing whatever upon the issue as to the amount of the net profits to which he was entitled. The proffered testimony was wholly immaterial to any issue in the case.

[5] R. P. Tyler, while testifying in his own behalf, was asked by his counsel this question:

"When it becomes necessary to go into your books, the system of bookkeeping that was carried on there, to get a true system (criterion) of actual cash received and paid out, to what books do you go for a true and correct criterion and guide?"

Objection was made by plaintiff, and the witness was not permitted to answer. If permitted to answer, the witness would have stated that he would go to the ledger and cash book to get the actual cash received and paid out. Error is assigned to the exclusion of this testimony. There was no error in the court's action. R. P. Tyler was not a bookkeeper. All of the books of the company were offered in evidence. The court permitted McChesney, who was a bookkeeper, Beauchamp, Browning, C. E. Tyler, and McAdams, all bookkeepers, and also R. P. Tyler, upon behalf of appellants, to explain the purpose of each and every book and to explain the accounts kept therein. It was therefore not error to exclude a general question calling for a mere conclusion of R. P. Tyler as to what book he would look to in order to ascertain the amount of cash received. His conclusion might have been an entirely erroneous one. In fact, it clearly appears that it was so.

[6] Error is assigned to the admission of testimony of the witness J. W. Moore as to the value of certain lands. The bill of exception taken to the admission of his testimony shows that the objection urged in the lower court is entirely different from the objection urged in the brief, for which reason the objection presented under this assignment is overruled.

[7, 8] Error is assigned to the refusal of

the court to give a requested special charge instructing the jury that if the plaintiff voluntarily left the office of the copartnership, and if they found from the evidence that under the articles of copartnership plaintiff was to keep the books of the company, and by reason of his failure to do so it became necessary to have the same done, then, for any amount so expended for such work, they would find the same to be a valid charge against the plaintiff. The court's charge sufficiently covered this phase of the case. Furthermore, the jury found a charge against him for the actual cost of doing the clerical work that he was supposed to do under the partnership agreement, to wit, the sum of \$708.90. For the reasons indicated, the refusal of the requested charge presents no error.

[9] The court, in its charge to the jury, instructed it to deduct from the expense account said sum of \$250 paid as attorney's fees for answering a garnishment proceeding at Brownwood, and said sum of \$83.70, traveling expenses of J. L. Tyler, and error is assigned to this instruction. It was a proper instruction. The evidence shows that the \$250 attorney's fees was paid for answering in a garnishment against the Tylers individually, and this was not a proper charge against the partnership. As to the item of \$83.70, the evidence shows that this was traveling expenses of J. L. Tyler, on his individual business, and, of course, that could not be charged against partnership funds.

[10] It is contended that the verdict is vague and indefinite and not responsive to the pleadings, issues, and evidence. It is not pointed out in what particular it is subject to the objection urged, and we think the objections are without merit. The verdict is clearly sufficient and responsive to the pleadings, issues, and evidence.

It is also contended that the verdict and judgment was contrary to the law and unsupported by the evidence. An examination of the testimony shows that the verdict is amply supported thereby, and, under the verdict found, the law was properly applied in the judgment rendered.

Affirmed.

SKEEN v. SKEEN. (No. 7666.)

(Court of Civil Appeals of Texas. Dallas.
Dec. 23, 1916.)

1. INSANE PERSONS — §87—DIVORCE—PROSECUTION BY NEXT FRIEND.

Vernon's Sayles' Ann. Civ. St. 1914, art. 4632, prohibits the granting of a divorce when either spouse is insane, and, where insanity of one of the spouses exists, a next friend, intervening during pendency of the insane spouse's suit for divorce, cannot prosecute it to a termination.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 155; Dec. Dig. —§87.]

2. INSANE PERSONS — §87 — PARTITION OF PROPERTY—SUIT BY INSANE WIFE.

In view of the law recognizing the rights of husband and wife to agree as to the division of their property when living apart or in view of a separation, in a wife's suit for divorce, the court, having jurisdiction of the parties, could take charge of their property and grant partition thereof at the instance of the next friend of the wife, although the wife was insane, so that divorce could not be granted.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 155; Dec. Dig. —§87.]

3. HUSBAND AND WIFE — §278(1)—DIVISION OF PROPERTY — AGREEMENT — ENFORCEABLE CHARACTER.

Where, at the time of a wife's suit for divorce and for division of property, her husband was not contributing anything to her support, and for a long time prior thereto each party had determined not to live together, and an agreement for division of property was entered into by them with the authority of each when the wife was of sound mind, the agreement for division was enforceable in the suit at instance of the next friend of the wife, who had become insane.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1051, 1053; Dec. Dig. —§278(1).]

4. INSANE PERSONS — §94(1)—SUIT BY INSANE WIFE—REPRESENTATION BY NEXT FRIEND.

Where a wife suing for divorce and division of property became insane, no guardian being appointed to represent her, it was proper for her to be represented in her suit by next friend.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. —§94(1).]

Appeal from District Court, Delta County;
A. P. Dohoney, Judge.

Suit for divorce and partition of property by Susan Skeen against W. E. Skeen, wherein J. E. Skeen, as next friend of plaintiff, filed a motion for injunction and judgment dividing the property. From a judgment sustaining defendant's plea in abatement and dismissing the cause, J. E. Skeen, as next friend, appeals. Judgment reversed in part, and case in such respect remanded.

James Patteson, of Cooper, for appellant.
I. B. Lane, of Cooper, for appellee.

RAINEY, C. J. On December 12, 1914, Susan Skeen brought suit against her husband, W. E. Skeen, for divorce and partition of their property. On January 18, 1915, the defendant filed a plea in abatement setting up that plaintiff was insane and could not prosecute the suit. On the day last men-

tioned the court allowed plaintiff allmony in the sum of \$50 per month. On January 20, 1915, plaintiff and defendant, by their attorneys and with their consent, signed and caused to be filed a written agreement partitioning their property. On September 17, 1915, J. E. Skeen, as next friend of plaintiff, filed in said cause a motion alleging that just after signing said agreement plaintiff became insane, and that defendant was collecting the rents from the property so set apart to plaintiff and asked for an injunction restraining defendant from such action and that judgment be entered dividing said property as per said agreement, etc. On October 5, 1915, said J. E. Skeen amended the petition of plaintiff praying for the divorce, setting up the agreement for division of the property, and prayed for judgment. On October 11, 1915, defendant filed his original answer, specially excepting to plaintiff's petition and alleging that plaintiff was insane and could not maintain the suit. On the same day the case was tried and defendant's plea in abatement was sustained and the cause dismissed, and J. E. Skeen, as next friend, appeals.

In passing upon the plea in abatement there were no facts presented other than the allegations of the pleadings, about which there seems to be no controversy, except the defendant contends that Susan Skeen was insane when the agreement for division of the property was made, while the plaintiff contends that at said time she was perfectly rational. The pleadings of plaintiff show that in 1903 Susan Skeen became insane and afterwards in a few months became rational, and in 1906 she was again insane for a few months and again became sane, and then in 1909 she was duly adjudged insane by a court of competent jurisdiction and sent to the asylum for the insane, where she remained until about September 10, 1913, when she became sane and was released from the asylum and returned to Delta county; that she was never kept long in the asylum, except from 1909 to 1913, as aforesaid, and that at all other times she would only be insane for a few months at a time; that from the date of her discharge from the asylum to February 1, 1915, she was sane and perfectly in her right mind, then able to contract. At the time of trying this case she was insane and confined in the asylum. The agreement for division of the property was entered into before February 1, 1915, and shows it to have been filed with the district clerk of Delta county on January 20, 1915.

[1, 2] On September 17, 1915, J. E. Skeen, as next friend for Susan Skeen, filed a motion in the divorce proceeding setting up the different periods of insanity and the lucid intervals, and her insanity and confinement in the asylum at that time, and praying for judgment of divorce separating Susan and

W. E. Skeen, for a partition of their property as per agreement, and that the injunction thereto granted be perpetuated. Susan Skeen alleged sufficient grounds for divorce, but our statutes on divorce, by amendment to article 4632, provide "that this act shall not apply to any case where either the husband or wife is insane." Vernon's Sayles' Civ. Stats. 1914. This provision prohibits the granting of a divorce when either spouse is insane, and we are of the opinion that a next friend, where insanity of one of the spouses exists, who intervenes during the pending of the suit for divorce, cannot prosecute the suit for divorce to a termination. However, in view of our law recognizing the rights of husband and wife to enter into an agreement for the division of their property when living apart or in view of a separation, and the court having jurisdiction of the parties, we see no reason why the court, as alleged in this proceeding, could not take charge of the property and grant a partition thereof at the instance of the next friend of Susan Skeen, who was insane.

J. E. Skeen, the son, made himself a party as next friend and asked that judgment of partition be granted. But the defendant says the agreement for partition was entered into with the view that a decree of divorce was to be granted, and as no decree of divorce was granted the court did not err in rendering a decree for partition and dismissing the case.

[3] Susan Skeen alleged that W. E. Skeen was not contributing anything to her support, and J. E. Skeen, as next friend, alleged in his plea:

"That at the time of the filing of this suit, and long prior thereto, plaintiff and defendant had each and both determined not to live together in life as husband and wife; that the agreement for division was entered into with the authority and consent of each; and that at the time Susan Skeen was of rational and sound mind."

If these allegations are true, we see no reason why the court below should not have enforced the agreement.

In *Rains v. Wheeler*, 76 Tex. 390, 18 S. W. 324, in discussing this subject, Mr. Justice Gaines said:

"All deeds for future separation are held to be absolutely void; but where the spouses have already separated, or have determined upon a separation and are in the act of executing it, a conveyance by the husband intended as a provision for the support of the wife will be upheld. In other respects a deed of separation was held void. This was the carefully restricted doctrine at an early day in the English courts, and as so limited it has been universally recognized in the courts of this country. The tendency of the later English cases is to extend to deeds of separation a more liberal support (1 Bishop on Marriage and Divorce, § 634a), while by the weight of authority in the American courts they are held valid in so far as they settle the rights of property between the husband and wife, provided they have been entered into without coercion or other undue influence, and the provisions are just and equitable. (Cit-

ing authorities.) In most of the cases cited the only interest in property relinquished by the wife in the agreement was her dower in the husband's lands. But we think that, in a jurisdiction where the spouses hold each an equal interest in the property acquired during marriage, the same principle should apply to deeds of separation which make a partition of the common property. Unless against the policy of the law, and on that account void, there is no difficulty in giving effect to the conveyances in the present case."

In *Caffey's v. Caffey's*, 12 Tex. Civ. App. 616, 35 S. W. 738, this court adhered to this doctrine; *Lightfoot, C. J.*, rendering the opinion. In the case of *Crouch v. Crouch*, 30 Tex. Civ. App. 288, 70 S. W. 596, we upheld the same doctrine.

[4] In view of Susan Skeen's condition, it was necessary for her property rights to be protected, and, no guardian being appointed to represent her, it was proper for her to be represented by next friend.

The judgment is reversed as to the action of the court in not passing upon the agreement of division of property, and the case in that respect is remanded.

HOPPING et al. v. HICKS. (No. 1061.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 20, 1916. Rehearing Denied Jan. 10, 1917.)

1. EXECUTION ⇐344—RETURN—COLLATERAL ATTACK.

In a suit by the surety on a secured note, as assignee of the note after payment, seeking payment from the maker and to establish a lien on the chattels mortgaged, the plaintiff, not being a party to the judgment under which the execution was levied upon the mortgaged property, may attack the return on the execution and show that there was in fact no levy or sale thereunder.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1033-1040; Dec. Dig. ⇐344.]

2. CHATTEL MORTGAGES ⇐157(2)—EXECUTION LEVY—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to show a levy of execution thereon before mortgage was recorded under a judgment against the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. ⇐157(2).]

3. EXECUTION ⇐146(2)—LEVY—RETENTION OF POSSESSION BY OFFICER.

The mere fact that a sheriff left live stock in a lot over night after making levy of execution on it, until arrangements could be made to care for it, did not release the levy or make the levy lawfully theretofore made, no levy.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 384; Dec. Dig. ⇐146(2).]

4. EXECUTION ⇐245—SALE—EVIDENCE—SUFFICIENCY.

In a suit by the surety on a secured note, as assignee of the note after payment, seeking payment from the maker and to establish a lien on the chattels mortgaged, evidence held sufficient to warrant a finding that neither the mortgagor nor the plaintiff waived the statutory requirement that property taken under execution must be present and exhibited at the place of sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 681-686; Dec. Dig. ⇐245.]

5. EXECUTION \Leftrightarrow 220—PRESENCE OF PROPERTY—STATUTES.

Under Rev. St. 1911, art. 3760, providing that personal property taken on execution shall be sold on the premises where taken or at the courthouse door or at some other place where it is more convenient to exhibit it to the purchaser, and article 3762, providing that personal property shall not be sold unless present and subject to the view of those attending the sale when it is susceptible of being exhibited, the presence of the property at the sale is only excused when its nature prevents it from being exhibited, and the nature of the premises or the remoteness thereof does not excuse compliance with the statute.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 622-625; Dec. Dig. \Leftrightarrow 220.]

6. EXECUTION \Leftrightarrow 288—SHERIFFS AND CONSTABLES \Leftrightarrow 120—SALE—LIABILITY UNDER A VOID SALE.

Where a sale of chattels taken on execution was void because of failure to comply with the statutes requiring the presence of property at the sale, the sheriff and purchaser at the sale, having wrongfully taken possession of the property over the protest of the owner, were guilty of conversion and liable to parties sustaining damages thereby.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 823-826; Dec. Dig. \Leftrightarrow 283; Sheriffs and Constables, Cent. Dig. §§ 205-218; Dec. Dig. \Leftrightarrow 120.]

7. CHATTEL MORTGAGES \Leftrightarrow 170(2)—RIGHTS OF MORTGAGEE—CONVERSION OF PROPERTY BY EXECUTION CREDITOR.

The purchaser of chattels under void execution sale and the officer conducting the sale, being wrongdoers, are not in a position to demand that the assignee of mortgagee of the property taken look to other property of the mortgagor or to the mortgagor's personal responsibility.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 305; Dec. Dig. \Leftrightarrow 170(2).]

8. SUBROGATION \Leftrightarrow 7(7)—RIGHT OF SURETY.

Where the surety on a note secured by chattel mortgage paid the note, he was subrogated to the rights of a mortgagee under the mortgage and the debt.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 26, 77, 92; Dec. Dig. \Leftrightarrow 7(7).]

Appeal from District Court, Parmer County; D. B. Hill, Judge.

Action by W. E. Hicks against R. C. Hopping and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Patton & Bratton, of Clovis, N. M., J. D. Reese, of Farwell, and Kimbrough, Underwood & Jackson, of Amarillo, for appellants. Russell & Dameron, of Hereford, for appellee.

HUFF, C. J. The appellee, W. E. Hicks, sued V. C. Weir, R. C. Hopping, and D. W. Dunn, alleging substantially that Weir was indebted to the First State Bank & Trust Company of Hereford, Tex., in the sum of \$1,580, and to secure this amount he executed a chattel mortgage to that bank on certain described stock, cattle, sheep, etc., and thereafter paid all of the indebtedness except the sum of \$300, which he borrowed from the Western Bank of Hereford, Tex.; that W. E. Hicks signed this note to the bank as surety on the 10th day of January, 1914, and also

to secure the Western National Bank of Hereford, Weir executed a chattel mortgage to that bank, on certain described property, possibly some of it described in the former mortgage; that thereafter, at the maturity of the notes, Hicks discharged the same and took an assignment of the note; and that afterwards Hopping and Dunn took charge of the mortgage property last mentioned, and converted it to their own use. He sues to recover of Weir the sum of money, together with interest and attorney's fees on the note, and to establish a lien against the property and for the value of the property so converted by Hopping and Dunn.

Hopping and Dunn answered by alleging that one C. S. Fergus obtained judgment against V. C. Weir for the sum of \$130, upon which judgment an execution was issued, and placed in the hands of Hopping, who was the sheriff of Parmer county, and levied on the property in controversy as the property of Weir, and after advertising the same sold it at public sale, and that Dunn became the purchaser thereof, paying \$152.55, which is credited on the judgment, after paying the costs; and also attempted to require the marshaling of assets in the case by setting up the fact that there was \$417 worth of property not included in the last mortgage and levied on by the execution but covered by the first mortgage, asking that the court require that that property be first sold by Hicks under the first mortgage.

The trial court submitted only one issue to the jury, and that was for the jury to find the value of the property sold and purchased by Dunn. This the jury did, finding its value to be \$235. The trial court rendered judgment against Weir in favor of Hicks for the amount of the debt, \$300 together with interest and attorney's fees; established the mortgage against the property described therein and a judgment for \$235 against Hopping and Dunn for conversion, finding that that amount was less than the indebtedness due Hicks.

The facts in this case are sufficient to establish the indebtedness of Weir, as alleged in the petition, and that Hicks paid the amount of the note to the Western National Bank of Hereford, and took a transfer of the note and the mortgage to himself, and that he was a surety on the note. The facts also show that this mortgage was executed on the 10th day of January, 1914, but was not recorded until the 12th. The facts show, also, that the execution on the judgment of Fergus against Weir was placed in the hands of the sheriff on the 10th of January, and that he and his deputy and one of the attorneys of Fergus went to Weir's place to levy on the cattle and purport to have levied the same about 8 o'clock on the 10th. The other facts necessary to an understanding of the ruling

of this court will be noticed in the body of the opinion.

The first assignment presents as error the action of the court in excluding the sheriff's return on the execution issued on the judgment rendered in the case of Fergus against V. C. Weir. The return, in so far as we are able to ascertain, is regular on its face. The objections to its admission were that appellant was not a party to the judgment; that it was not properly identified; that the sheriff made the levy personally and the deputy made the sale; and, further, unless it was shown that the levy was made it was not binding on any one.

The second assignment is to the action of the court in rendering judgment upon appellee's motion therefor for the reason that there was a valid judgment and execution and sale thereunder, at which Dunn became the purchaser of the property in question. It is manifest that the trial court sustained the last objection to the introduction of the officer's return on the execution, that is, there was no testimony showing a levy on the property, and that he rendered judgment against appellants, on the ground that because there was no levy on the property, and because the officer did not have it at the place of sale, the acts of the officer were a trespass and not protected by the writ, and that his failure to have the property present at the place of sale passed no title to Dunn, rendering the whole proceeding with reference to levy and sale void ab initio. The facts in this case raise the issue of the levy being made, which would be sufficient to satisfy the statute relating to such levies. The evidence shows that the sheriff, armed with the writ, accompanied by his deputy and Mr. Bratton, went onto the premises of Weir, the execution defendant; that he counted the sheep levied on and took the description of the other property. He testifies that all the property was in the lot of Weir except one horse, one mare, and possibly one colt, which were out in the pasture. He counted out the stock in the lot, 60 sheep, a horse, a mare, and did not recollect just how many colts. The parties present all assisted in the counting. Weir was not at home when the levy was made, and the sheriff told Mr. Lillard, a son-in-law of Weir, who was present and assisted in the counting, and then on the place, that he would leave the property there until the next day, when Clarke, the deputy, would come out and make arrangements with Mr. Weir to care for them. The next day Clarke, the deputy sheriff, did go and did see Weir, and entered into an agreement with him to care for the stock levied on at his place until after the sale. It is uncontroverted that the sale was advertised to be at the courthouse door of Parmer county, and that the sale was made by the sheriff's deputy at the courthouse door in Farwell, but that the stock or any of them were not present

at the sale; that they were sold for a lump sum, not being sold separately, Dunn being the bidder and purchaser at such sale. After the sale was so made, the sheriff's deputy and Dunn went to the place of Weir, and the deputy there delivered up the property to Dunn; and the evidence is sufficient to warrant the court in finding that Weir did not willingly surrender the property to the deputy or Mr. Dunn, and refused to receive pay for keeping them while awaiting the sale. After Dunn purchased the stock, he disposed of all of them. Some of them were dead, some in New Mexico, and the sheep, it may be inferred, are in the possession of one Mr. Maxwell, near Friona, possibly in Parmer county.

[1] It is contended by the appellant that the return on the execution cannot be attacked collaterally. The appellee Hicks was not a party to the judgment upon which the execution was issued, and may attack, we think, the return thereon, and show in fact there was no levy or sale thereunder. He had no control over the officer and should not be prejudiced by an incorrect or deficient return. This is recognized by our Supreme Court, in the case of *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154, and is expressly so held by the Court of Civil Appeals for the Fifth District in *Holt v. Hunt*, 18 Tex. Civ. App. 363, 44 S. W. 889.

[2] In this case, however, we think the evidence is sufficient to show a levy on the property in question. The stock were all in the lot of Weir, except two or three head, one of which Weir was using. A description of this stock was taken at the time, counted, and a note made thereof. It was levied on late one evening, and the next day arrangements were made with Weir to keep and care for the stock awaiting the sale. The evidence is practically undisputed that Weir consented that the stock should be left in his care; that he would act for the sheriff in their control. If we correctly understand our Supreme Court, this will constitute a levy.

"One object of the levy is to set apart from the effects of the execution debtor a sufficient amount of his property subject to forced sale to satisfy the judgment against him. Another is to secure the property against its disposition by the defendant in the writ during the interval between its seizure and its sale. Since a decree establishing a lien upon certain * * * property and an order directing its sale for the payment of the judgment designates the property to be sold, it is evident that a levy is not necessary for that purpose. In case of personal effects, it is proper for the protection of the plaintiff in the foreclosure decree that the officer should have power to seize and hold the property until a sale can be effected; and, in case the officer fail to exercise such power, and it should be removed before sale, he would doubtless be liable to the plaintiff for any loss which may result from his failure to make the seizure. But it is not perceived that any injury could accrue to the defendant from his being permitted to enjoy the possession of the property until the day of sale." *Patton v. Collier*, 90 Tex. 115, 37 S. W. 413.

[3] While the court in that case was passing upon a levy under an order of sale, it should be noted that the levy and sale thereunder is substantially the same as required under ordinary executions. In that case the officer notified Mrs. Collier that he had the order of sale and had advertised the property for sale and that she could keep it until sale day. He did not take possession of it by seizing it and taking it from her. The sheriff in this case designated the property levied on and left it with Weir to care for it for him, and Weir agreed to do so. This put the property under the control of the sheriff, and he became responsible for the acts of Weir in keeping and caring for the property. The property actually in the lot when levied on was such a seizure and possession as will constitute a levy. The mere fact that it was left in the lot over night, until arrangements could be made to care for, did not release the levy or make the levy lawfully theretofore made no levy. A sheriff should have a reasonable time in which to remove the property or to arrange for its care until sale. The views of this court on this question are expressed in the case of *Burch v. Mounts*, 185 S. W. 889. As to the levy on the horses in the pasture and the one which Weir was riding at the time of the seizure, we do not at this time care to express an opinion as to the levy. "The officer need not in any case take charge of the property in person. He may act through the agency of deputies or keeper, being in either event responsible for their conduct. If he chooses to repose confidence in the defendant, he may appoint him keeper and may leave the property in his custody." 2 *Freeman on Executions* (3d Ed.) § 261. On the question of levy appellee cites the case of *Dickinson v. Mail Pub. Co.*, 31 S. W. 1083. In that case the sheriff declined to seize the property because the plaintiff would not indemnify him and at the sale stated he had refused to take possession of the property and in his return erased the words "taking into my possession." This clearly was not a levy under the statute.

[4] The trial court, in our judgment, was not authorized to exclude the return of the officer; but as we view this record, in the light of other testimony, it becomes immaterial. That this property was not at the place of sale is established without controversy. The evidence is sufficient to warrant the finding that Weir or the appellee did not waive this requirement. Weir objected to the sale and delivery of the stock to Dunn and testified he did all he could, without resorting to force, to prevent Dunn and the deputy sheriff from removing the property after the purported sale.

[5] Article 3760, R. C. S.:

"Personal property taken in execution shall be sold on the premises where it is taken in execution, or at the courthouse door of the county, or at some other place if, owing to the na-

ture of the property, it is more convenient to exhibit it to purchasers at such place."

Article 3762:

"Personal property shall not be sold, unless the same be present and subject to the view of those attending the sale, when it is susceptible of being thus exhibited."

These statutes are clear and unambiguous that the property shall not be sold unless it is present at the sale. A sale made when it is not present is not sale under an execution and the statute. It is contended that the property was poor and weak and could not be moved to the courthouse. The statute provides for this contingency in giving preference to the premises where taken, but it is contended that the premises were remote and in a sparsely settled neighborhood. This does not authorize a sale at another place than those named, or dispense with the presence of the property. The statute will excuse its presence only when the nature of the property prevents its being exhibited. The nature of the premises or the remoteness thereof does not excuse. The statute amply protected the sheriff if he but followed its terms. In *Dickinson v. Mail Pub. Co.*, supra, it is apparently held in order to render an execution sale valid it must be in the possession of the officer and exhibited at the sale.

"A sale of personal property at a place where it cannot be examined and seen is a nullity." *Freeman on Void Judicial Sales* (3d Ed.) § 31; *Kennedy v. Clayton*, 29 Ark. 270.

It was held by the court of appeals, where a sale was made at a place different from the one in the notice of sale, that the sale was an improper one and the officer liable and responsible as a trespasser ab initio; that when he sold unlawfully he lost the protection of the execution, and this was true even though he paid over the proceeds received at the sale. 1 *White & Wilson*, § 399, citing *Freeman on Execution*, §§ 290 and 303.

[6] The Court of Criminal Appeals, in *Floyd v. State*, 68 S. W. 690, held the sale of an estray to be illegal when the animal was not present at the place of sale as required by the civil statutes for the sale of personal property under execution; that such sale will support a conviction for unlawful sale of an estray. However, in that case, the law with reference to the sale of an estray was in other particulars violated. There being no sale, the sheriff had no right or authority to deliver the property to Dunn, especially over the protest of Weir. Having wrongfully taken possession of the property, they were guilty of conversion and liable to the parties sustaining damages thereby.

In examining the authorities, we find that there is some difference with reference to having the property present as to whether the sale would be simply void or voidable, some courts holding them void and others only voidable; but our statutes are so clear and apparently mandatory that we are satisfied that the rule in this state will require

the holding that a sale under such circumstances is void, unless perhaps the defendant waives their presence at the sale. This is not now before us. It seems to be the rule in this state, where a trespasser converts property to his own use, that a mortgagee may sue for and recover its value if it does not exceed his debt.

There being no controversy, or at least such under the assignments and requested instruction that we can take note of, raised by the evidence as to the amount of indebtedness, and the judgment having established the debt and mortgage, we believe the court submitted the only issue raised and properly rendered judgment for the value against the appellants. *Fouts v. Ayres*, 11 Tex. Civ. App. 338, 32 S. W. 435; *Parlin v. Moore*, 28 Tex. Civ. App. 243, 66 S. W. 798.

[7] It is contended that the appellee should be required to look to the other property covered by the first mortgage and not included in the second. The appellants in this case are shown to be wrongdoers, and they are not in a position to demand that appellee look to other properties or to personal responsibility. The judgment does not establish the first mortgage in favor of Hicks, and the evidence will support the finding that he was not subrogated to the right thereunder. *Scallig v. First National Bank*, 39 Tex. Civ. App. 154, 87 S. W. 715. However, it is admitted in this case that Weir was and is insolvent.

[8] The evidence warranted the finding by the court that Hicks was a surety to Weir on the note to the bank; that he paid this amount to the bank, taking a transfer of the note and mortgage at the time of the payment; and that he was thereby subrogated, both in law and by contract, to the rights of the bank under the mortgage and the debt.

We find no error on the part of the court in rendering judgment as he did in this case, and the judgment of the lower court will therefore be affirmed.

BRIGGS et ux. v. McBRIDE et al. (No. 1076.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 27, 1916.)

1. WITNESSES §139(9)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED—"HEIR."

Under Rev. St. 1911, art. 3690, providing that in actions by or against executors or administrators in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the decedent, unless called to testify thereto by the opposite party, and the provisions of the article shall extend to actions by or against heirs or legal representatives of a decedent arising out of any transaction with the decedent, testimony of plaintiffs, and consequently of defendants, in an action against a widow to establish a trust in property held by her in her own

right as survivor of the community and as a vendee of her children, is not inadmissible, since as to community property, the title to which is cast on the survivor by Rev. St. 1911, art. 2469, the surviving widow is not an "heir" of her husband within article 3690.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 590; Dec. Dig. §139(9).]

For other definitions, see Words and Phrases, First and Second Series, Heir.]

2. LIMITATION OF ACTIONS §102(8)—COMPUTATION OF PERIOD—ACCRUAL OF CAUSE OF ACTION—ESTABLISHMENT OF TRUST.

Where plaintiffs, each about 60 years old, advanced \$1,550 to their son-in-law, who contributed \$1,450 for the purchase of real property, which the parties occupied jointly, but through mistake or fraud the deed to the property was taken in the name of the son-in-law alone, and was so recorded, and plaintiffs were frequently informed that the deed was in the name of the parties jointly, and never discovered the error till after the death of the son-in-law, limitations did not begin to run against an action to establish a trust in the land till their discovery of the omission of their names from the deed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502; Dec. Dig. §102(8).]

3. PLEADING §205(2)—DEMURRER—PLEADING GOOD IN PART.

Where a petition to establish a trust stated a cause of action at least as to one-half of 31/60 of the estate claimed by plaintiffs, a general demurrer should not be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 492; Dec. Dig. §205(2).]

4. HUSBAND AND WIFE §248—COMMUNITY PROPERTY—NATURE OF ESTATE.

The community status, like a partnership, has the elements of gains and losses based on the presumed labors of each, irrespective of the real industry of either spouse.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 880; Dec. Dig. §248.]

5. HUSBAND AND WIFE §285—COMMUNITY PROPERTY—MANAGEMENT AND DISPOSITION.

The husband has the real management, disposition, and control of the community estate, with the exception of the conveyance of the homestead, or when the wife is abandoned by the husband, or where the property is conveyed in fraud of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. §285.]

Appeal from District Court, Deaf Smith County; D. B. Hill, Judge.

Action by E. R. Briggs and wife against Lillie McBride and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Russell & Dameron, of Hereford, for appellants. Ben H. Stone and E. T. Miller, both of Amarillo, for appellees.

HENDRICKS, J. E. R. Briggs and O. E. Briggs, husband and wife, sued Lillie McBride, their daughter, on allegations in a second amended original petition, in substance as follows: That on or about April 17, 1909, the plaintiffs and one Louis McBride, their son-in-law, purchased certain residence lots in the town of Hereford, Deaf

Smith county, Tex.; that plaintiffs advanced and paid on said property the sum of \$1,550, and that Louis McBride contributed the sum of \$1,450, a total consideration of \$3,000, paid in cash for the same; that said property was purchased as a home for all of the parties, who took immediate possession, after the purchase, for that purpose. Plaintiffs further aver that the sum advanced by them, \$1,550, was delivered to Louis McBride upon an oral agreement that McBride would use the money for the purchase of the property and take a deed to the same in the joint names of the plaintiffs and McBride, but, through inadvertence and mistake of the scrivener, the names of the plaintiffs were omitted from the deed; that McBride accepted the deed, placing the same of record, and did not know that the names of plaintiffs had been so omitted, but believed that their names had been inserted in said instrument; that McBride informed the plaintiffs that he had taken the deed in the joint names of all the parties, and that all of said parties believed that said deed contained the names of all up to the date of the death of Louis McBride, which occurred on or about March 18, 1913; that McBride repeatedly informed the plaintiffs, and stated to other parties, that they and he were joint owners of the property, and that McBride never in any manner held the property adversely to the plaintiffs or repudiated their claim of ownership. It is also averred that Lillie McBride, the defendant herein, and the daughter of plaintiffs, and Louis McBride, resided together for a number of years, and that plaintiffs had the utmost confidence in the integrity of their son-in-law, and the latter had been intrusted with numerous business affairs of the plaintiffs, and had been "in the habit of conducting plaintiffs' business"; that when McBride informed them the deed had been taken in the joint names of all the parties, they never examined the deed records to ascertain if such were a fact, and never had any notice or knowledge that their names did not appear in the deed until on or about August 15, 1914, after the death of McBride, at which time the plaintiffs discovered the error, and demanded of defendant Lillie McBride a conveyance of their interest, which was refused. Immediately following the allegations expressing the preceding facts, it is alleged:

"Plaintiffs will show that immediately upon making said \$1,550 payment on said property, as aforesaid, they went into possession of the said property and so continued to reside on and possess said property and pay the taxes thereon until some time in the year of 1914, as aforesaid."

There are further averments in the nature of an alternative plea, rather hard to construe the extent and reach of the same, in effect that if at any time Louis McBride discovered the omission of plaintiffs' names from the deed, he expressly stated that such fact was an error in drawing the deed, and

that plaintiffs in fact owned an undivided interest in the property, and that he was holding same in trust for them to the extent of their interest. Following, however, the last averment, it is stated that they never at any time had the deed in their possession, and again repeated that they did not know the contents, and, reposing the utmost confidence in McBride, on account of his information to them as to the nature of the deed, and on account of the fiduciary relationship, they had no reason to disbelieve McBride's statements.

It was also stated "that if McBride intended to take said deed in his name, for the purpose of defrauding these plaintiffs, they never had any notice of the same until about August 14, 1915, and that they were prevented from learning of such facts by reason of the concealment and misstatements of said McBride," and relied on the same and had no reasonable way of learning to the contrary.

It was averred that Louis McBride left surviving him "as his sole and only heirs, the defendant herein Lillie McBride and two children, Clara McBride and L. E. McBride. Thereafter, about August 1, 1914, the said children * * * by duly executed deed, conveyed their interest in said property to the defendant herein Lillie McBride."

The trial court sustained a general demurrer to plaintiff's petition and two special exceptions, respectively setting up the two and four years' statutes of limitations.

As affecting the nature and character of the estate and the source of title charged in the petition, as held by Lillie McBride, we think, in legal effect, the same is averred as follows: That plaintiffs furnished $\frac{31}{100}$ and their son-in-law Louis McBride $\frac{29}{100}$ of the purchase money of the property upon an oral agreement for the joint acquisition of same; that upon the death of Louis McBride the legal title only to one-half of this $\frac{29}{100}$ of said property was in the wife after the death of Louis McBride, in her own right, subject to proper proof affording a divestiture. This results because the property is presumptively community. If it had been community property without any charge of an equitable estate, the children would only have succeeded to one half, with the other half vesting in the wife by virtue of the community principle, and Rev. St. art. 2469, casting on the survivor one half of said community estate.

[1] It is insisted, and seriously argued, in this cause that the plaintiffs' second amended original petition discloses upon its face that the trust sought to be established by the plaintiffs in error must be established by their testimony as to statements made by them to Louis McBride, and by the latter to them, which, under article 3890 of the Revised Statutes would be inadmissible.

"In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither

party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." Article 3960.

We cannot conceive that the learned trial judge sustained the general demurrer upon such a theory. The petition does not negative, nor does it disclose, wholly the source of the proof to sustain the alleged equitable estate. Neither do we see how a trial judge could anticipate that either party would not call the 'opposite party to the witness stand.

In view of the above analysis of the status of the estate charged in the petition as being claimed by Lillie McBride, and on account of another trial, we hold, in the condition of this record, the plaintiffs' testimony, and consequently defendant's, would be admissible. *Wootters v. Hale*, 83 Tex. 563, 19 S. W. 134; *Harris v. Warlick*, 42 S. W. 356; *Evans v. Scott*, 97 S. W. 117; *Edwards v. White*, 120 S. W. 916; *Harry v. Hamilton*, 154 S. W. 637; *Field v. Field*, 39 Tex. Civ. App. 5, 87 S. W. 726; *Wilmoth v. Tompkins et al.*, 58 S. W. 893.

As to the particular property claimed in the petition, though stated that Lillie McBride is an heir, she was not an heir of her husband in a strict sense of heirship to the one-half of the 31/60 of said estate though title was cast by article 2469. The action is not against her as executrix or administratrix, nor is she asserting any right to the property as the heir of her deceased husband; neither is it shown that she was administering their community estate under the statute as his surviving wife. As a vendee from the children of the legal title to one-half of the 31/60 of said alleged trust estate, she was in the attitude of a purchaser.

The condition of the title, upon this record, as it would have been litigated upon the pleading, was one in Mrs. Lillie McBride, in her own right: First by virtue of her half of the community; and, second, as a vendee from the children. Some of the above authorities hold, and the others are persuasive, that testimony to establish such a claim, when such a condition is disclosed, is not excluded by the terms of the statute mentioned.

[2] On account of the averments of the petition it may be a little difficult to properly characterize the nature of the trust charged against the estate in question, though probably it should be designated as a constructive trust. The oral agreement to jointly acquire the property and to have the conveyance express the joint interest, was not fulfilled, either by mistake or inadvertence of the scrivener, or fraud by Louis McBride. There are some general expressions in the opinions that the statute of limitations begins to run from the time that a constructive trust, or one

ex maleficio, was created. However, such a rule is subject to exceptions, and this case would illustrate an exception. The relationship of the parties; the age of the beneficiaries, about 60 years; the management of plaintiffs' business by the son-in-law; the trust and confidence reposed in him by them; the reliance by them upon his statements; their joint residence on the property with the son-in-law to the time of his death, and inferably with the daughter after his decease; and such confidence and trust remaining until the actual discovery in August, 1914. It may be that the allegations of excuse in detail are not quite as full as careful pleading should dictate, but we think they are full enough against a general demurrer.

If a plaintiff's claim of the land is against the possessor of a legal title as held in constructive trust for his benefit, it may be that the defendant may argue that the statute of limitations applies from the time of the creation of the trust, without showing that he has repudiated the trust. *Oaks v. West*, 64 S. W. 1034. However, if plaintiffs show that, without fault on their part, they are ignorant of facts on account of having been lulled into security, the statute would not apply. The ordinary rule is:

"If * * * the act of the trustee is not inconsistent with any right of the beneficiary which is known to the latter, then there is not cause for his bringing a suit; there being no violation of any known right." *Rice v. Ward*, 92 Tex. 704, 708, 51 S. W. 844, 845.

We mean as applied to express or resulting trusts.

Justice Moore held that under circumstances showing the possession of certain negroes by a father in a fiduciary capacity as a natural guardian of the daughter, there must be a distinct repudiation of her title brought to her knowledge, and such repudiation must have been persisted in throughout the term of prescription; that equivocal acts, first in denial and then in recognition, would not constitute such a repudiation. *Lewis v. Castleman*, 27 Tex. 422. Chief Justice Willie said:

"In case of a constructive trust, which is born of fraud, and which presupposes from its beginning an adverse claim of right on the part of the trustee by implication, the statute will commence to run from the period at which the cestui que trust could have indicated his right by action or otherwise. *Hunter v. Hubbard*, 26 Tex. 537; *Anderson v. Stewart*, 15 Tex. 285; *Carlisle v. Hart*, 27 Tex. 350. But even in such cases the trustee must bring himself clearly within the position of a continued and consistent adverse claimant (*Grumbles v. Grumbles*, 17 Tex. 472) and the cestui que trust must have no reasonable excuse for failing to prosecute his claim within a proper time. *McKia v. Williams*, 48 Tex. 89." *M. S. & R. Cole v. C. W. Noble*, 63 Tex. on page 434.

Judge Willie was dealing with a resulting trust, and said:

"In this case S. F. Noble, Jr., set up no claim to hold the land adversely to his brother; and, after his death, his personal representatives

in effect declined to make such claim by failing to administer the lots as part of his estate; and his widow did not repudiate the trust until a short time before the commencement of this suit. These circumstances were calculated to lull the appellee into the belief that the trust was still recognized by those claiming under the original trustee; and as the opposing claimants, if any existed, were connected with him by blood and affinity, we cannot say that he was bound to prosecute his rights at any time before their disavowal was brought to his notice in such manner as to claim his attention." 63 Tex. pages 434, 435.

The case of *Davis v. Davis*, 20 Tex. Civ. App. 311, 49 S. W. 726, is practically the same as the present case. Two brothers were partners; one residing in Kentucky and the other in Texas. The latter purchased the land with partnership funds. He thereafter, in writing and verbally, acknowledged that the land was the property of himself and brother. However, subsequently, he executed a deed conveying the land to his wife, which was promptly recorded. "The evidence shows an act of repudiation occurring in 1877, by the conveyance of the tract by Geo. R. Davis to his wife, the deed being, as stated, at once placed on record. Neither this or another act of repudiation would start the statute to run until the party affected knew of it, or until the circumstances reasonably charged him with knowledge of it." 20 Tex. Civ. App. page 313, 49 S. W. 728. Writ of error denied.

Chief Justice James also said that the conduct of the trustee, the nonresidence of his brother, and the relations of the parties, would excuse the ascertainment of the act of repudiation.

[3] We were at first concerned with the thought that, on account of the petition averring that Lillie McBride received a part of the land from Louis McBride's heirs, by duly executed conveyance, without allegations that she had notice or paid a valuable consideration, and the burden being upon the plaintiff to aver and prove such facts, this court should discuss that subject. The complexity of the problem arose on account of the fact that Mrs. McBride was the wife and partner in community at the time the husband acquired the property; hence would notice to him be constructive notice to her, by virtue of the community and the domestic relations? If we are correct, however, that the wife is vested with the legal title to one-half of the 31/60 of the estate claimed by plaintiffs, in any event, the trial court should not have sustained the general demurrer. As to so much of said estate she would stand in the shoes of her husband. We referred such a question of constructive notice to both parties for a new brief and additional argument on that subject.

The cases of *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, and *Pearce v. Jackson*, 61 Tex. 645, cited by appellees in their supplemental brief, are not wholly persuasive that a wife, under conditions exhibited in this

record, could be an innocent purchaser from her husband of a trust estate, or from his heirs after descent was cast, on account of the imputation of notice solely resulting from the community principle. In the former case, on a careful analysis of the facts, the wife knew that the property had been conveyed to another grantee, though the deed was unrecorded, and the consideration for the conveyance by the husband to the wife was in reality community funds.

The case of *Stephens v. Herron*, supra, was one where the wife purchased from the husband an estate. The opinion does not disclose that it was community. Previous to this purchase she had joined with the husband in an instrument appointing an attorney in fact, and such agent had thereafter conveyed the property, and his grantee had failed to place the deed of record. The Court of Civil Appeals simply certified the question to the Supreme Court whether the fact that she had joined in the power of attorney imputed notice to her of the rights of the holder of the unrecorded deed from the attorney in fact, and the Supreme Court answered negatively. Bates on Partnership says:

"If the trustee, without his copartners knowing that the money is held in trust, uses it to pay the debts of the firm, or applies it to other partnership uses, or lends it to the firm or puts it in as capital, the cestui que trust does not become a creditor of the firm, and can neither maintain an action against them or prove against the joint estate in bankruptcy. * * * The knowledge of the guilty partner is not the knowledge of the firm because it is outside of the firm's business"

—and states that those partners who were cognizant only of the misapplication of the trust fund are alone chargeable. Vol. 1, § 481, pp. 500, 501.

Perry, citing some of the cases cited by Bates, says, in a note to section 846:

"The weight of authority seems to be to the effect that when a partner turns over to the firm money which is apparently his own, or uses it to pay firm debts, without notice to his co-partner of any trust attaching to it, and he is given credit for it as his own money, the firm is given protection of a bona fide taker for value without notice." Perry on Trusts, vol. 2, § 846, p. 1385 (note).

This doctrine is on the theory that the misapplication, by the individual partner, when a trustee, of trust funds, is a tort which is outside the scope of the partnership. The comment by Perry is, though, that this question has never been worked out very satisfactorily.

[4, 5] The community status, of course, has been likened to a partnership. It has the elements of gains and losses, based upon the presumed labors of each, irrespective of the real industry of either spouse. As to community property, though, the wife is practically a passive partner, viewing her powers to act for the community, except probably where she acts as the agent, or implied agent, of the husband for the community, or for the family. The husband has the real management, dispos-

tion, and control, with the exception of the conveyance of the homestead, or when abandoned by the husband, or except where the property is conveyed in fraud of the wife. The liability of the partnership and of the individual partners, in ordinary partnerships, is worked out through one of agency by virtue of a contract. The wife, though, is denied the full supervision and management, as well as the powers, of an agent inhering ordinarily in partnerships. The marriage, of course, in a sense is a contract, but the law thereafter impresses the community principle, and the community gains and losses as a result, with the husband as the dominant partner. The wife is not personally liable; neither is her separate estate, for the community debts, or the husband's torts. As to the acquisitions aside from her industry falling into the community, when to sell or buy, or when to trade, or how much, or how little, in law she is negligible; her dictation is entirely feminine. Concerning this question, it might be thought that in an ordinary case, where one trusts the husband with the legal title to property, which carries with it the apparent title to the whole estate, if a wife in reality, without notice, pays value out of her separate estate, she should be entitled to the same as any other innocent purchaser. However, on the other hand, the husband, if he should convey to the wife such an estate, and defraud the *cestui que trust*, or convey to some other innocent purchaser, he would be liable for the value of the property, and in the last instance we know, and in the first instance it would seem, that

the community estate would have to respond. If so, we would have the anomaly of the wife being an innocent purchaser of property on account of which her community property is liable, through the very wrong which produces, with her innocence, her estate. If the property is presumptively community, it may be considered, as a practical question, she would only purchase, and pay for, the husband's interest; ostensibly she owns the other half.

It is true that Justice Stayton's language, in the case of *Pearce v. Jackson*, *supra*, is subject to the construction that he thought a wife could become an innocent purchaser against the undisclosed interests of another if she had no notice and paid value. The language of such a great judge has affirmative persuasion, but the facts of the particular case, when analyzed, are of a negative value.

We consider the question as a matter of policy, and a rule of property, one of serious import, and its correct solution, though a desirable result, quite difficult as a legal question. Such a question probably may not arise on another trial in view of our opinion, if correct, on other legal merits arising upon the record, and we will not decide it.

The district court should not have sustained the general demurrer to the petition, or the special exceptions on limitation, as the allegations present sufficient grounds of excuse affecting the question of diligence for the lack of knowledge of the plaintiffs.

The case is reversed and remanded.

QUANAH, A. & P. RY. CO. v. COLLETT.
(No. 1086.)

(Court of Civil Appeals of Texas. Amarillo.
Jan. 3, 1917.)

1. EMINENT DOMAIN \Leftrightarrow 262(2)—PARTIES ENTITLED TO ALLEGE ERROR—ESTOPPEL—CONDEMNATION.

Where a railroad against which an action to recover land was brought pleaded ownership of its right of way across the land, and by a separate paragraph alleged that it had constructed its railroad across the land and prayed a condemnation of a right of way therefor, as it was permitted to do by Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, which provided that the plea for condemnation should be an admission of plaintiff's title to the property, and the railroad appealed from the award of damages, but did not question the judgment of condemnation, it is estopped to raise on that appeal questions affecting its original claim of title to the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 682; Dec. Dig. \Leftrightarrow 262(2).]

2. LIMITATION OF ACTIONS \Leftrightarrow 32(2)—INJURING PROPERTY WITHOUT COMPENSATION—DAMAGES.

The two-year statute of limitation, though it may bar recovery for the negligent construction of a railroad across plaintiff's land, does not bar recovery in condemnation proceedings of the incidental damages to plaintiff's land not taken caused by the proper construction of the railroad along the right of way condemned.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 143; Dec. Dig. \Leftrightarrow 32(2); Eminent Domain, Cent. Dig. § 788.]

3. EMINENT DOMAIN \Leftrightarrow 307(2) — COMPENSATION—DAMAGES—EVIDENCE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6521, providing that in estimating either the injuries or the benefits in condemnation those sustained by the owner in common with the community generally, and not peculiar to him, shall be excluded, evidence that the land was of more value after the railroad was constructed than it was before, without evidence that the increase in value was due to particular benefits received by that land, does not show that plaintiff is not entitled to recover compensation for damages to the part of the land not taken, but, at most, makes that a question for the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 823; Dec. Dig. \Leftrightarrow 307(2).]

4. EMINENT DOMAIN \Leftrightarrow 224—NEWLY DISCOVERED EVIDENCE—NEW TRIAL.

In an action against a railroad company to recover land, where defendant claimed title, and also asked for condemnation under Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, which provides that the plea for condemnation is an admission of plaintiff's title, defendant cannot, after a judgment of condemnation, secure a new trial on newly discovered evidence as to his title.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574-579; Dec. Dig. \Leftrightarrow 224.]

Appeal from District Court, Motley County; Jo A. P. Dickson, Judge.

Action by J. C. Collett against the Quanah, Acme & Pacific Railway Company to recover possession of land, in which defendant asked for a condemnation of a right of way across the land. Judgment for plaintiff, but award-

ing condemnation and assessing the damages, and defendant appeals. Affirmed.

D. E. Decker and J. A. Clarke, both of Quanah, and G. E. Hamilton, of Matador, for appellant. T. T. Bouldin, of Matador, for appellee.

HENDRICKS, J. The appellee, J. C. Collett, sought to recover of the appellant, Quanah, Acme & Pacific Railway Company, the title and possession of a certain section of land situated in Motley county, Tex.

The defendant railway company disclaimed as to all of the land described in plaintiff's petition, except 200 feet of right of way through said survey, amounting to 12.8 acres; and, after specially answering, under separate paragraphs, that it was entitled to the land on account of certain agreements and estoppels, the railway company, in reconvention, pleaded that it had constructed a line of railway across plaintiff's land (but with his consent), and that said right of way is necessary to its business as a common carrier, praying for a condemnation of a right of way, and that the court assess plaintiff's damages therefor.

Article 6531, Vernon's Sayles' Civil Statutes, provides:

"When any railroad company is sued for any property occupied by it for railroad purposes, or for damages thereto, the court in which such suit is pending may determine all matters in dispute between the parties, including the condemnation of the property, upon petition or cross bill asking such remedy by defendant, but the plea for condemnation shall be an admission of the plaintiff's title to such property."

Before the passage of this article in 1889 the district court had no jurisdiction on the application of a railway company, by cross-action or otherwise, to change plaintiff's suit to one of condemnation for the land. Such a corporation in the exercise of the right prior to said statute could only obtain a condemnation in a manner pointed out by the particular statutes giving the power and prescribing the methods and adjudicating the rights in the county court. Railway Co. v. Poindexter, 70 Tex. 98, 7 S. W. 316. The statute was evidently enacted to give railroad companies such a right, but in providing the remedy furthering it attached the condition that the "plea for condemnation shall be an admission of the plaintiff's title to such property." The appellant railway company is in the attitude of pleading an agreement of donation of the right of way, also estoppel and acquiescence, and at the same time seeking to condemn the property, in which event the statute requires it to admit plaintiff's title.

[1] In this case the damages were awarded, and while there may be questions arising upon the evidence, or otherwise mooted, as to the correctness of the damages, however, as to the question of title, the district court in its judgment having condemned the land,

and there being no complaint in that respect by the defendant, nor attempted rejection of said judgment in this court, but an evident acquiescence and election with reference to the same, we think the defendant is estopped to raise in this court questions affecting any other claim of right affecting the title to the property interposed by it. *Railway Co. v. Johnson*, 156 S. W. 259, par. 12; *Vance v. Railway Co.*, 173 S. W. 265; *Railway Co. v. Kinkead*, 60 S. W. 468.

[2] The first, second, and third assignments of error, as to the question of damages, assert that the record discloses that that part of the suit for same was barred by the two-year statute of limitation. That question also arose in the cases of *Chicago, Rock Island & Gulf Railway Co. v. Johnson*, and *Railway Co. v. Kinkead*, supra, in which the Supreme Court denied writs of error. Following the case of *Railway Co. v. Cave*, 80 Tex. 137, 15 S. W. 786, it was held that the statute of two or four year limitation did not apply to the right of the owner of compensation for damages to the remainder of the land, when in reconvention in trespass to try title the railroad sought condemnation. Justice Stayton had said in the case of *Railway Co. v. Cave*, supra:

"It might as well be held that plaintiff was barred from recovering damages for the condemnation of the right of way itself by reason of a former occupancy not sufficient to confer the right as to hold that he is barred from recovering for injury to land not actually condemned, but made less valuable by the condemnation of the right of way; for the one element of damages as well as the other enters into the compensation to be paid for the taking, and neither can be barred so long as the land has not in some lawful manner been burdened with the easement."

Cases applying a shorter statute of limitations, where the damages arose either from negligence or unskillfulness in the construction or operation of the road, do not apply. The case of *Railway Co. v. Henderson*, 86 Tex. 308, and particularly page 313, 24 S. W. 381, discloses the difference between damages accruing under the Constitution for the taking or appropriation of private property for public use and other damages arising on account of either the negligent construction or operation of the railroad. The land belongs to the owner until paid for under the Constitution, and the compensation is the whole damages, including the value of the land taken, as well as the damages to the remainder of the land. *Railway Co. v. Henderson*, supra, p. 313.

[3] The fifth assignment of error raises the question that the judgment and verdict are contrary to the evidence, in "that the land not taken was of greater value after the construction of the railway than prior

thereto." We assume that appellant means that in estimating the compensation or the damages to the remainder of the tract the testimony shows such a deduction of benefits peculiar to the land not taken as to offset, or more than offset, one against the other.

Article 6521, Vernon's Sayles' Civil Statutes, provides:

"In estimating either the injuries or the benefits, as provided in the preceding article, those injuries or benefits which the owner of such real estate sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use and enjoyment of the particular parcel of land, shall be altogether excluded from such estimate."

Plaintiff's proposition under the above assignment is, in substance, that the evidence shows that plaintiff's land not taken, for which he seeks damage because of the construction of defendant's road, was worth more, or at least as much, after construction, than it was before.

It might be well doubted whether the assignment and the proposition really raise a deduction of special benefits as offsetting the injuries. However, all of the testimony by the different witnesses reproduced in appellant's statement under said assignment is addressed to an enhancement of the value of the land on account of the construction of the railroad, which, it would seem to us, would be shared by the community. Evidence of a general increase in the value of the property in the neighborhood arising on account of the presence of the railroad is, of course, not to be considered in estimating or reducing such damages. We see no testimony quoted in the brief as affecting the value of the land pointing to benefits peculiar to the owner "and connected with his ownership, use, and enjoyment of the particular parcel of land." While we do not think the testimony raises an issue, however, at best, according to the statement in the brief, it could only be a question for the judge or jury.

[4] The seventh assignment of error is based upon a ground in the motion for new trial of newly discovered testimony with reference to a contract found after the trial, and not produced at the hearing. This assignment before this court on account of previous discussion of the article with reference to condemnation by defendant and admission of title by it in this suit, we think, is wholly immaterial.

Before concluding to determine that part of the case upon the authorities and reasons adduced by us, we had carefully considered all the assignments, and would not have reversed the cause on either of them.

The judgment of the trial court is affirmed.

**AMES PORTABLE SILO & LUMBER CO.
v. GILL. (No. 1077.)**

(Court of Civil Appeals of Texas. Amarillo.
Dec. 27, 1916.)

1. SALES 644(9) — WARRANTY — TRIAL — INSTRUCTIONS.

In an action for the price of a silo, where defendant alleged fraud and breach of warranty, and claimed rescission or damages in the alternative, and there was evidence tending to defeat the claim for a rescission, it was error to refuse plaintiff's requested instruction that if the silo was guaranteed as alleged by defendant, and the guarantee was broken by plaintiff, and the silo was of any value, the jury should only allow an abatement of a sum equal to the difference between value of the silo delivered and the value of such silo as it was guaranteed to be.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1317; Dec. Dig. 644(9).]

2. SALES 354(6)—PLEADING—FRAUD.

In an action for the price of a silo, allegations in the answer that defendant was induced to sign an order for the silo which recited that it contained the entire contract between the parties, by the statement of plaintiff's agent that the order was a mere formal matter necessary to get the proposition before the plaintiff, and that the defendant did not know or read the contents of the order but relied upon the representations of the agent, and that the agreement was that the contract between the parties would be recorded in another and different writing thereafter, and that such representations were untrue, made for the purpose of inducing the defendant to execute the written order, and that the defendant was inexperienced and relied upon such representations to the plaintiff's knowledge, were sufficient to charge fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1015; Dec. Dig. 354(6).]

3. SALES 364(4), 446(2)—REMEDIES OF BUYER — FRAUD — BREACH OF WARRANTY — INSTRUCTIONS.

In an action for the price of a silo, where defendant alleged fraud entitling him to a rescission, with an alternative plea of damages for breach of warranty if the evidence failed to sustain his allegations of fraud, the charge of the court should have covered both phases of the case.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1068, 1310; Dec. Dig. 364(4), 446(2).]

4. EVIDENCE 131 — ADMISSIBILITY — SIMILAR FACTS.

In an action for the price of a silo, where it was shown that the silo was erected under the supervision of a person furnished for that purpose by plaintiff, and that it "did not set straight," and that the ensilage in the silo had spoiled, evidence that other silos of the same make, when properly constructed, filled, and taken care of, would make and keep good ensilage, was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 399-402; Dec. Dig. 131.]

5. SALES 358(4)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for the price of a silo, where defendant offered evidence tending to show that the silo was of no value, evidence of the cost of putting the silo in repair and correcting all defects was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1052; Dec. Dig. 358(4).]

6. APPEAL AND ERROR 959(3)—PLEADING 236(3) — AMENDMENT — DISCRETION OF COURT—REVIEW.

Allowance of trial amendments to pleadings is a matter of discretion with the trial judge, and will not be reviewed by the appellate court, unless there has been a clear abuse of this discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830; Dec. Dig. 959(3); Pleading, Cent. Dig. § 601; Dec. Dig. 236(3).]

Error from District Court, Carson County; Frank Willis, Judge.

Action by the Ames Portable Silo & Lumber Company against R. E. Gill. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Boyce & Davidson, of Amarillo, for plaintiff in error. Kimbrough, Underwood & Jackson, of Amarillo, for defendant in error.

HALL, J. Plaintiff in error sued defendant in error for the purchase price of a silo, alleged to have been sold and delivered upon the written order of defendant in error, dated August 31, 1914, the material provisions of which are as follows: The entire purchase price is \$663, f. o. b. Beaumont, Tex., shipment to be made to defendant in error at Groom, Tex. It was provided that \$200 should be paid 30 days after the arrival of the silo at Groom, the balance to be evidenced by two promissory notes; that the bill of lading should be sent to the First State Bank of Groom, where settlement would be made by execution of the notes provided for and a failure on the part of the purchaser to make such settlement within 10 days to mature the entire purchase price at the option of plaintiff. The order, among other provisions, contained the following:

"Contract. It is understood that this order contains the entire contract between the undersigned purchaser and the Ames Portable Silo & Lumber Company, and that either party hereto shall not be bound by any agreement not contained herein.

"Guarantee. The Ames Portable Silo & Lumber company guarantees the Ames portable silo to be well made, of good material, to be shipped knocked down in such parts as to form a complete structure when properly assembled and erected according to plans furnished by the company for same, and agrees that if any piece or part is found defective and unsuitable to enter the structure when received by purchaser, the company will furnish free to purchaser such parts as are necessary to replace the same within a reasonable time after receipt of proper notice in writing from the purchaser, notice to be given within ten days after delivery of the silo."

Plaintiff in error alleges that the silo was shipped to Groom and notes sent as provided by contract, but that defendant, without the knowledge or consent of plaintiff, secured the silo and hauled it away without having executed the notes; the recovery asked being for the amount represented by the notes, and in the alternative, for the purchase price of the silo and interest.

The answer of the defendant is in substance as follows: That plaintiff's agents, Hooper & Roach, of Groom, offered to sell the silo to him, making certain representations as to the quality and properties of the silo, stating to him that if he would execute the notes for the purchase price plaintiff would make good all representations, that defendant refused to enter into such contract on such representations, but advised the agents that the representations would have to be reduced to writing and that such guaranty must contain the following:

"That such written guaranty should warrant that such silo would be safe and durable for at least five years; that it would not fall down, buckle in, warp, or lean; that it would be air tight, and that it would keep, save, and preserve ensilage properly and in good condition so as to conserve and develop the greatest feed value out of such ensilage placed into the same; and that in case said silo for any reason should fail to meet the terms of such guaranty, then that said trade should be rescinded and defendant's notes returned to him, together with any moneys paid thereon."

Defendant further alleged that plaintiff agreed to furnish such writing before defendant would be required to execute any notes or pay any money and before any contract would be binding on the parties; that such agents represented that the order was a mere formal matter necessary to get the proposition before plaintiff; that the train upon which the agent wanted to send the order to plaintiff, was about due and that such agent said that he wanted to get off on said train; that defendant did not read or know the contents of the order, but relied upon the representations of the agent; and the agreement that said contract between the parties would be embodied in another and different writing thereafter to be executed by plaintiff, and if sufficient accepted by defendant. Then follow allegations that said representations were untrue, and were made for the purpose of inducing this defendant to execute said written order for the purchase of said silo; that defendant was inexperienced and wholly uninformed as to the sufficiency, character, workmanship, construction, or material in said silo, or what was required in a silo of proper construction, and plaintiff well knew that defendant relied upon such representations of plaintiff, and its assurance that the matter of signing the printed order was merely a matter of form and of plaintiff's agreement later to deliver him a contract covering said agreement made between the parties and embodying plaintiff's guaranties and warranties of said silo; and that defendant would not have executed such order blank then executed but for his reliance upon plaintiff's assurance that the same was merely a matter of form, and that the said contract and agreement of the parties would be later embodied in a written contract to be executed and delivered by plaintiff.

Defendant further says: That when the silo reached Groom no warranty accompani-

ed it. That he called upon plaintiff's general manager, Hume, who told him to take the silo out and that the guaranty would be furnished him. That defendant demanded performance of said contract from plaintiff, and that it failed to comply therewith until October 20, 1914, when it delivered to him, through its agent, Mr. Hooper, the following written guaranty:

"We, the Ames Portable Silo & Lumber Company, guarantee one Ames portable silo, sold to R. E. Gill of Groom, Texas, August 31, 1914, for a period of five years from the date of the above-mentioned order, not to fall down, go to stave, or buckle in, and to make and keep good ensilage when the silo is properly filled and taken care of.

"Dated October 20, 1914."

That this writing did not contain all the representations made by plaintiff and was not accepted by defendant as a full compliance with plaintiff's part of the contract. That the silo was filled during the first of October, and that about the 12th of November, plaintiff, on examining it, found that a large portion of the ensilage was spoiled and worthless. That thereupon he notified plaintiff of such fact, advised it that he would not pay any money or execute any notes, tendered it the silo, and demanded rescission of the contract and return to him of his freight money. Then follows a counterclaim against plaintiff for \$535.82, alleging that the silo was worthless and praying that the contract be canceled and held for naught.

Plaintiff in error's second assignment of error is that the court erred in refusing the following special charge:

"You are further charged in reference to defendant's defense to plaintiff's action for the purchase price of the silo (not in reference to its cross-action) that if you find that the silo was guaranteed as alleged by defendant, and that said guaranty was breached by plaintiff, and you further find that the silo delivered was of any value, then you will not allow the defendant an abatement of the entire purchase price of the silo, but you will allow him an abatement thereon of such sum as you find is the difference between the value of the silo delivered and the value of such silo as the same was guaranteed to be."

The proposition urged is that if the warranty charged by the court was breached the defendant could not have a verdict against the entire claim of plaintiff for the purchase price of the silo, unless the silo delivered was of no value. After the parties had proceeded with the trial for some time defendant in error filed a trial amendment, in which he set up that if he ever accepted said silo or any contract was entered into with him for the sale of said silo to him then plaintiff has breached its warranty and guaranty to deliver to him the kind of warranty and guaranty that it agreed to deliver to him and has breached the terms and provisions of the contract of warranty and guaranty actually delivered to him in that said silo failed to properly keep and preserve feed after the same was properly filled; that said silo is entirely worthless and of no value,

and had the plaintiff complied with its agreement to deliver to him a silo of the kind and character agreed to be delivered the same would have been worth to defendant the price agreed to be paid for the same; but on account of the kind and character of the silo delivered and on account of the failure of said silo to make and preserve and keep ensilage and plaintiff's breach of the warranty and guaranty it agreed to give defendant; and on account of the breach of the warranty and guaranty actually delivered to defendant, the silo was and is worthless, and that plaintiff has suffered damages in the full amount of the price agreed to be paid, together with the freight money paid by defendant. The prayer is, as in the original answer, and in the alternative, that if any contract for the sale of the silo was ever entered into, and if plaintiff be not entitled to a rescission of the trade, as set forth in the original answer, then that he recover damages representing the difference between the price at which the same was agreed to be sold to defendant and the actual value of the silo delivered to defendant.

[1] There is evidence in the record, which, if true, would tend to defeat defendant in error's claim for a rescission of the sale, and it is probable that this evidence induced defendant in error to file the trial amendment quoted from above and claim damages for breach of the warranty in the alternative. At any rate, the trial amendment and the evidence referred to raised the issue which the special charge properly presented, and we think the court erred in refusing it.

[2, 3] We think defendant's allegations are sufficient to charge fraud. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 853; *Carter v. Carter*, 5 Tex. 93; *State v. Wichita Land Co.*, 73 Tex. 450, 11 S. W. 488. If the evidence sustained his allegations he was entitled to a rescission; otherwise he had a right to stand upon his alternative plea of damages for breach of warranty, and the charge of the court should have covered both phases of the case.

[4] By its third assignment of error, plaintiff in error complains of the exclusion of a portion of the testimony of Hume. It appears that Hume was the general manager of the plaintiff in error, and while upon the stand testified that he had been using one of the Ames portable silos and selling them since 1914; that he had been making inquiries as to how they kept ensilage; that the silo in question was properly erected and constructed with the exception of some defects which he said could be remedied by a

few hours' work. Plaintiff in error then offered to further prove by said witness that silos of the make of the one in question, when properly erected and constructed, and properly filled and taken care of, would make and keep good ensilage. Upon objection this testimony was excluded. As a general rule, such testimony is not admissible, but in a great many cases it has been admitted when concurrence of time and similarity of conditions and surroundings are shown to be the same. The undisputed evidence shows that the silo in question was erected under the supervision of a party furnished for that purpose by plaintiff in error. Hume inspected the silo when about half of its contents had been taken out, and stated that in his opinion too much water had been used in filling it, while Ames, another representative of plaintiff in error, stated that in his opinion not enough water had been used. The undisputed testimony shows that the silo "did not set straight," from which we infer that it was not properly constructed. As they must be made practically air tight or the ensilage will spoil next to the walls, and since the uncontroverted testimony shows that the ensilage in this silo had spoiled all the way from 15 to 18 inches, from the walls toward the center of the bulk, evidence of the condition of ensilage in other silos, where it had not spoiled, could be of no probative value in this case. *Sou. Gas & Gasoline Engine Co. v. Adams & Peters*, 169 S. W. 1143; 1 *Elliott on Evidence*, § 177.

[5] The fourth assignment is that plaintiff offered to prove by the witness Davenport, who had testified that in the spring of 1915 he repaired the silo in question, that the cost of putting the silo in repair and correcting all defects would have amounted to the sum of \$35, and that the court erred in excluding this evidence because defendant in error had offered evidence tending to show that the silo was of no value. We think this testimony was admissible upon that issue.

[6] Plaintiff in error duly excepted to the action of the court in permitting defendant in error to file a trial amendment, setting up breach of warranty. This is usually a matter of discretion with the trial judge and will not be reviewed by the appellate tribunal unless there has been a clear abuse of his discretion. Since it will be necessary to amend the pleadings before another trial, and include the matter set upon in the trial amendment in the amended answer, it is not necessary to discuss this assignment.

For the errors indicated, the judgment is reversed, and the cause remanded.

FT. WORTH & D. C. RY. CO. v. ATTERBERRY. (No. 1086.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 27, 1916.)

1. CARRIERS \S 228(4) — CARRIAGE OF LIVE STOCK—EVIDENCE—ADMISSIBILITY.

In an action against a carrier for damages from delay in transportation of live stock, a paragraph of the shipping contract, releasing the carrier from loss which might be sustained by reason of delay in transportation by storms or floods, was properly excluded as immaterial, since a flood or storm which could not be reasonably anticipated and provided against excuses the carrier, and a carrier cannot, by contract, limit its liability for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. \S 228(4).]

2. CARRIERS \S 230(8) — CARRIAGE OF LIVE STOCK—TRIAL—INSTRUCTIONS.

In an action against a carrier for damages to a shipment of live stock by delay in transportation, an instruction that it was the duty of the railroad company to build and maintain its tracks, bridges, and culverts in such a substantial manner as will withstand such storms, rains, and floods as an ordinarily prudent person would anticipate, taking into consideration the condition of the soil, rivers, and climatic conditions of the country in connection with such history of the country as might be obtained by a person of ordinary prudence, although more specific than necessary, was not error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. \S 230(8).]

3. CARRIERS \S 230(8) — CARRIAGE OF LIVE STOCK—TRIAL—INSTRUCTIONS.

Where it was clear that the shipment was received by defendant on June 5th, although there was evidence that it was not received until June 6th, and the flood causing the delay occurred on June 6th, an instruction that if defendant received the shipment after it was in possession of facts which would put it upon notice or inquiry with reference to conditions of its bridges and tracks, the jury should find for plaintiff should not have been given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. \S 230(8).]

4. APPEAL AND ERROR \S 1064(1)—HARMLESS ERROR—INSTRUCTIONS.

Where plaintiff testified that he did not keep the hogs in the pen, but herded them on the prairie for two days and put them back into the pen at night, and it is shown that there were other pens, one of which was dry and the others contained water and mud to the depth of two inches, error in instructing the jury with reference to the duty of the defendant in keeping and maintaining its stock pens in good condition for the detention of stock while awaiting transportation was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. \S 1064(1); Trial, Cent. Dig. §§ 525, 528.]

5. EVIDENCE \S 5(2) — JUDICIAL NOTICE — COMMON KNOWLEDGE.

The court could not judicially know, nor could the jury from common knowledge say, that mud and water two inches deep was injurious or uncomfortable to hogs during summer months.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. \S 5(2).]

6. TRIAL \S 208(1)—INSTRUCTIONS—ISSUES.

Defendant was entitled to have its defense that the delay was caused by unprecedented rainfall and flood on its road presented clearly

without being confused and mixed with other issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. \S 208(1).]

7. TRIAL \S 252(12) — INSTRUCTION — EVIDENCE—DAMAGES.

It was error to submit as an element of damage items of feed which plaintiff alleged was purchased en route, where there was no evidence to show that the whole amount purchased was necessary, or that the price paid was reasonable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. \S 252(12).]

8. TRIAL \S 252(12)—INSTRUCTIONS—ISSUES.

In an action against a carrier of live stock for damages caused by delay in transportation, where it was shown that defendant employed a man to take care of the stock while unloaded during a delay, and there was no evidence showing what amount plaintiff expended for labor to assist him in caring for his stock while unloaded, the issue should not have been submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. \S 252(12).]

Appeal from Donley County Court; J. C. Killough, Judge.

Action by P. P. Atterberry against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, and H. B. White, of Clarendon, for appellant. A. T. Cole, of Clarendon, for appellee.

HALL, J. This is an action to recover damages growing out of a shipment of hogs from Lella Lake to Ft. Worth. The substance of plaintiff's allegation is that, on or about the 5th day of June, 1915, he delivered 168 head of hogs to the defendant railway company for transportation from Lella Lake to Ft. Worth, whereby it became and was the duty of the defendant railway company to transport said hogs between said points expeditiously and deliver them in Ft. Worth in good condition, reasonable shrinkage excepted; that the hogs were loaded on the defendant's cars at Lella Lake at 10 o'clock p. m. Saturday, June 5, 1915; that 24 hours was the usual and reasonable running time in which to transport said hogs, and that they should have arrived at destination at 10 o'clock p. m. Sunday, June 6th, and if they had been so transported, they would have been ready for the market June 7th; that the shipment was negligently delayed at Childress from 5 o'clock a. m. Sunday, June 6th, to 2 o'clock p. m. Wednesday, June 9th, resulting in great loss in weight to said hogs; that during the delay at Childress plaintiff unloaded the hogs in the stock pens, which were full of water and mud and in an unfit condition in which to keep fat hogs; that in order to avoid great loss thereby plaintiff employed a man for four days at \$2 per day, to herd the hogs on the commons, which services were actually performed, which were reasonable, just, and necessary;

that he paid said hand \$8 for his services, for which he asks judgment; that about 2 o'clock p. m. Wednesday, June 9th, said hogs were loaded out at Childress for Ft. Worth, Tex., but were held up at Wichita Falls, Tex., until 7 o'clock p. m. Thursday, June 10th, during which time appellant failed and refused to provide water for said hogs, which resulted in great loss in weight, and that on account of the delay one hog, weighing 450 pounds, died at Wichita Falls; that said shipment did not reach Ft. Worth until Saturday, June 12th, resulting in shrinkage and loss in weight of 2,620 pounds; that the usual shrinkage is 5 pounds per head, or 840 pounds, making a net loss to appellee of 1,780 pounds, which he alleges to be worth \$7.55 per hundred, for which he also asks judgment; that if the hogs had been shipped and delivered in Ft. Worth promptly, they would have sold on the June 7th market, at 15 cents per hundred pounds more than they actually sold for on the 12th, which difference in market value he also sought to recover; that on account of the delay he incurred a general expense bill of \$135 for feed for said hogs, which was reasonable, necessary, and just; that the appellants had knowledge of such expense on account of the delay in question, and that the same was necessary; that his personal and necessary expense by reason of delay was \$25, which amount he also sought to recover.

After general demurrer and general denial, defendant alleged that it handled the shipment under and by virtue of a special reduced rate written contract, which, among other provisions, specially provided that in consideration of the reduced rate appellant should be relieved from all injury, loss, or damage to said live stock by reason of storms or floods, and by reason of injury to its tracks and yards; that after it received the shipment of hogs at Lelia Lake, and after undertaking the transportation of same to Ft. Worth, a distance of approximately 268 miles, and shortly after departing from Lelia Lake, there came an unprecedented rainfall and flood on its line of road between Vernon, Tex., and Wichita Falls, Tex., which caused the streams known as the Pease river and Wichita river; across which its line of road extended, to greatly overflow their banks and the surrounding country, including the tracks and roadbed of appellant, over and near said streams, injuring and damaging the roadbed, trestles, and bridges, rendering it impossible to operate trains, making it necessary to suspend traffic until the flood receded and its tracks, trestles, and bridges had been repaired; that the bridge across Pease river was partially washed away by the flood prior to the arrival of said shipment of hogs at that point, and after its departure from Lelia Lake, making the delay at Childress unavoidable; that the unprecedented rainfall and consequent rise in the Wichita river at a point near Wichita Falls

washed away part of the dump, trestle, and bridge across that river after the acceptance of said shipment, and after the journey to Ft. Worth had commenced; that as soon as the water receded so that repairs could commence, appellant put forth every effort and used every means at its command toward repairing its roadbed, trestles, and bridges, and that it did, in fact as soon as possible, effect said repairs; that prior to said unprecedented rainfall and flood, its roadbed, bridges, and trestles, through the territory mentioned, were good and substantial structures, capable of withstanding all usual and ordinary rainfalls between said points, and that they had been maintained in that condition, for which reason the alleged damages were unavoidable; that during such unavoidable delay appellant gave due care and attention to such shipment, with a view of avoiding injury as far as possible.

A trial resulted in a verdict and judgment in favor of appellee for the sum of \$300, with 6 per cent. interest from date thereof, and costs of suit.

[1] The first assignment of error complains of the trial court's action in excluding the fifth paragraph of the shipping contract, which was, in effect, that the plaintiff, in consideration of the reduced rate, assumed and released the carrier from risk, injury, or loss which might be sustained by reason of any delay in the transportation of said live stock by storms or floods. The court did not err in excluding this paragraph of the shipping contract. If the delay was caused by a storm of such extraordinary violence and a flood so unprecedented that railroad engineers of ordinary care and prudence, in the construction of the bridges, culverts, trestles, and dumps, could not reasonably be expected to have anticipated and provided against it, appellant would be excused without regard to this provision of the contract. *G., C. & S. F. Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; *G., C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45. Even though the flood was extraordinary and unusual, if it might have reasonably been anticipated and provided against, the failure to make such provision might be considered by the jury as negligence. *G., C. & F. Ry. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722; *H. & G. N. Ry. Co. v. Parker*, 50 Tex. 344. The rule is settled in this state that common carriers cannot, by contract, limit their liability for negligence. *Railway Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *Railway Co. v. Harris*, 67 Tex. 166, 2 S. W. 574. This clause of the contract was therefore immaterial, and this assignment is overruled.

[2] In the second assignment of error complaint is made of the general charge, wherein the court instructs the jury that it is the duty of a railway company to build, construct, and maintain its tracks, bridges, and culverts in such a substantial manner as

will withstand any such storms, rains, and floods as an ordinarily prudent person would anticipate, taking into consideration the condition of the soil, the rivers, climatic conditions of the country through which the road passes, and that in connection with such history of the country through which said road runs as might be obtained by a person of ordinary prudence and diligence. This charge is somewhat more specific than is indicated in the case of Santa Fé Railway Co. v. Pomeroy, supra; but we are not prepared to say that it is erroneous for such reason.

[3] By its third assignment appellant insists that the court erred in instructing the jury, in effect, that if appellant received the shipment of hogs after it was in possession of such facts as would have put it upon notice or inquiry with reference to the condition of its bridges and tracks, they should find for plaintiff all damages he may have sustained, except they could not find damages on account of decline in market. The contention under this assignment is that, the shipment having been received on the night of June 5th, and the washout having occurred on the afternoon of June 6th, there was no evidence upon which to base such charge. There is some evidence to the effect that the shipment was received by the company on June 6th, but, taking the record as a whole, it is clear that this is a mistake, and that the hogs were actually received by the company on the night of the 5th of June. The date of the receipt of the shipment was not a contested point, and the discrepancy arises by reason of the fact that some of appellant's officials who had no actual knowledge of the true date, and who evidently were misled by information conveyed to them, fixed the date as of June 6th. Upon another trial this question will doubtless be made clear, in which event the fifth paragraph of the charge should not be repeated.

[4, 5] It is insisted under the fourth assignment of error that the court should not have instructed the jury with reference to the duty of the railway company in keeping and maintaining its stock pen in good condition for the detention of stock while awaiting transportation. It is shown that there were several pens at Childress; that the unloading pen was dry on account of having cinders in it, and that the other pens were muddy; that with the exception of the unloading pen the other pens were about two inches deep in water and mud. Appellee testified that he did not keep the hogs in the pens all the time; that he herded them on the prairies two days and put them back in the pens at night. Appellee insists under this assignment that no injury is shown, and we are inclined to the opinion that this contention is correct. The court could not judicially

know, nor could the jury from common knowledge say, that mud and water two inches in depth was injurious or even uncomfortable to hogs during the summer months. The nature and well-known habits of these animals would indicate that the reverse of the proposition is true.

[6] By the fifth and eighth assignments of error it is contended that the court erred in charging the jury upon the sole defense urged by appellants that the damages were caused by unprecedented rain and floods, and in confusing with that issue other matters not pertaining thereto, and in refusing appellant's special charge which properly and clearly presented its defense. Reference to the sixth paragraph of the court's charge shows that the jury were instructed:

"If you find and believe from the evidence that the delay in the shipment was caused by unprecedented rainfalls, floods, or high water, within the vicinity where the washouts occurred, if you find there were any, then you will find for the defendant and against the plaintiff for such damages as he may have sustained by reason of the delay in transportation, except such damages as you find he may have sustained under the last preceding paragraph of the following paragraph."

The "last preceding paragraph" submitted the issue of the receipt of the hogs by appellant after it had notice of the fact that the washouts had occurred, and the paragraph following that complained of instructed the jury as to the duty of appellants in providing and maintaining suitable stock pens, and further instructed upon the issue of holding the hogs in the cars an unreasonable length of time without giving plaintiff an opportunity to feed and water them. We think appellant was entitled to have its defense presented fairly, and without being confused and mixed with other issues.

[7, 8] In the seventh paragraph of the general charge the court submitted, as an element of damages, certain items of feed, which appellee claimed to have purchased en route, amounting to \$99.60. There is no evidence whatever to show that the whole amount of feed so purchased was necessary, or that the price paid by appellee for it and for which he seeks a recovery was reasonable. This assignment must be sustained. Claim is also made for the amount expended in hiring a man to assist appellee in caring for the hogs while at Childress. Appellee testified that the company employed a man, and no reason is shown for the employment of another to perform the same duty. There is no evidence whatever tending to show what amount, if any, plaintiff expended while at Childress for the hire of such labor to assist in caring for the hogs. This issue should not have been submitted to the jury.

We overrule the remaining assignments, and for the errors indicated the judgment is reversed, and the cause remanded.

KANSAS CITY, M. & O. RY. CO. OF TEXAS
et al. v. JAMES et al. (No. 1082.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 20, 1916.)

1. NEGLIGENCE §119(4) — PLEADING AND PROOF—SPECIFIC ACTS.

Where the petition in a negligence action alleges generally that the injury was the result of negligence, and then specifically sets up the acts of negligence relied on, the evidence will be confined to the specific allegations; the general allegations being controlled by the specific acts averred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 208; Dec. Dig. §119(4).]

2. LIMITATION OF ACTIONS §127(17) — AMENDMENT—NEW CAUSE OF ACTION.

In action for negligence and delay in shipping cattle, an amendment to the petition offered during the trial alleging that the cattle were on the cars for 43 hours and plaintiffs were refused permission to unload, feed, and water them during that time, etc., did not set up a new cause of action, although alleging different and additional grounds of negligence, and was not barred, though two years had elapsed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545; Dec. Dig. §127(17); Pleading, Cent. Dig. § 688.]

3. CONTINUANCE §80—SURPRISE AT TRIAL—AMENDMENT.

But such an amendment required continuance, upon defendants' request, to afford reasonable time to procure evidence to rebut the new allegations, since the amendment set up entirely new grounds of negligence, notwithstanding plaintiffs, in repelling any inference of contributory negligence arising from their having special charge of the cattle during transportation, had introduced some evidence that they had requested the cattle be unloaded for feed, water, and rest.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. §30.]

4. CARRIERS §228(1)—LIVE STOCK—BURDEN OF PROOF.

In action for negligent carriage of cattle, where defendants pleaded and proved that plaintiffs' contracts gave them special charge of the cattle in transportation, the burden was on plaintiffs to exonerate themselves for any negligence effecting injury to the cattle, since, if plaintiffs were negligent in that respect, defendants could reduce the damages, to that extent as affecting the amount of recovery based on defendants' negligence.

[Ed. Note.—For other cases, see Carriers, Century Dig. §§ 957, 958; Decennial Dig. §228(1).]

5. APPEAL AND ERROR §231(3)—PRESERVATION OF OBJECTIONS—FORM OF OBJECTION—EVIDENCE.

In an action for negligent carriage of cattle, error in the admission of evidence for plaintiffs of difference in the value of cattle when loaded and on their arrival was not sufficiently presented for review by the general objection that evidence "of any difference in value" between time of loading and of arrival would be incompetent to prove damage to the shipment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §231(3); Trial, Cent. Dig. §§ 194-200.]

6. TRIAL §81 — OBJECTION TO EVIDENCE — FORM.

A party objecting to evidence should state his objections clearly and specifically so that

they may be understood by the court and obviated by the opposing party if capable of being removed by the production of other evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 193; Dec. Dig. §81.]

7. EVIDENCE §481(3)—CONCLUSION OF WITNESSES.

In action for negligent carriage of cattle, testimony that the difference in value of the cattle was \$5 a head on account of their actual appearance on arrival compared with what their appearance would have been if they had arrived after a run in reasonable time was inadmissible as being a conclusion of witness on a mixed question of law and fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2251, 2254; Dec. Dig. §481(3).]

8. EVIDENCE §544 — EXPERTS — QUALIFICATION—CONDITION OF CATTLE.

In action for negligent carriage of cattle, an experienced cattleman may qualify to testify what the condition of cattle would be if confined in cars from 40 to 48 hours without unloading, although such witness has never accompanied a shipment of cattle.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2356; Dec. Dig. §544.]

Appeal from District Court, Dallam County; D. B. Hill, Judge.

Action by A. M. James and another against the Kansas City, Mexico & Orient Railway Company of Texas and another. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, H. S. Garrett, of San Angelo, and J. Y. Powell, of Houston, for appellants. Tatum & Tatum, of Dalhart, for appellees.

HENDRICKS, J. The appellees sued the Kansas City, Mexico & Orient Railway Company of Texas and the Ft. Worth & Denver City Railway Company for damages alleged to have arisen on account of a shipment of 850 head of cattle, made on April 21, 1913, from Ft. Stockton, Tex., by way of Chillicothe, to Dalhart, Tex.

The original petition of the plaintiffs, as well as the amended original petition, contain general allegations of negligence addressed to the failure of the defendant railway companies to exercise ordinary care in the transportation of the cattle, and the failure to transport the same with reasonable dispatch. Said petitions, however, contain specific allegations of negligence, set out in different paragraphs, alleging delay, rough handling of the cattle by jerking the cars in which they were shipped, also permitting the same to stand on the cars at a station, or stations, an unreasonable length of time, all of which produced the death of some of the cattle and a damage of \$1,251 to the remainder.

[1] It is the settled rule in regard to the construction of pleadings in negligence cases that, where the petition alleges generally that the injury was the result of negligence, and then specifically set up the acts of negligence relied upon, the evidence will be confined to the specific allegations of negligence,

and the general allegations will be controlled by the specific acts averred. *Railway Co. v. De Ham*, 98 Tex. 74-78, 53 S. W. 375; *Railway Co. v. Younger*, 10 Tex. Civ. App. 141, 145, 29 S. W. 948; *Railway Co. v. Hennessey*, 75 Tex. 155, 158, 12 S. W. 608.

During the trial of the case, and after the evidence had nearly closed, the plaintiffs requested, and the trial court granted, permission to file a trial amendment, in which it was alleged:

That the plaintiffs' cattle "were upon the defendants' said cars for more than 43 hours from the time they were loaded at Ft. Stockton, Tex., before they were unloaded for feed, water, and rest, and defendants failed and refused to permit the plaintiffs to unload, feed, water, and rest said cattle for more than 43 hours from the time they were loaded, although demanded and requested by the plaintiffs to do so."

It was also alleged that defendants failed to provide sufficient facilities to plaintiffs for the purpose of feeding, watering, and resting the cattle.

The first amended original petition of the plaintiffs was filed in the cause on the 15th day of January, 1915, and the cause was called for trial on March 18, 1916.

The defendants objected to the filing of the trial amendment, for the reasons that the allegations of negligence contained therein had never before been set up in plaintiffs' pleading, to their surprise, and without affording defendants opportunity to procure testimony to rebut the allegations. The objections were overruled by the trial court, and plaintiffs were permitted to file the amendment.

The defendants then presented to the court a motion, properly sworn to, to withdraw their announcement of ready in the cause, and continue the same for the term, or postpone it to a subsequent date, for the purpose of procuring testimony and evidence to rebut the plaintiffs' trial amendment. In said motion it was asserted that, if allowed a reasonable time in which to procure the evidence, the defendants expected to prove that the cattle did not remain on board the cars for the length of time alleged by plaintiffs, nor that the plaintiffs made any request of defendants, or either of them, to have the cattle unloaded, fed, watered, and rested. It was stated in the motion:

"That defendants had and were possessed of ample facilities to unload, feed, water, and rest said cattle at reasonable intervals, and would have furnished same to plaintiffs if requested, or informed of conditions rendering same necessary or advisable."

The defendants in their answers had pleaded the usual cattle shipping contracts, by the terms of which the plaintiffs had agreed to feed, water, and care for the cattle, unload and reload the same during the transportation.

After the filing of the trial amendment the defendants also pleaded a special exception, interposing the two-year statute of limita-

tion arising upon the record, which was likewise overruled by the trial court.

[2] We think the trial amendment, though alleging additional and different grounds of negligence, contributing, in part, to the cause of action, such negligence shown to be a part of the same transaction, and effecting the same injury alleged in the first amended petition, did not set up a new cause of action. *Railway Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282, writ of error denied, *Cotton Co. v. Stewart*, 17 Tex. Civ. App. 59, 42 S. W. 241, writ of error denied by Supreme Court, 98 Tex. 695, 42 S. W. 241; *Cotter v. Parks*, 80 Tex. 539, 16 S. W. 307; *Massey v. Blake*, 3 Tex. Civ. App. 57, 21 S. W. 782; *T. C. Ry. Co. v. Frazier*, 84 S. W. 665; *Landa v. O'Bert*, 78 Tex. 46, 14 S. W. 297; *Texas & Pacific Railway Co. v. Buckalew*, 34 S. W. 165.

[3] We think though the trial court should have sustained the defendants' motion and either continued the cause for the term or postponed it for a future date, affording reasonable time to procure evidence to rebut the new allegations of negligence.

It is clear, analyzing the specific acts of negligence charged in the amended petition, to which the proof would had to have been confined in sustaining the cause of action asserted therein, that the allegations of negligence set up on the trial amendment were entirely new grounds of negligence contributing to the injury and the recovery.

It is true that to the time of the trial amendment, there had been testimony on the question of the cattle having been injured on account of the long detention upon the cars and some testimony by one of the plaintiffs that at certain points during the transportation a request was made of the defendants that the cattle be unloaded for feed, water, and rest; and the record does not disclose any objection to this testimony, except that after the case had closed upon the evidence a special charge was requested and refused by the trial court that the character of testimony mentioned be excluded from the jury. We mention the fact of the deliverance of this character of testimony before the time of the filing of the trial amendment for the reason that it may be suggested and argued that such testimony was in the record, and the defendants could not have been surprised on that account. Such testimony, however, can be appropriately accounted for without any objection upon the part of the defendants on account of this condition. As stated, defendants had pleaded that the plaintiffs had assumed, as caretakers, the charge of the cattle during transportation, on account of special contracts pleaded by them. Such testimony was pertinent on the controverted issue between plaintiffs and defendants, whether the former were guilty of negligence in failing to comply with the contract to care for the cattle in course of transportation.

[4] The plaintiffs not having pleaded (to the time of the trial amendment) as grounds of negligence that the cattle had been on the cars an unreasonable length of time without feed, water, and rest, nor that defendants had failed to furnish facilities, the latter had the right to regard that such testimony in the record up to the time of the filing of the trial amendment was relevant only to the contributory negligence of the plaintiff, and not as affecting any right of recovery by the plaintiffs. When defendants pleaded that plaintiffs, under their contracts, had special charge of the cattle in transportation, the burden, after the introduction in evidence of said contracts, was upon the plaintiffs to exonerate themselves for any negligence affecting the injury to the cattle. *Texas & Pacific Railway Co. v. Arnold*, 18 Tex. Civ. App. 76, 77, 40 S. W. 829; *Railway Co. v. Vaughan*, 41 S. W. 415; opinion on motion for rehearing in the case of *Ft. Worth & Denver City Railway Co. v. Allen*, 189 S. W. 785 (with numerous authorities cited therein), decided by this court November 29, 1916. If they were negligent in that respect, necessarily defendants had the right to reduce the damages to that extent as affecting the amount of recovery based on the grounds of negligence alleged in the amended original petition. Such an issue, as pertinent to the defense of the carriers when first asserted in plaintiffs' trial amendment upon grounds of negligence affecting their right of recovery, is entirely different when addressed to the right of the defendants to be heard thereupon.

It may be said that, because there was evidence introduced by plaintiffs and defendants as a controverted question affecting defendants' defense, this court should consider (though the issue was reconverted in plaintiffs' petition as a ground of recovery) that all the testimony had been developed on that subject.

The case of *Railway Co. v. Groner*, 100 Tex. 414, 100 S. W. 137, presents one where a new cause of action was pleaded by amendment. An application was made by the defendant for a continuance to meet the new cause asserted. The defendant was forced to trial, and, as affecting the right of that litigant for opportunity to meet the new issues, Justice Williams of the Supreme Court said:

"Nor is the objection to the ruling of the court met by the fact that some evidence was produced by the defendant of the same character as that for which the continuance was sought. This consideration has weight where time and opportunity to procure evidence have been allowed and further delay is sought, but does not properly affect the question here. The defendant was entitled to a reasonable opportunity to bring all the evidence upon the issue which it could produce and thought important to its defense, and could not properly be denied this right so long as it was not in default."

The defendants, by their attorney, swore that they expected to meet the new issues presented in plaintiffs' petition as grounds of

recovery, if permitted opportunity to do so. The "newness" of the issue (though a new cause of action is not made) presents the application of the principle of the right for time to meet it equally as significantly as if a new cause had been presented.

The trial court submitted to the jury the issues of the alleged liability of the defendants for failure to unload, feed, water, and rest the cattle en route, and the failure to furnish plaintiffs reasonable facilities, on demand therefor, at reasonable intervals. It is evident, considering the statement of facts, that such issues were matters of serious consideration by the jury, which could have contributed considerably to their verdict. We think the trial court would have been on the "safe side" in continuing or postponing the cause.

[5] The first assignment of error declares that:

"The court, in permitting one of the plaintiffs, W. P. James, while testifying as a witness in behalf of plaintiffs, to testify, over objections of defendants, that the difference in the value of the cattle when loaded on the train at Ft. Stockton and their value when they arrived at Chillicothe was about \$2 a head; defendants' objections being that said testimony was incompetent to prove the damage to the shipment from the time they left Ft. Stockton until they arrived at Chillicothe."

The proposition under this assignment is:

"That the measure of damages to a shipment of live stock is the difference, if any, in the market values of said stock, if any, at the time and in the condition in which they did arrive at destination and at the time and in the condition in which they should have arrived if handled and transported with ordinary care and reasonable dispatch."

The bill shows that the objection to the testimony was:

"That evidence of any difference in value of the cattle from the time they were loaded and penned at Ft. Stockton and the time they arrived in Chillicothe would be incompetent to prove the damage to the shipment of cattle."

[6] A party objecting to evidence should state his objections clearly and specifically so that they may be understood by the court, and obviated by the opposing party if they be capable of being removed by the production of other evidence. *Bohanan v. Hans*, 26 Tex. 445; *Croft v. Rains*, 10 Tex. 520; *Cobb v. Norwood*, 11 Tex. 556.

Plaintiffs were evidently attempting, by the testimony, as exhibited in the bill of exceptions, to properly present an apportionment of damages with reference to the several liability of the connecting carriers. The objection that evidence of any difference in value of the cattle from the time they were loaded and penned at Ft. Stockton and the time they arrived in Chillicothe was incompetent would not reach the question. Plaintiff had a right, in some manner, to present the damages arising from the injury to the cattle on account of the negligence of the Orient, and such a general objection, to the effect that "any evidence" of any difference in value at Chillicothe, etc., was too general.

There could be evidence on the question tending to prove the difference which would be proper. We also seriously doubt that an objection on the ground of incompetency would permit the court to exclude the evidence.

[7] Appellants objected to the following answers of one of the plaintiffs James, on the ground that they were a conclusion of the witness and were answers on a mixed question of law and fact:

"The real appearance of the cattle and what they should have arrived in if they had got in on a good day without lying in that mud at Amarillo, and on those cars, the appearance was \$5 difference in them. They were that much off in appearance."

The meaning of this testimony is a little difficult. If it is intended to convey the idea of the difference in value of the cattle at \$5 per head on account of their actual appearance compared to their appearance if they had arrived as the result of a good run, we are clear that the testimony was subject to the objections, and was improper. Reading the whole of this witness' testimony, we are inclined to think that he was intending to convey such a meaning, or one similar thereto, though he used the expression as a part of his testimony, "what they should have arrived in if they had got in on a good day," meaning a good run or a run in good time, or at least a reasonable time. It will be recalled that the Supreme Court, in the case of *Houston & Texas Central Railway Co. v. Roberts*, 101 Tex. 418, 108 S. W. 809, held that a witness' testimony, in effect, that "runs" previously made within a certain time "would be a reasonable time to make the trip," constituted an answer involving a mixed question of law and fact; that the witness must first determine for himself what would constitute ordinary care, and then have deduced from a consideration of all the elements that would enter into his opinions on the question of reasonable time, a conclusion as to what that time should be. If a witness is unable to state that certain runs would constitute a reasonable time within which to make a trip, then this witness would certainly be unable to state the difference in the value of the cattle on account of a difference in appearance; one element of his conclusion being based upon a good run or a reasonable run. He would be unable to state in the first instance what a

reasonable or a good run or what reasonable time would have been. The following authorities hold the character of testimony discussed as improper: *T. & P. Ry. Co. v. Jones*, 58 Tex. Civ. App. 132, 124 S. W. 194; *K. C. M. & O. Ry. Co. v. Bigham*, 138 S. W. 432; *K. C. M. & O. Ry. Co. v. Beckham*, 152 S. W. 229; *T. & P. Ry. Co. v. McIntyre*, 152 S. W. 1103; *T. & P. Ry. Co. v. Crowder*, 157 S. W. 281; *T. & P. Ry. Co. v. Tomlinson*, 157 S. W. 278; *H. & T. C. Ry. Co. v. Hawkins*, 167 S. W. 190; *I. & G. N. Ry. Co. v. Hamon*, 173 S. W. 613; *P. & N. T. Ry. Co. v. Holmes*, 177 S. W. 505; *F. W. & D. C. Ry. Co. v. Gatewood*, 185 S. W. 932; *K. C. M. & O. Ry. Co. v. Corn*, 186 S. W. 807.

[8] There were several assignments of error in the brief challenging the testimony of a number of witnesses who stated that cattle would become drawn, feverish, and weak if confined in cars from 40 to 43 hours without unloading, feeding, watering, and resting the same; most of the witnesses also answering that it would take several days to recuperate or recover from the weakened condition. There can be no doubt but what nearly all of the witnesses qualified themselves to speak on the subject, on account of their experience as cattlemen and as shippers. The witness Price, it is true, stated that he had never accompanied a shipment of cattle. However, considering his experience, we think it was a question for the jury as to the weight of his testimony. There are witnesses who were not cattlemen, strictly speaking, testifying along the same line, the objections to which we will not discuss, for the reason that it is practically an indisputable fact in this record that cattle of this character, confined for the length of time as shown in this record, without sustenance and rest, were injured.

The eleventh assignment challenges the verdict of the jury and judgment of the court on the ground that there was not sufficient evidence to show any difference in the market value of the cattle that reached Dalhart alive at the time and in the condition they did arrive and the market value of such cattle at the time and in the condition they should have arrived at destination. In view of another trial the discussion of this assignment would probably be academic.

For the reasons indicated, the cause is reversed and remanded.

EARHART et al. v. AGNEW et al.
(No. 1040.)

(Court of Civil Appeals of Texas, Amarillo,
Dec. 20, 1916. Rehearing Denied
Jan. 17, 1917.)

1. FRAUDULENT CONVEYANCES \S 57(5)—**GIFT BY HUSBAND—VALIDITY.**

A husband can lawfully give any of his property or his interest in the community property to his wife, provided he is solvent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 155-157; Dec. Dig. \S 57(5).]

2. HUSBAND AND WIFE \S 235(4)—**SPECIAL FINDINGS—CONFLICT.**

A special finding by the jury that a wife signed a deed upon condition that she was to have the value of the land does not conflict with a finding that the note therefor was not given to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 862, 982; Dec. Dig. \S 235(4).]

3. HUSBAND AND WIFE \S 15(4)—**CONVEYANCE BY WIFE—CONSIDERATION.**

There is no consideration for a wife's signature to a deed to property which was not the homestead and which the husband could convey without her signature.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 95, 283; Dec. Dig. \S 15(4).]

4. APPEAL AND ERROR \S 1002—**REVIEW—FINDINGS—EVIDENCE.**

Special findings by the jury on questions of fact are binding on the appellate court, though there is evidence to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3935-3937; Dec. Dig. \S 1002.]

5. GIFTS \S 31(1)—**DELIVERY OF NOTE—"GOODS AND CHATTELS."**

Choses in action are not goods and chattels within Vernon's Sayles' Ann. Civ. St. 1914, art. 3968, providing that no gift of any goods and chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee so that delivery and possession of a note is not essential to the validity of a gift of the note.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. \S 58, 59; Dec. Dig. \S 31(1).]

For other definitions, see Words and Phrases, First and Second Series, Goods.]

6. TRIAL \S 121(2), 125(1)—**MISCONDUCT OF COUNSEL—INFERENCES FROM EVIDENCE.**

In an action in which plaintiff garnished the holder of notes payable to defendant, where defendant's wife intervened claiming the notes as a gift from him, the argument by plaintiff's counsel that defendant transferred the note to his wife for the purpose of beating his honest debt to plaintiff, was permissible as a conclusion from the evidence and not inflammatory or intended to prejudice the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 296, 303; Dec. Dig. \S 121(2), 125(1).]

7. EVIDENCE \S 233—**WITNESSES** \S 379(2)—**IMPEACHMENT—INCONSISTENT STATEMENTS—CLAIM OF OWNERSHIP.**

Where the debtor had testified that he had given notes payable to him to his wife, declarations by him subsequent to the gift claiming to own the notes, are admissible in proceedings by a creditor claiming fraud and conspiracy to con-

tradict and impeach defendant's testimony, though not to show his ownership of the notes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 886-888; Dec. Dig. \S 233; Witnesses, Cent. Dig. \S 1220, 1248; Dec. Dig. \S 379(2).]

8. APPEAL AND ERROR \S 216(1), 231(7)—**PRESENTING QUESTIONS BELOW—EVIDENCE—OBJECTIONS—LIMITING EFFECT.**

An assignment of error to the admission of testimony which was admissible only to impeach a witness cannot be sustained where only the general objection was made and no special charge limiting the effect of the testimony was requested.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 216(1), 231(7); Trial, Cent. Dig. \S 195, 627.]

9. GARNISHMENT \S 161—**EVIDENCE—ANSWER OF GARNISHEE.**

Where the action against the debtor and the garnishment proceedings are heard at the same time, the answer of the garnishee is admissible in evidence as between plaintiff and garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 299; Dec. Dig. \S 161.]

10. TRIAL \S 255(4)—**REQUEST FOR SPECIAL CHARGE—LIMITING EVIDENCE.**

Where evidence admissible only against the garnishee was admitted at the consolidated trial of the garnishment proceedings and the main action, it was the duty of defendants to have requested a special charge limiting the effect of the evidence if they did not wish it considered against them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 632; Dec. Dig. \S 255(4).]

11. APPEAL AND ERROR \S 1052(5)—**HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY FINDINGS.**

Error in admitting testimony by a garnishee that he had notes belonging to defendant was harmless where the note was payable to defendant and the jury found he did not give it to his wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4175; Dec. Dig. \S 1052(5).]

12. HOMESTEAD \S 216—**SPECIAL VERDICT—SUFFICIENCY.**

Special findings by the jury in an action in which defendant's wife claimed a note as the proceeds of the homestead, held sufficiently clear and to determine the issue of homestead adversely to the wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 400-408; Dec. Dig. \S 216.]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by J. W. Agnew against S. M. Earhart, with the Lubbock National Bank as garnishee, in which Mrs. S. M. Earhart intervened and claimed the fund impounded by garnishment proceedings. Judgment for plaintiff, and defendant and intervener appeal. Affirmed.

R. A. Sowder, of Lubbock, for appellants. W. F. Schenck and Roscoe Wilson, both of Lubbock, and Chas. C. Triplett, of Brownfield, for appellees.

HALL, J. The appellee Agnew sued T. O. Earhart, in the district court of Lubbock county, to recover the amount of a certain note made by Earhart, payable to Agnew, and at the time of filing the suit procured

the issuance and service of a writ of garnishment against the Lubbock State Bank. The bank answered that it had in its hands \$1,205.20. Mrs. S. M. Earhart, wife of T. O. Earhart, intervened in the garnishment proceedings, claiming the fund impounded. Special issues were submitted to the jury and judgment was rendered that T. O. Earhart was the owner of the fund; that he was indebted to J. W. Agnew in an amount exceeding the sum held by the bank, and the bank was ordered to pay the fund in its hands to plaintiff. The following are the issues submitted to the jury, with the answers returned thereto:

No. 1: "Did T. O. Earhart and his wife, S. M. Earhart, at the time they moved off the south 200 acres of survey No. 22, block D 2, in Lubbock county, Texas, and acquired and moved onto a place in the town of Lubbock, in the year 1909, intend to return and occupy the said section 22, block D 2, as a homestead?" Answer: "No."

No. 2: "Did S. M. Earhart and T. O. Earhart, or either of them, ever move back and occupy the south 200 acres of section No. 22, block D 2, as their homestead, after they moved away from the same to the town of Lubbock, in the year 1909, until they sold the same to A. Symes, on June 16, 1911?" Answer: "No."

No. 3: "Was section 22 abandoned by T. O. Earhart as a home, with the intention never to return and live thereon at the time they moved from the same in the year 1909?" Answer: "Yes."

No. 4: "Did T. O. Earhart and S. M. Earhart abandon 200 acres out of the south part of section 22 as a home at any time prior to their sale to A. Symes on June 16, 1911?" Answer: "Yes."

No. 5: "Was the transfer of the note, the proceeds of which are garnished in this suit, a gift from T. O. Earhart to S. M. Earhart?" Answer: "No."

No. 6: "Was the debt sued on by the plaintiff against said T. O. Earhart a community debt—that is, a debt contracted during the existence of the marriage relations between them?" Answer: "Yes."

No. 7: "Did S. M. Earhart, at the time she signed the deed to A. Symes on June 16, 1911, do so upon the condition that she was to have the value of the 200 acres out of the south half of section 22, block D 2?" Answer: "Yes."

No. 8: "Did the intervener, S. M. Earhart, or some one for her, have the open, notorious, exclusive, and adverse possession of the note due January 1, 1915, for a period of two years prior to January 1, 1915?" Answer: "No."

No. 9: "Was T. O. Earhart insolvent at the time it is alleged he indorsed the notes introduced before you, if he did so, to his wife S. M. Earhart?" Answer: "No."

[1] Appellants contend, first, that the court should have rendered judgment in favor of Mrs. S. M. Earhart on the special answers and verdict of the jury. It is true, as contended, that the husband may lawfully transfer or give any of his property, or his interest in the community property, to his wife, provided he is solvent at the time. "The right of one to give his property, whether separate or community, to another, even though it be his marital consort, is absolute where the principle is not violated that one must be just before he is generous." Speer's Law of Marital Rights, § 116; Bruce v. Koch,

40 S. W. 626; Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763; Kane v. Ammerman, 148 S. W. 815.

[2] The finding of the jury, however, is that the note in question, the proceeds of which are held by the garnishment, was, as a matter of fact, never given to Mrs. Earhart by her husband. In response to interrogatory No. 7, the jury found that at the time she signed the deed with her husband, conveying the 200 acres to A. Symes, it was upon condition that she was to have the value of the land. There is no conflict between this finding and the conclusion of the jury that this note was never given to her.

[3] It having been found that the 200 acres was not a homestead at the date of the Symes deed, there was no consideration for her signature as a sufficient conveyance might have been made by T. O. Earhart alone.

[4] There is considerable evidence tending to show a gift of the note to Mrs. Earhart by her husband, but it is clear from the findings of the jury that they "did not bless it with credence." The note itself was payable to T. O. Earhart and prima facie was his property. It was apparently the opinion of the jury that the indorsement was not made at the time of its execution, as asserted by some of the witnesses. We are bound by these findings.

[5] We were mistaken in our original opinion in basing our conclusions upon articles 3967 and 3968 of Sayles' Civil Statutes, since it has been held that choses in action are not "goods and chattels" within the meaning of such statutes (Schauer v. Von Schauer, 138 S. W. 145; Cowen v. First National Bank, 94 Tex. 547, 63 S. W. 532, 64 S. W. 778); and that delivery and possession by the donee of this character of property is not essential to the validity of the gift.

[6] Under the second assignment it is urged that because appellees' counsel stated in argument to the jury that "T. O. Earhart transferred the note to his wife for the purpose of beating his honest debt to Agnew, the plaintiff," the verdict and judgment should be set aside. We see nothing inflammatory in the remark, nor do we think it tended to prejudice the jury; it is simply a statement by counsel of his conclusions, drawn from the evidence. As we understand the rules of practice, it is permissible for counsel in argument to draw from the evidence every legitimate inference deducible therefrom, if in doing so the language used does not transcend proper bounds. Pitts v. Wood, 125 S. W. 954. The findings of the jury upon the issue of homestead preclude appellants from recovering the fund in controversy upon the ground set up by them that the money impounded by the writ of garnishment was the proceeds of a note given in part payment for their home, and therefore exempt.

[7] Plaintiff was permitted over the objec-

tions of the intervener to testify that T. O. Earhart had told him that he (Earhart) had about \$4,000 worth of notes in the bank. The court permitted the introduction of a release by Earhart to the vendor's lien retained in the note in question, in which it is recited that Earhart is "the present legal and equitable owner and holder of said vendor's lien notes above mentioned. The objections made were that the evidence offered is the statement of a legal conclusion and that declarations of ownership, after the declarant has parted with the title to the property, are not admissible against the real owner. It appears that T. O. Earhart had testified by deposition that he transferred, together with other notes, the one in question to his wife, as her pro rata share of the estate; that the notes were delivered to her as her own property and it was understood that she should hold them for the purpose of schooling the children and using the money as she saw fit. The declarations of T. O. Earhart as to his ownership of the note and the recital in the release of the vendor's lien were admissible under this record for the purpose of contradicting and impeaching Earhart, but should not have been admitted to disprove the claim of ownership made by Mrs. Earhart. Fraud and conspiracy had been alleged, and under such allegations considerable latitude is allowed in the admission of testimony.

[8] Appellant should have requested a special charge, limiting the effect of the testimony to its legitimate purpose, but, having made a general objection and having failed to request the charge, the assignment must be overruled. *P. & N. T. Ry. Co. v. McMeans*, 188 S. W. 692; *Construction Co. v. Crawford*, 39 Tex. Civ. App. 56, 87 S. W. 223.

[9, 10] It is further contended that the court erred in permitting the garnishee's answer to be introduced in evidence. As between the plaintiff and the garnishee the answer was admissible. *Moore v. Blum*, 40 S. W. 511; *Blum v. Moore*, 91 Tex. 273, 42 S. W. 856. We think the language of the statute clearly indicates that the garnishee's answer is to be looked to by the court in determining the extent of the garnishee's liability. It appears from the record that the original action against T. O. Earhart, and the garnishment proceeding against the bank, were tried at the same time as one case. The answer being admitted in one branch of the suit as consolidated and tried, it was the duty of appellants, if they did not want it to be considered as evidence against them, to have requested a special charge, limiting its effect.

[11, 12] Appellants assign as error the action of the court in permitting an official of the bank to testify:

"We have had, ever since Mr. Earhart left, we have had some notes in the vault that belonged to him."

Ordinarily, it would be reversible error to admit such evidence, since in a case of this nature the question of ownership is one of mixed law and fact; but the answer of the jury to special issue No. 5, to the effect that T. O. Earhart never gave the note to his wife, and the face of the note itself fixing the ownership in T. O. Earhart, the error, if any, was harmless. We think the findings of the jury are sufficiently clear, and determine adversely to appellants the issue of homestead.

Our original opinion is withdrawn, and the clerk is ordered to file this in its stead. What we have said disposes of the various assignments, and the judgment is affirmed.

KANSAS CITY, M. & O. RY. CO. OF TEX-
AS v. FINKE. (No. 575.)

(Court of Civil Appeals of Texas. El Paso.
Nov. 28, 1916. Rehearing Denied
Jan. 5, 1917.)

1. APPEAL AND ERROR \S 999(3)—QUESTIONS
OF FACT—CONTRIBUTORY NEGLIGENCE.

Where the proof is conclusive that a railroad and its employé were engaged in interstate commerce when the latter was injured, and the jury found on special issues the amount to which the employé's negligence contributed to his injuries, which was deducted from his damages by the court, the issue of contributory negligence is disposed of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8923, 8924; Dec. Dig. \S 999(3).]

2. APPEAL AND ERROR \S 934(2)—PRESUMPTIONS—SPECIAL VERDICT—ISSUES NOT SUBMITTED.

Where the question of assumed risk was not submitted to the jury and not required by defendant, the issue will be resolved in support of a judgment for plaintiff rendered on special issues found by the jury, if there is any evidence to support such a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. \S 934(2).]

3. TRIAL \S 365(1) — SPECIAL ISSUES — ASSUMPTION OF RISK.

In an action for injuries to a roadmaster who ran his railroad motorcar into an open switch, special issues as to whether it was the custom when engines went upon the side track to get coal and water to leave the switch open, and whether plaintiff knew of such custom, did not submit the question of assumption of risk either under the Texas rule that he assumed the risk arising from his knowledge that the doing of the work in a particular way had become so common and habitual that he should know it would be followed on the particular occasion, or under the rule in the federal courts that he does not assume the risks arising from a knowledge of his master's methods of business or from a failure to use ordinary care to ascertain such methods.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 871; Dec. Dig. \S 865(1).]

4. MASTER AND SERVANT \S 219(4), 226(2) — INJURIES TO SERVANT—ASSUMPTION OF RISK — OBVIOUS DANGER — NEGLIGENCE OF EMPLOYER.

An employé assumes the risks of the dangers normally and necessarily incident to the occupation and of such others as he becomes aware of or as are so open and obvious that an ordinarily prudent person must necessarily have observed them, but does not assume risks arising from his employer's negligence if he does not know of such negligence and is not charged with knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 613, 662; Dec. Dig. \S 219(4), 226(2).]

5. MASTER AND SERVANT \S 288(12) — INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR COURT.

The mere fact that a roadmaster ran his motorcar into an open switch, the position of which was correctly indicated by the switch target, does not charge him with assumption of risk of an obvious danger as a matter of law, but, at most, raises a jury question which will be presumed to have been found against defendant by the court where special issues, not including

assumption of risk, were submitted to the jury, and judgment rendered thereon for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1083; Dec. Dig. \S 288(12).]

6. MASTER AND SERVANT \S 276(8), 278(18)—INJURIES TO SERVANT—NEGLIGENCE OF DEFENDANT—EVIDENCE.

In an action for injuries to a roadmaster who ran his motorcar into an open switch, evidence held sufficient to support the jury's finding that defendant was negligent in leaving the switch open, and that such negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959, 970, 971; Dec. Dig. \S 276(8), 278(18).]

7. TRIAL \S 351(2)—SPECIAL ISSUES—ISSUES NOT SUBMITTED—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, requiring the court to submit all the issues made by the pleading, but providing that failure to submit any issue shall not require reversal of a judgment unless its submission was requested in writing by the party complaining of the judgment, and that upon appeal or writ of error an issue not submitted and not requested shall be deemed as found by the court in such manner as to support the judgment, if there is evidence to sustain such a finding, a judgment for plaintiff on special issues, which did not include assumption of risk, is not improper, where no issue on assumption of risk was submitted by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 837; Dec. Dig. \S 351(2).]

8. EVIDENCE \S 532 — EXPERT TESTIMONY — EXAGGERATION OF INJURIES.

In an action for personal injuries, testimony by a physician that it was recognized among the medical profession and in the books that there was such a thing as exaggeration of injuries, especially where they occurred as the result of accidents on railroads, in no way tended to prove that plaintiff had exaggerated his injuries, and was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2340; Dec. Dig. \S 532; Damages, Cent. Dig. § 483.]

9. TRIAL \S 260(1) — REQUESTED CHARGES — REPETITION OF GIVEN CHARGE.

There is no error in refusing requested charges when the issues were sufficiently covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. \S 260(1).]

10. MASTER AND SERVANT \S 296(1) — INJURIES TO SERVANT—REQUESTED INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

In an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), where special issues were submitted, including plaintiff's contributory negligence and the amount to which it contributed to his injury and the damages thereby reduced, it was not error to refuse a requested charge that it was plaintiff's duty to exercise ordinary care to avoid the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1180; Dec. Dig. \S 296(1).]

Appeal from District Court, Knox County; Jo A. P. Dickson, Judge.

Action by C. A. Finke against the Kansas City, Mexico & Orient Railway Company of Texas. Judgment for the plaintiff, and defendant appeals. Affirmed.

H. S. Garrett, of San Angelo, and D. J. Brookreson, of Benjamin, for appellant. W. M. Moore, of Benjamin, and Ocle Speer, of Ft. Worth, for appellee.

HARPER, C. J. This is an appeal from a judgment in favor of plaintiff (below) for \$3,000, with legal interest from date thereof.

For cause of action plaintiff pleaded that on or about February 17, 1915, while acting as roadmaster for defendant, he was making his usual trip over the road in a motorcar furnished by defendant, prosecuting his duties of inspection, and while in the exercise of proper care, without fault upon his part, and without notice, he ran into an open switch, his car was derailed, and by reason thereof he was injured; that the switch being open and disconnected was negligence upon the part of defendant and the proximate cause of the accident and injury.

Defendant answered that it was engaged in interstate commerce at the time of the accident, and that plaintiff was an employé of the defendant in such commerce within the meaning of the act of Congress of April, 1908; that it was plaintiff's duty to see that the track was in proper condition, including the side tracks and switches in Hamlin, and that switch targets, including the one in question, were in such condition that they could be readily seen several hundred yards away by persons approaching; also that switches, including the one in question, were closed when it was customary or necessary that same be closed; that at the time of the accident the switch target in question was in first-class condition so that it could have been seen by plaintiff with ordinary care several hundred yards away and in time to have avoided the accident; if it was not in such condition, this was plaintiff's fault; that the switch in question opened upon a coal and water track upon which engines went to obtain coal and water for use in hauling trains engaged in interstate commerce; that at and prior to the accident it was customary where engines went on the switch track for coal and water to leave the switch open until their return, with which custom plaintiff was, or should have been in connection with his duties, fully familiar; that at the particular time of the accident a road engine hauling freight between California and Kansas had gone on the switch track to obtain coal and water for use in such carriage; that plaintiff knew or should have known of such facts, even without being apprised thereof by the switch target itself; that, notwithstanding all these facts, plaintiff undertook to run a motorcar at a dangerously rapid rate of speed north from Hamlin past the switch track, although he well knew, or with ordinary care for his own safety should have known, and in accordance with his duty as an employé should have known, that the switch was open at the time; that in addition plaintiff could have discover-

ed the open switch with ordinary care, and it was his duty to do so under the rules of railroading and in accordance with his duties, in ample time to have stopped the motorcar, because the switch target clearly disclosed, in the usual manner, that the switch was open; yet plaintiff ran into the switch in gross violation both of the duty he owed to himself and to the property in his charge and of the universally accepted rules of defendant and principles of railroading; that therefore the accident and injuries resulted solely from the risk assumed by plaintiff in connection with his employment, and especially in undertaking to run the motorcar over the track at such speed under the conditions then existing.

The cause was submitted by special issues. The questions submitted and the answers thereto are as follows:

"No. 1. Was the defendant, acting by and through its servants or employes, guilty of negligence in leaving the switch open, into which the plaintiff ran? Answer: Yes.

"No. 2. If you have answered Issue No. 1 in the affirmative, then answer the following issue: Was such negligence, if any you have found, upon the part of the defendant, the proximate cause of the accident to the plaintiff? Answer: Yes.

"No. 3. Was the plaintiff injured as a result of the accident in question? Answer: Yes.

"No. 4. Was the plaintiff guilty of negligence in running into the switch, under the circumstances surrounding the plaintiff at the time of the accident? Answer: Yes.

"No. 5. How much damage has the plaintiff sustained, if any, by reason of the accident in question and the injuries received, if any, by him, by reason of said accident, if any? Answer: \$8,000.

"No. 6. If you have answered the fourth issue in the affirmative, then answer the following issue: Was plaintiff's negligence the sole proximate cause of the accident and the injuries, if any, to the plaintiff? Answer: No.

"No. 7. If you have found in answer to issues Nos. 4 and 6 that plaintiff was guilty of negligence in running into the open switch, and that such negligence, if any, contributed to cause the said accident and injuries, if any, occasioned plaintiff by reason thereof, then answer the following: How much in dollars and cents did plaintiff's contributory negligence, if any, contribute to the damage, if any, sustained by the plaintiff? Answer: \$5,000.

"No. 8a. If in answer to Issue No. 4 you have found that the plaintiff was guilty of negligence in running into the said open switch, then state whether such negligence contributed to the accident and injuries, if any? Answer: Yes."

Special issues submitted at request of defendant:

"1. Was it the custom where the engines went in upon the side track to get coal and water to leave the switch open until the engine came out? Answer: Yes.

"2. If you have answered the above question, No. 1, in the affirmative, then say: Did plaintiff, C. A. Finke, know of such custom, or should he have known of such custom by the exercise of ordinary care? Answer: Yes."

Upon which judgment was entered for plaintiff.

Appellant's first, second, fourth, fifth, sixth, seventh, and eighth assignments urge that under the undisputed facts and the find-

ings of the jury the court erred in refusing to instruct a verdict for defendant, because: (a) The undisputed proof is that defendant railway company and plaintiff, as its employé were engaged in interstate commerce within the meaning of the act of Congress as pleaded; (b) that there is no pleading or evidence to charge or show that the injuries resulted from or were contributed to by the violation by the defendant of any statute enacted concerning safety appliances for the protection of employes; (c) and that the undisputed proof shows that the plaintiff assumed the risk; and (d) that it was because of his own negligence that the accident and consequent injuries occurred; (e) that there is no evidence of negligence upon the part of defendant.

[1] The proof is conclusive that the defendant and plaintiff, as its employé, were engaged in interstate commerce, and there is no evidence to the contrary; so this question was not required to be submitted to the jury. Therefore, the jury having found that plaintiff was guilty of contributory negligence, his recovery is reduced from \$8,000 to \$3,000. The issue of contributory negligence is disposed of. The question of violation of statute requiring safety appliances is not in this case by either pleading or proof.

[2] Since the question of assumed risk as a defense was not submitted to the jury and not requested by appellant, the issue will by this court be resolved in favor of or in support of the judgment, if there is any evidence to support such a finding by the trial court.

[3] But appellant urges that the questions submitted upon its request submitted the issue, and that the answers thereto constitute a finding for the defendant. The effect of the questions and answers, at most, is that the defendant's trainmen had adopted the custom of leaving the switches open when they ran trains upon side tracks until they came back on the main line, and that plaintiff knew of such custom, or should have known of it by the exercise of ordinary care.

Under the Texas authority relied on by appellant, *Railway Co. v. Huyett*, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 869, this would not be equivalent to submission of the question of assumed risk arising by reason of plaintiff's knowledge of a customary doing of a negligent act. It must go further, be a submission of the issue and a finding by the jury that "the doing of the work" in a particular way had become "so common and habitual that the employé should know that it will be followed on the particular occasion," and not simply that he should have known of such custom by the exercise of ordinary care. But under the rule laid down by the United States Supreme Court in *T. & P. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; the employé does not subject himself to risks arising from a

knowledge of his master's methods of business or from a failure to use ordinary care to ascertain such methods. *T. & P. Ry. Co. v. Eberheart*, 91 Tex. 821, 43 S. W. 510; *M., K. & T. Ry. Co. v. Crowder*, 55 S. W. 380.

[4] The employé assumes the risks of the dangers which are normally and necessarily incident to the occupation and of such others as he becomes aware of and appreciates, and of such as are so open and obvious that an ordinarily prudent person under the circumstances must necessarily have observed and appreciated. But he does not assume the risks which arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, provided he does not know of such failure, or be charged with knowledge thereof.

[5] Appellant urges that appellee, by the evidence, is brought within the rule that the danger of running into an open switch must have been known to him, and, further, that by reason of the custom obtaining at this particular switch of leaving it open, the further fact that the switch target at this time indicated that the switch was open made the danger of running into it so open and obvious that a man of his experience must necessarily have been so charged with the knowledge of both defects and dangers as to bring him within the rule of assumed risk as a matter of law, and that therefore the court should have instructed a verdict for it.

In order to determine whether this contention of appellant is sound, it seems necessary to quote some of the evidence relied on by appellee as supporting the verdict of the jury in his favor:

Plaintiff testified:

That he was roadmaster for defendant at the time of his accident, and was in the active discharge of his duties as such. "As roadmaster, it was my duty to look after the road, its switches and side tracks, to see that they were properly lined up, and that the track was in good condition. If there was anything the matter with the switches, tracks, or side tracks, it was my duty to fix it up. I did not have charge of opening the switch. Do not know about the engines getting water; that was not my business. I had nothing to do with the locomotives. It was my business to keep up with the trains which ran over the road so I could go along where a heavy train had run over the road and see whether or not the heavy engine or train had knocked the track out of line, etc., but I did not know about the operation of the trains. When this accident occurred on the 17th day of February, 1915, I was making a trip over the railroad inspecting the track. I had my eye on the track all the time, and we run into an open switch. During my 25 or 30 years of railroad business, I have been section foreman, extra gang foreman, and head roadmaster. I am acquainted with the usual and customary practice of railroading on the Orient Railroad here in vogue at the time of the injury. I will state that the main line switches, such as I run into and caused this accident, are supposed to be closed all the time. If a train comes into a place where there is a switch the brakeman opens that switch. I will state that, if a train comes along and it comes to the switch, just exactly the same switch in question here, the one I run into, wants to use

that switch, runs in on it, runs down the switch, if it is going to be gone for 15 or 20 or 30 minutes, any considerable length of time like that, the usual and customary practice with reference to leaving the switch open or closed is that it is supposed to be closed. There was no switchman at or near this switch I run into at the time of the accident. The train crew was down at the roundhouse. I do not know how far that is, but I suppose it is close to one-fourth of a mile. I had been roadmaster two years when this accident occurred. I was in charge of that motorcar and boss of it, but I did not see that target, because I was looking at the track, which I always did, in front of me. I wasn't looking ahead, of course. I had no idea the main line switch was open until I looked up and went into it. Q. You knew at the time that that locomotive did go into that switch track, didn't you? A. Yes, sir; but they always shut up. It is not a fact that main line switches are sometimes left open temporarily where there is going to be switching done, after you get away from the main line they are shut. When a train goes in on a switch and is switching and intends to come right back out, there is a man left at the target to watch it. A main line switch is not left open temporarily. If they do switching in and out, there is always a man at the target, if they do that, always a man there to line it up for them; if they go a quarter of a mile, or anything like that, they generally shut them, supposed to."

As stated above, we conclude that the custom of leaving the switch open has no bearing upon the question of assumed risk; so we then are confined to the one fact admitted, the open switch as indicated by the switch target, upon which the defendant can rely in support of its defense that the danger was so open and obvious that an ordinarily prudent person under the circumstances must necessarily have observed and appreciated it. In other words, is the fact that the switch target (placed there for the purpose) was in good condition and showed that the switch was open and his failure to see it alone sufficient to charge plaintiff with assumed risk as a matter of law? If there is evidence that plaintiff knew that there was an engine on the side track in question, which is doubtful, he, in effect, says that he had no reason to apprehend that those who ran such engine off the main line onto the side track would leave it open, for he says it was supposed to be closed all the time, and he also says that he did not know that it was open, and the fact that he ran into it conclusively shows that he did not know that it was open. So, under the circumstances as he relates them, he was justified in going about his business in the usual way relying upon the master's other employes performing their duty to close the switches so as to leave his place of work, the main track, safe for him to pass over it. So we cannot hold that the mere fact that the switch target showed the open switch and his failure to observe it charges him with assumed risk as a matter of law, but was sufficient to raise a jury question, and, if not submitted to the jury, to be determined by the court.

The circumstances surrounding the open switch and plaintiff's failure to observe it in

the performance of his duties seem to be the only facts upon which to base a charge and the finding of the jury that plaintiff was guilty of negligence, which was submitted and found in favor of defendant, and the damages reduced accordingly.

[6] And it seems equally clear that the facts and circumstances above detailed are sufficient to support the court's charge and the finding of the jury on the question of defendant's negligence and liability to plaintiff for his accident and injuries.

[7] The third assignment is that the judgment was improper, etc., because rendered upon verdict of a jury which does not dispose of the material issues in the case as made by the pleadings and testimony. As stated next above, this case was submitted upon special issues under article 1935, Vernon's Sayles' Statutes, which reads:

"The special verdict must find the facts established by the evidence, and not the evidence by which they are established; and it shall be the duty of the court, when it submits a case to the jury upon special issues, to submit all the issues made by the pleading. But the failure to submit any issue shall not be deemed a ground for reversal of the judgment, upon appeal or a writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment: Provided, there be evidence to sustain such a finding."

The issue of assumed risk was not submitted, nor was it requested; so, having concluded that there is evidence to support a finding by the trial court (in support of its judgment) that plaintiff did not assume the risk, we cannot reverse this case upon the ground urged in this assignment, and the same rule applies to all other issues not submitted, if not requested.

[8] The ninth is that the court erred in refusing to permit counsel to interrogate a physician upon the subject as to whether or not he did not know and that it is recognized among the medical profession and in the books upon the subject that there is such a thing as exaggeration of injuries, especially where injuries occurred as a result of accidents on railroads or in connection with other public service corporations.

The appellant refers us to no bill of exceptions which shows that the witness would have testified as appellant indicated. But suppose the witness would have so testified, the fact that a witness would testify that it is common to exaggerate the injuries is in no way proof that the injuries in this case have been exaggerated by the plaintiff; so the court did not err in sustaining the objection to the testimony.

[9] The tenth, eleventh, twelfth, thirteenth, fourteenth, and sixteenth assign error in the charge of the court as given and in refusing charges requested. The issues were sufficiently covered by the charge given copied above.

[10] The seventeenth is that the court erred in refusing special charge to the effect that it was the duty of plaintiff to exercise ordinary care to avoid the accident, and it was not error to refuse to give it.

The eighteenth to the twenty-fourth assignments complain of various matters, the charge of the court, the findings of the jury in answer to special issues submitted, etc. After due consideration of each and all, there appears to be no reversible error.

WALTHALL, J., does not fully concur in that portion of the above opinion relative to assumed risk.

Affirmed.

BURGHER & CO. v. CANTER et al.
(No. 7647.)

(Court of Civil Appeals of Texas. Dallas. Dec. 23, 1916.)

1. BROKERS' COMMISSION—PERFORMANCE OF CONTRACT.

Where real estate agents agreed in writing, in consideration of a commission on the rents to be collected, to secure, for a tenant of a storehouse, subtenants of part of the premises for the full term of 5 years, but in fact secured tenants only for a period of 4 years and 11 months, they could not recover commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57(1).]

2. FRAUDS, STATUTE OF § 181(1)—MODIFICATION BY PAROL.

Under the statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 5) as to agreements not to be performed within one year, such agreement, contemplating a 5-year term, could not be modified by a parol agreement to waive full 5-year leases by subtenants, and accept leases for 4 years and 11 months, since, in the absence of ambiguity or claims of equity, a written contract within the statute cannot be modified by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 283; Dec. Dig. § 181(1).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by Burgher & Co. against A. R. Canter and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Wood & Wood and J. E. Gilbert, all of Dallas, for appellants. Muse & Muse, of Dallas, for appellees.

RASBURY, J. On October 23, 1914, appellants and appellees entered into a preliminary agreement in writing for the leasing of a lot and storehouse thereon, in the city of Dallas, to appellees, for which appellants were authorized agents. Appellees, in substance, agreed to lease the lot and storehouse for five years from January 1, 1915, paying therefor \$800 per month, and to furnish security for such payment satisfactory to the owners, and to ultimately execute a formal lease, such as were then commonly in use in the city of Dallas.

Appellants, for the owners, agreed to secure for appellees by November 15, 1914, three subtenants for as many subdivisions of the storehouse, who would pay an average of \$400 per month therefor for the term of appellees' lease; any improvements necessary for such subtenants to be made by appellees. Appellees also appointed appellants their agents to collect the rent from the subtenants, and agreed to pay as compensation for such services 8 per cent. of all rentals so collected.

Subsequent to the execution of the foregoing preliminary agreement to lease, appellants sued appellees, alleging in substance a compliance on their part with the agreement, and a repudiation thereof by appellees, and consequent damage to them, to be measured by the total amount of the compensation which they would have received, had appellees not repudiated the agreement, or the sum of \$708.

A number of defenses were urged by appellees, which were in various ways met by appellants, none of which it will be necessary to detail, in view of the conclusion we have reached in the case. The issues of fact raised by the evidence were submitted to the jury upon special issues, or interrogatories, some of which were answered and some not. Appellants, by appropriate motion, sought to have the result declared a mistrial, while appellees by like motion sought judgment in their behalf. Appellees' motion was sustained, and judgment for appellees rendered.

[1, 2] Appellants present assignments challenging the court's action in submitting certain special issues, in rendering judgment on the jury's findings, and in refusing to declare a mistrial upon the failure of the jury to answer several material interrogatories. We have concluded that the judgment of the court, without reference to the appellants' assignments, and without reference to the failure of the jury to answer some of the issues, and without reference to the grounds upon which the court based its judgment is for other controlling reasons correct, and being so, should be affirmed. The jury found, in answer to special issues submitted by appellants that appellees were to have possession of the storehouse January 1, 1915, and that appellees accepted the provision of the preliminary agreement we have stated. There really was no necessity for submitting such issues to the jury, since they were established without dispute by the contract, and arose thereon as matter of law. In any event, both by the finding of the jury and by the terms of the contract, appellees were bound to accept, and appellants to deliver, possession of the storehouse January 1, 1915. It was then as a consequence incumbent upon appellants to secure for appellees subtenants for the enumerated subdivisions of the storehouse for a term of 5 years beginning January 1,

1915. This by the undisputed testimony they did not do. On the contrary, assuming that those subtenants which the testimony of appellants tends to show they secured were in other respects in compliance with the preliminary agreement, it appears that all subtenants secured by appellants only agreed to lease the subdivisions of the storehouse for a period of 4 years and 11 months at \$400 per month, which was not a compliance with appellants' covenant that they would secure tenants who would pay that sum for the full term of 5 years. But appellants, by appropriate pleading, alleged that appellees waived or modified that provision of the preliminary agreement, and agreed to accept all subtenants from February 1, 1915, due to the fact that it would require about 30 days to make the improvements required by the subtenants. The jury found that it would require 30 days to make the improvements required by the subtenants. They failed to answer an interrogatory, submitted by appellants, inquiring whether appellees agreed to accept such subtenants, beginning February 1, 1915. On that issue the only testimony adduced was that of the witness Rupe, who on direct examination, testified that appellees, in the presence of Weiss, one of the proposed subtenants, and the witness, agreed that as soon as the necessary repairs were made Weiss could move in and start his rent February 1st. On cross-examination the witness said that the effect of the statements of appellees was that the tenants could move in after repairs were made and start their rental from February 1st.

We would be inclined to hold that, in the absence of any testimony disclosing an express consideration for such modification of the contract, the probative force of such testimony was insufficient to support a finding that the lease had in so material a respect been modified. However, it is not necessary to base our holding on such ground. We conclude, conceding, for the purpose of the dis-

cussion, the agreement to modify, that such agreement, being in parol, is ineffectual, because within the statute of frauds. Where the original written contract is within the statute, that is, one required by such statute to be evidenced or proved by writing, the current of authority is to the effect that, in the absence of ambiguity, or considerations or claims of equity, it cannot be modified by concurrent, collateral, or subsequent agreement resting in parol. The foregoing is nearly the language of an eminent author on the subject. 8 Elliott, Contracts, 7, § 1862. Our statute declares that no action may be maintained in the courts of the state "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the promise or agreement, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized. Vernon's Sayles' Civ. Stats. art. 3965, subd. 5. The preliminary agreement for leasing, as we have stated, contemplated a term of five years, and the parol agreement, which sought to modify, came within the prohibition of the statute, since it sought to ingraft upon the original agreement a material change over its entire life of five years. A case in point is *Beard v. Gooch & Son*, 62 Tex. Civ. App. 69, 130 S. W. 1022. We conclude, then, that appellants having covenanted to secure for appellees subtenants for the full term of the proposed lease who would pay as much as \$400 per month, and having failed to do so, and the alleged parol agreement modifying same being ineffectual, because within the statute of frauds, all other questions become immaterial, for the reason that appellants would in no event be entitled to recover, in the absence of a showing that they had secured the subtenants for the period agreed upon.

The judgment is affirmed.

McKIBBIN v. PIERCE. (No. 1065.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 13, 1916. Rehearing Denied Jan.
17, 1917.)

1. DAMAGES —23—BREACH OF CONTRACT—CONSEQUENTIAL DAMAGES.

Where one party has defaulted a contract with another on account of a third party's default, if third party knew of circumstances creating special damages, such damages are recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. —23.]

2. LANDLORD AND TENANT —116(4)—TENANCY FROM MONTH TO MONTH—TERMINATION.

Where tenant paid rent monthly in advance, agreeing to surrender premises on demand, this was a periodic monthly tenancy, and landlord could not demand premises until expiration of the month.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 395, 400; Dec. Dig. —116(4).]

3. DAMAGES —22, 23—BREACH OF CONTRACT—"DIRECT DAMAGES"—"CONSEQUENTIAL DAMAGES."

Damages which naturally follow the breach of the contract, when the defaulting party is without notice of conditions making special liability, are direct damages, while damages which follow on account of special conditions, known to defaulting party when contract is made, increasing the liability, are consequential damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58-63; Dec. Dig. —22, 23.]

For other definitions, see *Words and Phrases*, First and Second Series, *Direct Damages*; *Consequential Damages*.]

4. DAMAGES —23—CONSEQUENTIAL—NOTICE—PROTEST.

Where party has notice of special conditions producing increase of liability and makes contract, protesting he will not be liable for such damages, the other party not consenting thereto, he will be bound to such damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. —23.]

5. DAMAGES —23—CONSEQUENTIAL—CONTRACT REFERRING TO—NOTICE UNNECESSARY.

Where agreement is made with reference to special conditions producing increased liability, notice of such conditions is not necessary.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. —23.]

6. LANDLORD AND TENANT —144—AGREEMENT TO SURRENDER—NOTICE OF SPECIAL LIABILITY.

Where tenant had notice of landlord's penalizing contract with future tenant and agreed to vacate, his attempted repudiation of the increased liability will not excuse him.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 458, 459, 601; Dec. Dig. —144.]

Appeal from District Court, Wilbarger County; J. A. Nabers, Judge.

Suit by Hall Pierce against H. F. McKibbin. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Shirley Cook and J. E. Doran, both of Vernon, for appellant. Berry, Stokes & Morgan, of Vernon, for appellee.

HENDRICKS, J. Hall Pierce sued H. F. McKibbin to recover damages for the breach

of an alleged contract to deliver possession of a certain building in the town of Vernon, and upon the submission of special issues, and findings by the jury, in response thereto, a judgment was rendered in favor of Pierce, the landlord, against McKibbin, the tenant.

T. L. Pierce, the father of Hall Pierce, formerly owned the particular brick building occupied by McKibbin; he leased the same to defendant, McKibbin, for a term of two years, beginning the 1st day of May, 1910, expiring the 1st day of May, 1912; McKibbin to pay \$600 a year rent, payable in installments of \$50 per month. At the end of the two years' term McKibbin held the premises under T. L. Pierce, under a monthly tenancy; the rent at the beginning of this tenancy having been raised to \$60 per month.

On March 19, 1913, T. L. Pierce conveyed the premises to his son, Hall Pierce, the plaintiff herein; the periodic monthly tenancy continued as before, at the same rental of \$60 per month.

It is claimed by the plaintiff, Hall Pierce, that about the 20th day of April, 1915, while defendant was holding the premises by the month as aforesaid, that he notified McKibbin, the tenant, through his agent, T. L. Pierce, that he could not continue to use and occupy the premises longer than the 1st day of May, 1915, unless he (McKibbin) "would enter into a written contract for a definite time; that McKibbin refused to enter into such a contract, and agreed that plaintiff should have possession thereof at any time he might demand it after that time."

T. L. Pierce continued to act as the authorized agent of his son, Hall Pierce, the plaintiff herein, and the claim is further made that on the 17th day of September, 1915, defendant, McKibbin, was notified that plaintiff desired possession of said premises on the 1st day of October, 1915, and demanded possession on that date; that defendant then requested plaintiff to permit him to continue the possession until October 15, 1915; that defendant was then informed that plaintiff had an opportunity of leasing the premises if he could give possession on the 1st day of October, 1915, but that if he could prevail upon Trevathan, the new tenant, to wait until the 15th of October he would comply with the defendant's request; that Trevathan agreed to wait, and plaintiff then agreed with the defendant for the latter to hold possession until the 15th of October, with the distinct understanding that the possession of said premises would be delivered not later than that date, and, relying upon defendant's promises, he (the plaintiff) entered into a contract with Trevathan, leasing the building to him for one year, agreeing to give Trevathan possession on October 15th, and to pay him \$10 per day, as liquidated damages, for each day after October 15th that he

might fall to deliver such possession; that defendant had notice of the terms of the Trevathan contract when he promised to surrender the premises.

The jury found, besides other facts, that McKibbin was renting the store building from Pierce by the month, and that McKibbin informed Pierce that he would vacate the building by the 15th of October, 1915; also found that \$650 would "compensate plaintiff for any reasonable necessary loss * * * by not having possession of the building * * * on the 15th of October, 1915"; and further found that the amount (\$650) "would compensate plaintiff for any reasonable necessary loss * * * by not having possession of the building delivered on the 1st day of November, 1915."

In answer to a special issue requested by plaintiff, the jury additionally found that McKibbin was "holding the building at will."

[1] The amount found by the jury as reasonable compensation for plaintiff's loss is not complained of by appellant. It probably could not be questioned but that, where one party has defaulted with another on account of a third party's default with him, if there is proof of knowledge to the third party at the time of his contract of special circumstances which make different damages, other than those ordinarily implied by the contract, the natural and probable effect of the breach, such damages, as consequential damages, are recoverable, whether liquidated or otherwise. *Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Co.*, 181 Fed. 39, 104 C. C. A. 52; *Iowa Mfg. Co. v. Sturtevant Mfg. Co.*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *Halstead Lumber Co. v. Sutton*, 46 Kan. 192, 26 Pac. 444; *Feland v. Berry*, 130 Ky. 328, 113 S. W. 425; *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261; *Sutton v. Wanamaker*, 95 N. Y. Supp. 525; *Illinois C. R. Co. v. Southern Seathing & Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933; *O. H. Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 284, 40 S. E. 919; *Modern Steel Construction Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70; *Shurter v. Butler*, 43 Tex. Civ. App. 353, 94 S. W. 1084.

The last case cited (*Shurter v. Butler*, supra, 43 Tex. Civ. App. 353, 94 S. W. 1084) was one where a subcontractor delayed furnishing brick to a principal contractor; the latter having been required to pay liquidated damages to a city because of a failure to complete a sewer within a certain time. It appeared that the subcontractor knew when his contract was made that the work had to be completed within a certain time, and that the completion of the sewer depended upon his furnishing the brick promptly.

The other cases cited apply the same principle, and involve a similar state of facts, except that in some of them the augmented damages, arising out of the special course of

circumstances, were not measured by a collateral contract for a liquidated amount.

[2] A repeated consideration and analysis of the facts as to the character of the contract of tenancy discloses, we think, this condition: When the two-year term was ended there was a tenancy from month to month, the rent payable monthly in advance. Assuming that Pierce's theory is supported by the record, that in April, 1915, on account of McKibbin's refusal to enter into a written contract, it was then agreed that McKibbin would surrender and Pierce could receive the building on demand; however, the record further shows that thereafter, to October 1, 1915, McKibbin continued to pay the rent monthly in advance as before. We think the tenancy was then reconverted into a periodic monthly tenancy. During the period from April, 1915, to October, of the same year, on account of the rent having been paid in advance by McKibbin, Pierce could not call for the building at any intervening period in the month for the purpose of repossessing the same on demand—this could not occur until the expiration of the monthly period. Chancellor Walsworth of New York, quoting the syllabus, which reflects the opinion, held:

"Where a party enters into the possession of premises under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes by such refusal a tenant at will, or by sufferance, and may be ejected immediately. But if the landlord subsequently accepts rent from the tenant monthly, according to the original agreement, a tenancy from month to month is created, commencing from the time of entry." *Anderson v. Prindle*, 23 Wend. (N. Y.) 616.

While the facts are not the same, we think, though, the principle is applicable. Hence when McKibbin paid and Pierce received the monthly rents, in so far as the demand and the right of re-entry by the landlord are concerned, they would be measured by the law as applied to the contract, and necessarily re-entry would have to await its termination.

As to the question of alleged contract, with reference to the agreement to surrender the building on the 15th of October, 1915, we interpret the record as disclosing this condition: On the 17th day of September, 1915, Morgan, the agent of Pierce, was sent by the latter to McKibbin to ascertain when McKibbin would surrender the premises. Pierce and one Trevathan had been, on the same day, previously negotiating for a lease, and the latter, on account of the fall trade, and the character of his business, desired the lease to begin on the 1st of October. Morgan, on his mission, informed McKibbin of that fact, but the latter was apprehensive that he could not surrender the building that early, but stated to Morgan that he would get out the 15th of October, and to so notify the other parties, which statement Morgan reported to Pierce and Trevathan. Pierce then made the contract with Trevathan, leasing

him the building, also agreeing to pay him the sum of \$10 per day as liquidated damages for every day he was in default in not delivering the premises. Morgan then reported to McKibbin in effect that Pierce would accept the former's offer to surrender the premises on the 15th of October, 1915; also informing him at that time of the other contract between Pierce and Trevathan. Morgan testified that he informed McKibbin—

“that Pierce told me to tell him he would hold him [McKibbin] for the \$10 per day if he did not get out of there by the 15th; he said that he would not get under Mr. Pierce's contract for damages, but that he would back up his own contract, and that he would get out by the 15th.”

Afterwards Trevathan wrote to Pierce that he wanted to be sure that he would get the building on the date mentioned. Before the 15th of October Morgan again went to McKibbin, testifying as to this visit as follows:

“I went in and asked McKibbin whether he would get out or not, and told him about Trevathan making this further inquiry; I told him Trevathan was worried about it, and that Pierce was worried about it and had sent me over there. He said he did not know whether he would get out or not; wanted to know why Trevathan could not run on down at Wichita and wait until he (McKibbin) could get into this other building. I told him all Pierce wanted was to satisfy Trevathan, and he said he was going down to Wichita on some other business in a few days and would see Trevathan about getting him to wait.”

When McKibbin, on the first visit to Morgan, stated that he would deliver the building to Pierce on the 15th of October, it was not stated to McKibbin, nor contemplated by him, that there was any expectation of a penalty contract to be entered into between Pierce and Trevathan, as to the lease of the building. Such a special circumstance, affecting the measure of damages, cannot be imputed to McKibbin at that particular time.

Was there a contract between McKibbin and Pierce, obligating the former to deliver the premises to the latter on the 15th of October, 1915? If there was a contract, could McKibbin prevent his liability, which would ordinarily be produced by a knowledge of the special conditions, on account of his statement that he refused to get under Pierce's contract with Trevathan? We consider the two questions as merging into each other in this solution.

Associate Justice Denman said:

“The rule seems to be settled that plaintiff, in order to recover special damages for breach of a contract, must show that at the date of the contract defendant had notice of the special conditions rendering such damages the natural and probable result of such breach, under circumstances showing that the contract was to some extent based upon or made with reference to such conditions.” *M., K. & T. Ry. Co. v. Belcher*, 89 Tex. 429, 430, 35 S. W. 6, 7.

The appellant predicates his denial of liability upon the theory that no contract was made; neither could the special damages be recovered as a result thereof if one were made, because the same were excluded by

McKibbin when he made the statement that he refused to “get under” Pierce's contract with Trevathan.

We do not understand that any court has ever held, possibly with one exception, that the parties have in reality contracted for the special damages as a result of the breach where the special conditions have been merely imputed to the defaulting party when he made the contract; we think the philosophy of the rule is that the law makes the notice a basis, or a precedent condition, to the enlarged liability.

It is true we find expressions, and they are no doubt correct, when properly conceived, that the contract must be to some extent based upon the special circumstances, or made with reference thereto. “This appears from the language of the courts in many cases where the subject is discussed.” *Sedgwick on Damages*, vol. 1, § 159.

The same author says, while this assertion is made, it is also the rule that the notice of special conditions need not be a part of the contract. *Sedgwick*, vol. 1, § 160. This author says that Justice Blackburn, in *Horn v. Midland Railway* (an English case) L. R. 8 C. P. 131, “said that in his opinion notice did not change the rule of damages unless it were such as to create a special contract.”

Sedgwick's criticism of this doctrine attempted to be announced seems convincing. “It is to be observed that if this opinion is sound, it does away at once with the whole doctrine of notice. For if the notice of special circumstances is incorporated into the contract, that is, if the contract provides against the special loss, the loss, if it happens, is not a consequential, but is a direct, result of a breach of the contract, and, as such, is, of course, recoverable. The opinion of Lord Blackburn has not been supported by any decided case, and the weight of authority is against it.” *Id.* § 160.

[3] We will use the terms “direct” and “consequential,” as applied to damages, whether wholly appropriate or not. Damages which naturally follow from the breach of a contract, when the defaulting party is without notice of any special conditions that would increase the measure of liability, are “direct”; damages which follow on account of knowledge of special conditions, imputed to the defaulting party when the contract was made, and increasing the standard of liability, are “consequential.”

In the case of direct damages the law necessarily imposes the measure whether or not the defaulting party possessed any knowledge whatever of the implied and natural consequences of the breach, or of the amount the other party would suffer on account of such breach. We also find many cases where, if the knowledge is complete of the special conditions and course of circumstances, the amount of the loss is not necessary to be known in order to charge the defaulting party with the consequential damages—the law

would continue to fix the measure, and the liability, based upon the knowledge of the special conditions; the defaulting party would not have to actually contemplate the amount of damages which would ensue if they follow as a consequence of the special conditions. We assume that, if a party were to actually make a contract upon a consideration, but before making the same merely states to the other contracting party that he would not in the event of default be bound by any direct damages, which the law would impose on account of the breach (contradistinguished from a contract where upon notice of special conditions consequential damages would ensue) if not accepted by the other as a part of the contract actually made, the law would continue to impose direct damages as the result of a breach. We think probably that the language used in the opinions and by law-writers that a contract must to some extent be based upon the special circumstances, or made with reference thereto, it is meant that knowledge or notice when imposed in the course of dealing as a preliminary to the execution of the contract is merely the predicate upon which the consequential damages would follow; otherwise parties could make such a statement and continue to make contracts and claim that the same were not made with reference to the special conditions, and exclude damages which the law imposes.

[4, 5] The law, if the party had the notice, impresses the rule, and the party cannot exclude the rule by his mere statement that he will not be bound if he continues in making the contract. If the parties contract around the special circumstances, as Sedgwick well says, the question of notice is not an element which produce the damages; the agreement, expressly contracting with reference to the special conditions, would do away with the element of notice as a legal principle. If such special damages, dependent upon notice, were really a part of the contract in a contractual sense, as argued by appellant, we would ordinarily be met in cases of this character with the opposition rule, in attempting to prove the damage, that the same adds to a written contract and should be excluded.

"A verbal notice has been allowed to change the rule of damages, although the contract was in writing." Sedgwick on Damages (9th Ed.) vol. 1, § 160. Hence if a party about to enter into a contract has notice communicated to him by the other party of special conditions producing an increased liability, and actually thereafter makes the contract, though protesting that he will not be liable for such increased damages, if the other party does not agree that such damages will be excluded, we think the law, as a matter of policy, and rule, would stamp the liability as a result of the contract, though the party attempted to exclude them. His pro-

tection would be a refusal to make the contract.

[6] At first, we were concerned with the thought that when Morgan communicated to McKibbin the special conditions and McKibbin refused to be bound by the rule of damages arising on account of the special conditions, that the minds of the parties did not meet because McKibbin refused to accept as a part of his contract any special liability arising therefrom; Pierce, through Morgan, never assented to the protest; the record also shows that after the facts were communicated to McKibbin he continued to make the promise that he would deliver the building on the 15th of October, 1915, and it is inferable that thereafter on account of the contract having been made he went to Wichita Falls for the purpose of getting Trevathan to wait and continue his business at that place. There is some inference from the testimony of Morgan of an after recognition by McKibbin that he made a contract. If the doctrine is in reality dependent upon the notice properly communicated, as a preliminary condition to liability ensuing from the contract, and is not dependent upon the fact that they enter into the contract in a contractual sense, we do not think that an attempted repudiation of this liability to which the other party does not agree—of something which does not technically enter into the contract—prevents the minds of the parties meeting upon an offer and acceptance consummated between the parties upon a valuable consideration. The notice, of itself, continues the basis, applied to which the law stamps the liability.

We think the question considered is the controlling one in the case, and the discussion of other assignments is unnecessary.

The judgment of the trial court is affirmed.

BUNTING STONE HARDWARE CO., Inc.
et al. v. ALEXANDER. (No. 7675.)

(Court of Civil Appeals of Texas. Dallas. Jan. 6, 1917.)

1. BANKRUPTCY — 435 — DISCHARGE — BURDEN OF PROOF — SUIT TO ENJOIN EXECUTION.

In a suit to enjoin execution on a judgment which plaintiff claims was barred by his discharge in bankruptcy, the burden is on plaintiff to plead and prove the discharge, and that the debt involved was not within any class which the Bankruptcy Act excepts from the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 824-839; Dec. Dig. § 435.]

2. BANKRUPTCY — 436(8) — DISCHARGE — PLEADING.

A petition to restrain execution on a judgment which alleges that it was founded on a promissory note on which plaintiff was indorser, that the note was duly scheduled in the bankruptcy proceedings, and was a provable claim against his estate, and that he had been discharged is sufficient to admit proof of the dis-

charge, and that the debt was one provable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 842, 865; Dec. Dig. ~~436~~(3).]

3. BANKRUPTCY ~~436~~(3)—DISCHARGE—EVIDENCE—DEBTS BARRED BY DISCHARGE.

Proof that the judgment the enforcement of which plaintiff sought to restrain was based on a note indorsed by plaintiff is sufficient to show that the debt was barred by the discharge under Bankruptcy Act July 1, 1898, c. 541, § 63(a), 30 Stat. 562 (U. S. Comp. St. 1913, § 9647), as one founded upon a contract express or implied, not one excepted from the discharge by section 17 (section 9601) as one for liability for obtaining property by false pretenses, since the creditor by proceeding on the note waived any right arising in tort by reason of false pretenses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 842, 865; Dec. Dig. ~~436~~(3).]

Appeal from District Court, Freestone County; A. M. Blackman, Judge.

Suit by Ernest Alexander against the Bunting Stone Hardware Company, Incorporated, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

D. T. Garth, of Teague, for appellants. Boyd & Bell, of Teague, for appellee.

RASBURY, J. Appellee sued appellants in the court below to perpetually enjoin the sale of certain lands levied upon by appellant Geo. W. Burleson, the sheriff of Freestone county, by authority of an execution issued in a judgment in favor of appellant Bunting Stone Hardware Company, Incorporated, and against appellee. Upon hearing the relief sought was granted. The facts forming the basis of the judgment as shown in the record are these: On March 15, 1915, appellee filed in the District Court of the United States for the Northern District of Texas a voluntary petition for adjudication in bankruptcy. Thereafter, on April 6, 1915, appellant Bunting Stone Hardware Company, Incorporated, recovered in the court in which this proceeding was filed a final judgment against appellee and others for \$621.60, and interest. The basis of said judgment was the promissory note of Teague Gas Stove Company, a trading partnership composed of appellee and two others, and which note appellee and the other partners individually indorsed. Said note was scheduled by appellee in the bankruptcy proceeding, and the appellant Bunting Stone Hardware Company, Incorporated, listed therein as one of his creditors. On July 30, 1915, appellee was by said District Court of the United States discharged from all debts and claims existing against him on March 17, 1915, and by the acts of Congress relating to bankruptcy. On September 21, 1915, appellant Bunting Stone Hardware Company, Incorporated, caused execution to issue upon its judgment against appellee and placed same in the hands of appellant George W. Burleson, sheriff of Freestone county, who levied same upon 81 acres of land in said county, acquired by appellee subsequent

to his discharge in bankruptcy, and advertised same to be sold thereunder November 2, 1915. As we have said, the district judge, in the injunction proceeding, and to whom all issues of fact were submitted, perpetually enjoined Burleson, sheriff, from selling said land, and the Bunting Stone Hardware Company, Incorporated, from issuing further process on said judgment of any character against appellee.

[1, 2] The sole issue presented in various ways on appeal is that appellee was not entitled to injunction for the reason that he failed to plead and prove that the debt evidenced by the judgment was one made provable in bankruptcy by the acts of Congress relating thereto. Appellee being plaintiff in the court below, the burden was upon him to plead and prove by a preponderance of the evidence, as that term is generally understood, that which would release him from the judgment obtained against him before his discharge in bankruptcy. In that respect it was necessary for him to plead his discharge and that the debt from which he was discharged and which was asserted against him in the subsequent proceeding was not within any of the classes of claims which the act excepts from the operation of the discharge. 7 C. J. 414, § 783; 5 Cyc. 405; *Imhoff v. Whittle*, 82 S. W. 1056. And we conclude that appellee did in such respect sufficiently plead and prove the necessary facts. By his petition shown in the record, appellee, among other matters, alleges in substance that the claim or judgment sought to be enforced against him was founded upon a promissory note upon which he was indorser, and that such note was duly scheduled in the bankruptcy proceedings as a debt against his estate, and that said debt was a provable claim against his estate, and that he had been discharged therefrom. Obviously such allegations are sufficient to admit proof of his discharge and that the debt was one provable in bankruptcy.

[3] The proof offered in support of the allegations was that appellee, H. H. Houston, and A. J. Dobson were partners under the firm name of Teague Gas Stove Company, which firm on February 10, 1914, executed and delivered to appellant in payment of a firm debt their negotiable promissory note for the principal sum of \$737.10, due nine months from date, bearing 8 per cent. per annum interest and reasonable attorney's fees. This note each of the partners indorsed individually. The judgment sought to be enforced against appellee was upon said note; the judgment roll so reciting. Such facts are, in our opinion, sufficient to support the finding of the trial court that appellant's claim was one provable in bankruptcy or that it was not one of the debts excepted by the act from the operation of the discharge. Among the debts from which a discharge in bank-

ruptcy will release the debtor are those constituting a fixed liability, as evidenced by judgment or instrument in writing, absolutely owing at time of adjudication, etc., or one founded upon an open account or upon a contract, express or implied, etc., or one founded upon provable claim reduced to judgment after filing petition in bankruptcy and before discharge. Section 63 (a), Bankruptcy Act. Those debts from which the bankrupt is not released as applicable to the case at bar are liabilities for obtaining property by false pretenses or false representations, etc. Section 17, Bankruptcy Act. As we have said, the burden was upon appellee to show that the debt asserted against him (the judgment) was not of the class excepted by section 17, just recited. This he did by the proof we have detailed, since in applying section 17 to "liabilities" evidenced by judgments or instruments in writing it has been ruled that, where the creditor stands, either in the proceeding in bankruptcy or in a suit in the state court, upon the contract as originally made, he waives any right arising thereon in tort, and the claim as a consequence becomes one provable in bankruptcy and from which the bankrupt is released when discharged. *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; *Ford v. Blackshear Mfg. Co.*, 140 Ga. 670, 79 S. E. 576. Hence in the case at bar, if in truth facts existed which when proven would have brought appellee's note within the class of claims excepted from the operation of the discharge, appellant waived the right to assert them when he elected to stand upon the contract or note, and it was only necessary for appellee to prove the waiver. This he did when the record in the judgment proceeding disclosed that appellant elected to enforce the contract or note.

The judgment is affirmed.

SEAGRAVES v. SCARBOROUGH. (No. 5765.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 3, 1917.)

1. MANDAMUS \S 3(8)—SUBJECTS OF RELIEF— PROCEEDINGS AGAINST SHERIFF.

While if execution requires the restitution of certain property, mandamus may be the appropriate remedy, it will not lie to compel the sheriff to levy an execution issued on an ordinary money judgment, as an adequate remedy at law is provided by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3776, providing that should an officer fail or refuse to levy an execution he and his sureties shall be liable to the full amount of the debt, etc., to be recovered on motion before the court from which the execution issued.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 20, 23, 27; Dec. Dig. \S 3(8).]

2. MANDAMUS \S 3(5)—REMEDY AT LAW.

Where a judgment provided that personal property be delivered to the sheriff by defendant within 10 days, that the sheriff should immediately deliver the same to plaintiff and re-

ceipt defendant therefor, and that the defendant upon filing of such receipt with the papers in the cause would be credited upon the judgment with the value of such property, and through the illness of the deputy sheriff, defendant, although he attempted to return the property within the 10 days, did not actually do so until thereafter, pursuant to an agreement with the deputy, plaintiff's remedy to ascertain whether the judgment was in fact satisfied in accordance with its terms was a suit between the parties, and not mandamus against the sheriff to compel the levy of execution on the property.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 20, 21, 23, 25, 84; Dec. Dig. \S 3(5).]

Appeal from Kleberg County Court; Ben F. Wilson, Judge.

Mandamus by O. R. Seagraves against J. S. Scarborough to compel respondent as sheriff to levy an execution. From a judgment denying the petitioner the relief prayed for, he appeals. Affirmed.

Hook & Hunt, of Kingsville, for appellant.
Zeb V. Nixon and Pollard & Crenshaw, all of Kingsville, for appellee.

MOURSUND, J. On February 21, 1916, in a suit in the county court of Kleberg county, in which O. R. Seagraves sued T. E. Delbridge for a certain motorcycle, judgment was rendered in favor of plaintiff against said T. E. Delbridge and the sureties on his statutory replevy bond in sequestration, for \$205, the value of the motorcycle, and it was provided in said judgment that defendant should have the right within ten days from the rendition of the judgment to deliver the motorcycle to the sheriff of Kleberg county, and that the sheriff should receive such property if it had not been injured or damaged since the replevy, and immediately deliver same to plaintiff, and receipt defendant therefor, and that the defendant should, upon filing such receipt with the papers in the cause be credited upon the judgment by the clerk with the value of such property so returned. The costs were adjudged against plaintiff, and defendant was also awarded a judgment against plaintiff for \$45, with foreclosure of lien on the motorcycle. It was provided that if the motorcycle was not delivered to the sheriff as provided in the judgment, then the judgment against defendant should be credited with said \$45. Plaintiff paid the costs adjudged against him, and after the ten days had expired credited his judgment with \$45, and on March 17, 1916, had an execution issued, which was returned into court without any official return thereon. On May 4, 1916, plaintiff procured the issuance of another execution and delivered same to the sheriff, who refused to execute the same. Thereupon plaintiff brought this suit against the sheriff, J. S. Scarborough, praying for a writ of mandamus compelling the sheriff to levy the execution, alleging the facts above detailed, and that T. E. Delbridge and his sureties, against whom said

judgment had been rendered, had property liable to execution, and further alleging that said T. E. Delbridge did not within ten days after the rendition of the judgment deliver said motorcycle to the sheriff of the court in which such judgment was rendered, and that said sheriff did not within ten days after the rendition of said judgment receive said motorcycle nor receipt to said defendant therefor, and that said defendant did not within ten days after the rendition of the judgment file with the papers in said cause the receipt of the sheriff as is provided by law in order that he could be credited by the clerk with the value of such motorcycle. The petition was duly verified.

The sheriff answered that within ten days after the rendition of said judgment T. E. Delbridge came to the house of Cleto Stoops, deputy sheriff of Kleberg county, residing at Riviera, Tex. (being the officer who executed the writ of sequestration issued in said cause and who accepted the replevy bond of Delbridge and his sureties), and announced to said officer that he desired to return said motorcycle to him and was ready to do so at once; that at said time said Stoops was confined to his bed with a serious illness and was absolutely unable to leave his bed and unable to inspect said motorcycle and see that it was in as good condition as it was at the time it was replevied by the defendant; that said Stoops directed Delbridge to leave the motorcycle where it was and agreed that it should be considered as duly and legally returned into possession of the sheriff, and stated that as soon as he was physically able to do so he would inspect it and if found to be in as good condition as it was when replevied, it should be accepted in full satisfaction of the replevy bond and of the judgment rendered by the court; that on or about the 11th day after the rendition of such judgment Stoops, in compliance with his agreement, took such motorcycle into his actual manual possession, inspected same, and found it to be in as good condition as when replevied, and that said Stoops has issued to defendant a receipt therefor. It further appeared from the answer that the first execution was not levied because the sheriff had upon conferring with the county judge been advised to return the writ without executing it. It also appeared that an order of sale had been issued directing the sheriff to seize and sell the motorcycle to satisfy Delbridge's judgment against Seagraves for \$45. The answer was not verified.

Relator filed a general demurrer and special exceptions to the answer. He filed a motion to strike from the record of the judgment a marginal notation made on May 18, 1916, during the trial of this suit, crediting Delbridge "with \$205, value of motorcycle returned to officer 5-18-16." Said exceptions, general and special, to the answer were overruled; also the motion; and judgment

rendered denying petitioner the relief prayed for.

[1] This case has been briefed by both parties upon the theory that the writ of mandamus is the proper remedy to be invoked by the plaintiff when the sheriff refuses to levy an execution. We find that, if the execution requires the restitution of certain property, mandamus has been held to be the appropriate remedy. *Fremont v. Crippen*, 10 Cal. 212, 70 Amer. Dec. 711; *North Pac. C. R. Co. v. Gardner*, 79 Cal. 213, 21 Pac. 735; *Webster v. Ballou*, 108 Me. 522, 81 Atl. 1009, Ann. Cas. 1913B, 567.

But we find no case in which it has been held that mandamus will lie to compel the sheriff to levy an execution issued upon an ordinary money judgment. Such an execution is designed merely for the collection of plaintiff's debt, and in such cases it is held that the plaintiff has other adequate remedies at law against the sheriff for his neglect of duty. *State ex rel. Bradley v. Cone*, 40 Fla. 409, 25 South. 279, 74 Am. St. Rep. 150; *Armstrong v. Stansel*, 47 Fla. 127, 38 South. 762; *Habersham v. Sears*, 11 Or. 431, 5 Pac. 208, 50 Am. Rep. 481.

That the existence of an adequate common law or statutory remedy precludes resort to the writ of mandamus is so well established as to need no citation of authorities. Our Legislature has granted a remedy by enacting article 3776 (*Sayles' Statutes* 1914), which reads as follows:

"Should an officer fail or refuse to levy upon or sell any property justly liable to execution, when the same might have been done, he and his sureties shall be liable to the party entitled to receive the money collected on such execution for the full amount of the debt, interest and costs, to be recovered on motion before the court from which said execution issued, five days' previous notice thereof being given to said officer and his sureties."

This remedy is adequate, specific, and will more certainly right any wrong inflicted by the refusal to levy an execution than to compel the sheriff to try to make the money by levy and sale.

[2] If it be desired to ascertain what the rights of the parties are, in view of the occurrences taking place after the rendition of the judgment, to determine whether Seagraves' judgment is in fact satisfied or whether the sheriff's receipt and the entry of satisfaction should be canceled, and whether the order of sale in the hands of the sheriff is valid or void, such matters should, we think, be determined in a suit between the parties themselves, and not in a mandamus suit against the sheriff who holds two writs issued in the same case, one of which is bound to be void. It is true that at the time plaintiff instituted this suit no entry of satisfaction of his judgment had been made, but the sheriff had given a receipt showing its satisfaction, and we think he could have proceeded to try the issue whether in fact it was satisfied, without resorting to the writ

of mandamus. *De Witt v. Monroe*, 20 Tex. 289; *Hollon v. Hale*, 21 Tex. Civ. App. 194, 51 S. W. 900; *Massie v. McKee*, 58 S. W. 119; *Eppstein & Co. v. Holmes & Crain*, 64 Tex. 560; *Bailey v. Buchanan*, 128 Mo. App. 190, 102 S. W. 38.

As we are of the opinion that the statute furnishes an adequate remedy against sheriffs who fail to levy executions issued upon money judgments, it is unnecessary to decide the question involving the rights of Delbridge and his sureties who are not parties to the suit. *Shrewsbury v. Ellis*, 28 Tex. Civ. App. 406, 64 S. W. 700. It is proper that such questions should be left to be determined when the necessity therefor arises in a proceeding to which all are parties who are to be concluded by the decision. It is to be noted in this connection that there is a possibility that issues of fact may arise when Delbridge and Stoops testify to what took place between them.

Having held that the writ of mandamus cannot be awarded even in a case in which the sheriff offers no excuse for failure or refusal to levy an execution on a money judgment, it follows that plaintiff's petition when considered alone does not entitle him to the relief prayed for by him, so it is unnecessary to consider the effect of the failure to verify the answer. The only case in which we find the question discussed, whether the answer should be verified, is that of *Watkins v. Kirchain*, 10 Tex. 375, and in that case the court did not undertake to lay down any definite rule on the subject.

The judgment is affirmed.

PEARCE v. SUPREME LODGE, KNIGHTS AND LADIES OF HONOR. (No. 5750.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 3, 1917.)

1. EXCEPTIONS, BILL OF \S 39(1)—FAILURE TO FILE IN TIME.

A bill of exceptions not filed within the time given by statute, or any extension thereof, cannot be considered.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. \S 54; Dec. Dig. \S 39(1).]

2. APPEAL AND ERROR \S 490(4)—RECORD—OBJECTIONS TO CHARGE.

In view of Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), requiring objections to a charge to be presented before it is read to the jury, and providing that objections not so presented are to be considered waived, where the record fails to show that a peremptory instruction was objected to, the appellate court will not review the correctness of the ruling on the theory that they are considering a matter of fundamental error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2298; Dec. Dig. \S 499(4).]

Error from Bexar County Court for Civil Cases; John H. Clark, Judge.

Suit by M. A. Pearce against the Supreme Lodge, Knights and Ladies of Honor. Judge-

ment for defendant, and plaintiff brings error. Affirmed.

E. H. Powell, of San Antonio, for plaintiff in error. Locke & Locke, of Dallas, and C. A. Keller and W. S. Anthony, both of San Antonio, for defendant in error.

MOURSUND, J. This is a suit by M. A. Pearce against the Supreme Lodge, Knights and Ladies of Honor, upon an alleged assignment of \$212.50 out of \$500 due by defendant to Elizabeth Wolff, Edna Wolff, and Charles Wolff on a beneficiary certificate in favor of Herman T. Wolff issued by defendant. Plaintiff alleged that said assignment was made, in writing and verbally, on April 1, 1911, and that on April 4, 1911, he notified Mrs. Augusta Haack and Chas. A. Jenke, agents of defendant, that he held such assignment, and that he subsequently delivered same to them upon their promise to protect him in his interests therein and see that he was paid; that said agents paid the full amount of the certificate to the beneficiaries named therein and refused to pay plaintiff the amount assigned to him. Defendant answered by general demurrer, general denial, and a special answer, admitting the issuance of a warrant for the \$500, of which one-third was payable to Elizabeth Wolff and two-thirds to Chas. A. Jenke, who had duly qualified as guardian of Edna Wolff and Charles Wolff, the other two beneficiaries, who were minors; that such warrant was issued and delivered without any knowledge or notice of plaintiff's claim; that Mrs. Augusta Haack was not an agent of defendants for the purpose of receiving the instrument relied on by plaintiff or any notice of plaintiff's right or claim. It further alleged that Edna and Charley Wolff were minors and without legal capacity to make any assignment, and therefore any attempt by them to make an assignment was invalid. Plaintiff, by supplemental petition, excepted specially to the answer and denied the allegations thereof.

[1] Plaintiff in error, in his assignments, complains of the giving of a peremptory instruction to find for defendant. The record fails to disclose that any objections were made to the charge. There is a bill of exceptions which contains the statement that plaintiff excepted to the giving of the charge, but does not disclose what objections, if any, were made to the same. This bill of exceptions was not filed until June 4, 1915, although the court adjourned on February 27, 1915, and, not having been filed within the time given by statute or any extension thereof, cannot be considered. Unknown Heirs of Criswell v. Robbins, 152 S. W. 210; Loeb v. Railway, 186 S. W. 379.

[2] Our Supreme Court has held that it is unnecessary to except to the giving of the general charge, but that it is necessary, un-

der article 1971 as amended by the act of the Thirty-Third Legislature, to present to the court such objections to the general charge as are intended to be urged by assignments of error, otherwise they are waived, and that the transcript should contain some authentic record, showing that the objections were in fact presented to the court before the charge was read to the jury. *Gulf, T. & W. Ry. Co. v. Dickey*, 187 S. W. 184. The opinions of the Courts of Civil Appeals are not in accord on the question whether that statute is applicable to peremptory instructions, but this court has held that it applies to all charges, and that if a peremptory instruction is not objected to, the appellate courts will not investigate the correctness of the ruling on the theory that they are considering a matter of fundamental error. *Strong v. Harwell*, 185 S. W. 676; *McCall v. Roemer*, 186 S. W. 409.

As plaintiff in error is not in a position entitling him to complain of the charge, the assignments must be overruled.

The judgment is affirmed.

PITT et al. v. GILBERT et ux. (No. 5707.)

(Court of Civil Appeals of Texas. Austin.
Dec. 14, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 80(1)—FINAL JUDGMENT—DISPOSITION OF ISSUES—CANCELLATION OF DEEDS.

In a suit with counts in trespass to try title, and for the cancellation of plaintiff's deed to one of the defendants on the ground, that it was induced by fraudulent representations, wherein plaintiff filed in court and tendered defendant a quitclaim deed conveying to defendants the land received in exchange for their lands, and in which plaintiff sought to recover damages for the deprivation of the use of his land and for the expense in moving to and from the land received in exchange, and for the actual loss of his time in so doing and for punitive damages, a judgment canceling the deed, but failing to dispose of the deed tendered by plaintiff, was not a failure to dispose of the issues in that respect, since the deed placed in the registry for defendants could have been had upon demand, so that the judgment was a final appealable judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. \Leftrightarrow 80(1).]

2. APPEAL AND ERROR \Leftrightarrow 934(2) — FINAL JUDGMENT — DISPOSITION OF ISSUES — PRESUMPTION.

In such suit the issues properly presented by the pleadings would be presumed to have been disposed of by the judgment, though silent thereon, unless it appeared otherwise from the face of the judgment itself.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3777; Dec. Dig. \Leftrightarrow 934(2).]

3. APPEAL AND ERROR \Leftrightarrow 1082(2)—JUDGMENT APPEALABLE — DISPOSITION OF ISSUES — WAIVER.

Where appellee did not complain of a judgment for him on account of its failure to dispose of damages properly presented by the pleadings either in the lower court or in the Court

of Civil Appeals, he will be held to have acquiesced therein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1133-1136, 4281-4284; Dec. Dig. \Leftrightarrow 1082(2).]

4. JUDGMENT \Leftrightarrow 590(2)—NEGATIVE JUDGMENT—RES ADJUDICATA.

Where the pleadings put in issue plaintiff's right to recover upon two causes of action, a judgment awarding a recovery on one, but silent as to the other, was *prima facie* an adjudication that he was not entitled to recover upon the other cause, and was *res adjudicata* as to such cause.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1063, 1064, 1108; Dec. Dig. \Leftrightarrow 590(2).]

5. EXCHANGE OF PROPERTY \Leftrightarrow 5—RESCISSION—DEMAND.

Where plaintiff as soon as he returned to the county of the venue, after having found that defendant had made fraudulent representations as to the lands conveyed to him in exchange, and within about a year after such exchange, filed a suit to cancel his deed and for damages, etc., no formal notice or demand for rescission was necessary.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. \Leftrightarrow 5.]

6. DAMAGES \Leftrightarrow 208(5)—QUESTION FOR JURY—EXPENSES.

In a suit for the cancellation of a deed on the ground of fraudulent representations, etc., the court did not err in submitting the issue of plaintiff's reasonable and necessary expense in going to and returning from the land received in exchange, where there was evidence authorizing the submission of such issue.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 533, 534; Dec. Dig. \Leftrightarrow 208(5).]

7. EXCHANGE OF PROPERTY \Leftrightarrow 5—RESCISSION—STATU QUO.

In a suit to cancel a deed of land given in exchange for land, plaintiff, who had nothing to do with the trade between another party and defendant, and who had never been in possession of a note given by such party to defendant, would not be denied a rescission on the ground that he did not offer to return such note to defendant.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. \Leftrightarrow 5.]

8. JUDGMENT. \Leftrightarrow 253(1) — PLEADING — CONFORMITY TO PLEADING.

In a suit for the cancellation of a deed, where the pleading only authorized a recovery of rent for the year 1914 at \$150 and an item of \$80 damages for expense, it was error to render judgment against defendant for \$380, \$300 of which was rent for two years.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 443, 444; Dec. Dig. \Leftrightarrow 253(1).]

Appeal from District Court, Milam County; J. C. Scott, Judge.

Suit by L. G. Gilbert and wife against Maggie E. Pitt, Frank Pitt, and J. W. Cartwright, with counts in trespass to try title, and for the cancellation of a deed, etc. Decree canceling the deed, with a money judgment against defendant. Frank Pitt and defendants appeal. Reformed and affirmed.

Carl Monk, of McAlester, Okl., and Bryan, Stone & Wade and W. C. Blalock, all of Ft. Worth, for appellants. Jack & Jack, of Corsicana, and Henderson, Kidd & Gillis, of Cameron, for appellees.

Statement of the Case.

RICE, J. We adopt appellants' statement of the case, the same having been concurred in by appellees, as follows:

"This suit was instituted by the appellees, L. G. Gilbert and wife, Ida Gilbert, in the district court of Milam county, Tex., against Maggie E. Pitt, Frank Pitt, and J. W. Cartwright, on the 24th day of September, 1914. The first count in plaintiffs' petition is a suit in trespass to try title, involving 143 $\frac{3}{4}$ acres of land situated in Milam county, Tex., the plaintiffs alleging that they were the owners of said land on October 15, 1913, and that on said day the defendants and each of them unlawfully ejected plaintiffs therefrom and continued to withhold possession thereof. In their second count plaintiffs allege that on or about the 17th of September, 1913, they were the owners of said tract of land; that on said date plaintiffs were induced to execute and deliver a deed conveying said land to the appellant Maggie E. Pitt; that plaintiffs were induced to so act by the false and fraudulent representations of Frank Pitt that certain land which plaintiffs were to receive in the state of Oklahoma was very valuable, and that, on the contrary, said land was in truth and in fact of very little value. Plaintiffs further allege that they would not have executed the deed to the Milam county land had it not been for the alleged false representations of the appellant Frank Pitt; that they relied upon his representations; and that they were thereby defrauded out of their Milam county land. Plaintiffs sue to cancel the deed, and file among the papers a quitclaim deed conveying to appellants Maggie E. Pitt and Frank Pitt title to 160 acres of land in Atoka county, Okl., which plaintiffs allege that they had received in exchange for their Milam county land. Plaintiffs further allege that J. W. Cartwright is in possession of said Milam county land, and that he, together with the appellants, have deprived the plaintiffs of the use of said land to the plaintiffs' damage in the sum of \$150. Plaintiffs also sue these appellants for \$100 for the expense in moving to and from the land in Oklahoma and for \$500 as the actual loss of their time in moving to and from said Oklahoma land, and also sue for \$1,000 as exemplary or punitive damages.

"The appellant Maggie E. Pitt in her first amended original answer alleges that on or about the 17th of September, 1913, she was the owner of one certain note in the sum of and of the value of \$972.48, executed by one G. E. Jackson, payable to the order of Maggie E. Pitt, and was also the owner of 158 acres of land situated in Beckham county, Okl.; that on or about said date the said Maggie E. Pitt conveyed to the said Jackson said Beckham county land and canceled said \$972.48 note in consideration of the conveyance of the Atoka county land to the appellees Gilbert, and that she received as consideration for the cancellation of her note and for the conveyance of the Beckham county land the 143 acres of Milam county land involved in this suit. She also denied that she was guilty of any fraud, and denied that any one had any authority to make any representations for her, and denied that she had ever ratified or confirmed any fraudulent transactions of any of the parties to this suit. She also denied that any fraudulent representations were made, and says that if they were made that plaintiffs have waived their right to rescission by the long delay in seeking restitution

and in not having ever made any claim against appellants for the land in controversy. She also alleges that she never at any time until the filing of the suit received any notice of the desire on the part of the appellees Gilbert to rescind. She further pleads that, since it is impossible to place her in statu quo, the appellees Gilbert take nothing by their suit against her.

"The appellant Frank Pitt filed a disclaimer in so far as the land in controversy is concerned, and pleaded a general denial to the allegations of plaintiffs' petition. J. W. Cartwright also filed a disclaimer.

"Plaintiffs in their supplemental petition specially deny the allegations of Maggie E. Pitt that the property was her separate property and attack the entire transaction as being fraudulent.

"Trial was had before a jury on the 18th day of October, 1915, and the case was submitted on special issues. Upon the issues as determined by the jury, the court entered a decree cancelling the deed from L. G. Gilbert and wife to Maggie E. Pitt and decreeing that the said Gilberts recover of the defendants the 143 acres of land in Milam county, Tex. A judgment was also entered against the defendant Frank Pitt for the sum of \$380."

From this judgment the appellants have prosecuted this appeal.

Opinion.

[1] By their first assignment it is urged on the part of appellants that the judgment is not final, in that it does not dispose of the deed which was filed in court and tendered by Gilbert and wife to appellants, and further because it does not dispose of plaintiffs' suit against Maggie E. Pitt for \$150 rent, \$100 expenses, \$500 loss of time, and \$1,000 exemplary damages, for which reason, it is urged, this court is without jurisdiction. Appellees sued Cartwright and Pitt for \$150 for the rental value of the Milam county land. He also sought to recover from Pitt and wife damages of \$100 as expenses of moving to Oklahoma and back, \$500 for loss of time in going and returning, and \$1,000 as punitive damages. The judgment of the trial court canceled the deed of Gilbert and wife to appellants, but did not mention or dispose of their (appellees') deed to Maggie E. Pitt for the Atoka county land, and, while it gave judgment against Frank Pitt for \$380, made no mention of any moneyed judgment against Maggie E. Pitt or J. W. Cartwright, for which reason, it is contended, all the issues raised by the pleadings were not disposed of, and the judgment is therefore not final, citing in support of their contention *Hamilton v. Joachim*, 160 S. W. 645; *Bushong v. Alderson*, 143 S. W. 200; *Oklahoma City & Texas Ry. Co. v. Magee*, 56 Tex. Civ. App. 552, 120 S. W. 1103. We do not think there is any merit in the contention that the judgment of the court failed to dispose of the deed from appellees to Mrs. Pitt, reconveying to her the Atoka county land, for the reason that the same is shown by the pleadings and evidence to have been placed in the registry of the court for them, and could have been had upon demand, without order of the court therefor, the judgment being silent with reference thereto.

[2] The earlier authorities in this state appear to sustain appellants' second contention, but appellees insist that these have either been overruled or modified by subsequent decisions, citing to sustain their contention *Hermann v. Allen*, 103 Tex. 382, 128 S. W. 115, *Trammell v. Rosen*, 106 Tex. 132, 157 S. W. 1161, *Swan et al. v. Price*, 162 S. W. 994, and *Stockwell v. Melbern*, 168 S. W. 405, in which the doctrine is announced that all the issues properly presented by the pleadings will be presumed to have been disposed of by the judgment, unless it appears otherwise from the face of the judgment itself. The judgment in the instant case is silent as to the items of damages presented by the pleadings against Cartwright or Mrs. Maggie Pitt, and therefore it comes clearly within the rule announced in the above decisions.

[3] Appellees, however, did not complain of the judgment on account of this failure to dispose of the items of damages raised by the pleadings either in the lower court or in this court, and therefore must be held to have acquiesced therein.

[4] At any rate, we think they are concluded by said judgment, and the same became res adjudicata as to such items of damage. If so, it is, in effect, a final judgment from which an appeal could be prosecuted to this court. In *Rackley v. Fowlkes*, 89 Tex. 613, 36 S. W. 77, the court says:

"The proposition seems to be sound in principle and well supported by authority that, where the pleadings and judgment in evidence show that the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is *prima facie* an adjudication that he was not entitled to recover upon such other cause."

And this principle seems to be applicable here.

In view of these later decisions we are constrained to hold that the judgment appealed from is final, and overrule appellants' contention.

[5] The court properly declined to give a peremptory charge in behalf of appellants, based on their contention that no notice of dissatisfaction or formal demand for rescission was made prior to the filing of the suit by appellees. Under the circumstances disclosed by the record, no such notice or demand was necessary. As soon as appellees returned to Milam county, which was within about a year after the exchange of lands, this suit was filed and the deed of reconveyance was tendered by them. Besides this, appellants were nonresidents, and it appears from the evidence that notice and demand for rescission was made upon their agent, King, in charge of the land, which was communicated to appellants before the filing of the suit, for which reason we overrule appellants' second assignment.

[6] The court did not err in submitting to the jury the issue of the reasonable and necessary expense of the Gilberts in going to and returning from Oklahoma, since there was evidence in the record which authorized the submission of this issue.

[7] It appears from the evidence that Maggie Pitt, about the 17th of September, 1913, held a note for \$972.48 against G. E. Jackson, and was also the owner of 158 acres of land in Beckham county, Okl.; that on said date she conveyed to said Jackson said Beckham county land, canceling and delivering to him said note; that in consideration thereof she procured Jackson to convey to appellees the Atoka county land, upon consideration that appellees would convey to her, Mrs. Pitt, the Milam county land, which they did, and it is now urged on the part of appellants that appellees are not entitled to rescission of the contract, because they have not been placed in statu quo, in that appellees did not return or offer to return to them the Jackson note. Appellees had nothing to do with the trade between Jackson and the appellants. They had never been in possession of the \$972 note, and it was therefore impossible for them to return it to appellants; and, as between the parties to this suit, the situation was the same as if the appellants had deeded the Atoka county land direct to appellees. We therefore overrule all of the assignments complaining of this matter.

[8] We sustain the 6th assignment complaining that the court erred in rendering judgment against F. E. Pitt for the sum of \$380, of which \$300 was for rent for two years. The pleading only authorized a recovery for rent for the year 1914 at \$150 and the item of \$80 damages for money expended in going to and returning from Oklahoma. Appellees, however, have offered to remit \$150. We therefore reform the judgment in this respect so as to entitle them to recover the sum of \$230 for rents and damages, and as thus reformed the same will be affirmed, the costs of this appeal being taxed against appellees.

Reformed and affirmed.

LAYBOURNE v. BRAY & SHIFFLETT.
(No. 1075.)

(Court of Civil Appeals of Texas, Amarillo.
Dec. 6, 1916. On Motion for Rehearing,
Jan. 10, 1917.)

1. ATTORNEY AND CLIENT \S 123(1)—FIDELITY.

Generally, an attorney must act towards his client with the most scrupulous good faith and fidelity, and must make known to the latter the exact status, so far as he is able, of the matter concerning which he is employed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 239, 245, 248, 249; Dec. Dig. \S 123(1).]

2. ATTORNEY AND CLIENT ¶143—OPINIONS.

Ordinarily, expressions of opinions by attorneys as to probability of judgment secured by them being reversed on appeal, even if mistaken, are not such false representations as will entitle the client to avoid for fraud a contract based thereon.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. ¶143.]

3. ATTORNEY AND CLIENT ¶166(1)—ACTION FOR COMPENSATION—EVIDENCE.

Evidence is admissible upon the issue of good faith of the attorney in action on such contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 368; Dec. Dig. ¶166(1).]

4. ATTORNEY AND CLIENT ¶166(1)—AGREEMENT FOR INCREASED COMPENSATION.

A contract between attorney and client for increased compensation, made after the relation of attorney and client has commenced, is presumptively without consideration and void, where no additional services by the attorney are contemplated.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 368; Dec. Dig. ¶166(1).]

5. ATTORNEY AND CLIENT ¶166(1)—AGREEMENT FOR INCREASED COMPENSATION.

Where a new contract between attorney and client is made for increased compensation after the relation has commenced, the burden is upon the attorney to show that the new contract was fairly made, was reasonable, and that no advantage was taken by reason of the confidential relation existing, and that his client had full knowledge of the facts.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 368; Dec. Dig. ¶166(1).]

6. ATTORNEY AND CLIENT ¶167(2)—ACTION FOR COMPENSATION—QUESTION FOR JURY.

In an action on contract for additional compensation made after services had been commenced, the evidence being conflicting as to good faith of the attorneys, such issue was for the jury.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 374; Dec. Dig. ¶167(2).]

7. ATTORNEY AND CLIENT ¶113—ACTING FOR OPPOSING PARTY.

The rule prohibiting an attorney once retained from acting for the opposing party applies only in the case of conflicting interest, in the absence of a contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 229; Dec. Dig. ¶113.]

8. ATTORNEY AND CLIENT ¶167(2)—ACTION—EMPLOYMENT BY ADVERSE PARTY—QUESTION FOR JURY.

In an attorney's action for compensation, where defendant alleged a contract that the attorney would not be employed by the opposing party during the litigation, and there was evidence to support the allegation and to show breach thereof, the issue raised thereby should have been submitted to the jury.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 374; Dec. Dig. ¶167(2).]

On Motion for Rehearing.

9. ATTORNEY AND CLIENT ¶167(2)—ACTION—QUESTION FOR JURY.

In an action by attorney for services upon quantum meruit, the evidence being conflicting, plaintiff's right to recover is for the jury.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 374; Dec. Dig. ¶167(2).]

Appeal from District Court, Wheeler County; Frank Willis, Judge.

Action by Bray & Shifflett against W. A. Laybourne. From judgment for plaintiffs, defendant appeals. Reversed and remanded.

Crudgington & Works, of Amarillo, and Hill & Clark, of Shamrock, for appellant. Kimbrough, Underwood & Jackson, of Amarillo, for appellees.

HALL, J. Appellees, a firm of lawyers, filed their original petition in the district court of Wheeler county, September 9, 1915, seeking to recover of appellant \$1,117.50, and interest, as attorney's fees for services rendered appellant by them in certain litigation between Spaulding Manufacturing Company and appellant. It is alleged, in substance, that on September 30, 1912, appellant executed a written contract, in which he agreed to pay appellees \$1,000 for their services as attorneys in representing him in said litigation with the Spaulding Manufacturing Company, of Grinnell, Iowa; that \$500 of this amount was paid by note, and the remaining \$500 was to be paid upon the expiration of the statutory period allowed for appeal from the judgment entered in said Iowa cause shortly prior to the date of said contract; that said contract also provided for the payment of \$100 additional for services by appellees in the Supreme Court of Iowa, in the event the said Spaulding case was appealed to said court, and for an additional \$200 if said cause should be again tried in the court below; that said \$1,000 was due for services already rendered at the time of said contract; that said Spaulding case was appealed, and said \$100 for services in the appellate court had accrued, besides interest on said note, making said total sum; that in 1909 appellant made a written contract of employment with the Spaulding Manufacturing Company, of Grinnell, Iowa, under which he rendered services to said company as superintendent of its business of selling and trading buggies in the state of Texas; that, upon the termination of his employment, defendant claimed said company was due him the sum of \$4,124.13, which amount he had retained in his settlement with said company; that said company denied his right to retain said sum, and appellees were employed by appellant to represent him in litigating said controversy. In said action appellant claimed an additional amount due him from said company. In this suit appellees set up the contract and notes, upon which the original petition was founded, alleged compliance upon their part, and a total failure on the part of appellant to pay either of said notes.

Appellant alleged: That in 1909, having a controversy with said Spaulding Manufacturing Company, and desiring attorneys who would be perfectly free from any influence and obligations, both directly and indirectly,

of a business or other nature to said company, and being assured by said Bray and his firm that they were in no wise connected with, employed by, or under obligations of a business nature or otherwise to, said Spaulding Manufacturing Company, and, upon the faith of said assurance, employed said Bray and his firm to represent him in said matter. That said Spaulding Company was an old, wealthy concern, of extensive business influence in Grinnell. That by said original employment said Bray and his partner were to receive one-third of whatever amount should be recovered from and above \$2,000. That, during the preliminary development of said litigation, said attorneys became dissatisfied with their contingent fee arrangement, and appellant guaranteed them that they should not lose anything on account of said contract, whereupon in about May, 1912, they charged him on their books with \$500 as attorney's fees, and after said Iowa case had been tried, on September 30, 1912, they charged him again with \$500. That by said original contingent fee arrangement said attorneys would only have been entitled to about \$800, provided the judgment rendered in defendant's favor on September 28, 1912, had been affirmed by the higher court, but that said judgment was in fact afterwards reversed. That appellant was induced by the fraudulent representations and conduct of said Bray to employ him as his attorney to continue said employment and to enter into the contracts of March 13, 1909, and September 30, 1912, and to execute the notes mentioned in plaintiff's pleadings, in this: That he employed said Bray upon the agreement that he was free and should remain free from the influence of said Spaulding Manufacturing Company during the continuance of said litigation, but said Bray accepted employment to represent said company immediately after the trial of appellant's said cause in the lower court, and while an appeal was pending, although said Bray held out to appellant that he would not accept such employment. That, about the time said cause went to trial, appellant, under said Bray's advice, permitted an offer in open court to confess judgment for \$1,500 and costs, notwithstanding the fact that the jury a little later returned a verdict in appellant's favor for \$295.87. That the contract of September 30, 1912, was executed immediately after the return of said verdict, said Bray taking advantage of the condition of appellant's mind produced by such apparently splendid results, in the face of said offer to confess judgment for \$1,500, and induced appellant to enter into said contract for the payment of a greater fee than would have been due on said original contract, even on affirmation of said judgment; said Bray misleading appellant by representing that said offer to confess judgment for \$1,500 would have been a good settlement. That appellant was ignorant of the law relating to the facts of his case and

depended on said Bray, who claimed special knowledge of the law and of the legal effect of the facts in said cause. That said contract of September 30th was so entered into upon the definite and positive assurance of said Bray that said judgment would be affirmed and upheld in the higher courts, and defendant wholly protected thereunder, not only in the amount of \$4,124.13, which had been sustained by the jury as a credit in defendant's favor against said company in said suit, but also in said sum of \$295.87, and interest so recovered over against them; said Bray stating and claiming to defendant that there was nothing in the record of said cause on appeal to cause a reversal, intending thereby to defraud defendant. That said cause was reversed by the Supreme Court of Iowa, February 23, 1914. That appellant has reason to believe that said attorneys have been under the business influence of said company since immediately after the date of said last contract. That he since has been informed and believes that the bringing of this suit in Iowa, instead of in Texas, where said company had property and said offer to confess judgment, was not to appellant's best interest, and that his interests have not been protected in good faith in said matters. He is further informed and believes that appellees did not in good faith and correctly advise him as to the probabilities of said cause being reversed, but they took advantage of his ignorance of the real condition of said cause to secure a larger fee; that if appellant had known of appellees' lack of good faith and the influence of said company over them, he would not have executed said last contract or retained them as his attorneys; that said contingent fee was abrogated by said fixed charges of \$500 in May, 1911, and \$500 in September, 1912, and the same is barred by two years' limitation; that, on account of the reversal of said judgment, appellant was compelled to employ another attorney to prepare for second trial of said cause and incurred expenses and attorney's fees to the extent of about \$750, besides the loss of said judgment, his cross-action against said company being dismissed by appellees without his consent.

In their supplemental petition, appellees set up the written contract entered into between them and appellant on March 13, 1909, alleging that Laybourne was claiming the sum of \$5,389.20 of the Spaulding Manufacturing Company, by virtue of his contract with and services rendered said company, and employed appellees to render him such legal services as were necessary in the collection and settlement of said claim, and appellant would pay appellees a sum equal to one-third of the amount collected over \$2,000, either by litigation or settlement out of court; that said contract also bound appellant to advance such sums as were necessary to pay court costs, etc.; that, by reason of the services rendered to appellant

by appellees, appellant was permitted to retain the sum of \$4,334.29, with interest thereon from March, 1907, at the rate of 6 per cent., aggregating \$5,894.59, at the time the litigation terminated; that in said contract appellees were entitled, as the result of the litigation, to a fee of \$1,298.19, with interest from March 23, 1915, which is a greater sum than that sued for under the second contract and notes. They pray in the alternative that, if a recovery was denied them on said second contract, they be allowed to recover on the first, and that, if for any reason the recovery be denied them on both of said contracts, then that they be permitted to recover on quantum meruit \$1,500, the reasonable value of their services.

After the evidence had been introduced, the court directed the jury to find for the appellees the amount of the last contract, and judgment was entered accordingly.

[1-3] The first assignment is that the court erred in peremptorily instructing the jury to find for plaintiffs, because the evidence showed without conflict that one of the material inducements for defendant to execute said note and contract of September 30, 1912, was the definite statement and assurance of said Bray that the record in said cause of Spaulding Manufacturing Company against defendant had already been developed and was then in condition to strengthen defendant's cause and increase his recovery in case same had to be retried, and that the record for appeal was in such condition that the case could not be, and would not be, reversed. The first proposition under this assignment is that any false or fraudulent representation or statement as to a material inducement for entering into a contract will avoid the enforcement of the same. The general rule is that an attorney must act toward his client with the most scrupulous good faith and fidelity, and must make known to his client the exact status, so far as he is able, of the matter concerning which he is employed. The statements alleged to have been made were substantially proven. They were expressions of opinions as to what could or would be done in the future, and, ordinarily, are not such false representations as would entitle the appellant to avoid the contract upon the ground of fraud. We think the evidence was admissible, however, upon the issue of good faith, and the testimony of both Laybourne and Bray raised the issue.

[4-6] It will be observed that the court instructed the jury to return a verdict for the full amount due upon the second contract. The second contract was an agreement for increased compensation after the relation of attorney and client commenced. The rule with reference to such an agreement, where no additional services by the attorney are contemplated, is that it is presumptively without consideration and void, and the burden rests upon the attorney to show that the

new contract was fairly made, was reasonable, and that no advantage was taken by reason of the confidential relation existing between the parties, and that his client entered into it with full knowledge of the facts. *Waterbury v. City of Laredo*, 68 Tex. 565, 5 S. W. 81; *Kahle v. Plummer*, 74 S. W. 786; 2 R. C. L. "Attorneys at Law," §§ 42, 120. We think this issue should also have been submitted to the jury.

[7, 8] Appellant alleged that, at the time he employed appellees, he stated to Bray that he desired attorneys who were not then, and would not be during his litigation, in the employ or under the influence of the Spauldings; that, after being assured by Bray that he was free from any influence of the Spauldings and would make his money fighting them and not by working for them, he employed him. There is evidence in the record showing that Bray was employed by Spaulding during the progress of the litigation between appellant and Spaulding, in Iowa. The rule prohibiting an attorney once retained by a client from acting for the opposing party applies only in the case of conflicting interest in the absence of a contract. In the instant case, appellant alleged a contract to that effect with one of the appellees, and there is some evidence in the record tending to sustain the allegation. We think this issue should have been submitted to the jury.

The verdict of the jury was based upon the second contract, and the question of appellees' right to recover upon a quantum meruit is not presented by this record.

Some question is raised with reference to the action of appellees in dismissing appellant's cross-action at the time such dismissal was entered. If this was fraudulently done while appellees were under the influence of and in the employ of W. H. Spaulding, it would materially affect the right of appellees to recover any amount. The record, however, upon this issue, is not clear enough for us to pass upon it authoritatively.

Because the court erred in directing a verdict when the pleadings and evidence were sufficient to raise the issues of fact outlined above, the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

[9] Appellee insists that we erred in stating that the court directed the jury to find for appellees upon the second contract. We were led into making this statement by appellant's brief. Upon a review of the entire record, we are not sure whether the court directed a verdict based upon the first or second contract; but we are reasonably certain that he could not have directed it under that count of plaintiff's pleadings seeking to recover upon a quantum meruit. If, however, the trial court was of the opinion that plaintiff was entitled to recover

\$1,211.10 upon the quantum meruit, the record furnished us no basis upon which we can, by calculation, arrive at such an amount, and upon that theory of the case it was purely a question of fact for the jury, and the error of the court in directing a verdict is all the more apparent.

The motion for rehearing is overruled.

BOYCE, J., not sitting.

STATE v. HOFFMAN. (No. 5824.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 20, 1916. Rehearing Denied Jan. 17, 1917.)

1. TAXATION \S 841—REFUSAL TO PAY—PENALTY—TENDER.

Under Rev. St. art. 7692, providing that any one refusing to pay his taxes until January 31st next succeeding the return of the assessment rolls to the comptroller shall be subject to a penalty of 10 per cent. on the tax, defendant, who on January 28th tendered the collector the amount of his legal taxes which was refused, and who on January 31st served a writ of injunction on the collector, and who on February 2d again tendered the legal taxes which were refused, did all he could to pay his taxes, and thereby relieved himself from all penalties, interest, and costs; the tender of the legal taxes being sufficient, and the illegal tax being separable from the legal tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1857; Dec. Dig. \S 841.]

2. TAXATION \S 514—LIEN—TENDER.

A lien for taxes was extinguished by the tender thereof made good by the payment in the registry of the court, so that the court properly refused to foreclose a lien on the taxpayer's property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 956-961; Dec. Dig. \S 514.]

Appeal from District Court, Duval County; V. W. Taylor, Judge.

Suit by the State of Texas against Charles Hoffman for taxes, together with interest, penalties, and costs. Judgment for the State for the taxes alone, and it appeals. Affirmed.

J. F. Clarkson, of San Diego, for the State. Dougherty & Dougherty and G. C. Robinson, all of Beeville, for appellee.

FLY, C. J. This is a suit by appellant to recover the taxes due by appellee for the year 1913, together with interest, penalties, and costs. The cause was tried, without a jury, and judgment was rendered in favor of appellant for the taxes without penalties, interest, or costs.

On January 28, 1914, appellee tendered to the tax collector of Duval county all taxes due by him, but the collector refused to accept the taxes because a tax of 20 cents on the \$100, levied for courthouse and jail purposes, was not tendered. The collection of the last-named tax was enjoined by the district court on January 30th, and an order issued directing the tax collector to accept

the sums of money tendered by appellee and his coplaintiffs. The bond for injunction was filed on January 31st, and the writ issued, and on February 2, 1914, the amount of the taxes was again tendered, but refused because a 10 per cent. penalty was not tendered. Afterwards, on October 23, 1915, taxpayers, among the number being appellee, obtained an injunction restraining the county attorney from suing for the courthouse and jail tax. No appeal was taken from that order or the final order, and it is not contended in this case that the collection of the taxes should not have been enjoined. The full amount of the taxes demanded in this suit were tendered into court.

[1] The contention of appellant is that the court erred in not rendering judgment in its favor for the penalty, interest, and costs. The taxes for the year 1913, alleged to amount to \$2,140.84, less the courthouse and jail tax, were sued for, with penalties, interest, and costs. The taxes for 1913 could have been paid, without a penalty, at any time before February 1, 1914. On January 28, 1914, appellee tendered the collector of taxes for Duval county the identical taxes sued for in this case, but he refused to accept the same, and that tender protected appellee against all penalties, interest, and costs that might have been assessed against him for a failure to pay the taxes. By his first tender he had fully protected himself, and such penalty, interest, and costs could not again accrue. The writ of injunction was served on the tax collector on the afternoon of January 31, 1914, the same being Saturday, and on Monday, February 2d, the legal taxes were again tendered and again refused. It is not seriously contended that the first tender did not protect appellee against the imposition of penalties, interest, and costs; but it is insisted that, because the tax was not paid on the afternoon of January 31st, the penalties, interest, and costs again arose. The proposition amounts to the assumption that, if appellee had not sued out the writ of injunction, he would have been immune as to the penalty, interest, and costs, but because the court required the tax collector to receive the taxes, and they were not again tendered until February 2d, the penalty again attached. We are of opinion that the first tender formed a barrier to the collection of the penalty, and that it did not again attach as soon as the writ of injunction was served. Penalties are not favored in equity, and, unless there is a plain case of a failure or refusal to pay taxes, the penalty will not be imposed. Cooley on Taxation, pp. 901 and 902, and notes.

The tender of the legal taxes was sufficient, the illegal taxes being clearly separable from the legal taxes. *State v. Fulmore* (Tex. Civ. App.) 71 S. W. 418; *First National Bank of Lampasas v. City of Lampasas*, 33

Tex. Civ. App. 530, 78 S. W. 42. Appellant had not failed or refused to pay his taxes, as contemplated by article 7692, Rev. Statutes. That statute provides:

"If any person shall fail or refuse to pay the taxes imposed upon him or his property by law until the thirty-first day of January next succeeding the return of the assessment rolls of the county to the comptroller, a penalty of ten per cent. on the entire amount of such taxes shall accrue. * * *"

Appellee did all he could to pay his taxes, and made his original tender good by tendering the amount of taxes again on February 2d, and again when this suit was instituted. He thereby relieved himself of all penalties, interest, and costs. *Clark v. Colfax County*, 2 Neb. (Unof.) 133, 96 N. W. 607; *Loan & Trust Co. v. Codrington County*, 9 S. D. 159, 68 N. W. 314. As said in the last case cited:

"The county was offered all it was entitled to collect. * * * It refused the offer, and must now be content with a judgment for the amount it should have accepted. Payment of the valid portion was not required. A tender was sufficient."

[2] The lien was extinguished by the tender, made good by the payment into the registry of the court, and the court properly refused to foreclose a lien on appellee's property. *Cooley, Taxation*, pp. 808 and 809; *Tracey v. Irwin*, 18 Wall. 459, 21 L. Ed. 786.

There was no basis for the suit instituted against appellee, as he was ready and willing to pay the taxes and twice tendered the same before the suit was brought. The desire for the penalty turned the scale against receiving the taxes, and the suit was the result.

The judgment is affirmed.

ANDREWS et al. v. MYNIER et al.
(No. 5767.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 3, 1917.)

1. RAILROADS \S 312(4)—INJURY AT CROSSING—LIABILITY.

In an action to recover the value of an automobile destroyed by defendant's train, alleging failure to keep a lookout for any obstructions on the track, defendant, if its servants could not by keeping a lookout have discovered it in time to have prevented the injury, would not be negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 991; Dec. Dig. \S 312(4).]

2. RAILROADS \S 338—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

If plaintiff was negligent in going upon defendant's track with his automobile, and defendant's employes did not and could not by the exercise of ordinary care have discovered him in time to prevent injury, he could not recover for the destruction of the automobile.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1006-1009; Dec. Dig. \S 338.]

3. NEGLIGENCE \S 97—COMPARATIVE NEGLIGENCE—RECOVERY.

The rule of comparative negligence prescribed by Rev. St. art. 6649, in the case of injury to a carrier's employe does not prevail in other

cases of injury from negligence. In all other cases of negligence contributory negligence is an absolute defense.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. \S 93, 162; Dec. Dig. \S 97.]

Appeal from San Patricio County Court; M. A. Childers, Judge.

Suit by J. L. Mynier and another against Frank Andrews, receiver, and another. Judgment for plaintiffs, and defendants appeal. Reversed, and judgment rendered that plaintiffs take nothing by their suit.

Kleberg, Stayton & Picton, of Corpus Christi, for appellants. J. C. Houts, of Sinton, for appellees.

FLY, C. J. J. L. Mynier and Mae G. Mynier sued the St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, the receiver thereof, to recover the value of an automobile alleged to have been struck and destroyed by a train belonging to the railway company. It was alleged that J. L. Mynier attempted to drive his automobile across the track of the railway company, and that when on the track "the engine of said auto went dead, and said auto stopped on the track." The only negligence alleged on the part of appellants was:

"That it was the duty of the engineer and fireman on said locomotive to have kept a lookout for obstructions upon defendants' track on said occasion, and had they or either of them performed said duty they could have stopped said train before the said engine had reached said automobile, and that it was by reason of the carelessness and negligence of defendants' servants, agents, and employes that said automobile was injured and destroyed as aforesaid."

The cause was submitted to the jury upon special issues, and the court rendered judgment against the railway company and receiver for \$179.50.

The jury found that the automobile was of the value of \$450 just before the collision, and only \$91 immediately afterwards; that the employes operating the train did not discover the automobile on the track a sufficient time before the train struck it to have stopped the train before it struck the automobile, nor could they have made such discovery by the use of ordinary care; that the employes did not use ordinary care in having the train approach the place where the automobile had stopped on the track; that they were negligent, and such negligence was the proximate cause of the collision. The jury also found that J. L. Mynier was negligent when approaching and attempting to cross the railway track, and that his negligence contributed to the injury to the automobile.

[1] The inconsistency of the finding that the employes of appellant did not discover, and could not by the exercise of ordinary care have discovered, the automobile on the track, and yet that they were guilty of negligence in approaching the crossing, is appa-

rent. The only negligence charged was a failure to keep a lookout for any obstruction on the track, and if they could not, by keeping a lookout, have discovered the obstruction in time to have prevented the injury, there could be no negligence. Not only is it clear from the findings as to the acts of the employes that there could have been no negligence on their part, but in addition the jury found that the driver of the car was guilty of contributory negligence in attempting to cross the track. The jury was, in effect, instructed to apply the rule of comparative negligence, which had no application to a case of this character, and, although it was found that the car was injured to the extent of \$359, the sum of \$179 only was allowed appellees. It was endeavored to punish J. L. Mynler to the extent of a fine of \$180 for going upon a crossing in front of a moving train and having his motor "go dead" on him.

[2] If J. L. Mynler was guilty of negligence in going upon the track and the employes did not discover him thereon, and could not by the exercise of ordinary care have discovered him thereon, as found by the jury, appellees should not have recovered, and judgment should have been rendered, on the answers to the issues presented, for appellants.

[3] The rule of comparative negligence does not exist in Texas, except as between common carriers and their employes. In all other case of injuries resulting from negligence, contributory negligence is an absolute defense, no matter how negligent the defendant may have been. Article 6649, Rev. Stats.; *S. A. Brewing Ass'n v. Wolfshohl*, 155 S. W. 644. The jury found contributory negligence, and all the facts tend to show that the automobile could not have been injured had it not been for the negligence of the driver in going upon the track. The negligence of the driver was the proximate cause of the injury to the automobile.

The judgment is reversed, and judgment here rendered that appellees take nothing by this suit and pay all costs in this behalf expended.

FORD v. SIMS. (No. 5755.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 8, 1917.)

1. FRAUD — 22(1) — DUTY TO INVESTIGATE.

One induced to purchase 300 acres of land by false representations that it was level; that water would stand on only about 3 acres; that 150 acres were cleared; that it was all tillable, etc.—could recover for the fraud whether or not he used care in ascertaining the truth of the representations.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19, 20, 22, 23; Dec. Dig. — 22(1).]

2. FRAUD — 13(3) — REPRESENTATIONS — KNOWLEDGE OF FALSITY BY DEFENDANT.

Where the seller of land stated as a fact that it was level when it was not, he was liable

for damages to purchaser relying thereon, it being fraud to positively state a thing to be true not knowing whether it is true or not, where the thing asserted is not mere matter of opinion.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 5; Dec. Dig. — 13(3).]

3. APPEAL AND ERROR — 1068(1) — HARMLESS ERROR — PRESUMPTION OF PREJUDICE FROM ERROR.

In action for fraud in sale of land, a charge, erroneously conditioning recovery on plaintiff's having used due care in investigating, necessitated reversal, although the jury found for plaintiff on a certain item and against him on others, where the theory of such determination did not appear, since it would not be presumed that the verdict was based on determination of a question of fact rather than on the application of the law stated in the charge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4225; Dec. Dig. — 1068(1); Trial, Cent. Dig. §§ 525, 553.]

4. FRAUD — 59(3) — ACTION BY PURCHASER OF LAND — DAMAGES.

In action for fraud inducing purchase of land for an agreed price, other land being taken in part payment therefor at an agreed valuation, damages recoverable were the difference between the market value of the land when purchased and the amount paid, the land taken in part payment to be considered as cash; the transaction being a purchase and not a sale.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 62; Dec. Dig. — 59(3).]

5. FRAUD — 13(2) — REPRESENTATIONS — BELIEF OF TRUTH BY DEFENDANT.

If representations made by a seller of land were false and material and induced its purchase, the seller's belief in their truth would not relieve him from liability for consequences resulting from them.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 4; Dec. Dig. — 13(2).]

Appeal from District Court, Kleberg County; Robt. W. Statton, Special Judge.

Action by J. B. Ford against B. O. Sims. From judgment for defendant, plaintiff appeals. Reversed and remanded.

H. H. Flowers, of Hebbronville, and H. M. Holden, of Corpus Christi, for appellant. Pollard & Crenshaw, of Kingsville, for appellee.

FLY, O. J. This is a suit brought by appellant to recover damages in the sum of \$13,750, alleged to have accrued by reason of fraudulent representations made by appellee to induce the purchase by appellant of 301.83 acres of land in Kleberg county. The cause was tried by jury, and resulted in a verdict in favor of appellant for \$75.

The evidence of appellant shows that, at the time of the purchase of the land by him from appellee, appellant lived in Mississippi, and became interested in the Kleberg county land through advertising matter sent out by appellee. He came from Mississippi to Texas and went to see the land. He met appellee and in company with him, and an assistant of appellee, J. E. Flowers, went upon the land to inspect it. Appellee, as testified by appellant, represented to appellant that the land

was all even, good, black sandy land, with 150 acres that would be ready to plow by fall, when appellant was to take possession. It afterwards transpired that about 100 acres of the land were covered with water when it rained. There was a small place on the land when appellant looked at it that was covered by water, and appellee stated that it was the only place that had water on it. The statements attributed to appellee as to the quality and condition of the land were denied by him. The land was sold to appellant at \$60 an acre, certain property in Mississippi being taken in part payment for the land. The cleared land had not been put in condition to be plowed, and appellee, as a compromise, offered to pay appellant \$75. The prices put upon the land by witnesses ran from \$20 an acre to \$75 an acre. The facts were very contradictory and made a case peculiarly for a jury.

[1] The court charged the jury that, in order for appellant to recover, not only must he prove that the representations made by appellee were false, fraudulent, and material, and were believed by appellant, but that it should be shown that appellant "did not know, and could not by the exercise of ordinary care have known, whether such representations were true or false." The charge does not embody the law applicable in cases of this character. If appellee represented to appellant that the land he sold to him was level land, and that water would stand on only one depression, covering about 3 acres; that 150 acres of the land were cleared and ready for farming; that all of the land was tillable; that a town site had been laid out near the land; and that adjoining land would be divided into farms and settled; and those representations, or either of them, was false; and that appellant believed the representations to be true, and was induced by such representations to buy the land from appellee—he should recover whether he used ordinary care or no care in ascertaining the truth of the representations. The language used in connection with this subject in the case of *Railway v. Kisch*, 2 L. R. H. L. 120, has been copied into several Texas opinions and fully approved. It is as follows:

"When once it is established that there has been any fraudulent misrepresentation * * * by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by further inquiry. He has a right to retort upon his objector: 'You, at least, who have stated what is untrue * * * for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly upon your fairness and honesty.'" *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Buchanan v. Burnett*, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900.

[2] The facts in this case show that appellant was a stranger in Texas, knowing nothing about the land and necessarily relying upon the statements of appellee. He could rely upon the statements of appellee as to the

quality, situation, and condition of the land, and the duty did not devolve upon him to go all over the land to ascertain if appellee was telling him the truth. Appellant saw only a part of the land, which was so covered with grass and brush that he could not ascertain the topography of the land. Appellee stated as a fact that the land was level. He should have known before he stated it as a fact. As said by this court in a similar case to this:

"If he did not know the balance of the land was as good as that he showed to appellee, it had the same effect as though he did know. It was fraud to positively state a thing to be true when the party making the representation did not know it to be true. *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. 166. It may be that if appellee had insisted on going upon the land he could have discovered the falsity of the statement as to its quality, but that would be no answer to his prayer to be relieved from the contract. * * * However, he relied upon the positive statement of appellants' agent that the land, not seen by appellee, was equally as good as that part of the land shown to him. The agent could not claim that what he said was a matter of opinion, because the defect in the land was so obvious and patent that he could not have entertained such an opinion. No man could honestly give it as his opinion that a parcel of land, with a depression that gathers and holds water after a rain, was as good as land adjoining it, upon which there was no such depression. It was a plain statement of fact, made to deceive, or made without knowledge with which he should have possessed himself before making any such statement." *White v. Peters*, 185 S. W. 659.

See, for a full discussion and citation of authorities, *Gibbens v. Bourland*, 145 S. W. 274.

[3] In this case, however, it is the contention that the erroneous charge did not injure appellant, for the reason that the jury returned a verdict in his favor for \$75, and must necessarily have found against appellant on all charges of fraud except that of a failure to grub the land as he said he had done or would do. That may be true, but the jury may have applied the doctrine of ordinary care to all of the misrepresentations except that as to the land being ready for plowing, and, if so, the charge may have prevented the recovery of damages that would have been meted out to appellant had the charge not been given. One of the jurors testified, on the hearing of the motion for new trial, that the \$75 was awarded to cover the grubbing of the land, but it is not ascertainable upon what theory no recovery for the damages arising from other misrepresentations was allowed. It may have been because the jury did not believe that such representations were made, or it may have been on the ground that appellant, by the exercise of ordinary care, could have discovered the falsity of the representations. When an appellate court cannot determine from the record that a verdict was not probably influenced by an erroneous charge, the judgment will be reversed. *Williams v. Conger*, 49 Tex. 582; *Dwyer v. Insurance Co.*, 57 Tex. 184. As said

by this court in *Norton v. Railway*, 108 S. W. 1044:

"We cannot determine how the jury arrived at their conclusion, and we are unwilling to sacrifice the rights of a party on a mere hypothesis that the jury, by finding a verdict under the condemned charge, must have found that there was no evidence in favor of the position of plaintiff in error. If the jury may have been misled by the erroneous charge, the judgment will be reversed, although there be other grounds upon which the jury might have based their verdict."

The alleged misconduct of the jury will not probably be repeated on another trial, and need not be discussed.

[4] The facts do not establish a case of exchange of property, but should be treated as making a case of a sale, a part of the consideration being the property owned by appellant in Mississippi. The measure of damages given the jury by the court, "the difference between the value of the property and effects which plaintiff parted with and the value of the property which plaintiff received from defendant," was erroneous. The measure of damages in this case is the difference between the market value of the land at the time of the purchase and the amount which appellant paid for it. If the property in Mississippi was valued at a certain sum by the parties and treated as a payment, it should be considered in ascertaining the amount of the damages, as money paid on the land.

[5] The special charge numbered 2 should have been given by the court. If the representations made by appellee were false and material and misled appellant and caused

him to purchase the land, the fact that appellee may have believed the representations to be true would not exonerate him and relieve him from the consequences flowing from the representations that were made. *Loper v. Robinson*, 54 Tex. 510; *Culbertson v. Blanchard*, 79 Tex. 486, 15 S. W. 700; *Buchanan v. Burnett*, 102 Tex. 495, 119 S. W. 1141, 132 Am. St. Rep. 900; *Carter v. Cole*, 42 S. W. 369.

The judgment is reversed, and the cause remanded.

BROWN et al. v. HILL. (No. 1684.)
(Court of Civil Appeals of Texas. Texarkana.
Nov. 23, 1916.)

Appeal from District Court, Franklin County; J. A. Ward, Judge.

Foreclosure suit by G. P. Hill against Ada Brown and others. Judgment for complainant, and the defendant named appeals. Affirmed.

B. O. Shurtleff, of Mt. Vernon, for appellant.
R. T. Wilkinson, of Mt. Vernon, for appellee.

LEVY, J. The appellee, Hill, is seeking by his suit to have judgment of foreclosure of a vendor's lien note, and the defendant Ada Brown, joined pro forma by her husband, answered resisting the lien on the land. There was a trial before the court without a jury, and judgment was in favor of the appellee. The court made findings of fact, which are not challenged, and which appear in the record.

The question on appeal, under assignments of error, entirely depends upon the construction of the deed from W. T. Sullivan and wife to Mrs. Lizzie Wells. The court construed the deed as passing to Mrs. Lizzie Wells only a life estate. In this we think the trial court did not err, and that the judgment should be sustained. Affirmed.

END OF CASES IN VOL. 190

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⌚14 (Tex.Civ.App.) Where an account is properly verified under Rev. St. art. 3712, providing for suit on sworn account, it is admissible as prima facie evidence, in absence of a sworn denial by defendant that it was not true, etc., as required by such statute.—*Wilson v. J. W. Crowder Drug Co.*, 190 S. W. 194.

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⌚1 (Mo.App.) An action for services held not an action on an account stated, where there was no allegation that plaintiff stated the account to defendants, or that either defendant agreed to its correctness and promised to pay.—*Risinger v. Begley*, 190 S. W. 418.

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III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

¶50(3) (Mo.App.) Where, a cause of action was stated in the petition in favor of each of the parties plaintiff which was several and not joint, the petition was objectionable for misjoinder.—Belt v. St. Louis, I. M. & S. Ry. Co., 190 S. W. 1002.

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I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

¶13 (Mo.) If there has been an actual, open, notorious, continuous, hostile, exclusive possession of land under claim of right, question whether one in possession has acted with ordinary prudence is not involved or to be considered by jury.—Connor Realty Co. v. Sparlin, 190 S. W. 6.

(B) Actual Possession.

¶14 (Ky.) A possession, which if continued for the statutory period of 15 years will ripen into title, must, in the first instance, be an actual possession.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

Parties having constructive possession of lands embraced within certain patents could not be divested of such possession, except by an actual possession in fact, or by such acts as vested in another an actual possession by construction.—Id.

Without actual possession of some part of a tract of land, there can be no constructive possession of any part by one without title, or one having a mere color of title under a deed, patent, etc., which makes an inferior title.—Id.

¶14 (Ky.) The only way by which a title may be acquired by patentee whose patent laps over upon an earlier patent is by an actual occupancy of it, or a part of it, claiming to its well defined and marked boundaries continuously and adversely for statutory period.—Patton v. Stewart, 190 S. W. 1062.

¶15 (Ky.) Before one can acquire an actual possession to land to which he has only a color of title, he must enter upon it with the intention of holding it and must claim it to well marked and defined boundaries.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

¶16(1) (Ky.) Adverse possession necessary to create title must be based on physical facts such as making of improvements or the doing of acts openly evincing purpose to hold dominion in hostility to title of real owner, and such as to give notice of that purpose.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

Adverse possession must be based upon some physical acts performed upon the land as will give the true owner notice that another is in possession of his land, and the acts necessarily must be such as to enable the owner to maintain an action of ejectment or trespass against the intruder.—Id.

¶24 (Tenn.) A possession consisting of having dirt thrown upon a lot from time to time to fill up holes and occasionally storing lumber and wagons thereon held not sufficient to support a claim of adverse possession.—Ferguson v. Prince, 190 S. W. 548.

¶27 (Ky.) In a suit to quiet title, evidence held not to show plaintiff's adverse possession of a lap over upon or interference between his later patent and an earlier patent, part of which included the land involved.—Patton v. Stewart, 190 S. W. 1062.

(E) Duration and Continuity of Possession.

¶43(2) (Ky.) A later patentee whose patent overlaps an earlier patent cannot tack to his possession of the earlier patent his claim to the boundary of his later patent.—Patton v. Stewart, 190 S. W. 1062.

¶43(3) (Tenn.) Successive adverse possessions under statute of limitations cannot be tacked unless they are connected by contract or other form of legal privity.—Ferguson v. Prince, 190 S. W. 548.

Under the doctrine of presumption of grant by continuous adverse possession of land for 20 years while successive possessions must be connected without hiatus, there need be no privity of contract or other legal privity between successive occupants.—Id.

(F) Hostile Character of Possession.

¶58 (Tex.Civ.App.) As prescription is founded on supposition of grant, use or possession on which it is founded must be adverse or of nature to indicate that it is claimed as right and not by permission, or any compact short of grant.—Callan v. Walters, 190 S. W. 829.

¶66(1) (Ky.) One having title to land and actual possession thereof and who acquires the

title to contiguous tracts with intention to hold possession to the boundaries of all the tracts is in the actual possession of all.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡68 (Ky.) One having no color of title may create an actual possession in himself, by construction, to part of a tract of land, by entering thereon and using and occupying a part and claiming it to a well marked and defined boundary, which either already exists, or which he places.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡85(3) (Tex.Civ.App.) Evidence to indicate that the possession was adverse, and not by permission, must be clear and positive.—*Callan v. Walters*, 190 S. W. 829.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

⚡96 (Ky.) One entering under an instrument evidencing title with intention of possessing to the boundaries described therein will be in actual possession to such boundaries, or to the extent his boundary is not in another's actual possession, or unless his boundary embraces a lap upon a senior grant.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡96 (Ky.) Where defendants had been in open, notorious, adverse possession of part of boundary tract in dispute, they were entitled to instruction that in no event could plaintiffs' recovery include such portion.—*Garvin v. Threlkeld*, 190 S. W. 1092.

⚡100(1) (Ky.) One having color of title may have an actual possession, by construction, in parts of tract by entering with intention to hold possession to extent of boundaries of his deed, etc., and is then in actual possession of part which he occupies and in actual possession, by construction, of remainder when not in another's possession.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡101 (Ky.) One entering under deed on land to part of which vendor's title was valid and to part of which it was invalid and covered by another's valid title, and occupying the part to which he has good title, does not have adverse possession to part to which he has no valid title without actual entry and use so as to be notice to true owner.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡103 (Ky.) Where junior grant laps upon senior grant and senior patentee has never entered upon any part of his grant and has only constructive possession, junior patentee entering without the lap and continuing to hold to his boundaries is not in actual or constructive possession.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

One owning and residing upon a tract who acquires an inferior title to an adjoining tract, to which another has a constructive possession, does not acquire an actual possession of the tract to which he holds a color of title, and before he obtains adverse possession of it must enter and take physical possession.—*Id.*

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡110(4) (Tex.Civ.App.) In an action to recover land, with cross-bill by defendant pleading title by limitations evidence as to the long possession and use of the land sued for by defendant, was admissible.—*Miller v. Meyer*, 190 S. W. 247.

⚡114(1) (Ky.) In suit to establish ownership of various tracts of land conveyed to plaintiff by devisees under will of original patentee, and to minerals thereunder, evidence held insufficient to show adverse possession in vendors of defendant coal company.—*Tennis Coal Co. v. Sackett*, 190 S. W. 180.

⚡114(1) (Ky.) Evidence, held to show that defendant, believing himself to be the owner of certain disputed land by virtue of purchase and deed, at once took possession and held the land continuously for over 20 years.—*Ross v. Richardson*, 190 S. W. 1087.

⚡115(1) (Ky.) In a suit to establish the ownership of tract embraced in patent under which plaintiff claimed, held, that question of adverse possession of defendant's vendors was for jury.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡115(1) (Tex.Civ.App.) In trespass to try title, evidence held sufficient to require the question of defendant's right to the property under the five-year statute of limitations to be submitted to the jury.—*Morris v. Parsons*, 190 S. W. 241.

⚡115(6) (Mo.) In a suit in ejectment, whether defendant's grantor had acquired title by adverse possession at time of her deed to defendant held for jury.—*Connor Realty Co. v. Sparlin*, 190 S. W. 6.

⚡116(1) (Mo.) In a suit in ejectment, an instruction on adverse possession held unintelligible, and properly refused.—*Connor Realty Co. v. Sparlin*, 190 S. W. 6.

AFFIDAVITS.

See Appeal and Error, ⚡387; Criminal Law, ⚡958; Depositions; Injunction, ⚡122; Pleading, ⚡302.

AGENCY.

See Principal and Agent.

AIDER BY VERDICT.

See Appeal and Error, ⚡1088; Pleading, ⚡438.

ALIMONY.

See Divorce, ⚡227-236.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

AMENDMENT.

See Appeal and Error, ⚡590, 959, 1149; Continuance, ⚡30; Courts, ⚡118; Limitation of Actions, ⚡127; Pleading, ⚡236-243, 420; Process, ⚡6.

AMOUNT IN CONTROVERSY.

See Courts, ⚡231.

ANIMALS.

See Carriers, ⚡218-230; Railroads, ⚡337, 411-446; Statutes, ⚡118.

⚡36 (Ark.) A penalty for violation of Acts 1915, p. 338, and regulations made thereunder held properly imposed under Kirby's Dig. §§ 2447, 2448, and not under Acts 1907, p. 1045, § 5.—*Davis v. State*, 190 S. W. 436.

In prosecution for violation of Acts 1915, p. 338, and regulations thereunder regarding tick eradication, and requiring owners to bring cattle to be dipped, proof on part of defendant that his cattle were not infected with ticks, and that no ticks had been found in his neighborhood, held properly excluded.—*Id.*

⚡100(9) (Mo.App.) An instruction that, if the dog for the value of which suit was brought came into defendant's possession by voluntarily coming onto his premises, or being brought there by some one other than defendant, and was thereafter so injured as to be of no value, plaintiff could not recover, held properly refused.—*Penter v. Ritter*, 190 S. W. 29.

ANSWER.

See Pleading, ¶85-148.

APPEAL AND ERROR.

See Appearance, ¶9; Costs, ¶254-263; Courts, ¶231; Criminal Law, ¶1081-1186; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

¶21 (Ky.) The parties cannot confer jurisdiction on the Court of Appeals by consent.—Hillman Land & Iron Co. v. Commonwealth, 190 S. W. 467.

¶23 (Mo.App.) It is the duty of appellate courts to raise jurisdictional questions *sua sponte*.—Matlack v. Kline, 190 S. W. 408.

III. DECISIONS REVIEWABLE.

(B) Nature of Subject-Matter and Character of Parties.

¶36 (Ky.) That a judgment under \$500 was for the recovery of a license tax from which appeal was granted by circuit court, does not give the Court of Appeals jurisdiction, under Ky. St. § 950, as amended by Laws 1914, c. 23.—Hillman Land & Iron Co. v. Commonwealth, 190 S. W. 467.

(D) Finality of Determination.

¶80(1) (Tex.Civ.App.) In suit to cancel deed on ground of fraudulent representations including it, where plaintiff tendered a deed of land received in exchange, judgment for plaintiff, though not disposing of the tender, *held* a final appealable judgment.—Pitt v. Gilbert, 190 S. W. 1157.

IV. RIGHT OF REVIEW.

(B) Estoppel, Waiver, or Agreements Affecting Right.

¶154(1) (Ky.) Right of appeal is waived by recognition or voluntary acquiescence in a judgment or order.—Todd's Ex'r v. First Nat. Bank, 190 S. W. 468.

Acquiescence must be clear and unconditional to bar right of appeal.—*Id.*

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

¶170(2) (Mo.App.) A garnishee, who took no exception to the overruling by the trial court of his contention that the statute under which plaintiff was proceeding was unconstitutional, cannot raise a constitutional question on appeal.—Riley Pennsylvania Oil Co. v. Symmonds, 190 S. W. 1038.

¶171(2) (Mo.App.) Where attorneys announce in trial court that they will try the case in equity, such theory of the case controls.—Buckner v. Midland Farm & Land Co., 190 S. W. 419.

¶172(1) (Mo.App.) Contentions *held* not reviewable on appeal when not presented below.—Briggs v. Lusk, 190 S. W. 380.

¶173(1) (Mo.App.) The objection that a newspaper publishing a notice of time for presenting claims was not a proper newspaper for such purpose cannot be considered for the first time on appeal.—C. H. Albers Commission Co. v. Vogelsang, 190 S. W. 1058.

¶173(2) (Mo.App.) In an action to recover plaintiff's interest in real estate formerly conveyed to defendant and by plaintiff and her husband, upon defendant's oral agreement to pay plaintiff value of her interest, where defendant rested the case on nonliability and made

no issue by instructions or otherwise as to value of plaintiff's interest or measure of her recovery, he cannot make such issue on appeal.—Grayson v. Grayson, 190 S. W. 930.

¶179(3) (Tex.Civ.App.) A peremptory instruction for plaintiff serves as basis for assignments of error raising those issues.—Leonard v. Kendall, 190 S. W. 786.

(B) Objections and Motions, and Rulings Thereon.

¶184 (Ark.) The objection that a suit in chancery should have been transferred to the law court cannot be raised for the first time on appeal.—Mosaic Templars of America v. Austin, 190 S. W. 671.

¶197(1) (Mo.App.) Alleged variance between the allegations and proof is not available in the Court of Appeals, where no objection was made or exceptions taken in the court below.—Volk v. Zepp, 190 S. W. 609.

¶200 (Tex.Civ.App.) Defendant, which accepted jurors without protest after they heard claimed improper remark of plaintiff's counsel in argument on exception to petition, *held* unable to complain of it.—Marshall Mill & Elevator Co. v. Scharnberg, 190 S. W. 229.

¶203(3) (Tex.Civ.App.) Where appellant failed to test accuracy of witness as to stated percentage of depreciation, it could not complain on appeal.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, 190 S. W. 819.

¶204(2) (Mo.App.) The admission of evidence of a conversation between defendant and a third party, to which no objection or exception was taken, was not reversible error.—Dawson v. Flinton, 190 S. W. 972.

¶204(3) (Ark.) Where defendant made no objection at time and saved no exception to ruling of court, and did not make such ruling a ground for motion for new trial, he could not complain on appeal of court's ruling permitting a justice of the peace to testify that a criminal prosecution instituted by defendant against plaintiff was dismissed.—Twist v. Mullinix, 190 S. W. 851.

¶209(5) (Mo.App.) The failure of a party to object to the admission in evidence of an ordinance not in force when the accident occurred does not preclude him from insisting that it was of no weight in the case.—Young v. Dunlap, 190 S. W. 1041.

¶213 (Tex.Civ.App.) Where the court without objection submitted to the jury the issue of contributory negligence, defendants cannot complain that there was no evidence to sustain the jury's finding.—Caffarelli Bros. v. Bell, 190 S. W. 228.

¶216(1) (Ky.) Where no instructions were offered or considered relating to grounds of defense, they will not be reviewed.—Wallace v. Lackey, 190 S. W. 709.

¶216(1) (Tex.Civ.App.) An assignment of error to the admission of testimony which was admissible only to impeach a witness cannot be sustained where only the general objection was made and no special charge limiting its effect was requested.—Earhart v. Agnew, 190 S. W. 1140.

¶218(1) (Mo.App.) A verdict, erroneous because based on a defense not pleaded, will be set aside, notwithstanding counsel in their briefs assumed that such defense was in the case.—Stoutzenberger v. Lamb, 190 S. W. 963.

¶230 (Ky.) Alleged error occurring during a jury selection is not saved for review when first presented in a motion for new trial.—Carter Coal Co. v. Love, 190 S. W. 481.

¶231(3) (Mo.App.) An objection to evidence which fails to state the grounds thereof will not be considered on appeal.—Pounds v. Farmers' Union Mercantile Co., 190 S. W. 374.

¶231(3) (Tex.Civ.App.) In an action for negligent carriage of cattle, error in the admis-

sion of evidence for plaintiff of difference in the value of cattle when loaded and on their arrival was not sufficiently presented by the general objection that evidence "of any difference in value" between time of loading and of arrival would be incompetent.—*Kansas City, M. & O. Ry. Co. of Texas v. James*, 190 S. W. 1136.

⇨231(7) (Tex.Civ.App.) An assignment of error to the admission of testimony which was admissible only to impeach a witness cannot be sustained where only the general objection was made and no special charge limiting the effect of the testimony was requested.—*Earhart v. Agnew*, 190 S. W. 1140.

⇨232(2) (Tex.Civ.App.) Where the bill of exception to admission of testimony shows that objection urged in trial court was entirely different from objection urged in brief, the assignment will be overruled.—*Tyler v. McChesney*, 190 S. W. 1115.

⇨236(1) (Ky.) Refusal of defendant to give his deposition required under Civ. Code Prac. § 606, subsec. 8, as to examination of adverse party before trial, was not ground for reversal, where plaintiff went into trial without moving for continuance to take the deposition.—*Christian's Adm'r v. Ennis*, 190 S. W. 675.

⇨236(1) (Ky.) Where plaintiff undertook to take defendant's deposition before trial under Civ. Code Prac. § 606, subd. 8, defendant's refusal to answer questions or complete the deposition held not error, where plaintiff did not ask a continuance.—*Netter v. Caldwell*, 190 S. W. 721.

⇨237(2) (Mo.App.) Where plaintiff's testimony as to statements made by a fellow servant was admitted over objections, but on cross-examination he testified that they were made after accident, as defendant did not then move to strike testimony on direct examination, held that he cannot complain on appeal.—*Markow v. Gross-O'Reilly Chandelier Co.*, 190 S. W. 624.

⇨242(4) (Ky.) In an action for trespass and removal of timber, where court was not asked and did not rule upon competency of evidence offered in support of a defense and the sufficiency of such evidence to support the defense, such questions will not be reviewed.—*Wallace v. Lackey*, 190 S. W. 709.

⇨242(4) (Ky.) In absence of showing that defendant's deposition before trial, taken by plaintiff under Civ. Code Prac. § 606, subd. 8, was presented by plaintiff to trial court, or that court was asked to rule on questions which defendant refused to answer, etc., plaintiff could not complain they were not answered, or that deposition was not completed.—*Netter v. Caldwell*, 190 S. W. 721.

(C) Exceptions.

⇨248 (Mo.App.) Assignments of error referring to matters concerning which no exceptions were saved below cannot be considered.—*Moore v. McCutchen*, 190 S. W. 350.

⇨253 (Mo.App.) Alleged variance between the allegations and proof is not available in the Court of Appeals where no objection was made or exceptions taken in the court below.—*Volk v. Zepp*, 190 S. W. 609.

⇨253 (Tex.Civ.App.) That petition for injunction was not properly verified as required by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4649, should be raised in the trial court by exception, and failure to except is waiver of sufficiency of affidavit.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

⇨260(1) (Ark.) Where defendant made no objection at time and saved no exception to ruling of court, and did not make such ruling a ground for motion for new trial, he could not complain on appeal of court's ruling permitting a justice of the peace to testify that a criminal

prosecution instituted by defendant against plaintiff was dismissed.—*Twist v. Mullinix*, 190 S. W. 851.

⇨260(2) (Mo.App.) Exclusion of deposition offered in evidence cannot be reviewed in absence of exception.—*Stinson v. Brinkman*, 190 S. W. 646.

(D) Motions for New Trial.

⇨301 (Ark.) Where defendant made no objection at time and saved no exception to ruling of court, and did not make such ruling a ground for motion for new trial, he could not complain on appeal of court's ruling permitting a justice of the peace to testify that a criminal prosecution instituted by defendant against plaintiff was dismissed.—*Twist v. Mullinix*, 190 S. W. 851.

⇨301 (Mo.App.) An instruction not complained of in appellant's motion for new trial was not reviewable.—*Viles v. Viles*, 190 S. W. 41.

⇨301 (Mo.App.) The objection that the verdict is contrary to the instructions is not available to appellants where it was not called to the attention of the trial court in motion for new trial.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

⇨301 (Mo.App.) Where, in motion for new trial, no mention is made of a nonjoinder of parties, the objection cannot be raised on appeal.—*Buck v. Meyer*, 190 S. W. 997.

⇨301 (Tex.Civ.App.) Under rule 25, Rules for the Courts of Civil Appeals (142 S. W. xii), an assignment cannot be considered where it is not found in the amended motion for a new trial.—*Caffarelli Bros. v. Bell*, 190 S. W. 223.

⇨302(4) (Ky.) Although all instructions were objected and excepted to, if the giving of one only was assigned as error in the motion and grounds for new trial, that alone is reviewable.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

⇨302(4) (Mo.) A motion for a new trial for errors in instructions held sufficient to raise these errors on appeal, even if *Rev. St. 1909*, § 1841, applies to motions for new trials.—*Wampler v. Atchison, T. & S. F. Ry. Co.*, 190 S. W. 908.

VI. PARTIES.

⇨335 (Ky.) Appeal granted by clerk of Court of Appeals to "C. P. M., etc.," in accordance with statement for an appeal required by Civ. Code Prac. § 739, made him the only appellant; the word "etc." after his name being insufficient to make any one else an appellant.—*Morton v. Young*, 190 S. W. 1090.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(H) Petition or Prayer, Allowance, and Certificate or Affidavit.

⇨359 (Ky.) Under Ky. St. § 950, as amended by Laws 1914, c. 23, providing that appeals from the circuit court to the Court of Appeals for money judgments under \$500 can only be granted by the Court of Appeals, an appeal granted by a circuit court from such a judgment is void.—*Hillman Land & Iron Co. v. Commonwealth*, 190 S. W. 487.

⇨361(5) (Ky.) Under Court of Appeals rule 20 (169 S. W. vii) the motion for appeal may be considered at the hearing on the merits.—*Kentucky Traction & Terminal Co. v. Grimes*, 190 S. W. 129.

⇨365(1) (Ark.) Under Kirby's Dig. § 1487, providing that appeals from county to circuit court shall be granted by either the county court or circuit clerk, the circuit court has no jurisdiction over a claim disallowed by the county court, where an affidavit for appeal was filed, but no order granting the appeal was made.—*Mississippi County v. Moore*, 190 S. W. 110.

☞367 (Mo.App.) Regardless of recitals in the order of the circuit court granting an appeal, jurisdiction is not conferred in the absence of sufficient affidavit, as required by Rev. St. 1909, § 2040.—*Walser v. Leach*, 190 S. W. 932.

It is not necessary that the affidavit for appeal follow the statutory language literally, if in substantial compliance therewith, and, where it shows on its face an attempt to comply, even error of substance by omission of some words can be treated as clerical.—*Id.*

Affidavit for appeal held insufficient under Rev. St. 1909, § 2040, stating requisites thereof, for failure to show that the appellant was aggrieved, or that the appeal was not for vexation.—*Id.*

(C) Payment of Fees or Costs, and Bonds or Other Securities.

☞389(3) (Tex.Civ.App.) Under Rev. St. art. 2008, nonresident seeking to appeal as pauper must make proof of inability to give required security before trial court, and certificate of county judge of another state is of no legal value.—*Ridling v. Fannin County*, 190 S. W. 251.

(D) Writ of Error, Citation, or Notice.

☞417(1) (Tex.Civ.App.) A paper which in no way identifies the case, whether by its style, file number, or the description of any judgment or order, and which is not signed, though filed with the clerk of court, does not constitute notice of appeal.—*Russell v. Koennecke*, 190 S. W. 253.

Under Rev. Civ. St. art. 2085, written statement filed with clerk, not brought to attention of court, does not amount to notice of appeal in open court.—*Id.*

☞429 (Mo.App.) Under Rev. St. 1909, § 7584, providing that on appellant's failure to give notice of appeal the judgment may be affirmed or the appeal dismissed at option of appellee, the appellee may waive notice of appeal and enter his appearance, thereby giving the circuit court jurisdiction to render judgment.—*Munroe v. Dougherty*, 190 S. W. 1022.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

☞485(2) (Mo.) Where cestuis secured judgment that trustee pay them proportionate shares of trust fund, claimed by third person, and trustee, as a mere stakeholder, did not appeal, the appeal of the third person did not stay execution in favor of trustee, and the cestuis could have execution on the judgment.—*State ex rel. Captain v. Graves*, 190 S. W. 859.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

☞499(1) (Ky.) Alleged error in selecting a jury is not available where the record does not show any objection raised or exception taken at the time.—*Carter Coal Co. v. Love*, 190 S. W. 481.

☞499(1) (Mo.App.) Where bill of exceptions discloses no request of plaintiff to argue the question of value of goods in replevin, no ruling and no exception saved, no question thereon is presented for review.—*Meston v. Crawford*, 190 S. W. 391.

☞499(2) (Tex.Civ.App.) Where it does not appear except by bill of exception that a plea in abatement for nonjoinder of necessary parties was called to attention of court or action taken thereon, it cannot be reviewed.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

☞499(3) (Mo.App.) An alleged error in the admission of testimony cannot be reviewed where no objection or exception thereto appears in the abstract of his testimony.—*Le Master v. Butler County R. Co.*, 190 S. W. 38.

☞499(4) (Tex.Civ.App.) In view of Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c.

59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), requiring objections to charge to be presented before read to jury, and providing that when not so presented they are waived, where record fails to show that peremptory instruction was objected to, held that Appellate Court will not review ruling.—*Pearce v. Supreme Lodge, Knights and Ladies of Honor*, 190 S. W. 1156.

☞501(1) (Ky.) Alleged error in selecting a jury is not available where the record does not show any objection raised or exception taken at the time.—*Carter Coal Co. v. Love*, 190 S. W. 481.

☞501(1) (Mo.App.) Where bill of exceptions shows no exceptions saved to overruling of defendant's objections to remarks of plaintiff's counsel, Court of Appeals must rule assignment of error predicated on such remarks against defendant.—*Hicks v. Metropolitan Life Ins. Co.*, 190 S. W. 661.

☞509 (Tex.Civ.App.) Where the transcript shows that no notice of appeal was given in open court, the Court of Civil Appeals has no authority to consider the case.—*Russell v. Koennecke*, 190 S. W. 253.

(B) Scope and Contents of Record.

☞516 (Ky.) For the purpose of compliance with rule 20 of Court of Appeals (169 S. W. vii), the judgment will be treated as the "record," as the basis of a motion for leave to appeal.—*Kentucky Traction & Terminal Co. v. Grimes*, 190 S. W. 129.

Under Court of Appeals rule 20 (169 S. W. vii) objections to granting an appeal because only the judgment was filed will be overruled if appellant chooses to appeal on only so much of the record.—*Id.*

☞528(1) (Mo.App.) Matters raised by motion for new trial cannot be considered on appeal where such motion is not copied into the bill of exceptions and no direction was given to the clerk so to copy it, pursuant to Rev. St. 1909, § 2083.—*Wank v. Peet*, 190 S. W. 88.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

☞544(1) (Tex.Civ.App.) It is not necessary to take a bill of exception to a charge as a prerequisite to the right to complain of such instruction on appeal.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

☞547(1) (Ark.) Where no motion was filed to strike paragraphs of the answer, but demurrer thereto was sustained with exceptions saved, but the court struck the paragraphs, such order was surplusage, so that it need not be presented by a bill of exceptions.—*East v. Southern Cotton Oil Co.*, 190 S. W. 558.

☞554(1) (Tex.Civ.App.) Affidavit filed in trial court held sufficient to show appellant and counsel did all possible to procure a statement of facts in accordance with statute, and were deprived of such statement by arbitrary action of trial judge.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

☞554(3) (Ark.) On appeal from judgment overruling motion for summary judgment against sheriff by party who gave cash bond for one charged with embezzlement and later surrendered him in open court, in absence of bill of exceptions showing what was done below, held, that Supreme Court must affirm.—*Childress v. Boyett*, 190 S. W. 429.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

☞571 (Tex.Civ.App.) Where a trial judge arbitrarily refused to approve a statement of facts made out and agreed to by parties, or to make and file one himself, the appellant's remedy held to be mandamus to compel trial judge to discharge his statutory duty, and not to have judgment reversed on appeal.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

(E) Abstracts of Record.

⚡582(2) (Mo.App.) Under the rules of court it is not necessary in order to present evidence to Supreme Court that the same should be printed in toto in form of questions and answers in abstract of record, but all evidence should be presented in narrative form, avoiding unnecessary repetition.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

⚡590 (Mo.App.) An amended abstract cannot be filed when the case is called for argument several days after appellees have made the point of insufficiency against the abstract and briefed the case as it stood.—*Wank v. Peet*, 190 S. W. 88.

(H) Transmission, Filing, Printing, and Service of Copies.

⚡621(2) (Ky.) Where appeal is granted by clerk of Court of Appeals, pursuant to Civ. Code Prac. § 734, transcript must be filed in office of clerk at least 20 days before first day of second term of court next after granting of appeal, as required by section 738.—*Edelston v. Edelston*, 190 S. W. 1083.

⚡624 (Ky.) Court of Appeals held without authority to sustain motion of purported appellant for extension of time for filing transcript in office of clerk, where he had no appeal pending.—*Edelston v. Edelston*, 190 S. W. 1088.

⚡627(2) (Ky.) Under Civ. Code Prac. § 738, where appellant failed to file transcript with clerk of Court of Appeals 20 days before first day of second term thereof next after granting of appeal by circuit court, appellee's motion to dismiss appeal must be sustained.—*Edelston v. Edelston*, 190 S. W. 1083.

Dismissal of appeal granted by circuit court on motion of appellee for appellant's failure to file transcript in office of clerk of Court of Appeals 20 days before first day of second term next after granting of appeal, as required by Civ. Code Prac. § 738, cannot be prevented by appellant's asking that appeal be granted him by Court of Appeals.—Id.

⚡629 (Ky.) Under Civ. Code Prac. §§ 734, 745, dismissal of appeal granted by circuit court for failure to file transcript, as required by section 738, will not prevent appellant from being granted appeal by clerk of Court of Appeals.—*Edelston v. Edelston*, 190 S. W. 1083.

(I) Defects, Objections, Amendment, and Correction.

⚡639(1) (Mo.App.) On appeal from judgment for interpleader, the abstract, notwithstanding defects, when considered with the certificate of clerk of the circuit court, filed under Rev. St. 1909, § 2048, as to certified transcript of part of the record in dispute, held to warrant review not only of the record proper, but of that made a part of the record by bill of exceptions.—*Highfield v. United Magazine Press*, 190 S. W. 926.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

⚡662(1) (Mo.App.) An ordinance which showed, according to the record, that it was not in force when the automobile collision which caused plaintiff's injuries occurred, cannot be considered notwithstanding plaintiff's claim of a mistake in the date supported by some oral testimony.—*Young v. Dunlap*, 190 S. W. 1041.

⚡662(3) (Mo.App.) A bill of exceptions imports verity as it stands, and can alone be looked to by the Court of Appeals concerning matters of exception.—*Hicks v. Metropolitan Life Ins Co.*, 190 S. W. 661.

(K) Questions Presented for Review.

⚡683 (Mo.App.) Exclusion of deposition of defendant offered to contradict defendant's testimony at the trial could not be reviewed, where there was nothing in the record authenticating

the paper offered as a deposition.—*Stimson v. Brinkman*, 190 S. W. 646.

⚡692(1) (Tex.Civ.App.) Where a bill of exception does not show what answer was expected to a question, complaint as to the exclusion of the testimony cannot be considered.—*Caffarelli Bros. v. Bell*, 190 S. W. 223.

(L) Matters Not Apparent of Record.

⚡713(3) (Ark.) Where the motion for new trial appeared improperly in the bill of exceptions, it will be considered to avoid unnecessary delay by certiorari to bring up the motion in the proper way.—*East v. Southern Cotton Oil Co.*, 190 S. W. 558.

⚡714(5) (Ky.) Failure of the record to show alleged error of the court during a jury selection is not excused by affidavits in the briefs stating that the court refused to permit a motion raising the question to put on the order book of the court.—*Carter Coal Co. v. Love*, 190 S. W. 481.

XL ASSIGNMENT OF ERRORS.

⚡719(1) (Mo.) Constitutional questions not assigned as error will be assumed to be waived or abandoned.—*State ex rel. McWilliams v. Little River Drainage Dist.*, 190 S. W. 897.

⚡722(1) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, and Rule 24 for Courts of Civil Appeals (142 S. W. xii), the grounds set up in the motions for new trial constitute the assignments of error on appeal.—*Grant v. Grant*, 190 S. W. 229.

⚡741 (Tex.Civ.App.) An assignment of error, complaining that the court erred in overruling appellant's motion for new trial because the judgment was contrary to the law and the evidence and the findings of the jury and on account of newly discovered evidence, is multifarious and bad.—*Grant v. Grant*, 190 S. W. 229.

⚡742(1) (Tex.Civ.App.) An assignment of error not followed by propositions, as contemplated by Rule 30 (142 S. W. xiii), need not be considered.—*Grant v. Grant*, 190 S. W. 229.

XII. BRIEFS.

⚡757(1) (Mo.) Appellant's brief, containing no statement of the case, held not a proper brief within Supreme Court Rule 15 (169 S. W. ix), so that the appeal will be dismissed.—*Royal v. Kansas City Western Ry. Co.*, 190 S. W. 578.

⚡773(2) (Tex.Civ.App.) Under Rev. St. art. 2115, and rule 39, Rules for the Courts of Civil Appeals (142 S. W. xiii), where appellants offer no excuse for failure to file copy of brief in district court, appeal must be dismissed.—*Hensley v. Pena*, 190 S. W. 247.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⚡781(6) (Mo.App.) Where plaintiff, appealing from judgment of justice's court, while the appeal was pending accepted the amount of its claim and gave a receipt in full, and matter is called to attention of Court of Appeals, there being nothing left to adjudicate, the case will be dismissed.—*Walther v. Woodson*, 190 S. W. 61.

⚡792 (Tex.Civ.App.) Where nonresident seeking to appeal as pauper did not prove inability to give security before trial court, as required by Rev. St. art. 2098, defect is fundamental, of which Court of Appeals is required to take notice without action by opposing party.—*Ridling v. Fannin County*, 190 S. W. 251.

XVI. REVIEW.

(A) Scope and Extent in General.

⚡840(4) (Mo.App.) In servant's action for injuries, where defendant asked 21 instructions, the appellate court would not critically examine those refused; the number requested being so great as to tend to produce confusion.—*McDon-*

old v. Central Illinois Const. Co., 190 S. W. 683.

⇨854(2) (Tex.Civ.App.) Where cause was tried by jury, and judgment is sustained by pleadings and proof, it should be affirmed by appellate court, though trial court gave erroneous reasons therefor.—Speed v. Sadberry, 190 S. W. 781.

⇨856(1) (Tex.Civ.App.) A judgment which can be supported by any reasonable theory as to the evidence must be affirmed, where there are no conclusions of fact and law.—Coker v. Mott, 190 S. W. 747.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

⇨874(5) (Mo.App.) An order requiring plaintiff to consent to reduction of the damages, after which defendant's motion for a new trial was overruled, cannot be reviewed on exception to overruling the motion.—LeMaster v. Butler County R. Co., 190 S. W. 38.

(C) Parties Entitled to Allege Error.

⇨877(4) (Ark.) Appellant cannot complain of the fact that appellees were not granted the relief they prayed for.—Peay v. Kinsworthy, 190 S. W. 565.

⇨877(4) (Tex.Civ.App.) Where two parties join in claiming personal property upon its sequestration and both recover judgment, that one of them cannot maintain such claim is not error of which plaintiff may complain.—Dawedoff v. Hooper, 190 S. W. 522.

⇨880(1) (Mo.App.) On appeal by one defendant in action against tort-feasors, the only question is whether appellant had a fair trial, without material error committed against him, rather than as to any error in connection with other defendant.—Mitchell v. Brown, 190 S. W. 354.

⇨882(3) (Mo.App.) A claimant against an estate could not object that the newspaper publishing notice limiting time to present claims was not a proper newspaper, where he himself put in evidence the affidavit of publication relied on by the executor.—C. H. Albers Commission Co. v. Vogelsang, 190 S. W. 1058.

⇨882(12) (Ky.) Where appellant offered an instruction similar to one given, he cannot complain that court erred.—Sovereign Camp of Woodmen of the World v. Valentine, 190 S. W. 712.

⇨882(12) (Mo.App.) An instruction given at appellant's request, if erroneous, is invited error, and cannot serve him as ground for new trial.—Whimster v. Holmes, 190 S. W. 62.

⇨882(12) (Mo.App.) Defendant railway company cannot object because the court after instructing that it was liable if it negligently jerked a passenger coach, at defendant's request gave an erroneous instruction, requiring the jury to find that the forward part of the train was run forward before backing into the coach.—Johnson v. St. Louis & S. F. R. Co., 190 S. W. 352.

⇨882(12) (Mo.App.) Giving defendant's instruction alleged to be in conflict with a correct instruction given for plaintiff *held* not to render plaintiff's instruction erroneous so as to require a reversal.—Risinger v. Begley, 190 S. W. 418.

⇨882(14) (Mo.App.) Appellant, who asked that issue be submitted, will not be heard on appeal to challenge verdict on ground that submission was improper.—Mitchell v. Brown, 190 S. W. 354.

(E) Presumptions.

⇨907(8) (Tex.Civ.App.) In absence of statement of facts, reviewing court will presume that the facts proven on trial support finding of jury

and judgment.—Borton v. Borton, 190 S. W. 192.

⇨911(3) (Mo.App.) Where the record proper shows the court had jurisdiction, such jurisdiction will be presumed to have been properly exercised.—Wank v. Peet, 190 S. W. 88.

⇨925(2) (Tex.Civ.App.) Where, it being uncertain in whose possession the property was when seized, the record does not show that the court directed which party should assume the burden of proving right of possession, it will be presumed the burden was on the writ plaintiff.—Dawedoff v. Hooper, 190 S. W. 522.

⇨926(4) (Tex.Civ.App.) On appeal in partner's suit for dissolution and accounting, where defendants' bill of exceptions, to refusal to permit them to offer trial balance from books of firm, fails to incorporate balance, Court of Appeals cannot presume it would have thrown light on net profits of firm.—Tyler v. McChesney, 190 S. W. 1115.

⇨927(5) (Mo.App.) On a demurrer to the evidence, the appellate court relies on the evidence most favorable to the party attacked.—LeMaster v. Butler County R. Co., 190 S. W. 38.

⇨927(5) (Mo.App.) On appeal from defendant's demurrer to evidence, for purpose of demurrer, evidence is to be viewed in light most favorable to plaintiff.—Markow v. Gross-O'Reilly Chandler Co., 190 S. W. 624.

⇨927(5) (Mo.App.) On review of order overruling defendant's demurrer to evidence, the court must deal with case from standpoint of evidence in plaintiff's behalf and reasonable inferences therefrom.—Dunn v. Missouri Pac. Ry. Co., 190 S. W. 966.

⇨927(5) (Mo.App.) On demurrer to testimony, Court of Appeals must look to the evidence in plaintiff's behalf as establishing the facts.—Belt v. St. Louis, I. M. & S. Ry. Co., 190 S. W. 1002.

⇨927(6) (Tex.Civ.App.) Unless contrary is shown it must be presumed that the trial judge would not have passed on motion for peremptory instruction without requiring its submission to opposing counsel in compliance with Vernon's Sayles' Ann. Civ. St. 1914, art. 1071.—Atchison, T. & S. F. Ry. Co. v. Smith, 190 S. W. 761.

⇨930(1) (Mo.App.) In reviewing a verdict for plaintiff, appellate court must adopt most favorable construction that can be given to plaintiff's testimony as a whole.—Stephens v. City of Eldorado Springs, 190 S. W. 1004.

⇨930(4) (Tex.Civ.App.) In an action for negligently firing her household goods, *held* that judgment based on verdict for plaintiff should be upheld on theory that jury presumably found that she was occupying premises with consent of defendant, the owner.—Blount-Decker Lumber Co. v. Martin, 190 S. W. 232.

⇨933(1) (Tex.Civ.App.) Where neither the transcript nor the statement of facts disclosed the action of the court on motion for new trial, but the record disclosed subsequent proceedings, including final judgment, the court will assume that the motion was sustained.—Johnson v. Waggoner, 190 S. W. 835.

⇨934(2) (Tex.Civ.App.) Notwithstanding Rev. St. 1911, arts. 1990, 1991, requiring judgment to be rendered on separate conclusions of fact by the judge, where there is no statement of facts and there are findings of fact, such findings will support the judgment, although not stating affirmatively every fact necessary to support.—Producers Oil Co. v. Snyder, 190 S. W. 514.

⇨934(2) (Tex.Civ.App.) Where a particular issue, on which a finding for plaintiff was necessary to the judgment was not requested to be submitted or submitted to the jury, *held* that it would be presumed on appeal that the trial court found for plaintiff on such issue.—Fidelity Trust Co. v. Rector, 190 S. W. 842.

—934(2) (Tex.Civ.App.) Where the question of assumed risk was not submitted to the jury and not required by defendant, the issue will be resolved in support of a judgment for plaintiff rendered on special issues found by the jury, if there is any evidence to support such a finding.—*Kansas City, M. & O. Ry. Co. of Texas v. Finke*, 190 S. W. 1143.

—934(2) (Tex.Civ.App.) The issues properly presented by the pleadings would be presumed to have been disposed of by the judgment, though silent thereon, unless it appears otherwise from face of judgment itself.—*Pitt v. Gilbert*, 190 S. W. 1157.

(F) Discretion of Lower Court.

—957(1) (Mo.App.) The Court of Appeals can only interfere with discretion of trial court in setting aside default judgment where it clearly appears that such discretion has been abused.—*Munroe v. Dougherty*, 190 S. W. 1022.

—957(2) (Mo.App.) Court of Appeals could not say that trial court abused its discretion in refusing to set aside judgment for plaintiff on defendants' appeal, rendered on defendants' failure to appear on the ground that they understood that they had employed counsel, where motion did not show facts warranting such understanding.—*Munroe v. Dougherty*, 190 S. W. 1022.

—959(3) (Tex.Civ.App.) Allowance of trial amendments to pleadings is for discretion of trial judge, and will not be reviewed by appellate court, unless there has been a clear abuse of discretion.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

(G) Questions of Fact, Verdicts, and Findings.

—987(1) (Mo.App.) Where questions of fact are tried to the court, the appellate court cannot weigh the evidence.—*Willis v. Reed*, 190 S. W. 377.

—989 (Mo.App.) In passing on the objection that the verdict for plaintiff is not supported by the evidence because plaintiff's testimony was contrary to the physical facts, the appellate court need examine only plaintiff's evidence, together with the physical facts disclosed.—*Young v. Dunlap*, 190 S. W. 1041.

—997(2) (Mo.App.) On demurrer to evidence, Court of Appeals should reject parts contrary to physical facts, and any statements which are merely conjectures or conclusions rather than facts within witness' knowledge.—*Spain v. St. Louis & S. F. R. Co.*, 190 S. W. 353.

—999(3) (Tex.Civ.App.) Where a railroad and its employé were engaged in interstate commerce when the latter was injured, and the jury found the amount to which the employé's negligence contributed to his injuries, which was deducted from his damages by the court, the issue of contributory negligence is disposed of.—*Kansas City, M. & O. Ry. Co. of Texas v. Finke*, 190 S. W. 1143.

—1001(1) (Ky.) A verdict supported by some evidence will not be disturbed unless flagrantly against the evidence.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

—1001(1) (Mo.App.) The court on appeal cannot set aside verdict having substantial testimony to support it.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S. W. 46.

—1002 (Ark.) The verdict of the jury on conflicting evidence will not be disturbed where there is substantial evidence to sustain it.—*Harris v. Ring*, 190 S. W. 560.

—1002 (Mo.App.) The court on appeal cannot weigh conflicting evidence.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S. W. 46.

—1002 (Mo.App.) Verdict on conflicting evidence is conclusive on appeal.—*Witham v. Lusk*, 190 S. W. 403.

—1002 (Mo.App.) Findings of fact made by jury on conflicting evidence will not be reviewed.—*Grayson v. Grayson*, 190 S. W. 880.

—1002 (Mo.App.) A verdict, based on conflicting evidence, is not reviewable.—*American Union Trust Co. v. Never Break Range Co.*, 190 S. W. 1045.

—1002 (Tex.Civ.App.) Special findings by the jury on questions of fact are binding on the appellate court, though there is evidence to the contrary.—*Earhart v. Agnew*, 190 S. W. 1140.

—1004(1) (Mo.App.) A verdict will not be disturbed for insufficient allowance on items of damage claimed by defendants, though the evidence would have justified a greater allowance, where the allowance made was in accordance with substantial evidence.—*Moore v. McCutchen*, 190 S. W. 350.

—1005(3) (Tex. Civ. App.) Where the trial court has sustained a verdict based on conflicting evidence, it will not be disturbed on appeal.—*Scott v. Northern Texas Traction Co.*, 190 S. W. 209.

—1005(4) (Ark.) A ruling of court overruling a motion for new trial and sustaining a verdict as in accord with preponderance of evidence will not be reversed on appeal if there is evidence to sustain it, unless it is manifest that court abused its discretion.—*Twist v. Mullinix*, 190 S. W. 851.

—1006(2) (Mo.App.) Though a court might well agree that the weight of evidence was with defendant, yet where the trial court granted one new trial because the verdict was against the weight of the evidence, and a second jury found the same way, the appellate court could not grant relief on that ground.—*Sisk v. Dillman Egg Case Co.*, 190 S. W. 389.

—1009(3) (Ky.) Where the evidence is conflicting, some weight will be given to the chancellor's finding, and if on the whole case the mind is left in doubt as to the truth, his judgment will not be disturbed on appeal.—*Hardaway v. Webb*, 190 S. W. 1071.

—1010(1) (Ark.) Trial court's finding on sufficient evidence that courthouse commissioners performed their nondelegable duties, and that such services were worth the sum allowed them, must be affirmed.—*Mississippi County v. Grider*, 190 S. W. 102.

—1010(1) (Ark.) The finding of the trial court is binding upon the Supreme Court when supported by legally sufficient evidence.—*Jones v. Road Improvement Dist. No. 1 of Sevier County*, 190 S. W. 567.

—1010(1) (Mo.App.) Whether materials were furnished and entered into construction of building, and, if so, when, are questions of fact, and court's findings supported by substantial evidence are conclusive.—*Benning v. Farmers' Bank of Odessa*, 190 S. W. 983.

—1010(1) (Tex.Civ.App.) Where evidence is sufficient to support a judgment of trial court, appellate court held without authority to disturb judgment.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

—1010(1) (Tex.Civ.App.) Findings by the court that persons were property taxpayers in a school district, when supported by the evidence, cannot and will not be disturbed by the appellate court.—*Lane v. Herring*, 190 S. W. 778.

—1011(1) (Mo.App.) Findings of the trial court, based on conflicting evidence, are not reviewable.—*Wilson v. St. Louis Envelope & Paper Box Co.*, 190 S. W. 979.

—1011(1) (Tex.Civ.App.) A judgment on conflicting evidence on trial to the court will be affirmed if supported by sufficient evidence.—*Wells Fargo & Co. v. Long*, 190 S. W. 530.

—1011(1) (Tex.Civ.App.) The trial judge's findings as to the facts have the same effect as

findings of a jury, and if the evidence is conflicting, a mere preponderance against the finding is not cause for reversal.—*Coker v. Mott*, 190 S. W. 747.

The fact that the trial judge accepted testimony of defendant alone as against that of plaintiff and his witnesses is not ground for a reversal.—*Id.*

⇒1015(3) (Mo.App.) Where a new trial is granted on ground that verdict is contrary to evidence, order will not be disturbed if there was substantial evidence against verdict unless on record no other verdict could have been rendered.—*United States Fidelity & Guaranty Co. v. W. P. Carmichael Co.*, 190 S. W. 648.

⇒1017 (Mo.App.) Referee's finding of facts in action at law stands before Court of Appeals as verdict of jury.—*Citizens' Trust Co. v. Ferguson*, 190 S. W. 395.

(H) Harmless Error.

⇒1032(1) (Tex.Civ.App.) The burden is on appellant to show injury as well as error.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

⇒1033(5) (Ky.) An instruction, that the jury might consider rumors of the same purport as the alleged slanderous words in mitigation of punitive damages, but not of compensatory damages, while erroneous, was not prejudicial to the plaintiff.—*Marksberry v. Weir*, 190 S. W. 1108.

⇒1033(5) (Mo.App.) Under allegations that train was negligently jerked backwards, defendant railway company cannot object because the jury was required to find that no warning of the lurch was given.—*Johnson v. St. Louis & S. F. R. Co.*, 190 S. W. 352.

⇒1033(5) (Mo.App.) Error in an instruction, which submitted an issue as to the acts of a fellow servant not raised by the pleading, held not harmless to defendant, as imposing an additional burden on plaintiff.—*Ruch v. Pryor*, 190 S. W. 1037.

⇒1042(3) (Mo.App.) Errors, if any, in overruling motion to strike out certain counts held cured by subsequent dismissal by the plaintiff of all counts so objected to.—*Hunter v. Sloan*, 190 S. W. 57.

⇒1048(2) (Tex.Civ.App.) In action by pedestrian for injuries when struck by railway cars, it was prejudicial to permit plaintiff's brother, who was not a physician, to testify that after the accident plaintiff recovered and was in perfect health.—*Gulf, C. & S. F. Ry. Co. v. Sullivan*, 190 S. W. 739.

⇒1048(5) (Tex.Civ.App.) In action against railroads for delay in shipment of live stock, impropriety in question to plaintiffs calling for expression of opinion, held harmless in view of answer.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

⇒1048(6) (Mo.App.) The admission of certain testimony on cross-examination, if error, was harmless, where the same testimony had already been brought out without objection on cross-examination of another witness.—*Moore v. McCutchen*, 190 S. W. 350.

⇒1050(1) (Mo.App.) The admission of evidence of a conversation between defendant and a third party was not reversible error where not prejudicial.—*Dawson v. Flintom*, 190 S. W. 972.

⇒1050(1) (Mo.App.) In action for damages to goods shipped, testimony of consignee's foreman of rough handling by the railroad of shipments from plaintiff held not reversible error, although not confined to the shipment sued on, where he was thoroughly cross-examined.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S. W. 1032.

⇒1050(1) (Tex.Civ.App.) Any error in admitting in evidence certificate of person who prepared an abstract held harmless; description being sufficient without it.—*Nelson v. Butler*, 190 S. W. 811.

⇒1051(1) (Tex.Civ.App.) The admission of an account, incorrectly made up, was not injurious to appellant, where the true account was substantially proven otherwise.—*Wilson v. J. W. Crowds Drug Co.*, 190 S. W. 194.

⇒1051(3) (Tex.Civ.App.) Error in allowing plaintiff to testify to T. making contract as defendant's agent, held harmless in view of defendant's testimony and evidence of ratification.—*Carr v. Wright*, 190 S. W. 254.

⇒1052(5) (Tex.Civ.App.) Error in admitting testimony by a garnishee that he had notes belonging to defendant was harmless where the note was payable to defendant and the jury found he did not give it to his wife.—*Earhart v. Agnew*, 190 S. W. 1140.

⇒1054(1) (Tex.Civ.App.) On trial to the court, the admission of hearsay testimony does not require reversal, if there be legitimate evidence sufficient to support the judgment and the result would have been the same had the hearsay testimony been excluded.—*Wells Fargo & Co. v. Long*, 190 S. W. 530.

⇒1058(1) (Tex.Civ.App.) A creditor's books, showing that the notes of a third person were entered as a credit on a debtor's account, would have had no probative force as showing an agreement to accept the notes as a novation, and the fact of entry having been otherwise shown, there was no reversible error in excluding the books.—*Wilson v. J. W. Crowds Drug Co.*, 190 S. W. 194.

⇒1060(1) (Mo.App.) Where proof showed that there was nothing to prevent the engineer from seeing plaintiff in time to avoid injuring him, the remarks of plaintiff's counsel to jury that the fireman also should have seen him were harmless.—*Waterfield v. Wabash Ry. Co.*, 190 S. W. 981.

⇒1060(2) (Mo.App.) In view of Rev. St. 1909, § 2082, where court told jury that question as to whether a witness had been indicted was immaterial and not to consider it, failure to reprimand defendant's counsel for asking a witness if he had been indicted, held not reversible error.—*Stephens v. City of Eldorado Springs*, 190 S. W. 1004.

⇒1060(4) (Mo.App.) Argument of plaintiff's counsel, though improper, is nonprejudicial, where on the first trial plaintiff secured a verdict of \$4,000, but on the retrial, in the face of such argument, the verdict was for only \$3,250.—*Allen v. Quercus Lumber Co.*, 190 S. W. 86.

⇒1062(1) (Mo.App.) In view of Rev. St. 1909, §§ 1850, 1993, 2082, where a court directed amount jury should allow on a counterclaim, amount being correctly calculated, error held not reversible.—*State, to Use of Goodman, v. Regent Laundry Co.*, 190 S. W. 951.

⇒1064(1) (Mo.App.) In view of Rev. St. 1909, §§ 1850 and 2082, in action by landlord against a third person to recover for damages caused by painting gum sign on the outer wall of building by permission of tenant, omission, in an instruction directing verdict for plaintiff on entire case of requirement that they find property was substantially damaged, held not reversible error.—*Kretzer Realty Co. v. Thomas Cusack Co.*, 190 S. W. 1011.

⇒1064(1) (Tex.Civ.App.) In an action against a carrier of live stock for damages caused by delay in transportation, error in instructing jury regarding duty of defendant to keep and maintain stock pens in good condition held not prejudicial.—*Ft. Worth & D. C. Ry. Co. v. Atterberry*, 190 S. W. 1133.

⇒1064(2) (Ark.) The giving of an instruction which assumes that plaintiff was injured is not prejudicial, where the undisputed evidence shows that he was injured.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

⇒1064(2) (Mo.App.) Error in instructing that a speed in excess of 10 miles per hour at a street intersection was negligence was harmless,

where there was no evidence which would excuse the excess speed so as to overcome the presumption created by an ordinance.—*Young v. Dunlap*, 190 S. W. 1041.

⇒1064(4) (Ark.) The giving of an instruction as to the measure of damages for personal injuries, while not in the most approved form, held not prejudicial error.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

⇒1064(4) (Mo.App.) An instruction, in a passenger's action for assault committed by the conductor, held not to require a reversal, though not perfect in form.—*Briggs v. Lusk*, 190 S. W. 380.

⇒1064(4) (Mo.App.) Where the only contradictory evidence in the case was upon material matters, the omission of the word "material" in instruction regarding credibility of witnesses was harmless error.—*Dawson v. Flintom*, 190 S. W. 972.

⇒1066 (Mo.) In action by railroad employé catching his foot under guard rail not maintained as required by Rev. St. 1909, § 3163, an instruction authorizing a verdict in the absence of blocking was not prejudicial error, where the defense was that the guard rail was blocked, and not filled.—*Bowman v. Wabash R. Co.*, 190 S. W. 579.

⇒1066 (Mo.App.) In an action against a railroad for injury to employé struck by a switch engine, an instruction that plaintiff was entitled to notice of movement of engines and trains, although stating an abstract proposition of law, held not prejudicial.—*Duyn v. Missouri Pac. Ry. Co.*, 190 S. W. 968.

In an action against a railroad for injuries to employé, where defendant's servant on the footboard of the engine which struck plaintiff testified that he saw plaintiff while 30 feet away, any error in an instruction submitting hypothesis of defendant's servants being able to see plaintiff with ordinary care held harmless.—*Id.*

⇒1066 (Mo.App.) In action for injury to boy when opening in defendant's freight train was closed at a crossing, instruction permitting verdict for plaintiff if there was no lookout on approaching end of cars held prejudicial error, where there was no allegation of such negligence.—*Israel v. Wabash R. Co.*, 190 S. W. 1015.

⇒1068(1) (Mo.App.) In action by a landlord against a third party for damages caused by sign painted on outer wall by authority of tenant, where jury found that sign did substantial damage to freehold, an instruction that tenant did not have authority to authorize defendant to paint a sign on said premises, although it did not indicate that it referred to sign involved, held not reversible error.—*Kretzer Realty Co. v. Thomas Cusack Co.*, 190 S. W. 1011.

⇒1068(1) (Tex.Civ.App.) In action for fraud in sale of land, a charge, erroneously conditioning recovery on plaintiff's having used care in investigating, necessitated reversal, although the jury found for plaintiff on a certain item and against him on others, the theory of such determination not appearing.—*Ford v. Sims*, 190 S. W. 1165.

⇒1068(4) (Ky.) An erroneous instruction on the measure of damages for breaching a timber purchase contract did not prejudice defendant buyer, where the verdict was no more than the uncontradicted proof and the correct measure of damages authorize.—*R. Burleigh & Sons v. Overton*, 190 S. W. 472.

⇒1068(4) (Mo.App.) The modification of plaintiff's instruction by striking out the amount "\$75," which could only have effect of diminishing amount of damages recoverable, was harmless error, where jury did not find for plaintiffs in any amount.—*Dawson v. Flintom*, 190 S. W. 972.

⇒1068(4) (Mo.App.) Where jury returned no punitive damages, error in an instruction authorizing such damages held not prejudicial.—*Kretzer Realty Co. v. Thomas Cusack Co.*, 190 S. W. 1011.

⇒1068(5) (Ky.) Failure to instruct that mortality tables are admitted only to show the probable duration of life, etc., is not prejudicial error, where \$5,000 damages were awarded for the death of a coal miner about 16 years of age.—*Carter Coal Co. v. Love*, 190 S. W. 481.

⇒1068(5) (Tex.Civ.App.) In partner's suit for dissolution and accounting, refusal of requested charge relative to plaintiff's liability for amount expended in keeping books held harmless, where jury found such charge against plaintiff.—*Tyler v. McChesney*, 190 S. W. 1115.

⇒1071(1) (Tex.Civ.App.) The failure of the trial court to file conclusions of fact and law does not require a reversal where the note sued on, which is set out in the transcript, furnished all the material that could have been furnished by the court's conclusions.—*Thomas v. Kean*, 190 S. W. 847.

⇒1073(1) (Ky.) In suit to quiet title wherein defendant in his answer did not show specific part he claimed, as required by Civ. Code Prac. § 125, subd. 2, an erroneous adjudication of land to him which would bar plaintiff's renewal of his cause of action was prejudicial.—*Patton v. Stewart*, 190 S. W. 1062.

(I) Error Waived in Appellate Court.

⇒1078(1) (Mo.) Correctness of action assigned as error will be treated as conceded; the point not being urged on appeal.—*Cornet v. Cornet*, 190 S. W. 333.

⇒1078(1) (Mo.) Constitutional questions not specifically referred to in appellant's brief will be assumed to be waived or abandoned.—*State ex rel. McWilliams v. Little River Drainage Dist.*, 190 S. W. 897.

Where questions raised in a case are important and involve numerous counties in the state, the court may consider them, although warranted under the rules in treating them as waived, where respondent's counsel does not urge such waiver.—*Id.*

⇒1078(1) (Mo.App.) A point not briefed by either party will not be considered.—*Krippendorf-Dittman Co. v. Hunt-Riddick Mercantile Co.*, 190 S. W. 44.

⇒1078(1) (Mo.App.) The appellate court will not examine an objection referred to in statement only, and not stated in briefs.—*Haire v. Schnaff*, 190 S. W. 56.

⇒1078(4) (Mo.App.) Where the appellant in his points and authorities and in his argument made no complaint or cited authority condemning the action of the court in giving an instruction, he waived his right to urge error thereon.—*Allen v. Quercus Lumber Co.*, 190 S. W. 86.

(J) Decisions of Intermediate Courts.

⇒1082(2) (Tex.Civ.App.) Where appellee did not complain of judgment for him on account of its failure to dispose of damages presented by the pleadings, either in lower court or in Court of Civil Appeals, he acquiesced therein.—*Pitt v. Gilbert*, 190 S. W. 1157.

(K) Subsequent Appeals.

⇒1097(2) (Ky.) Matters decided in a former opinion on appeal are not open on another appeal under the rule that a final adjudication between the same parties in the same case is conclusive whether sound or not.—*Rates v. City of Monticello*, 190 S. W. 1074.

⇒1097(6) (Mo.) In action against railroad for death of servant, decision of Court of Appeals rendered on former appeal was not res judicata on appeal on a second trial to Su-

preme Court on question of sufficiency of evidence.—*Grant v. Kansas City Southern Ry. Co.*, 190 S. W. 588.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

⚡1140(1) (Tex.Civ.App.) In action for delay in shipment of live stock that verdict is excessive to extent of improvement in selling appearance of cattle on Thursday when they were sold, over Wednesday the day when they arrived, at most only required a remittitur.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

In action for delay in shipment of live stock, error in verdict in that it left undetermined only question of 25 cents per hundredweight on 470 pounds, due to decline in market from Tuesday to Thursday, was too small to even require a remittitur.—*Id.*

⚡1140(4) (Ky.) Where items constituting the damages recovered are separable, and plaintiff recovered the full amount claimed the court may eliminate items improperly included, and direct a judgment for the proper amount.—*R. Burleigh & Sons v. Overton*, 190 S. W. 472.

⚡1140(4) (Mo.App.) Where the only competent evidence in an action to recover the statutory double damages for killing stock showed that the market value of the stock was one-half the verdict, a judgment for double the amount of the verdict will be reversed unless plaintiff remits one-half thereof.—*Shahan v. Lusk*, 190 S. W. 43.

(C) Modification.

⚡1149 (Tex.Civ.App.) Where an erroneous judgment was rendered, and the error plainly appears from the record, the appellate court may reform the judgment.—*Stewart v. Briggs*, 190 S. W. 221.

⚡1152 (Mo.App.) Where there was nonjoinder of devisees in suit to enforce contract to make plaintiff an heir, and a decree can be made without affecting such interests, the judgment will not be reversed, but a decree, making plaintiff pretermitted heir in the personality only, will be rendered.—*Buck v. Meyer*, 190 S. W. 997.

(D) Reversal.

⚡1170(10) (Mo.App.) Under Rev. St. 1909, §§ 1850, 2082, forbidding reversal for immaterial errors, a judgment based on a verdict correct in result, because damages assessed on counts on which damages were not recoverable were the proper damages upon the valid counts, will not be reversed.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S. W. 1032.

⚡1171(1) (Mo.) That the verdict in an action for personal injuries is excessive constitutes reversible error as a matter of law, irrespective of the existence of passion or prejudice on the part of the jury.—*Northam v. United Rys. Co. of St. Louis*, 190 S. W. 576.

⚡1173(1) (Tex.Civ.App.) Under Court of Civil Appeals rule 62a (149 S. W. x), a judgment, improperly rendered in a cross-action by one defendant against another, can be reversed without reversing the judgment properly rendered for plaintiff.—*Wood v. Love*, 190 S. W. 235.

⚡1173(1) (Tex. Civ. App.) Where recovery awarded attorneys suing a railroad and its injured employé was conditioned upon the liability of the road at all for the damages in excess of the amount already paid the employé in settlement, a reversal in favor of the road operated as a reversal of the entire judgment.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

Where attorneys sued a railroad company and their client alleging an assignment of part of a cause of action as attorney's fees, and that the company had settled by paying a sum to the client, and a judgment was rendered canceling the settlement and awarding damages on

the client's cross-complaint, and for plaintiffs for their share in the award, held that, on reversal of the judgment for damages, judgment for plaintiffs against their client should be modified and entered for the sum to which they were entitled on the settlement.—*Id.*

⚡1178(8) (Mo.App.) In action against city for damages from change of grade of sidewalk, judgment for plaintiff will not be reversed, without remand because ordinances introduced by her only provided for establishment of grade.—*Berglar v. University City*, 190 S. W. 620.

(F) Mandate and Proceedings in Lower Court.

⚡1184(1) (Ky.) A judgment on appeal is conclusive only of the matters and things raised by the pleadings and presented to it.—*Bates v. City of Monticello*, 190 S. W. 1074.

⚡1212(1) (Ky.) After a judgment on appeal and on return of the case to the circuit court, the defendant has the right to rely as a defense on any matter not presented by either of the former opinions.—*Bates v. City of Monticello*, 190 S. W. 1074.

APPEARANCE.

⚡9(8) (Ky.) Appellant by praying an appeal to the Court of Appeals thereby enters its appearance in the action, and when the case returns to the court below it will be before the court for all the purposes of the action.—*Thomas B. Jeffrey Co. v. Lockridge*, 190 S. W. 1103.

APPOINTMENT.

See Executors and Administrators, ⚡11, 12; Trusts, ⚡160.

APPROPRIATION.

See States; Waters and Water Courses, ⚡130.

APPROVAL.

See Appeal and Error, ⚡1005.

ARGUMENTATIVE INSTRUCTIONS.

See Trial, ⚡240.

ARGUMENT OF COUNSEL.

See Appeal and Error, ⚡1060; Criminal Law, ⚡699-728, 1037, 1154, 1171; Trial, ⚡108½-181.

ARMS.

See Weapons, ⚡8.

ARREST.

See Criminal Law, ⚡351; Escape.

ARREST OF JUDGMENT.

See Criminal Law, ⚡970, 1125; Judgment, ⚡266.

ASSAULT AND BATTERY.

See Carriers, ⚡283, 319; Criminal Law, ⚡364, 448; Homicide, ⚡45, 96, 257; Rape, ⚡13.

I. CIVIL LIABILITY.

(B) Actions.

⚡39 (Mo.App.) A finding of willful and wanton assault is sufficient to support a recovery of punitive damages.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S. W. 371.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

⚡83 (Tex.Cr.App.) In trial for aggravated assault on a constable who had been summoned by a third party to arrest accused for robbery, it was proper to permit the constable to state what

the third party had said when he came to get him to make the arrest.—Porter v. State, 190 S. W. 159.

In trial for aggravated assault on a constable trying to arrest accused, evidence that he communicated with other officers who arrested accused *held* proper.—Id.

In trial for aggravated assault on a constable, it was not error to refuse to permit the county attorney to testify at accused's instance that accused had been charged with drunkenness, disturbing the peace, etc.; these matters being irrelevant.—Id.

ASSESSMENT.

See Constitutional Law, ¶290; Drains, ¶76, 79; Municipal Corporations, ¶455-530.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ¶719-742.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Fraudulent Conveyances; Insurance, ¶607; Vendor and Purchaser, ¶241.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

¶8 (Tenn.) Where deceased by warranty deed conveyed his expectancy as heir of his mother, but predeceased her, his children took by inheritance from grandmother, and were not bound by covenant of warranty to relinquish property involved as after-acquired property.—Johnson v. Breeding, 190 S. W. 545.

(B) Mode and Sufficiency of Assignment.

¶56 (Tex.Civ.App.) Where a contractor paid money due a subcontractor into court and sought to have claimants interplead, the court properly rendered judgment of distribution, giving preference to those who had received orders from subcontractor on contractor, though not accepted, as they constituted an assignment.—Ogburn Gravel Co. v. Watson Co., 190 S. W. 205.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Trusts for Creditors.

¶36 (Mo.App.) A purported assignment for the benefit of creditors by which the trustee was given power to continue in course the retail business as his judgment directed was void as placing no limit upon the term of the trustee.—Meston v. Crawford, 190 S. W. 391.

¶45 (Mo.App.) A purported assignment for benefit of creditors under which the assignor attempted to retain control was void; it being requisite that the transfer to the trustee be absolute.—Meston v. Crawford, 190 S. W. 391.

V. RIGHTS AND REMEDIES OF CREDITORS.

(B) Presentation, Proof, and Payment of Claims.

¶302 (Tex.Civ.App.) As regards sufficiency of creditors' statement of claim and supporting affidavit filed with assignee for benefit of creditors, substantial compliance with the statute is enough.—Lang v. Collins, 190 S. W. 784.

Vernon's Sayles' Ann. Civ. St. 1914, art. 98, requiring creditor to file with assignee for benefit of creditors a "distinct" statement of claim, *held* satisfied by one that he claims a certain amount for legal services.—Id.

Statement of claim filed with assignee for benefit of creditors is of the "particular nature" of the claim, as required by Vernon's Sayles' Ann. Civ. St. 1914, art. 98, where disclosing it is for legal services.—Id.

Vernon's Sayles' Ann. Civ. St. 1914, art. 98, requiring claim filed with assignee for benefit of creditors to be supported by affidavit that there are no "credits or offsets," *held* satisfied by one that all just "offsets" have been allowed.—Id.

ASSOCIATIONS.

See Insurance, ¶723-826.

ASSUMPSIT, ACTION OF.

See Account Stated.

ASSUMPTION OF RISKS.

See Master and Servant, ¶216-226, 288.

ATTACHMENT.

See Election of Remedies, ¶12; Execution; Fraudulent Conveyances, ¶228; Garnishment; Homestead; Judgment, ¶17; Sequestration.

VIII. CLAIMS BY THIRD PERSONS.

¶308(3) (Mo.App.) Admission of evidence for an interpleader having title to goods attached, tending to show the attaching plaintiff was a member of the firm to whom interpleader conditionally sold the goods in order to show he was not a creditor *held* not error, where there was nothing to show that attaching plaintiff was proceeding against the firm or was a creditor of the firm.—Highfield v. United Magazine Press, 190 S. W. 926.

ATTORNEY AND CLIENT.

See Appeal and Error, ¶1060; Criminal Law, ¶699-728, 1037, 1154, 1171; District and Prosecuting Attorneys; Divorce, ¶197, 227; Pleading, ¶302; Trial, ¶108½-131.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

¶113 (Tex.Civ.App.) The rule prohibiting an attorney once retained from acting for the opposing party applies only in case of conflicting interest, in the absence of a contract.—Laybourne v. Bray & Shifflett, 190 S. W. 1159.

¶123(1) (Tex.Civ.App.) Generally, an attorney must act towards his client with the most scrupulous good faith and fidelity, and must make known to the latter the exact status, so far as he is able, of the matter concerning which he is employed.—Laybourne v. Bray & Shifflett, 190 S. W. 1159.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

¶143 (Tex.Civ.App.) Ordinarily, expressions of opinions by attorneys as to probability of judgment secured by them being reversed on appeal, even if mistaken, are not such false representations as will entitle the client to avoid for fraud a contract for increased compensation based thereon.—Laybourne v. Bray & Shifflett, 190 S. W. 1159.

¶166(1) (Tex.Civ.App.) In an action by attorneys on a contract of employment, evidence of their expression of opinion as to probability of reversal of judgment secured by them is admissible upon the issue of their good faith in making contract increasing compensation.—Laybourne v. Bray & Shifflett, 190 S. W. 1159.

A contract between attorney and client for increased compensation, made after the relation of attorney and client has commenced, is pre-

sumptively void, where no additional services by the attorney are contemplated.—Id.

Burden was on attorney to show that a new contract for increased compensation, after the relation of attorney and client had commenced, was fairly made and was reasonable and without undue advantage.—Id.

☞167(2) (Tex.Civ.App.) In an action on contract for additional compensation made after services had been commenced, the evidence being conflicting as to good faith of the attorneys, such issue was for the jury.—Laybourne v. Bray & Shifflett, 190 S. W. 1159.

In action on contract for compensation, where defendant alleged a contract that the attorney would not be employed by the opposing party during the litigation and there was evidence to support the allegation and to show breach thereof, the issue raised thereby should have been submitted to the jury.—Id.

In an action by attorney to recover for services upon quantum meruit, the evidence being conflicting, plaintiff's right to recover is for the jury.—Id.

AUTOMOBILES.

See Carriers, ☞320; Highways, ☞191; Master and Servant, ☞302, 330, 332; Municipal Corporations, ☞592, 705, 706; Railroads, ☞312, 338; Statutes, ☞110½.

BAGGAGE.

See Commerce, ☞47.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

☞48 (Ark.) Under Kirby's Dig. §§ 2179-2181, the only proper officer to receive cash bail bonds is the county treasurer.—Childress v. Boyett, 190 S. W. 429.

☞73 (Ark.) Kirby's Dig., § 4487, subd. 7, has no application to motion for summary judgment against sheriff by party who gave cash bail for one charged with embezzlement, but later surrendered him in open court, the court ordering payment by county treasurer or other officer having money.—Childress v. Boyett, 190 S. W. 429.

BAILMENT.

☞11 (Mo.App.) The unlawful tortious possession by a bailee renders him liable for injury or loss, regardless of negligence on his part.—Penter v. Ritter, 190 S. W. 29.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

☞435 (Tex.Civ.App.) In suit to enjoin execution on a judgment which plaintiff claims was barred by his discharge in bankruptcy, the burden is on plaintiff to plead and prove the discharge, and that the debt involved was not within any class which the Bankruptcy Act excepts from the discharge.—Bunting Stone Hardware Co. v. Alexander, 190 S. W. 1152.

☞436(3) (Tex.Civ.App.) A petition for injunction to restrain execution held sufficient to admit proof that the debt on which the judgment was founded was one provable in bankruptcy, and that plaintiff had been discharged.—Bunting Stone Hardware Co. v. Alexander, 190 S. W. 1152.

Proof that the judgment the enforcement of which plaintiff sought to restrain was based on a note is sufficient to show that the debt was barred by discharge under Bankruptcy Act, § 63 (a), not one excepted from the discharge by section 17.—Id.

BANKS AND BANKING.

See Bills and Notes, ☞407, 437; Constitutional Law, ☞148, 190; Garnishment, ☞56; Interpleader, ☞8; Mandamus, ☞73.

I. CONTROL AND REGULATION IN GENERAL.

☞3 (Mo.) The state has the right to prescribe the general policies which shall be observed in the conduct of a banking institution.—Citizens' Bank of Hayti v. Wells, 190 S. W. 314.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) Officers and Agents.

☞51 (Mo.) Rev. St. 1909, § 1112, providing that the directors of a bank may appoint and remove any cashier at pleasure, prevents the employment of a cashier under a contract putting it beyond the board's power to remove him at any time.—Citizens' Bank of Hayti v. Wells, 190 S. W. 314.

☞54(4) (Mo.App.) Bookkeeper or assistant cashier of bank and bondsmen whose act was not willful, held not liable on his bond for peculations of cashier and other officers of bank, in view of Rev. St. 1909, §§ 1088, 1099, as to duties of bank directors and stockholders in examining the bank's affairs.—Citizens' Trust Co. v. Ferguson, 190 S. W. 395.

☞57 (Ky.) Creditors of insolvent bank had right, not only to subject directors as stockholders and other stockholders to statutory double liability, but had right to seek indemnity from directors if they had been guilty of negligence, resulting in loss to creditors.—Caldwell v. Ryan, 190 S. W. 1078.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

☞127 (Tenn.) Deposit of draft with bill of lading attached and entry of credit therefor by the bank held a purchase of the draft, so that the proceeds were not subject to attachment as the property of the drawer.—Guggenheimer v. Queen Bee Flour Mills Co., 190 S. W. 455.

VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

☞316 (Mo.) Where a trust company, in process of dissolution, had ceased business prior to 1915, but left on deposit with the superintendent of insurance certain securities, and had complied with Rev. St. 1909, §§ 1140, 7072, as to dissolution, inspection, and request for return of such securities, it was entitled to a return of the securities from the insurance superintendent, notwithstanding Laws 1915, p. 188, § 168, transferring to the banking commission the duties of the insurance superintendent as to trust companies.—State ex rel. Commonwealth Trust Co. v. Chorn, 190 S. W. 17.

BARRIERS.

See Municipal Corporations, ☞796.

BASTARDS.

See Wills, ☞57.

I. ILLEGITIMACY IN GENERAL.

☞3 (Ky.) Evidence that plaintiff's mother was legally married to a man, and that there was opportunity for procreation within the period of gestation, raises a conclusive presumption that plaintiff is his legitimate son.—Vanover v. Steele, 190 S. W. 667.

BAWDY HOUSE.

See Disorderly House.

BENEFICIAL ASSOCIATIONS.

See Insurance, ¶723-826.

BENEFICIARIES.

See Death, ¶49; Insurance, ¶782, 784.

BENEFITS.

See Principal and Agent, ¶171.

BEST AND SECONDARY EVIDENCE.

See Evidence, ¶158-181.

BETTING.

See Gaming.

BIAS.

See Witnesses, ¶370, 372.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, ¶56, 58, 150-163.

BILLS AND NOTES.

See Action, ¶25; Courts, ¶89; Evidence, ¶420, 441; Gifts, ¶31; Insurance, ¶187; Joint Tenancy, ¶8, 10; Limitation of Actions, ¶148; Principal and Agent, ¶109; Replevin, ¶4.

I. REQUISITES AND VALIDITY.**(B) Form and Contents of Promissory Notes and Duebills.**

¶49 (Tex.Civ.App.) An accommodation maker of a note might at any time before payee bank advanced money thereon, withdraw from his engagement evidenced thereby.—First State Bank of Teague v. Hare, 190 S. W. 1113.

¶52 (Tex.Civ.App.) Where one of two accommodation makers of a note before payee bank had advanced money thereon notified bank of his withdrawal from note, his release did not release other accommodation maker.—First State Bank of Teague v. Hare, 190 S. W. 1113.

(C) Execution and Delivery.

¶64 (Mo.App.) Under Rev. St. 1909, § 9987, as to delivery of note, where dramshop keeper, his brother, and another executed two notes to plaintiff to discharge plaintiff's judgment against the brother, on condition that plaintiff deliver whisky to dramshop keeper, plaintiff could not return a note, and, retaining other, treat it as payment of the judgment without delivering whisky.—B. J. Semms & Co. v. Barnett, 190 S. W. 364.

(D) Acceptance.

¶76 (Ark.) Under Acts 1913, p. 304, § 137, providing that destruction by drawee of a bill of exchange will be deemed an acceptance, accidental destruction held not an acceptance.—Bailey & Co. v. Southwestern Veneer Co., 190 S. W. 430.

¶74 (Tex.Civ.App.) Where drafts were presented to and accepted by defendant, there was a primary contract between him and owner of drafts, and he became absolutely liable, regardless of question whether or not payee in drafts was alive or dead when they were drawn.—Bloch v. Rio Grande Valley Bank & Trust Co., 190 S. W. 541.

(E) Consideration.

¶92(5) (Mo.App.) The delivery of goods to another is sufficient consideration for a note; Rev. St. 1909, § 9999, as to absence of consideration as a defense against a person not hold-

ing in due course, not applying.—Rudolph Wur-litzer Co. v. Rossmann, 190 S. W. 636.

¶96 (Ky.) The delivery of collateral security to the maker of an accommodation note is not sufficient consideration to support the note.—First Nat. Bank's Receiver of London v. Boring's Adm'x, 190 S. W. 1106.

II. CONSTRUCTION AND OPERATION.

¶117 (Mo.App.) A note delivered to payee residing in Illinois, but which was executed and delivered and by its terms made payable in Missouri, was to a Missouri contract.—American Nat. Bank v. Allen, 190 S. W. 947.

¶123(2) (Mo.App.) Under Negotiable Instruments Law (Rev. St. 1909, § 9991) as to form of signature on notes, where notes given for a piano purchased by a corporation were signed by the corporation and by another person with no official designation, the latter signer was liable to the payee, although in fact secretary of the corporation and intending to sign as such.—Rudolph Wur-litzer Co. v. Rossmann, 190 S. W. 636.

Under Negotiable Instruments Law (Rev. St. 1909, § 9991), as to form of signature on notes, where notes given for a piano purchased by a corporation were signed by its president as an individual, and by another with the word "Secy." affixed to her name, the notes containing no other reference to a corporation, the latter signer was liable thereon to the payee.—Id.

IV. NEGOTIABILITY AND TRANSFER.**(B) Transfer by Indorsement.**

¶183 (Mo.App.) Under Rev. St. 1909, §§ 10001, 10002, the indorsement of the name of a corporation on the back of a note by means of a rubber stamp was sufficient "written indorsement," where there was substantial testimony that such indorsement was ratified by the officers of the corporation, in view of section 10160, defining "written" as printed.—American Union Trust Co. v. Never Break Range Co., 190 S. W. 1045.

¶195 (Mo.App.) Relation of stranger or third party to commercial paper when he puts up his money and acquires possession of it is one of intent, to be ascertained from all facts and circumstances and condition of the parties surrounding transaction.—Citizens' Trust Co. v. Ward, 190 S. W. 364.

¶200 (Mo.App.) The indorsement of a note, "Pay to any bank or banker," is an indorsement for collection, and does not transfer title.—Citizens' Trust Co. v. Ward, 190 S. W. 364.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(B) Indorsement for Transfer.**

¶280 (Tex.Civ.App.) If one not having an assignable interest in promissory notes joined in an indorsement for purpose of assignment alone, his liability would have been that of a surety or guarantor, and not that of an ordinary indorser.—Borschow v. Wilson, 190 S. W. 202.

(D) Bona Fide Purchasers.

¶327 (Mo.App.) Under Rev. St. 1909, § 10028, in order to charge purchaser of a note with knowledge of illegality of transaction in which it was given, he must have had actual knowledge, or knowledge of such facts that his purchase amounted to bad faith.—Willis v. Reed, 190 S. W. 377.

¶334 (Tex.Civ.App.) Notice of defects in notes acquired after purchase in good faith without notice does not affect the holder's standing as a bona fide purchaser.—Landon v. Wm. E. Huston Drug Co., 190 S. W. 534.

¶342 (Tex.Civ.App.) That the edge of notes showed perforations, indicating, that they might

have been attached to other paper, is not sufficient to show notice of defects or defenses against them.—*Landon v. Wm. E. Huston Drug Co.*, 190 S. W. 534.

—531 (Mo.App.) Where, contrary to the agreement upon which a neighbor, for accommodation, signed a note, as joint maker, that the accommodated maker should discount it at a bank for cash, the accommodated maker negotiated it after maturity for corporate stock, the accommodation maker was not liable to a transferee after maturity, under Rev. St. 1909, § 10028, as to holders in due course.—*Schlamp v. Manewal*, 190 S. W. 658.

—365(1) (Tex.Civ.App.) A purchaser of notes before maturity for valuable consideration without notice of any defense can recover thereon, though there is a good defense as against the original payee.—*Landon v. Wm. E. Huston Drug Co.*, 190 S. W. 534.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

—407 (Mo.App.) If the drawer gets the bank to certify his check and then delivers it to the holder, who neglects to present it for payment in due course, the drawer is discharged to the extent he suffers by the delay, under Rev. St. 1909, § 10156, requiring presentment for payment within reasonable time.—*City of Brunswick v. People's Savings Bank*, 190 S. W. 60.

VII. PAYMENT AND DISCHARGE.

—437 (Mo.App.) When a bank at the request of the drawer certifies a check before delivery to the payee, the certification does not discharge the drawer if the check is not paid on due presentment, but simply vouches for its genuineness and adds to its ease of negotiation.—*City of Brunswick v. People's Savings Bank*, 190 S. W. 60.

If the holder receives an uncertified check, but, instead of drawing the money, has it certified, he discharges the drawer, under specific provision of Rev. St. 1909, § 10158.—*Id.*

VIII. ACTIONS.

—460 (Mo.App.) Holder of note has privilege of suing all or any of indorsers.—*Citizens' Trust Co. v. Ward*, 190 S. W. 364.

—467(2) (Tex.Civ.App.) In an action against drawee of drafts, an allegation that they were indorsed and delivered by owner is a sufficient allegation of a legal indorsement without allegation of name of indorser.—*Bloch v. Rio Grande Valley Bank & Trust Co.*, 190 S. W. 541.

Holder of drafts belonging to estate of a foreign administrator, and indorsed by the latter, can maintain a suit on drafts in courts of Texas without alleging administration laws of foreign country or state.—*Id.*

—485 (Tex.Civ.App.) Under direct provisions of Rev. St. 1911, art. 588, in an action against drawee of drafts, in absence of a sworn plea raising issue as to genuineness of indorsements, it was not necessary to offer proof to support allegations that drafts had been indorsed and delivered.—*Bloch v. Rio Grande Valley Bank & Trust Co.*, 190 S. W. 541.

—489(2) (Tex.Civ.App.) In an action against drawee of a draft, where pleading does not state whether acceptance was oral or in writing, it is permissible to prove either a verbal or a written acceptance.—*Bloch v. Rio Grande Valley Bank & Trust Co.*, 190 S. W. 541.

—508 (Mo.App.) In suit against indorser by receiver of bank on note forwarded for collection and either paid or purchased by bank by sending back draft for amount, evidence that note had never been listed by bank as asset, and as to where it was found by receiver, held admissible.—*Citizens' Trust Co. v. Ward*, 190 S. W. 364.

—517 (Mo.App.) Evidence held sufficient to sustain a finding that there was no delivery to payee.—*Pounds v. Farmers' Union Mercantile Co.*, 190 S. W. 374.

—518(1) (Mo.App.) Evidence held sufficient to sustain a finding of want of consideration.—*Pounds v. Farmers' Union Mercantile Co.*, 190 S. W. 374.

—525 (Mo.App.) Evidence held to sustain finding that purchaser of note did not have knowledge of the illegality of transaction in which note was given, and that she did not take note from her son, the original payee, to evade defense of illegality.—*Willis v. Reed*, 190 S. W. 377.

—537(1) (Ark.) In view of Acts 1913, p. 304, § 137, in an action against drawee of a bill of exchange, where it appeared that defendant threw bill into wastebasket, permitted it to burn, and refused to pay without explanation after having orally accepted it, question as to why bill was destroyed held for jury.—*Bailey & Co. v. Southwestern Veneer Co.*, 190 S. W. 430.

—537(1) (Tex.Civ.App.) Evidence held to require peremptory instruction for plaintiff in action by holder of notes against the maker and indorsers.—*Landon v. Wm. E. Huston Drug Co.*, 190 S. W. 534.

—537(5) (Mo.App.) Whether bank, to which note had been forwarded for collection, by forwarding draft for full amount, intended to pay note, or to purchase it, held question of fact for jury.—*Citizens' Trust Co. v. Ward*, 190 S. W. 364.

—537(6) (Mo.App.) In action on a note, evidence held to carry to the jury the question whether notes were delivered to one as purchaser.—*American Union Trust Co. v. Never Break Range Co.*, 190 S. W. 1045.

—538(2) (Mo.App.) In replevin for a promissory note in which delivery and consideration were denied, instructions held to adequately represent the rights of defendant arising from naked possession of the note.—*Pounds v. Farmers' Union Mercantile Co.*, 190 S. W. 374.

—538(2) (Mo.App.) In action on a note, a requested instruction, defeating plaintiff's recovery if defendant's indorsement was so unusual and contrary to custom as to be substantial notice of irregularity, was properly refused, where the facts necessary to establish a custom were entirely omitted.—*American Union Trust Co. v. Never Break Range Co.*, 190 S. W. 1045.

—538(4) (Mo.App.) In action on a note, an instruction to find for plaintiff, unless when plaintiff purchased the note "it had knowledge or notice" of a certain claimed defense, was not erroneous as permitting plaintiff to recover, in the absence of actual notice.—*American Union Trust Co. v. Never Break Range Co.*, 190 S. W. 1045.

BONA FIDE PURCHASERS.

See Bills and Notes, —327-365, 525; Vendor and Purchaser, —230, 240.

BONDS.

See Bail; Criminal Law, —1076; Justices of the Peace, —191; Life Estates, —6; Municipal Corporations, —918; Principal and Surety; Trusts, —161.

BOOKS.

See Officers, —85.

BOOKS OF ACCOUNT.

See Evidence, —354.

BOUNDARIES.

See Adverse Possession, —66; Frauds, Statute of, —70; Schools and School Districts, —32, 33.

I. DESCRIPTION.

—3(6) (Tex.Civ.App.) The real object in applying the various calls is to find the footsteps of the surveyor, and, when found and identified,

all classes of calls must yield to them.—*Miller v. Meyer*, 190 S. W. 247.

⚡11 (Ky.) Where the calls of a deed are for an adjoining owner's line, the line of the grantee is controlled by such line.—*Ross v. Richardson*, 190 S. W. 1087.

⚡11 (Tenn.) Description in a deed to land which was bounded by two streets meeting at an acute angle held to indicate that lines were intended to run parallel with boundary of adjoining lot which was at right angles with second street.—*Ferguson v. Prince*, 190 S. W. 548.

⚡11 (Tex.Civ.App.) Adjoining surveys by same surveyor within a few days of each other, mapped with a common division line and calling for each other, will appropriate the land the one to the other, and only very clear evidence will justify conclusion of existence of any vacancy between such surveys as actually made.—*Miller v. Meyer*, 190 S. W. 247.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚡36(3) (Ky.) An original survey or plat constituting the basis of a patent is admissible, with other evidence, to explain a mistake or ambiguity in the description in the patent, or to supply the omission of a course, distance, or object necessary to correctly determine and fix its boundary.—*Hardaway v. Webb*, 190 S. W. 1071.

⚡36(5) (Tex.Civ.App.) It was error to admit against objection, as evidence of a boundary line, a report to commissioners' court of a survey, where neither objector nor any one under whom he claimed had anything to do with the report.—*Petty v. Wilkins*, 190 S. W. 531.

⚡37(1) (Ky.) Evidence held insufficient to establish plea of estoppel as against claimant of land under patent and deeds purporting to convey the land involved.—*Hardaway v. Webb*, 190 S. W. 1071.

⚡37(2) (Ky.) Evidence held sufficient to show that the patent erroneously described a course and distance so that the original plat controlled, with the effect that the patent granted land in controversy to the defendant in an action for trespass by cutting timber and to restrain further trespass.—*Hardaway v. Webb*, 190 S. W. 1071.

⚡37(3) (Tex.Civ.App.) In action to recover strip of unlocated and unappropriated public lands lying between west boundary of a survey and east boundary of another survey, where the maps or plats had made such boundaries the same line, evidence held to sustain verdict for defendant.—*Miller v. Meyer*, 190 S. W. 247.

Original survey agreeing with maps in use for many years should not be held erroneous because not agreeing with subsequent resurveys on assumption that statements of living persons as to locality of lines and corners was absolutely correct, nor where based upon an indefinite and uncertain starting point.—*Id.*

Adjoining surveys by same surveyor within a few days of each other, mapped with a common division line and calling for each other will appropriate the land, the one to the other, and only very clear evidence will justify conclusion of existence of any vacancy between such surveys as actually made.—*Id.*

⚡40(1) (Tex.Civ.App.) Evidence held to make location of boundary line a question for the jury.—*Petty v. Wilkins*, 190 S. W. 531.

⚡40(3) (Ky.) Upon conflicting evidence as to agreement fixing boundary and its subsequent execution by erection of fence, question of the existence and execution of the agreement was for jury.—*Garvin v. Threlkeld*, 190 S. W. 1092.

⚡46(3) (Ky.) An agreement fixing boundaries, followed by possession with reference thereto, is conclusive on the parties, although the pos-

session may not have been for statutory period.—*Garvin v. Threlkeld*, 190 S. W. 1092.

⚡47(1) (Ky.) The mere fact that a party entertained some doubt as to his boundary some 17 years prior to litigation would not change the true location of the boundary line where for more than 15 years he consistently claimed the entire amount which the deeds from his ancestors purported to convey.—*Hardaway v. Webb*, 190 S. W. 1071.

BRIDGES.

See Commerce, ⚡26; Drains, ⚡55.

BRIEFS.

See Appeal and Error, ⚡757, 778.

BROKERS.

See Limitation of Actions, ⚡46; Pleading, ⚡248.

II. EMPLOYMENT AND AUTHORITY.

⚡7 (Mo.App.) A contract by which the employer agreed to pay the broker a certain commission to locate, negotiate for, or buy timber for it without stipulating the price or placing a limit on the number of feet, was nevertheless not too indefinite for enforcement, especially when executed.—*Sisk v. Dillman Egg Case Co.*, 190 S. W. 389.

IV. COMPENSATION AND LIEN.

⚡57(1) (Tex.Civ.App.) A real estate broker not making a sale on the terms authorized by the owner, held not entitled to compensation.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

⚡57(1) (Tex.Civ.App.) Where real estate agents agreed in writing, in consideration of a commission, to secure subtenants for full term of 5 years, but in fact secured tenants only for a period of 4 years and 11 months, they could not recover commission.—*Burgher & Co. v. Canter*, 190 S. W. 1147.

⚡63(1) (Tex.Civ.App.) Broker's right to commissions under contract to pay it on completion of sale, held not necessarily dependent on conveyance.—*Leonard v. Kendall*, 190 S. W. 786.

As regards anticipatory breach of vendor's contract to pay brokers their commission contained in contract to convey land to the purchaser, it is not a renunciation thereof for the vendor to refuse to convey to the purchaser.—*Id.*

Any renunciation by vendor of contract to convey is not accepted, so as to result in an anticipatory breach, by purchaser bringing suit for specific performance, entitling broker to sue vendor for commissions payable on conveyance to purchaser.—*Id.*

V. ACTIONS FOR COMPENSATION.

⚡82(1) (Tex.Civ.App.) A petition in a broker's action for commission, alleging that he was to make a sale for part cash, the balance due to suit the purchaser, and that the lot was sold upon terms required by the seller to a purchaser willing and able to pay all cash, or to make terms to suit the seller, is not subject to a general exception.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

⚡82(4) (Mo.App.) Agent's petition for commissions and proof held not to present a variance; the essential elements entitling a broker to commission being present in the evidence and the pleadings.—*Sisk v. Dillman Egg Case Co.*, 190 S. W. 389.

⚡86(7) (Tex.Civ.App.) Mere statement of vendor that the property was worth more than the contract price is not sufficient for submission of the defense to action for commissions of fraud

of the broker in inducing her to sell at less than its value.—*Leonard v. Kendall*, 190 S. W. 786.

BUILDING CONTRACTS.

See Contracts, ¶300.

BULK SALES.

See Fraudulent Conveyances, ¶228; Principal and Agent, ¶105.

BURGLARY INSURANCE.

See Insurance, ¶646, 665.

BYSTANDERS.

See Exceptions, Bill of, ¶54.

CANCELLATION OF INSTRUMENTS.

See Insurance, ¶226, 238; Reformation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

¶1 (Mo.) Where deed contains neither an express condition subsequent nor a mutually dependent contract or reverter, an equitable intervention by cancellation usually occurs only where accident, mistake, surprise, or fraud is shown, and, where supplemental thereto, breach alleged results in complete failure of consideration.—*Shafer v. Shafer*, 190 S. W. 323.

CARMACK AMENDMENT.

See Carriers, ¶177.

CARRIERS.

See Appeal and Error, ¶1050, 1064, 1140; Commerce, ¶33, 47; Continuance, ¶30; Courts, ¶489; Evidence, ¶317, 417, 471, 481, 544; Limitation of Actions, ¶127; Pleading, ¶32; Trial, ¶203, 251, 252, 296.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) Interstate and International Transportation.

¶30 (Mo.App.) Tariff sheet of railroad naming rates on coal between two points and a common destination within the state, the higher rate being named for the shorter distance, held not affected by the clause, "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line."—*Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co.*, 190 S. W. 650.

¶30 (Tenn.) A shipper held chargeable with knowledge of the contents of schedules filed with the Interstate Commerce Commission and duly published, where the shipment contract referred to alternate rates and alleged acceptance of a lower rate because of embodied limitations on the carrier's liability.—*Louisville & N. R. Co. v. Hobbs*, 190 S. W. 461.

A provision of an interstate shipment contract held to establish prima facie that the carrier had complied with the requirements relative to the filing and publication of its schedules of rates.—Id.

¶35 (Mo.App.) Railroad could not by special contract with shipper of coal or otherwise bind itself to deviate from established rate per ton, between certain points, duly promulgated and in effect during certain period.—*Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co.*, 190 S. W. 650.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

¶56 (Mo.App.) In view of Rev. St. 1909, §§ 11956, 11957, bills of lading are transferable without indorsement for value and carry prop-

erty in goods covered.—*Kinsolving v. State Savings & Trust Co.*, 190 S. W. 379.

¶58 (Mo.App.) Where a bank agreed in advance to furnish price of lumber and take bills of lading as security, it became owner of bill of lading as soon as it was issued on delivery of lumber, so that lumber could not be subsequently attached as property of consignee.—*Kinsolving v. State Savings & Trust Co.*, 190 S. W. 379.

Where seller of lumber retained bills of lading to keep title until paid by bank, and bills were sent to second bank, pursuant to agreement to pay for lumber and take bills, when title passed from buyer to seller, it passed to second bank by virtue of bill, and lumber could not be attached as property of buyer.—Id.

(D) Transportation and Delivery by Carrier.

¶91 (Tex.Civ.App.) Where the carrier demands excessive and illegal freight charges, and on the refusal of the shipper to pay them declines to deliver the goods, and sells them for the charges, there is a conversion.—*Panhandle & S. F. Ry. Co. v. Hubbard*, 190 S. W. 793.

(F) Loss of or Injury to Goods.

¶121 (Mo.App.) The mere knowledge of a shipper of strawberries of defects in refrigerator car, and the probable effect of shipping in such car, would not necessitate a verdict for carrier in an action for damages.—*Seneker v. Lusk*, 190 S. W. 96.

In action for damages to shipment of strawberries from defective refrigerator car, carrier could not avoid liability on account of shipper's knowledge of defects in car, without showing that another car could have been procured which would have materially avoided loss.—Id.

A shipper is bound to protest against shipping in a defective car.—Id.

¶132 (Mo.App.) That sewer pipe, which is not broken by ordinarily careful handling, was properly packed and upon arrival one-third of the pipe was broken, held evidence of negligence.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S. W. 1032.

(H) Limitation of Liability.

¶150 (Tex.Civ.App.) A common carrier may not stipulate so as to relieve itself from liability arising from its own negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

¶154 (Mo.App.) Stipulation in contract of shipment, placing a limited valuation on the property shipped in case of loss by the default of the carrier, when not made in consideration of a special or reduced rate of shipment, is not binding on the shipper.—*Wilson v. Chicago Great Western R. Co.*, 190 S. W. 22.

¶158(1) (Mo.App.) Under contract of shipment, stipulation that carrier should be liable for damage computed on the bona fide invoice price, if any, to the consignee, the shipper of soda fountain, purchased for \$100, though actually worth \$250, could recover only the cost price, where it was destroyed in transit.—*Wilson v. Chicago Great Western R. Co.*, 190 S. W. 22.

¶158(1) (Tenn.) Where alternate rates fairly based on valuation are offered for an interstate shipment, the carrier may limit its liability by special contract.—*Louisville & N. R. Co. v. Hobbs*, 190 S. W. 461.

¶163 (Mo.App.) In an action for damages to shipment of goods, defense being that the goods were shipped under the lower of two rates, relieving the carrier from liability for damages from breaking, the shipper is presumed to have knowledge of the two rates.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 190 S. W. 1032.

(I) Connecting Carriers.

¶177(3) (Mo.App.) Carrier of goods received for through transportation became responsible

for the destruction of the goods while in custody of delivering carrier, in transit under terms of contract.—*Wilson v. Chicago Great Western R. Co.*, 190 S. W. 22.

⇒177(4) (Mo.App.) Nothing in Carmack Amendment to Interstate Commerce Act abrogates right of shipper under existing federal laws to pursue connecting carrier whose wrong caused the loss, so that shipper could sue an intermediate carrier for its negligent breach of contract.—*Collier v. Wabash R. Co.*, 190 S. W. 969.

⇒180(3) (Tex.Civ.App.) While in intrastate shipments, which are not through shipments, a carrier may by contract limit its liability to damages through negligence on its own line, if the damages proven are shown to have resulted from joint negligence of two carriers, each may be held responsible for proportion which its negligence bears to entire negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

(J) Charges and Liens.

⇒191 (Tex.Civ.App.) A carrier is not entitled to storage charges on goods wrongfully detained by it.—*Panhandle & S. F. Ry. Co. v. Hubbard*, 190 S. W. 793.

⇒194 (Mo.App.) The shipper is primarily liable under a bill of lading providing that the owner or consignee should pay the freight, and, if required, should pay it before delivery.—*Yazoo & M. V. R. Co. v. Picher Lead Co.*, 190 S. W. 387.

Consignee under bill of lading providing that he shall pay the freight, and if required should pay it before delivery, becomes liable when he accepts the shipment and pays a part of the freight.—*Id.*

⇒197(1) (Mo.App.) A carrier may lawfully refuse to deliver goods until all the transportation charges are paid.—*Yazoo & M. V. R. Co. v. Picher Lead Co.*, 190 S. W. 387.

III. CARRIAGE OF LIVE STOCK.

⇒218(5) (Tex.Civ.App.) Stipulations in contract for interstate shipment of live stock for written notice to agent of initial carrier of a claim for loss, injury, detention, or delay in transportation thereof and that the notice be given within one day as a condition precedent to recovery of damages held not unreasonable.—*Chicago, R. I. & G. Ry. Co. v. Whaley*, 190 S. W. 833.

⇒218(10) (Tex.Civ.App.) In view of Interstate Commerce Act, § 1, damages occasioned by a delay at pens before an interstate shipment of cattle started the trip falls within terms of a contract of shipment requiring notice of claim for loss or injury by delay in "transportation" as a condition precedent to recovery.—*Chicago, R. I. & G. Ry. Co. v. Whaley*, 190 S. W. 833.

⇒219(4) (Tex.Civ.App.) Where negligence of railroad in failing or refusing to accept shipment of live stock at connecting point concurred with negligence of connecting road in failing to deliver shipment in question, on transfer track, both companies were responsible for delays and consequent damages proximately resulting from such negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

If failure of railroad to receive shipment of live stock when tendered it by connecting road was negligence, and such negligence prevented shipment of cattle that night to destination, railroad cannot excuse itself from liability on ground that it did not actually receive shipment until next day.—*Id.*

⇒228(1) (Tex.Civ.App.) In action for negligent carriage of cattle, where defendant pleaded and proved that plaintiffs' contract gave them special charge of the cattle in transportation,

the burden was on plaintiffs to exonerate themselves for any negligence, effecting injury to the cattle.—*Kansas City, M. & O. Ry. Co. of Texas v. James*, 190 S. W. 1138.

⇒228(4) (Tex.Civ.App.) In an action against a carrier for damages to shipment of live stock, a paragraph of shipping contract, releasing carrier from loss by delay in transportation by storms or flood, held properly excluded as immaterial.—*Ft. Worth & D. C. Ry. Co. v. Atterberry*, 190 S. W. 1133.

⇒228(5) (Tex.Civ.App.) In action for delay in shipment of live stock in transit, evidence held sufficient to justify finding of negligent refusal or failure of defendant railway to accept shipment at connecting point.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

In action against two railroads for delaying shipment of live stock, evidence as to negligent delay held to support verdict for plaintiff.—*Id.*

⇒230(6) (Tex.Civ.App.) In action against two defendants for delay in shipment of cattle, question whether road was liable as partially responsible for delay, held for jury.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

⇒230(8) (Tex.Civ.App.) In an action against a carrier of live stock for delay in transportation, an instruction on duty of carrier to maintain its tracks, etc., to withstand ordinary floods held not error.—*Ft. Worth & D. C. Ry. Co. v. Atterberry*, 190 S. W. 1133.

In an action against a carrier of live stock for damages caused by delay in transportation, held that an instruction that if defendant received shipment after it was in possession of facts to put it upon inquiry regarding conditions of bridges and tracks, plaintiff could recover, should not be given.—*Id.*

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

⇒283(3) (Mo.App.) Where a conductor before stopping his train takes hold of a passenger to eject her for failure to pay her fare, he is guilty of an assault rendering the company liable in damages.—*Briggs v. Lusk*, 190 S. W. 380.

⇒287(5) (Mo.App.) A railroad company is required to stop its freight and mixed trains carrying passengers at stations a sufficient length of time to permit passengers to enter and leave, and a failure to do so is negligence.—*Witham v. Lusk*, 190 S. W. 403.

⇒315(4) (Mo.App.) Allegations that plaintiff, a passenger, was injured because defendant railway company took the forward part of the train some distance from plaintiff's coach and negligently backed it into said coach, are supported by proof of a sudden jerk, by the collision alleged.—*Johnson v. St. Louis & S. F. R. Co.*, 190 S. W. 352.

⇒318(4) (Mo.App.) Where a passenger coach was severely jerked soon after the train was stopped, held that the jury were justified in finding that it was caused by the sudden backing of the forward part of the train.—*Johnson v. St. Louis & S. F. R. Co.*, 190 S. W. 352.

⇒318(5) (Mo.App.) In action against railroad for injuries from being knocked from car platform by sudden jerking, evidence held to support plaintiff's verdict.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S. W. 46.

⇒319(1) (Mo.App.) The rule precluding recovery for mental shock alone does not preclude a passenger from recovering for an assault, where the conductor before stopping the train has taken hold of her to eject her for failure to pay her fare.—*Briggs v. Lusk*, 190 S. W. 380.

⇒319(3) (Mo.App.) A recovery of \$1,500 punitive damages, in addition to \$500 compensatory damages for a wanton and lustful assault com-

mitted by a conductor on a female passenger, *held* not excessive.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S. W. 371.

—319(3) (Mo.App.) A passenger's recovery of \$750 for an assault by conductor in dispute over payment of extra fare *held* excessive above \$500.—*Briggs v. Lusk*, 190 S. W. 380.

—320(4) (Mo.App.) Where the evidence in a passenger's action for an assault by a conductor was conflicting, defendant's demurrer thereto was properly overruled.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S. W. 371.

—320(21) (Mo.App.) In action for personal injuries by automobile passenger against owners of car in which she rode and another with which it collided, case against each defendant *held* for jury under evidence as to their negligence.—*Mitchell v. Brown*, 190 S. W. 354.

—321(4) (Mo.App.) An instruction on the damages for an assault by a conductor on a passenger, *held* fatally defective, for failure to distinguish between the wrongful acts committed by the conductor, from those which were rightful.—*Briggs v. Lusk*, 190 S. W. 380.

—321(6) (Mo.App.) An instruction that defendant carrier's liability continues not only while its passengers are in transit, but while entering the cars at stations, *held* not erroneous or misleading in using the word "liability" instead of "duty."—*Witham v. Lusk*, 190 S. W. 403.

—321(7) (Mo.App.) In an action for injuries to plaintiff by not stopping a mixed train for sufficient length of time to enable him to safely board the train, instruction *held* not erroneous as containing a general charge of negligence in addition to the specific charge.—*Witham v. Lusk*, 190 S. W. 403.

—321(22) (Mo.App.) An instruction on punitive damages *held* not erroneous for failure to require a finding of the lustful character of the assault, especially where other instructions required such finding a prerequisite to a verdict for passenger.—*Flynn v. St. Louis Southwestern Ry. Co.*, 190 S. W. 371.

In passenger's action for wanton and willful assault, *held*, not error to instruct that the jury could in their discretion assess punitive damages as a punishment, and as a protection to society, and a warning to others.—*Id.*

(E) Contributory Negligence of Person Injured.

—336 (Mo.App.) A passenger may rely on the invitation of a brakeman to occupy a place on car steps preparatory to getting off when the train stops or slows at a station.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S. W. 46.

—347(8) (Mo.App.) Whenever there is any good reason for a passenger going upon steps of a car, it is a question for the jury whether such act amounts to contributory negligence.—*Shelton v. Chicago, M. & St. P. Ry. Co.*, 190 S. W. 46.

(F) Ejection of Passengers and Intruders.

—357 (Mo.App.) Where a passenger requested information as to why the cash fare demanded of her was more than the usual fare, the conductor should have given her the desired information.—*Briggs v. Lusk*, 190 S. W. 380.

—382(1) (Mo.App.) Where a passenger is wrongfully ejected from a train, the carrier is liable for damages which might reasonably be expected to flow from the ejection, together with damages for humiliation and mental distress.—*Davis v. Lusk*, 190 S. W. 362.

Where a passenger is wrongfully ejected from a train on a rainy night and takes a cold, such cold is a consequential damage directly flowing from the wrongful act.—*Id.*

—382(4) (Mo.App.) Damages for humiliation and mental distress caused by wrongful ejection of a passenger from a train may be recovered,

although there is no contemporaneous physical injury.—*Davis v. Lusk*, 190 S. W. 362.

—382(7) (Mo.App.) A verdict of \$750 for ejection of passenger from a train *held* excessive under the evidence.—*Davis v. Lusk*, 190 S. W. 362.

CARRYING WEAPONS.

See Weapons.

CASH BAIL.

See Bail, —48, 78.

CASHIERS.

See Banks and Banking, —51, 54; Constitutional Law, —148, 190.

CATTLE.

See Animals, —38.

CERTAINTY.

See Damages, —6; Libel and Slander, —21.

CERTIFICATE.

See Corporations, —109.

CERTIFIED CHECKS.

See Bills and Notes, —407, 437.

CERTIORARI.

See Justices of the Peace, —202.

CHAMPERTY AND MAINTENANCE.

—7(1) (Tenn.) Under Shannon's Code, § 3174, the provisions of sections 3171, 3172, 3175, relating to champerty, *held* not to apply where one without title or possession conveyed land by warranty deed, unless the land was held adversely.—*Ferguson v. Prince*, 190 S. W. 548.

Although land conveyed by warranty deed by one without title was held adversely, champerty statutes would not apply as between the parties; as grantor would be estopped to deny validity of his deed.—*Id.*

—7(2) (Ky.) During 15 years necessary to hold land to create title by adverse possession, after an adverse judgment, one estopped by adverse judgment to deny title of owner has no such adverse possession as would make conveyance by owner void as against champerty statute.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

—7(7) (Ky.) In a suit to establish the ownership of tract embraced in patent under which plaintiff claimed, *held*, that question of champerty was for jury.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

CHANCERY.

See Equity.

CHARACTER.

See Homicide, —188; Rape, —40; Witnesses, —337-362.

CHARGE.

Against decedents' estates, see Executors and Administrators.

By carrier, see Carriers, —191-197.

To jury, see Criminal Law, —761-829; Trial, —191-296.

CHARITIES.

See Taxation, —241.

CHARTER.

See Corporations, —613; Municipal Corporations, —48.

CHASTITY.

See Rape, ¶86.

CHATTEL MORTGAGES.

See Corporations, ¶415, 426, 477.

III. CONSTRUCTION AND OPERATION.**(D) Lien and Priority.**

¶157(2) (Tex.Civ.App.) Evidence held sufficient to show a levy of execution upon mortgaged chattels before the mortgage was recorded.—Hopping v. Hicks, 190 S. W. 1118.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶170(2) (Tex.Civ.App.) The purchaser of chattels under void execution sale and officer conducting sale, being wrongdoers, are not in a position to demand that the assignee of a mortgagee of property taken look to other property of mortgagor or to the mortgagor's personal responsibility.—Hopping v. Hicks, 190 S. W. 1119.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.**(A) Rights and Liabilities of Parties.**

¶219 (Ark.) That mortgagee had permitted the mortgagor in previous similar transactions to sell the property and apply the proceeds to the mortgage did not show that the mortgagee gave him the same right under a later mortgage.—Imperial Valley Savings Bank v. Huff, 190 S. W. 116.

¶227 (Ark.) Where, without consent of mortgagee, the mortgagor sells the mortgaged property, the mortgagee may elect either to sue the purchaser for conversion of the property or to ratify the sale and sue the mortgagor for the proceeds.—Imperial Valley Savings Bank v. Huff, 190 S. W. 116.

Where a mortgagor sold mortgaged property without permission and deposited the proceeds in habeas corpus proceedings in lieu of bail and the mortgagees filed their claim therefor in the court having custody of the fund, this petition being filed before the mortgagor assigned his right, the mortgagees were entitled to it.—Id.

CHAUFFEUR.

See Master and Servant, ¶802.

CHEAT.

See False Pretenses; Fraud.

CHECKS.

See Bills and Notes, ¶407.

CHILDREN.

See Adoption; Bastards; Guardian and Ward; Infants; Master and Servant, ¶95, 153.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, ¶814; Homicide, ¶228.

CITIES.

See Municipal Corporations.

CLAIMS.

See Assignments for Benefit of Creditors, ¶302; Executors and Administrators, ¶223, 251; Mechanics' Liens, ¶132.

CLERICAL ERRORS.

See Indictment and Information, ¶79.

CLERKS OF COURTS.

See Mandamus, ¶55.

CLIENTS.

See Attorney and Client.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Judgment, ¶481-518.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLOR OF TITLE.

See Adverse Possession, ¶68, 180-183.

COMMERCE.

See Courts, ¶489.

I. POWER TO REGULATE IN GENERAL.

¶10 (Mo.App.) Until Congress asserts its constitutional power to regulate interstate commerce to avoid contracts for street paving providing that the brick must be manufactured in the state, the state law governs the validity of such contracts.—Pasche v. South St. Joseph Town-Site Co., 190 S. W. 30.

II. SUBJECTS OF REGULATION.

¶26 (Ky.) In the absence of reciprocal legislation by Ohio and Kentucky, held that the courts of Kentucky could not impose penalties on a company maintaining a bridge over the Ohio river, for making charges in violation of Ky. St. § 845.—Broadway & Newport Bridge Co. v. Commonwealth, 190 S. W. 715.

The requirements as to reciprocal state legislation for collecting tolls on bridges over the Ohio river held not met by Ky. St. § 845, and Gen. Code, Ohio, § 9312.—Id.

The state has no authority under its police power, in the absence of congressional legislation on the subject, to fix the rate of toll on an interstate bridge over the Ohio river.—Id.

¶27 (Ky.) Under federal Employers' Liability Act, an employé may have duties involving both interstate and intrastate commerce, and where plaintiff, regularly employed in replacing old rails, was, when accident occurred, loading old rails lying on right of way, he was not then engaged in interstate commerce.—Cincinnati, N. O. & T. P. Ry. Co. v. Hansford, 190 S. W. 690.

The test of employé's engagement in interstate commerce is whether at time of injury he was engaged in interstate transportation or work so related as to be practically part of it.—Id.

¶27 (Mo.App.) Section hand in service of interstate carrier, hurt while repairing track to scales on which cars destined to other states were weighed, was engaged in interstate commerce, and might sue under federal Employers' Liability Act.—Dowell v. Wabash Ry. Co., 190 S. W. 939.

¶27 (Mo.App.) A carpenter injured while riveting a stovepipe for a stove to be used in a roundhouse, where engines engaged in interstate commerce were sheltered, was not "engaged in interstate commerce."—Dunn v. Missouri Pac. Ry. Co., 190 S. W. 966.

¶33 (Mo.App.) Where property is delivered to carrier for transportation to point beyond the state, it constitutes interstate commerce, and it is immaterial whether shipment be made on a through contract or upon separate contracts.

with each carrier.—*Collier v. Wabash R. Co.*, 190 S. W. 969.

⚡47 (Mo.App.) A shipment of baggage held to be interstate, notwithstanding its rechecking at the state line to avoid the regulation of interstate commerce.—*Reynolds v. St. Louis S. W. Ry. Co.*, 190 S. W. 423.

III. MEANS AND METHODS OF REGULATION.

⚡50 (Mo.) Laws 1913, p. 354, relative to weighing and grading of grain by state inspectors, and issuing of certificates therefor, does not interfere with interstate commerce.—*State ex rel. Barker v. Merchants' Exch. of St. Louis*, 190 S. W. 908.

⚡59 (Mo.) R. S. 1909, § 4749, as to stakeholding, is not invalid as an attempt by the Legislature to control interstate commerce, notwithstanding it may apply to transactions which involve the use of a telephone.—*Fleming v. Wengler*, 190 S. W. 875.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Counties, ⚡74; Municipal Corporations, ⚡181.

COMMISSIONS.

See Brokers, ⚡57-86; Principal and Agent, ⚡90; Trusts, ⚡316; Usury, ⚡57.

COMMON CARRIERS.

See Carriers.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ⚡248-266.

COMPARATIVE NEGLIGENCE.

See Negligence, ⚡97, 101.

COMPENSATION.

See Attorney and Client, ⚡143-167; Brokers, ⚡57-86; Contracts, ⚡229, 233; District and Prosecuting Attorneys; Eminent Domain, ⚡75, 141; Executors and Administrators, ⚡491; Master and Servant, ⚡80, 351; Municipal Corporations, ⚡162; Officers, ⚡100; Physicians and Surgeons, ⚡24; Principal and Agent, ⚡90; Schools and School Districts, ⚡144; Statutes, ⚡102; Trusts, ⚡316.

COMPETENCY.

See Criminal Law, ⚡390, 393, 427; Evidence, ⚡543, 544; Witnesses, ⚡37-219.

COMPLAINT.

See Rape, ⚡48.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Criminal Law, ⚡408; Evidence, ⚡213; Payment; Release.

⚡6(2) (Ark.) Where a claim is disputed and unliquidated and a less amount is offered in condition of satisfaction, the creditor's acceptance thereof, knowing the condition, is conclusive as an accord and satisfaction.—*Mosaic Templars of America v. Austin*, 190 S. W. 571.

⚡15(1) (Mo.App.) Where property in litigation had been transferred by certain defendants to others before settlement with plaintiffs, and such transfer ratified, settlement barred action against the transferees.—*Butler v. Hydro-Pneumatic Sprinkler & Mfg. Co.*, 190 S. W. 921.

⚡18(1) (Mo.App.) Although Rev. St. 1909, § 1812, providing that when a release is pleaded in bar, the reply may allege fraud, etc., changed the rule that a release can only be set aside in equity, the statute was not intended to change the rules governing rescission of contracts of settlement for fraud.—*Wessel v. Wm. Walthe & Co.*, 190 S. W. 628.

CONCLUSION.

See Evidence, ⚡471.

CONCLUSIVENESS.

See Appeal and Error, ⚡662, 1194; Execution, ⚡844; Judgment, ⚡590-743.

CONCURRENT NEGLIGENCE.

See Master and Servant, ⚡201, 226.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Bills and Notes, ⚡64; Corporations, ⚡206, 613; Deeds, ⚡155, 160; Evidence, ⚡444; Insurance, ⚡622; Payment, ⚡33; Sales, ⚡124.

CONFESSION.

See Criminal Law, ⚡517, 518.

CONFIRMATION.

See Judicial Sales, ⚡31.

CONFLICT OF LAWS.

See Bills and Notes, ⚡117; Wills, ⚡57.

CONGRESS.

See Commerce, ⚡10.

CONNECTING CARRIERS.

See Carriers, ⚡177, 180, 219, 230.

CONSENT.

See Appeal and Error, ⚡21; Chattel Mortgages, ⚡219; Larceny, ⚡13.

CONSENT JUDGMENT.

See Judgment, ⚡481.

CONSIDERATION.

See Bills and Notes, ⚡92, 96, 518; Carriers, ⚡154; Compromise and Settlement, ⚡6; Contracts, ⚡54-75; Deeds, ⚡17, 19; Evidence, ⚡420; Fraudulent Conveyances, ⚡75, 80; Release, ⚡12; Schools and School Districts, ⚡33; Specific Performance, ⚡97.

CONSPIRACY.

See Criminal Law, ⚡422-427.

II. CRIMINAL RESPONSIBILITY.

⚡4(1) (Tex.Cr.App.) One who enters into a conspiracy to commit a crime before the ultimate object of it is completed is deemed a party to it from its inception and adopts as his own all the preceding acts of the others.—*Sapp v. State*, 190 S. W. 489.

CONSTITUTIONAL LAW.

See Appeal and Error, ¶170, 719, 1078; Courts, ¶231.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, ¶4-84.

Special and local laws, see Statutes, ¶102. Subjects and titles of statutes, see Statutes, ¶110½-123.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶48 (Mo.) The court presumes that the Legislature did not intend to violate organic law, and places upon him who asserts the contrary the burden of so convincing them.—State ex rel. Harvey v. Sheehan, 190 S. W. 864.

Acts of the Legislature and provisions of the Constitution must be read together, and so harmonized as to give effect to both when this can be reasonably and consistently done.—Id.

¶48 (Mo.) There is a presumption of validity of a statute, and if there is doubt it must be resolved in favor of validity.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

¶70(3) (Mo.) The courts will not question the wisdom of the Legislature in enacting a law, unless the law violates either the state or federal Constitution.—Fleming v. Wengler, 190 S. W. 875.

¶70(3) (Mo.) The expediency or inexpediency of a statute is not for the courts.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

¶121(2) (Ky.) Ky. St. § 4437, providing that any reversionary interest in land used as site for schoolhouse shall not deprive district of improvements if construed to apply to reversionary interests created by contracts executed prior to its enactment, would impair obligation of contract.—County Board of Education for Jefferson County v. Littrell, 190 S. W. 465.

(C) Contracts of Individuals and Private Corporations.

¶146 (Mo.) Rev. St. 1909, § 1112, providing that directors may appoint and remove any bank cashier at pleasure, does not violate Const. art. 2, § 15, denouncing laws impairing the obligation of contracts, where it was in existence when one was employed as such cashier.—Citizens' Bank of Hayti v. Wells, 190 S. W. 314.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

¶188 (Mo.) Act March 27, 1913 (Laws 1913, p. 271), amending the act as to construction and improvement of ditches, is not retrospective, in contravention of Const. art. 2, § 15, because of the provision for a maintenance tax.—Barnes v. Pikey, 190 S. W. 883.

¶190 (Mo.) Rev. St. 1909, § 1112, providing that directors may appoint and remove any bank cashier at pleasure, does not violate Const. art. 2, § 15, denouncing ex post facto laws, where it was in existence when one was employed as such cashier.—Citizens' Bank of Hayti v. Wells, 190 S. W. 314.

X. EQUAL PROTECTION OF LAWS.

¶245 (Ark.) The application of the fellow-servant act (Acts 1907, p. 162) to a foreign corporation, the same as to domestic corporations, does not violate the fourteenth amendment of the federal Constitution by denying such foreign corporation the equal protection of the laws.—Caddo River Lumber Co. v. Grover, 190 S. W. 560.

XI. DUE PROCESS OF LAW.

¶289 (Mo.) Const. art. 2, § 30, the due process clause, is not violated by Act March 27, 1913 (Laws 1913, p. 271), as to constructing and improving ditches, parties having their day in court when attempt is made to collect assessments for benefits.—Barnes v. Pikey, 190 S. W. 883.

¶290(1) (Ark.) In dividing levee district, Legislature could not make property owners of original district liable for levee work done in new district, after passage of dividing act, under contract made by original district, as that would be taking property without due process of law.—Second Division of Laconia Levee Dist. v. Laconia Levee Dist., 190 S. W. 438.

¶314 (Mo.) To uphold Rev. St. 1909, §§ 10405, 10409, 10412, 10413, such as affording due process of law, which demands judicial determination and not decision of the single judge, they must be construed as requiring action of the court, and not merely of a single judge.—In re Letcher, 190 S. W. 19.

CONSTRUCTION.

See Bills and Notes, ¶117, 123; Chattel Mortgages, ¶157; Contracts, ¶163-238; Criminal Law, ¶822; Deeds, ¶93-177; Evidence, ¶448; Guaranty, ¶27; Insurance, ¶146, 726; Libel and Slander, ¶19; Mines and Minerals, ¶78; Pleading, ¶34; Sales, ¶68, 81; Statutes, ¶181, 219; Taxation, ¶204; Trial, ¶365; Wills, ¶439-693.

CONSTRUCTIVE POSSESSION.

See Adverse Possession, ¶100.

CONTAGIOUS DISEASES.

See Animals, ¶36.

CONTEMPT.

See Courts, ¶39.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

¶21 (Mo.) No one can be held in contempt of court for refusing to obey an order which that court had no jurisdiction to make.—In re Letcher, 190 S. W. 19.

Under Rev. St. 1909, §§ 10405, 10409, 10412, and 10413, retiring officer who refused to obey order of single judge of Supreme Court to surrender public records to his successor held not in contempt.—Id.

CONTEST.

See Elections, ¶289-291.

CONTINGENT ESTATES.

See Wills, ¶630.

CONTINUANCE.

See Criminal Law, ¶594-598, 917, 1090.

¶30 (Tex.Civ.App.) In action for negligent transportation of stock, a trial amendment alleging defendant's refusal to permit them to be unloaded for feed, water, and rest held to

require continuance to procure evidence when requested by defendants.—*Kansas City, M. & O. Ry. Co. of Texas v. James*, 190 S. W. 1138.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Action, ¶27; Adoption; Assignments; Attorney and Client, ¶148; Bailment; Bills and Notes; Boundaries, ¶46; Brokers, ¶7; Carriers, ¶35, 150-163, 180, 218; Chattel Mortgages; Commerce, ¶10; Compromise and Settlement; Constitutional Law, ¶121, 148; Corporations, ¶448, 477; Covenants; Customs and Usages; Damages, ¶23, 62, 81, 85, 189; Evidence, ¶397; Exchange of Property; Executors and Administrators, ¶491; Frauds, Statute of; Guaranty, ¶27; Husband and Wife, ¶83, 278; Injunction, ¶59; Insurance; Interest; Liens; Limitation of Actions, ¶46, 127; Logs and Logging, ¶8; Mechanics' Liens; Municipal Corporations, ¶330; Novation; Parties, ¶15; Partnership; Payment; Physicians and Surgeons, ¶13; Principal and Agent, ¶155; Principal and Surety; Reformation of Instruments; Release; Sales; Specific Performance; Subrogation; Vendor and Purchaser; Wills, ¶57.

I. REQUISITES AND VALIDITY.

(B) Parties, Proposals, and Acceptance.

¶28(1) (Mo.App.) Where two of the parties to a contract did not sign, writing presumptively took effect upon its delivery and was binding upon parties who signed it, and burden of proof was on plaintiffs to show that understanding was that contract should not take effect until signed by all parties.—*State, to Use of Goodman, v. Regent Laundry Co.*, 190 S. W. 951.

¶28(3) (Mo.App.) In the absence of fraud or mistake, delivery of a written contract by one party to the other, if not delivered in escrow, establishes the fact of a contract.—*Stimson v. Brinkman*, 190 S. W. 646.

(D) Consideration.

¶54(1) (Ky.) Where directors of insolvent bank, in consideration of stockholders' releasing them from liability for negligence, stipulated to arrange with creditors of bank, whereby their claims should be satisfied or paid by directors, stipulation rested on sufficient consideration.—*Caldwell v. Ryan*, 190 S. W. 1078.

¶65(3) (Tex.Civ.App.) The rights of plaintiffs under a former contract cannot be the consideration for a subsequent contract where there was no agreement to surrender those rights.—*Davis v. Wynne*, 190 S. W. 510.

¶71(2) (Mo.App.) Agreement between debtor, his creditors, and debtor's father, that father should retain out of debtor's salary a certain sum a month to be applied on his debts in order in which claims were filed, was a valid agreement, based on sufficient consideration, to extend the time of payment until claim should be reached in order.—*Walther v. Woodson*, 190 S. W. 61.

¶75(2) (Tex.Civ.App.) A consideration for defendant's promise to organize a corporation and convey his patent rights to it cannot be the consideration for a subsequent promise to convey to plaintiffs an interest in the patent equivalent to the interest they would have in the corporation.—*Davis v. Wynne*, 190 S. W. 510.

(E) Validity of Assent.

¶96 (Ky.) Undue influence is a kind of mental coercion destroying one's free agency and constraining him to do that which is against his will, and that he would not have done if left to his own judgment and volition, so that his act becomes the act of one exerting the influence

rather than his own act, rendering his deed, etc., void.—*Beard v. Beard*, 190 S. W. 703.

(F) Legality of Object and of Consideration.

¶138(3) (Tex.Civ.App.) Where realty or personality has been acquired by means of contract forbidden by Constitution or statute, or otherwise unauthorized, vendor may recover specific property, where clearly identifiable, by return of anything he may have received by virtue of contract of sale.—*City of Ft. Worth v. Reynolds*, 190 S. W. 501.

¶138(3) (Tex.Civ.App.) The head of a faction in a foreign state cannot recover money, intrusted to an agent to buy arms in the United States in violation of law and contrary to the president's proclamation, from a secret service officer, to whom the agent delivered it, as the courts will not enforce agreements made in violation of law, or relieve the parties thereto.—*Carranza v. Hicks*, 190 S. W. 540.

¶141(2) (Tex.Civ.App.) In an action by the head of a faction in a foreign state to recover money intrusted to an agent to buy arms in violation of law and contrary to the President's proclamation, and turned over to a secret service officer, declarations of the agent held not to show plaintiff's right to the money and to be inadmissible.—*Carranza v. Hicks*, 190 S. W. 540.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

¶163 (Tex.Civ.App.) Where a contract is ambiguous because of apparent inconsistencies between the written or typewritten and printed parts, the written or typewritten words control.—*Producers' Oil Co. v. Snyder*, 190 S. W. 514.

¶167 (Ky.) The law which subsists at the time and place of making a contract enters into and forms a part of it as if it were expressly referred to or incorporated in its terms.—*Board of Education for Jefferson County v. Littrell*, 190 S. W. 465.

¶170(1) (Mo.App.) A written automobile sales contract is not subject to be varied by a construction which the buyer placed upon it.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

¶171(2) (Tex.Civ.App.) Defendant's contract to convey land to K., and on completion of the sale to pay plaintiffs a commission for it, is divisible.—*Leonard v. Kendall*, 190 S. W. 786.

(B) Parties.

¶187(1) (Ky.) Director of insolvent bank, who stipulated with stockholders to arrange with creditors whereby claims should be satisfied or paid, held liable to creditor, who refused to make composition agreement, for full amount of debt.—*Caldwell v. Ryan*, 190 S. W. 1078.

(F) Compensation.

¶229(2) (Tex.Civ.App.) Under a contract for the sale of the business of a surety company, held, that the percentage of profits due the seller was to be figured only on the portion of premiums collected which had been actually earned at the expiration of the time fixed by the contract.—*Southern Surety Co. v. Western Indemnity Co.*, 190 S. W. 837.

¶233 (Ark.) Where plaintiff agreed to pay for clearing lands of tax titles together with back taxes, the defendant to conduct all litigation, etc., held, plaintiff was not entitled, in an accounting, to credit for expenditures in examining the record title or in negotiating with parties claiming an interest in the property.—*Williams v. Thweatt*, 190 S. W. 113.

¶233 (Tex.Civ.App.) Under a contract for the sale of the business of one surety company to another, the seller held required to pay expenses of maintaining an agency and subagents

for the transfer of the business.—Southern Surety Co. v. Western Indemnity Co., 190 S. W. 837.

IV. RESCISSION AND ABANDONMENT.

↪270(2) (Mo.App.) A person desiring to rescind a contract for fraud is entitled to a reasonable time in which to investigate the facts.—Dawson v. Flintom, 190 S. W. 972.

↪270(3) (Mo.App.) Unless there is such delay in rescinding a contract that reasonable minds would not differ, the question of what is reasonable time is for the jury.—Dawson v. Flintom, 190 S. W. 972.

V. PERFORMANCE OR BREACH.

↪300(2) (Mo.App.) Building contractors held not liable on their bond for a delay caused by acts of the defendant owners in making alterations in the plans.—Moore v. McCutchen, 190 S. W. 350.

↪313(2) (Tex.Civ.App.) There is not an anticipatory breach of contract merely from one party renouncing it before time for performance; but the other must adopt the renunciation.—Leonard v. Kendall, 190 S. W. 786.

For person holding deed for delivery, but before time therefor, to state that, under instructions, he refuses to deliver, is not such an unconditional declaration as to amount to renunciation of contract, as regards anticipatory breach.—Id.

↪321(1) (Tex.Civ.App.) The fraudulent breach by defendant of a contract to organize a corporation and convey a patent to it does not authorize the subscribers to the stock to recover on preliminary and tentative agreements for the transfer of an interest in the patent to them.—Davis v. Wynne, 190 S. W. 510.

↪322(1) (Ark.) In the absence of proof to the contrary, a party to a contract is presumed to have performed his part.—Williams v. Thweatt, 190 S. W. 113.

↪322(1) (Ky.) In action for balance due by plaintiffs against defendant, to whom they advanced money to enable him to manufacture staves for them, burden was on defendant to sustain his claim that plaintiffs received a number of staves in dispute, or that they were such as the contract called for and plaintiffs were required to accept.—Somerset Stave & Lumber Co. v. Brown, 190 S. W. 680.

↪322(3) (Ark.) Evidence held insufficient to sustain a master's finding that defendant was negligent in not redeeming land forfeited for taxes, where such matters were intrusted to his judgment and his testimony indicated that he considered the land not worth the cost of clearing the title.—Williams v. Thweatt, 190 S. W. 113.

VI. ACTIONS FOR BREACH.

↪349(4) (Mo.App.) Testimony concerning sheets of paper constituting specifications showing changes and alterations made after the signing of the building contract sued on held proper for the consideration of the jury.—Moore v. McCutchen, 190 S. W. 350.

↪353(8) (Mo.App.) An instruction that the jury could not find against plaintiffs for any delay caused by defendants held not erroneous for failure to state what acts of defendants would excuse delay.—Moore v. McCutchen, 190 S. W. 350.

CONTRADICTION.

See Witnesses, ↪330, 398, 406.

CONTRIBUTION.

See Principal and Surety, ↪195.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ↪82-101, 136, 141.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds; Husband and Wife, ↪14, 15; Mortgages.

CONVICTS.

See Pardon.

CORPORAL PUNISHMENT.

See Schools and School Districts, ↪176.

CORPORATIONS.

See Banks and Banking; Carriers; Evidence, ↪443; Fraudulent Conveyances, ↪41; Insurance, ↪32; Municipal Corporations; Physicians and Surgeons, ↪13; Railroads; Set-Off and Counterclaim, ↪33; Specific Performance, ↪31; Statutes, ↪113; Taxation, ↪276; Telegraphs and Telephones; Trial, ↪191, 252.

I. INCORPORATION AND ORGANIZATION.

↪30(1) (Mo.App.) Parties with whom plaintiff claimed to have made his original contract for services in promoting, selling stock in, and organizing a corporation, who were holding themselves out as officers of the corporation before it was organized, were all mere promoters.—Van Zandt v. St. Louis Wholesale Grocer Co., 190 S. W. 1050.

II. CORPORATE EXISTENCE AND FRANCHISE.

↪33 (Tex.Civ.App.) The name of an association on the office door with names of individuals with whom the representative of plaintiff dealt did not necessarily give notice to plaintiff of a corporation.—Luck v. Alamo Printing Co., 190 S. W. 204.

↪37 (Mo.) The provision of Rev. St. 1909, § 2901, requiring the payment of fees for extending the existence of a corporation, is not inconsistent with section 2977, and the two acts, being in pari materia, will be construed as if parts of the same section.—State ex rel. Kinloch Telephone Co. v. Roach, 190 S. W. 862.

The proviso of Rev. St. 1909, § 2901, requiring payment of fees for extension of a corporation's existence, applies to corporations organized thereafter under general laws as well as to those theretofore organized under special laws.—Id.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

↪49(1) (Mo.App.) Similarity or identity of names does not make identity of corporations formed under different sovereignties, even though there be identity of stockholders.—Knott v. Fisher Vehicle Woodstock & Lumber Co. of Erin, Ark., 190 S. W. 378.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(C) Issue of Certificates.

↪109 (Tex.Civ.App.) No right exists against a corporation because of lost certificates of stock, where the owner has duplicates issued, sells them, and they are redeemed, though some of the duplicates are erroneously numbered.—Yeaman v. Galveston City Co., 190 S. W. 212.

(D) Transfer of Shares.

☞121(5) (Mo.App.) When the false representation by plaintiff as to the market value of stock was in issue, testimony of an offer by plaintiff to buy this same stock of a broker friend of defendants and the making of the false representation to defendant immediately thereafter was material.—*Dawson v. Flintom*, 190 S. W. 972.

☞121(6) (Mo.App.) A delay of eight days for a seller in Kansas City to investigate curb market price of stock in New York, not regularly listed, before rescinding a contract to sell because of fraud in stating market price, was not as a matter of law, unreasonable.—*Dawson v. Flintom*, 190 S. W. 972.

Where defendant, as soon as he became suspicious of plaintiff's representation as to value of stock sold latter, stopped presentation of draft therefor, and soon thereafter plaintiff knew of this, it cannot be said as a matter of law that defendant did not rescind promptly.—*Id.*

Where there was evidence that defendant rescinded his contract to sell stock to plaintiffs without delay, upon learning of the latter's false representation of market price, instructions that defendant had a right to rescind upon discovery of fraud were proper.—*Id.*

☞121(7) (Mo.App.) A defendant having purchased one-half of capital stock of corporation, held damaged to extent of one-half of amount by which corporation's indebtedness exceeded that which plaintiffs covenanted it would be found to be.—*State, to Use of Goodman, v. Regent Laundry Co.*, 190 S. W. 951.

☞123(16) (Mo.App.) Action to establish title to pledged corporate stock was barred by prior agreement by plaintiffs with pledgors that plaintiffs would assume the amount of the debt to the pledgee.—*Butler v. Hydro-Pneumatic Sprinkler & Mfg. Co.*, 190 S. W. 921.

In action to establish title to pledged corporate stock, failure to join the pledgee as defendant barred relief.—*Id.*

In action to establish title to pledged corporate stock, absence of evidence that pledgee at the time of the pledge knew that plaintiff claimed the pledged stock barred recovery.—*Id.*

☞143 (Ky.) That ownership of corporation's stock changed did not affect its corporate existence or its rights under a contract.—*Somerset Stave & Lumber Co. v. Brown*, 190 S. W. 680.

V. MEMBERS AND STOCKHOLDERS.

(C) Suing or Defending on Behalf of Corporation.

☞206(2) (Mo.App.) A shareholder cannot sue alone to enforce corporate rights without showing that he has used all available means to secure action by the corporation itself.—*Butler v. Hydro-Pneumatic Sprinkler & Mfg. Co.*, 190 S. W. 921.

In suit by stockholders of a corporation, evidence of a corporate meeting held not to show that plaintiffs made demand on the corporation to bring suit or that the corporation refused to do so.—*Id.*

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

☞415 (Mo.App.) The director of a corporation does not by virtue of his office have authority to make a chattel mortgage.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

The treasurer of a corporation does not by virtue of his office have authority to make a chattel mortgage.—*Id.*

The manager of a corporation was not given authority, by his appointment as manager "to manage the mining interests and property of the company," to execute a chattel mortgage disposing of all the corporation's property.—*Id.*

☞423 (Tex.Civ.App.) Where a corporation and plaintiff jointly owned secured note payable to plaintiff's order, if president of corporation in its behalf assumed authority to dispose of plaintiff's interest, corporation would be liable in damages to plaintiff for any loss sustained.—*Beall v. Clack*, 190 S. W. 774.

☞425(5) (Mo.App.) That the director of a corporation represented that he had authority to execute a chattel mortgage, and that the creditors believed it and relied thereon, held not to estop the corporation to deny director's authority in absence of knowledge of transaction.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

☞426(12) (Mo.App.) Where unauthorized execution of a chattel mortgage was a benefit to corporation, knowledge thereof would call for prompt repudiation, and acquiescence with knowledge would be a ratification; but such knowledge must be shown and will not be presumed because of knowledge of wrongdoing officer.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

☞432(12) (Mo.App.) That manager of a mining corporation loaned articles of corporation's machinery, or any act not involving parting with title, even if known to the corporation, while showing extent of authority, would not conclusively show authority to alienate property by custom or usage.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

☞432(12) (Tex.Civ.App.) Evidence held to sustain a finding that defendant corporation's manager acted within his authority in giving plaintiff a firm check to apply on an indebtedness due plaintiff from a third firm, which was a creditor of defendant's and in which defendant's manager was financially interested.—*Munday Trading Co. v. J. M. Radford Grocery Co.*, 190 S. W. 520.

(D) Contracts and Indebtedness.

☞448(1) (Mo.App.) Though a corporation is not generally liable for services rendered by a promoter, the promoter can recover where he expected compensation for his services, where they were rendered at the request of a majority of his associate promoters, and where the corporation received the benefits.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

A corporation, by merely accepting incorporation, does not accept benefit of promoter's services in obtaining subscriptions to its capital stock, at request of a few of its promoters, so as to be liable therefor; and no promoter can incur its whole property by contract to pay for promoter's services.—*Id.*

☞477(4) (Mo.App.) Where a chattel mortgage executed in behalf of a corporation is not sealed with the corporate seal, it does not make out a prima facie case of its validity.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

(F) Civil Actions.

☞513(1) (Mo.App.) Count in quantum meruit, in petition against corporation and its officers for services in the promotion, sale of stock in and organization of corporation which defendants assumed to pay, held to state a good cause of action.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

☞513(2) (Mo.App.) Counts in quantum meruit, in petition against corporation and its officers for services in the promotion, sale of stock in and organization of corporation which defendants assumed to pay, held to state a good cause of action.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

☞521 (Mo.App.) In action against corporation and its officers, etc., with count in quantum meruit for services and expenses in promoting the corporation, selling its stock, and organizing

it, *held*, that a demurrer to the evidence should have been sustained.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

A promoter suing on a quantum meruit for services in promoting a corporation, selling its stock, etc., was not entitled to go to the jury, where there was no evidence to show the value of any services.—*Id.*

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⚡613(1) (Tex.Civ.App.) A county attorney may not bring suit to forfeit charter of a private corporation, exclusive authority in that respect being conferred by Const. art. 4, § 22, on the Attorney General.—*Union Men's Fraternal & Beneficiary Ass'n v. State*, 190 S. W. 242.

⚡613(2) (Mo.) As condition precedent to forfeiture of corporate charter for failure to comply with Laws 1913, p. 167, requiring annual reports, etc., a certificate of the recorder of deeds of the county where corporation is located of posting notice of suspension is necessary under sections 8, 10, and 12 thereof.—*Woodward Hardware Co. v. Fisher*, 190 S. W. 576.

⚡617(1) (Mo.App.) After dissolution of a corporation the assets may be administered in a proper case by a court of equity as a trust fund.—*Wank v. Peet*, 190 S. W. 88.

⚡619 (Mo.App.) In suit against the statutory trustees of a dissolved corporation for accounting, the court had power to investigate the charges made by an attorney in winding up the corporation and make him an allowance therefor.—*Wank v. Peet*, 190 S. W. 88.

Statutory trustees of a dissolved corporation are liable to suit in equity by the stockholders for an accounting.—*Id.*

⚡620 (Mo.App.) Statutory trustees of a dissolved corporation are amenable to a court of equity, and stockholders are entitled to injunction against an inequitable disposition of the assets by such trustees.—*Wank v. Peet*, 190 S. W. 88.

⚡621(1) (Mo.App.) In suit against the statutory trustees of a dissolved corporation for accounting, the court had power to appoint a receiver to take over the assets and distribute them as directed.—*Wank v. Peet*, 190 S. W. 88.

XII. FOREIGN CORPORATIONS.

⚡673 (Ky.) In action against a nonresident corporation, evidence *held* to show that party upon whom a copy of summons was served was not an agent of defendant.—*Thomas B. Jeffrey Co. v. Lockridge*, 190 S. W. 1103.

CORPUS DELICTI.

See Homicide, ⚡228.

CORROBORATION.

See Seduction, ⚡46; Witnesses, ⚡414.

COSTS.

See Appeal and Error, ⚡389; Divorce, ⚡197; Municipal Corporations, ⚡644; Trusts, ⚡167, 830.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚡3 (Mo.App.) The right to tax costs is purely statutory.—*City of Greenfield v. Farmer*, 190 S. W. 406.

⚡48 (Mo.App.) Where creditor brought suit against his debtor before its claim, in the order filed with debtor's father under an agreement, was reached, its action was prematurely commenced, and it was not entitled to costs.—*Walther v. Woodson*, 190 S. W. 61.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡254(4) (Mo.App.) Where appellant has not complied with the rules of the court in abstracting the record on appeal, no costs will be allowed for printing abstract unless with express consent of respondent.—*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.*, 190 S. W. 35.

⚡255 (Mo.App.) If the appellant fails to abstract the testimony as required by rule, he cannot have costs for printing the abstract though successful on the appeal.—*Meston v. Crawford*, 190 S. W. 391.

⚡260(2) (Ky.) Notwithstanding superseding of judgment by appellant, in absence of recovery of money by judgment appealed from, awarding of damages to appellee upon dismissal of the appeal is not permissible.—*Edelston v. Edelston*, 190 S. W. 1083.

⚡263 (Ky.) On affirmance or dismissal of an appeal, 10 per cent. damages will not be allowed on the costs adjudged appellee by the lower court.—*Edelston v. Edelston*, 190 S. W. 1083.

IX. IN CRIMINAL PROSECUTIONS.

⚡284 (Mo.App.) Rev. St. 1909, § 2263, providing that in all civil actions "or proceedings of any kind" the prevailing party shall recover costs, etc., does not include criminal proceedings.—*City of Greenfield v. Farmer*, 190 S. W. 406.

COTENANCY.

See Joint Tenancy; Tenancy in Common.

COUNCIL.

See Municipal Corporations, ⚡100.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

II. GOVERNMENT AND OFFICERS.

(D) Officers and Agents.

⚡74(1) (Ark.) Under Laws 1913, p. 1498, appointing three courthouse commissioners for a certain county, and the general statute contemplating compensation for one commissioner, allowance to the three commissioners collectively a sum which would have been reasonable compensation for one commissioner was proper.—*Mississippi County v. Grider*, 190 S. W. 102.

That courthouse commissioners might have secured an architect to supervise the work more cheaply than an architect and supervisor is not controlling on the commissioners' right to compensation, for the county court, under Kirby's Dig. § 1017, requiring plans to be submitted to it, has discretionary power regarding the employment of an architect.—*Id.*

COUNTS.

See Criminal Law, ⚡878; Indictment and Information, ⚡128.

COURT HOUSE COMMISSIONERS.

See Counties, ⚡74.

COURTS.

See Appeal and Error, ⚡21, 23, 184, 359, 911, 987; Constitutional Law, ⚡70; Contempt; Eminent Domain, ⚡172; Executors and Administrators, ⚡11, 12; Judges; Justices of the Peace; Wills, ⚡255.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

—39 (Mo.) On a citation for contempt, though the question of the jurisdiction of the Supreme Court is not raised, it is its duty to determine the question as an initial question upon its own volition.—*In re Letcher*, 190 S. W. 19.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

—89 (Mo.App.) Settled rules of law governing commercial paper cannot be set aside because their application in a particular case results in hardship.—*Rudolph Wurlitzer Co. v. Rossmann*, 190 S. W. 636.

—89 (Tex.Civ.App.) The weight of precedents establishing a certain rule of evidence is not lessened by the fact that such precedents have changed the ordinary rule as to evidence and applied a more strict rule without any legislative enactment.—*Pierce-Fordyce Oil Ass'n v. Staley*, 190 S. W. 814.

—90(1) (Mo.) Where the Supreme Court had, in a proceeding similar in all material features, reviewed *Rev. St. 1909, § 8315*, making it a misdemeanor for one to hold himself out as a physician without a license, and ruled that the statute was a proper exercise of the police power, the decision is binding in the instant case.—*State v. Evertz*, 190 S. W. 287.

—91(1) (Mo.) A decision of the Court of Appeals that a clause avoiding a fire insurance policy on the commencement of foreclosure proceedings applied only when such proceedings increased the hazard, *held* contrary to a prior decision of the Supreme Court.—*State ex rel. American Fire Ins. Co. v. Ellison*, 190 S. W. 879.

—116(2) (Tex.Cr.App.) After adjournment of the county court, the county clerk had no authority without permission to add to or take from the minutes approved by the court.—*Whitcomb v. State*, 190 S. W. 484.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

—203 (Mo.) Under *Const. art. 6, §§ 2, 3, held*, that *Rev. St. 1909, §§ 10409, 10412, 10413*, so far as giving the Supreme Court or a judge thereof original jurisdiction to issue warrant for delivery of records, are unconstitutional and void.—*In re Letcher*, 190 S. W. 19.

—207(1) (Mo.) Under *Const. art. 6, § 3*, giving the Supreme Court power to issue writs of quo warranto, etc., and to hear and determine the same, it has jurisdiction of a garnishment proceeding incidental to enforcement of judgment for fine in quo warranto proceedings.—*State, on Inf. of Attorney General, v. Arkansas Lumber Co.*, 190 S. W. 804.

(B) Courts of Particular States.

—231(1) (Mo.) In cases in which the Supreme Court has no original appellate jurisdiction, its review is limited to the question whether the Court of Appeals decided contrary to the last previous rulings of the Supreme Court.—*State ex rel. Miles v. Ellison*, 190 S. W. 274.

The Courts of Appeal, when acting within their jurisdiction, and not in violation of the Supreme Court decisions, are courts of last resort, and their judgments cannot be interfered with by the Supreme Court, even if erroneous.—*Id.*

—231(4) (Mo.) A decision of the Court of Appeals that a local option election conducted in total disregard of *Rev. St. 1909, §§ 5397, 5398, 5919*, made applicable to such election by sections 7239, 9145, is void, *held* not contrary to prior Supreme Court decisions that mere ir-

regularities do not make the election void.—*State ex rel. Miles v. Ellison*, 190 S. W. 274.

A decision of the Court of Appeals that the contestant of a local option law could not dismiss the contest after other contests were barred *held* not contrary to previous decisions of the Supreme Court.—*Id.*

—231(19) (Mo.) The Supreme Court will not assume jurisdiction of an appeal in which the only constitutional question involved had been decided adversely to appellant before he took his appeal.—*State v. Wild*, 190 S. W. 273.

—231(19) (Mo.) Jurisdiction cannot be conferred upon the Supreme Court by the introduction into the proceedings and saving in the record of a constitutional question, when the same has been determined in a similar case.—*State v. Evertz*, 190 S. W. 287.

—231(25) (Mo.App.) The title to the land being the issue in suit to enjoin its use, jurisdiction of the appeal is under *Const. art. 6, § 12*, in the Supreme Court, as a case-involving title to real estate.—*Bryant v. West*, 190 S. W. 95.

—231(39) (Mo.App.) A suit to enjoin the opening of a road through plaintiff's land because the required legal notice was not given involves the title to real estate so as to give the Supreme Court jurisdiction over an appeal therein.—*Ripkey v. Gresham*, 190 S. W. 354.

—231(50) (Mo.App.) In suit to determine ownership of royalty or contract rental for mines amount involved *held* beyond the jurisdiction of the St. Louis Court of Appeals, so that such court could only transfer the case to the Supreme Court.—*Matlack v. Kline*, 190 S. W. 408.

—246 (Tenn.) Where an appeal was granted to Court of Civil Appeals but appeal bond indicated appeal to Supreme Court and transcript was filed in Supreme Court, action of Supreme Court in transferring case to Court of Civil Appeals *held* correct.—*Delap v. National Bank of La Follette*, 190 S. W. 456.

In a suit to restrain sale of complainant's property under an order of condemnation, where a decree dismissing bill rendered judgment against principal and sureties on injunction bond, *held* that Supreme Court did not, because incidental judgment exceeded \$1,000, have jurisdiction of a general appeal.—*Id.*

VII. UNITED STATES COURTS.

(F) State Laws as Rules of Decision.

—365 (Tex.Civ.App.) The holdings of state courts that injuries received before voyage began do not fall under the term "transportation" or the contract of shipment are not controlling in case of an interstate shipment, in view of provision including such injuries in term "transportation" in Interstate Commerce Act, § 1.—*Chicago, R. I. & G. Ry. Co. v. Whaley*, 190 S. W. 833.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

—474 (Mo.App.) Where husband and wife residing in different counties each started suit for divorce on same day, and wife's petition was first filed and summons issued, but husband's summons was first served, court in which wife's suit was filed acquired exclusive jurisdiction under *Rev. St. 1909, § 1756*, as to commencement of suits.—*State ex rel. Taubman v. Davis*, 190 S. W. 964.

As between immediate parties in proceeding in rem, jurisdiction attaches when suit is filed and process issued, which jurisdiction cannot be defeated by bringing suit in another court.—*Id.*

—480(1) (Mo.App.) Where one court has acquired jurisdiction over res in action in rem, another court will be prevented from interfering

by prohibition.—*State ex rel. Taubman v. Davis*, 180 S. W. 964.

⚡487(1) (Tenn.) A case appealed to Court of Civil Appeals may only be brought to Supreme Court by order of Court of Civil Appeals transferring case, or on petition for writ of certiorari filed after Court of Civil Appeals has acted upon merits and entered judgment.—*Delap v. National Bank of La Follette*, 190 S. W. 454.

(B) State Courts and United States Courts.

⚡489(9) (Mo.App.) Where a shipment of coal by rail was interstate, any complaint based on the illegality or impropriety of the published rate was not within jurisdiction of state court.—*Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co.*, 190 S. W. 650.

Cause of action of shipper of coal to recover 5 cents excessive charge per ton exacted over contract obligation of railroad to carry for 35 cents a ton was within jurisdiction of state courts, though charge was on interstate shipments.—*Id.*

⚡493(1) (Mo.) When either a state or federal court takes into its jurisdiction a specific thing, that res is withdrawn from the judicial power of the other.—*State ex rel. Kern v. Stone*, 190 S. W. 601.

COVENANTS.

I. REQUISITES AND VALIDITY.

(A) Express Covenants.

⚡1 (Tex.Civ.App.) The sale of lots by a town-site company, with statement that railway would build its depot opposite the lots, held not a contractual obligation in the nature of a covenant to erect the depot.—*Ore City Co. v. Rogers*, 190 S. W. 226.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Evidence, ⚡588; Witnesses, ⚡330-414.

CREDITORS.

See Fraudulent Conveyances.

CRIMINAL LAW.

See Animals, ⚡36; Assault and Battery, ⚡83; Bail; Conspiracy; Costs, ⚡284; Depositions, ⚡49; Disorderly House; District and Prosecuting Attorneys; Escape; False Pretenses; Gaming; Homicide, ⚡163; Indictment and Information; Infants, ⚡68; Injunction, ⚡103; Insane Persons, ⚡83, 86; Intoxicating Liquors, ⚡189-239; Larceny; Libel and Slander, ⚡7, 152; Master and Servant, ⚡18; Municipal Corporations, ⚡644; Pardon; Prostitution; Rape; Seduction; Statutes, ⚡113, 118; Weapons; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⚡27 (Mo.) The act of two persons betting privately with each other on the result of a horse race is gambling, and punishable as a misdemeanor, but not as a felony.—*Fleming v. Wengler*, 190 S. W. 875.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

⚡53 (Mo.) Drunkenness alone in any degree constitutes no defense to criminal charge.—*State v. Bobbst*, 190 S. W. 257.

VI. LIMITATION OF PROSECUTIONS.

⚡150 (Mo.) Three-year statute of limitations as to offense of seduction runs from date of first intercourse, and subsequent acts cannot be relied upon to avoid bar of the statute, unless the woman has after the first act duly reformed so as to come again within the protection of the law.—*State v. Stoker*, 190 S. W. 294.

VII. FORMER JEOPARDY.

⚡200(7) (Tex.Cr.App.) In view of Pen. Code 1911, arts. 1317, 1318, demurrer to plea of former jeopardy by defendant charged with assault with intent to rape, alleging a former indictment for burglary with intent to rape a named woman in the said house at the time and an acquittal, held properly sustained.—*Jennings v. State*, 190 S. W. 733.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⚡260(13) (Mo.App.) Under Rev. St. 1909, § 9343, providing that certain cases appealed to the circuit from police court should proceed as misdemeanor cases, the practice after appeal is that of a criminal proceeding.—*City of Greenfield v. Farmer*, 190 S. W. 406.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

⚡351(3) (Tex.Cr.App.) Flight or attempted flight may be shown as a criminating circumstance.—*Porter v. State*, 190 S. W. 159.

⚡351(3) (Tex.Cr.App.) In a prosecution for crime, the state may prove the flight or attempted flight by defendant.—*Kelley v. State*, 190 S. W. 173.

⚡351(4) (Tex.Cr.App.) It is always proper to show that when accused is arrested or sought to be arrested for an offense, he resists it.—*Porter v. State*, 190 S. W. 159.

⚡351(4) (Tex.Cr.App.) In a prosecution for crime, the state may prove resistance to arrest by defendant.—*Kelley v. State*, 190 S. W. 173.

In a prosecution for robbery, evidence held to show that the officers whom defendant resisted had a right to arrest him without warrant and attempted to do so in a proper manner.—*Id.*

⚡351(10) (Tex.Cr.App.) A threat by accused to whip two men whom he knew were important witnesses against him was admissible as a circumstance tending to show that he was trying to prevent them from testifying.—*Deisher v. State*, 190 S. W. 729.

In prosecution for rape, where it appeared that prosecutrix had at first denied the act, and that accused attempted to persuade her and her parents not to testify against him, evidence of a request by him to her sister to talk to prosecutrix was admissible.—*Id.*

⚡361(1) (Mo.) Accused could either deny or admit and explain a statement which it was proved he had made, that his drunkenness was his reason for killing deceased.—*State v. Dixon*, 190 S. W. 290.

⚡361(1) (Tex.Cr.App.) In a prosecution for unlawful sale of intoxicating liquors in prohibition territory, it was proper for the court to permit the state's witness to explain why he had transported whisky, since a witness may always explain his action from his standpoint when attacked.—*Dupree v. State*, 190 S. W. 181.

⚡363 (Tex.Cr.App.) In prosecution for assault with intent to rape, testimony of those to whom complaint was made soon after offense as to condition of assaulted party's clothes, person, etc., held res gestæ, and admissible.—*Jennings v. State*, 190 S. W. 733.

⚡364(2) (Tex.Cr.App.) In trial for aggravated assault upon a constable endeavoring to arrest

accused, evidence of the whole transaction *held* admissible as part of the *res gestæ*.—Porter v. State, 190 S. W. 159.

☞364(5) (Tex.Cr.App.) In prosecution of schoolboy for shooting his teacher, testimony as to what defendant told witness immediately after shooting, when defendant was still laboring under excitement, *held* admissible.—Wilson v. State, 190 S. W. 155.

☞364(6) (Tex.Cr.App.) In murder trial, accused's version of the killing, given in conversation not over 12 or 20 minutes thereafter, after going 700 or 800 yards from the scene, was admissible as part of the *res gestæ*.—Gillespie v. State, 190 S. W. 146.

☞366(1) (Tex.Cr.App.) Where victim of rape does not herself testify, testimony of *res gestæ* statements by her are not inadmissible as being secondary or inferior evidence.—Marion v. State, 190 S. W. 499.

☞368(3) (Ark.) Where a third party, fatally wounded by accused's victim, stated, after the fight, that he was dying, and then in response to a question said deceased shot him before accused fired, *held* his statement was inadmissible as part of the *res gestæ*.—Holland v. State, 190 S. W. 104.

☞368(3) (Mo.) Admission in evidence of an exclamation by a bystander immediately following the striking of the fatal blow by defendant and as deceased fell that, "There is a dead man" was proper.—State v. Fletcher, 190 S. W. 317.

☞368(3) (Tex.Cr.App.) Evidence that immediately after deceased was cut, his brother entered the house and assaulted other occupants and "was drunk and seemed very mad" was a part of the *res gestæ*, showing the situation, and should have been admitted.—Carr v. State, 190 S. W. 727.

(C) Other Offenses, and Character of Accused.

☞372(5) (Tex.Cr.App.) In a trial for horse theft, where defendant's defense was purchase of animals stolen, evidence of a similar transaction a short time prior *held* admissible on that issue.—Lusport v. State, 190 S. W. 151.

(D) Materiality and Competency in General.

☞390 (Ky.) It is permissible for defendant to state, if that be his defense, that his killing of deceased was in defense of his person, or to protect his person or life.—Cavanaugh v. Commonwealth, 190 S. W. 123.

☞390 (Mo.) The court erred in sustaining the state's objection to the question to defendant on the witness stand whether he intended to kill deceased when he struck him.—State v. Fletcher, 190 S. W. 317.

☞393(1) (Ark.) The provision of Const. art. 2, § 8, that a person shall not be compelled to be a witness against himself is not violated by allowing foreman of grand jury to impeach defendant's testimony by stating the latter's incriminating testimony before the grand jury.—Pinkerton v. State, 190 S. W. 110.

☞393(3) (Tex.Cr.App.) In a prosecution for larceny of cotton, evidence that the county attorney took defendant's shoes and fitted them in tracks about where the cotton was found is admissible.—Lunsford v. State, 190 S. W. 157.

(E) Best and Secondary and Demonstrative Evidence.

☞404(4) (Tex.Cr.App.) In a murder trial, unless there is an issue as to the position of the parties, or character of the wound, on which examination of the bloody clothing of the victim might be enlightening, such clothing is inadmissible.—Gillespie v. State, 190 S. W. 146.

(F) Admissions, Declarations, and Hearsay.

☞408 (Ky.) In prosecution for chicken stealing, note executed by defendant in payment for

fowls *held* competent against him.—Fuson v. Commonwealth, 190 S. W. 1095.

☞413(1) (Tex.Cr.App.) Self-serving declarations made by defendant two hours prior to his difficulty with deceased were properly excluded from evidence.—Becker v. State, 190 S. W. 185.

☞417(1) (Mo.) Under Rev. St. 1909, § 5242, while the wife's testimony as to facts surrounding an alleged larceny would have been admissible with his consent, yet testimony of her extrajudicial confession of such facts was incompetent.—State v. Pace, 190 S. W. 15.

☞417(2) (Tex.Cr.App.) It was error to permit the county attorney to testify that he heard the testimony on an inquiring investigation, of another witness, and to state what such witness then testified, where it subsequently was made to appear that accused was not then present.—Lunsford v. State, 190 S. W. 157.

☞419, 420(1) (Mo.) Evidence of statements heard by the witness outside of court is hearsay and generally inadmissible unless within the well-defined exceptions.—State v. Loeb, 190 S. W. 299.

☞419, 420(5) (Mo.) Testimony of the wife's extrajudicial confession is, in prosecution of the husband for larceny, incompetent as hearsay.—State v. Pace, 190 S. W. 15.

☞419, 420(10) (Tex.Cr.App.) While evidence of other extraneous crimes, if a part of the *res gestæ*, or tending to connect defendant with the offense for which he is on trial, is admissible, yet testimony that another person identified certain cotton stolen as his is hearsay and not admissible in a prosecution for stealing other cotton.—Lunsford v. State, 190 S. W. 157.

☞419, 420(11) (Tex.Cr.App.) In a prosecution for violating Pen. Code 1911, art. 500, relating to keeping disorderly houses, *held*, that a witness' testimony as to what others told him should have been excluded as hearsay.—Speers v. State, 190 S. W. 164.

(G) Acts and Declarations of Conspirators and Codefendants.

☞422(9) (Mo.) In a prosecution against two defendants, admissions by one of them are admissible against him, but not against the other defendant unless there was proof of a conspiracy.—State v. Loeb, 190 S. W. 299.

☞423(2) (Tex. Cr. App.) The declarations or statements by conspirators, even if made before a conspirator entered into the conspiracy, are admissible against him, even though what was said or done by any of the others was done in his absence.—Sapp v. State, 190 S. W. 489.

Declarations of a coconspirator are admissible against all the parties to the conspiracy whether they heard it or had it communicated to them or not.—Id.

☞427(2) (Mo.) In a prosecution against two defendants, admissions by one of them are admissible against him, but not against the other defendant unless there was proof of a conspiracy.—State v. Loeb, 190 S. W. 299.

☞427(4) (Mo.) A conspiracy between two defendants to commit the crime with which they are charged, so as to render the statements of one admissible against the other, may be shown by circumstances, but cannot be established by the testimony or statements of one defendant alone.—State v. Loeb, 190 S. W. 299.

(H) Opinion Evidence.

☞448(3) (Tex.Cr.App.) In trial for aggravated assault, it was proper for the state to elicit from accused's witness on cross-examination that it looked to him as if when accused was running with a gun toward the assaulted party, he was getting ready to shoot.—Porter v. State, 190 S. W. 159.

☞450 (Tex.Cr.App.) In prosecution for murder, testimony of witness that there was not any doubt but that defendants were guilty, was a

conclusion or opinion, and inadmissible.—*Sapp v. State*, 190 S. W. 489.

⚡451(3) (Tex.Cr.App.) A witness may testify, in a prosecution for murder, that another was mad from his tone of voice.—*Ray v. State*, 190 S. W. 1111.

(K) Confessions.

⚡517(6) (Tex.Cr.App.) A confession or admission of guilt was admissible if it was a personal statement to the county attorney.—*Lunsford v. State*, 190 S. W. 157.

⚡518(4) (Tex.Cr.App.) A confession or admission of guilt is admissible if the accused was properly warned by the officer taking it.—*Lunsford v. State*, 190 S. W. 157.

(M) Weight and Sufficiency.

⚡564(1) (Mo.) Evidence held sufficient to show that the larceny of rings from a railway coach was committed in the county of prosecution.—*State v. Pace*, 190 S. W. 15.

XI. TIME OF TRIAL AND CONTINUANCE.

⚡576(9) (Mo.) Rev. St. 1909, § 5423, does not entitle accused to be discharged, where he was tried during the second term after the end of the term at which the information was filed.—*State v. Taylor*, 190 S. W. 330.

⚡594(1) (Tex.Cr.App.) Though conduct of witness in criminal case in willfully absenting himself is censurable, defendant cannot be held responsible to justify denial of motion for continuance on ground of absence of witness.—*Wilson v. State*, 190 S. W. 155.

⚡595(1) (Tex.Cr.App.) Court held to have erroneously denied continuance to defendant charged with murder for absence of witness who would have testified that he knew a person was dead to whom deceased had stated that he intended to beat defendant up.—*Wilson v. State*, 190 S. W. 155.

⚡598(2) (Tex.Cr.App.) Where accused made only one attempt to subpoena a witness residing in an adjoining county, although the witness was home part of the time during the trial, it was proper to refuse continuance.—*Porter v. State*, 190 S. W. 159.

⚡598(3) (Tex.Cr.App.) Where accused sent interrogatories to a notary public in another state who was not authorized to take depositions, it was proper to refuse continuance because of his lack of diligence.—*Porter v. State*, 190 S. W. 159.

⚡598(6) (Tex.Cr.App.) Motion for continuance showing that accused waited until day before trial to have process issued to an absent witness, held not to show that accused exercised diligence.—*Wyatt v. State*, 190 S. W. 153.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

⚡636(3) (Mo.) That accused was not present when his case was set for trial did not require a reversal in the absence of a request to be present.—*State v. Bobbat*, 190 S. W. 257.

⚡655(1) (Mo.) The remarks and conduct of the trial judge, manifesting his desire to expeditiously hear the case, without denying defendant any right to which he was legally entitled, were not erroneous.—*State v. Fletcher*, 190 S. W. 317.

(C) Reception of Evidence.

⚡661 (Tex.Cr.App.) It is not error to exclude testimony of witnesses to prove defendant's good reputation, where the state admitted that he bore such reputation prior to his difficulty with deceased.—*Becker v. State*, 190 S. W. 185.

⚡663 (Tex.Cr.App.) In a prosecution under Pen. Code 1911, art. 500, relative to keeping of disorderly houses, held error to admit in evi-

dence record of a deed, where a certified copy had not been filed and notice given as required by Rev. St. art. 3700.—*Speers v. State*, 190 S. W. 164.

⚡665(1) (Tex.Cr.App.) In trial for rape of accused's daughter, it was proper for the court to place all his children in custody of an officer, and allow no communication with them, nor comment to the jury by accused's counsel on such action; it all occurring out of the presence of the jury.—*Marion v. State*, 190 S. W. 499.

⚡666(3) (Mo.) It is not error for the state to fail to call a witness, even though in attendance in obedience to subpoena, and although accused expected the witness to perjure himself and then to impeach him.—*State v. Dixon*, 190 S. W. 290.

⚡673(2) (Tex.Cr.App.) It is neither necessary nor proper to limit the evidence which goes to prove motive.—*Sapp v. State*, 190 S. W. 489.

⚡673(3) (Ark.) When evidence of testimony of accused before grand jury is admitted to impeach his testimony the court should instruct jury not to consider statements before grand jury as substantive proof of guilt.—*Pinkerton v. State*, 190 S. W. 110.

⚡678(1) (Tex.Cr.App.) Where in a prosecution for slander, evidence of alleged slanderous statements on several occasions is introduced, it is error to refuse to compel the state to elect upon which occasion it will rely.—*Owens v. State*, 190 S. W. 487.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

⚡693 (Mo.) Where defendant's counsel desired that incidental items of evidence be eliminated which came out while state was linking together its chain of incriminating circumstances, he should have made objection at that time.—*State v. Smith*, 190 S. W. 288.

⚡695½ [New, vol. 17 Key-No. Series] (Mo.) Exception to failure to rule on an objection not such as to make a ruling necessary is unavailing.—*State v. Swearingin*, 190 S. W. 268.

⚡696(3) (Tex.Cr.App.) It was error to refuse to strike county attorney's testimony as to testimony of another witness on an inquiring investigation, where it subsequently was made to appear that accused was not then present.—*Lunsford v. State*, 190 S. W. 157.

⚡696(5) (Mo.) Where a witness answered a question before objection made, it would have been proper for the state to have requested that the answer be stricken out.—*State v. Fleetwood*, 190 S. W. 1.

(E) Arguments and Conduct of Counsel.

⚡699 (Ark.) Trial courts have broad discretion in matter of controlling arguments of counsel.—*Wilson v. State*, 190 S. W. 441.

⚡700 (Mo.) The requirement of Rev. St. 1909, § 5231, that the prosecuting attorney make an opening statement, is mandatory.—*State v. Loeb*, 190 S. W. 299.

⚡700 (Tex.Cr.App.) Vernon's Ann. Code Cr. Proc. 1916, art. 717, subdiv. 3, requiring the prosecuting attorney to state to the jury the nature of the accusation and the facts expected to be proved, is directory, and in the absence of injury from omission of such statement, there was no error.—*Bell v. State*, 190 S. W. 732.

⚡713 (Tex.Cr.App.) In trial for rape of accused's daughter, it was proper for the court to place all his children in custody of an officer, and allow no communication with them, nor comment to the jury by accused's counsel on such action; it all occurring out of the presence of the jury.—*Marion v. State*, 190 S. W. 499.

—717 (Ky.) Refusal to exclude commonwealth's attorney's substantially correct statement of the law as to voluntary manslaughter and his advising jury that on the stated facts they might find defendant guilty of that crime, was not error.—Cavanaugh v. Commonwealth, 190 S. W. 123.

—719(1) (Ark.) In prosecution for wife murder, remarks of state's counsel *held* warranted by evidence.—Wilson v. State, 190 S. W. 441.

—719(1) (Tex.Cr.App.) Both counsel for the state and the accused should in their argument discuss only the evidence adduced on the trial and legitimate deductions to be drawn therefrom.—Cleveland v. State, 190 S. W. 177.

—720(1) (Ark.) In prosecution for murder, remarks of state's counsel in opening argument that a witness was there and had testified for the state, though he had been threatened and intimidated from so testifying, were improper.—Wilson v. State, 190 S. W. 441.

—721(1) (Mo.) It is highly improper for a special prosecutor in his closing argument to refer to the failure of accused to testify.—State v. Volz, 190 S. W. 307.

—721½(2) (Tex.Cr.App.) In murder trial, where accused contended that another who had also been indicted for the crime, and was a witness against him, was insane, and therefore an incompetent witness, comment by the state on the fact that accused had called several doctors and yet had questioned none of them on such issue, was legitimate.—Garson v. State, 190 S. W. 145.

—722(2) (Mo.) In a prosecution for rape, reference by the prosecuting attorney in his argument to the appearance and demeanor of defendant during the trial, but not while he was on the witness stand, is improper.—State v. Davis, 190 S. W. 297.

—726 (Tex.Cr.App.) The accused cannot complain that the state's attorney in argument went beyond the record, if the argument was occasioned, justified, or provoked by accused's attorney, as by the introduction of illegal testimony.—Dupree v. State, 190 S. W. 181.

—726 (Tex.Cr.App.) In trial for rape of accused's young daughter, where accused's counsel commented on failure to make the victim a witness, the prosecutor was justified in stating that the jury could see why she was not called from the fact that her little brother, as witness for the state, was caused to change his testimony by his father's influence.—Marion v. State, 190 S. W. 499.

—726 (Tex.Cr.App.) Argument of district attorney in response to, and brought out by, the argument for the defense, cannot be complained of.—Deisher v. State, 190 S. W. 729.

—728(5) (Ark.) In prosecution for murder, improper remarks of state's counsel in opening argument *held* not so intensely prejudicial as to render it duty of trial court on its own motion, unrequested by defendant, to instruct the jury not to consider them.—Wilson v. State, 190 S. W. 441.

(F) Province of Court and Jury in General.

—747 (Tex.Cr.App.) Under conflicting evidence, credibility of the witnesses is a question for the jury.—Bell v. State, 190 S. W. 732.

—752 (Mo.) Where there was sufficient evidence to sustain the conviction of one of two joint defendants, a general demurrer by both defendants to the testimony was properly overruled.—State v. Loeb, 190 S. W. 299.

—761(9) (Mo.) An instruction on insanity, *held* not erroneous because it assumed that defendant killed his wife where such killing was shown by strong uncontradicted evidence.—State v. Bobbst, 190 S. W. 257.

—761(12) (Mo.) Instruction *held* not erroneous as assuming that state had established

beating and wounding of deceased by defendant.—State v. Fletcher, 190 S. W. 317.

—763, 764(6) (Tex.Cr.App.) In a prosecution under Pen. Code 1911, art. 500, *held*, that an instruction was properly refused as on the weight of the testimony.—Speers v. State, 190 S. W. 164.

(G) Necessity, Requisites, and Sufficiency of Instructions.

—772(6) (Tex.Cr.App.) In a prosecution for violating Pen. Code 1911, art. 500, *held*, that requested instructions enumerating facts alleged to constitute special defenses were properly refused.—Speers v. State, 190 S. W. 164.

—778(5) (Ark.) In prosecution for wife murder by poisoning, instruction that, the killing being proved, burden of proving circumstances of mitigation in justification or excuse devolved on accused, *held* not to shift the burden to defendant to establish his innocence; the burden of proof to show guilt in the whole case still resting on the state.—Wilson v. State, 190 S. W. 441.

—781(6) (Mo.) Refusal of an instruction cautioning the jury as to the weight to be given to any proven extrajudicial statement made by accused *held* not error, in view of the evidence and undisputed facts.—State v. Bobbst, 190 S. W. 257.

—783(1) (Tex.Cr.App.) In prosecution for murder, charge that in determining whether defendants or either of them killed deceased, claimed to have been hired by one defendant to kill his wife, the jury should consider testimony as to relationship of that defendant and his wife after their marriage should not be given.—Sapp v. State, 190 S. W. 489.

—792(1) (Tex.Cr.App.) In a trial for horse theft, where no one saw who took the stock, and defendant offers no explanation, it was *held* proper to charge law of principals.—Lusport v. State, 190 S. W. 151.

—792(2) (Tex.Cr.App.) Where the state's evidence tended to show that one defendant held the deceased while the other defendant shot him, it is proper to charge the law of principals as to the first defendant.—Bell v. State, 190 S. W. 732.

—792(3) (Tex.Cr.App.) In an instruction defining who are principals, the court should only quote that part of the statute relating to principals, omitting the part not applicable to principals.—Sapp v. State, 190 S. W. 489.

—800(7) (Mo.) Instructions that drunkenness is no defense *held* not erroneous for failure to further define the term "drunkenness."—State v. Bobbst, 190 S. W. 257.

—809 (Mo.) In a prosecution for carnally knowing a chaste girl between 14 and 18 years old, an instruction *held* not objectionable as misleading the jury into thinking that the consent could not be considered by them in determining other issues.—State v. Volz, 190 S. W. 307.

In a prosecution for carnally knowing a chaste girl, a requested instruction that there was no presumption of prosecutrix's chastity, *held* properly refused as misleading.—Id.

—811(2) (Mo.) In prosecution for keeping a bawdyhouse, an instruction that the general bad reputation of inmates of the house for chastity might be considered was error, as singling out evidence.—State v. Malloch, 190 S. W. 266.

—814(1) (Ark.) Upon trial of indictment for murder, the instructions given the jury ought to be responsive to the evidence.—Diggs v. State, 190 S. W. 448.

—814(1) (Mo.) An instruction in a prosecution for carnally knowing a chaste girl *held* not erroneous as permitting the jury to convict defendant for a second act of intercourse with prosecutrix when she was no longer chaste.—State v. Volz, 190 S. W. 307.

⇒814(3) (Tex.Cr.App.) Requested charges, that defendant's resistance to unlawful arrest should not be considered as evidence of his guilt in robbery, *held* properly refused under the evidence showing the arrest to have been lawful.—Kelley v. State, 190 S. W. 173.

⇒814(10) (Tex.Cr.App.) Refusal to submit to the jury accused's insanity from use of drugs was proper; there being no evidence thereof.—Marion v. State, 190 S. W. 499.

⇒814(17) (Mo.) Where the testimony for the prosecution is chiefly circumstantial, the court should instruct upon the nature of circumstantial evidence and the law regulating it.—State v. Smith, 190 S. W. 288.

⇒814(17) (Mo.) It was not error to refuse a requested charge that the unchastity of prosecutrix could be proved by circumstantial evidence, where there was no circumstantial evidence to that effect.—State v. Volz, 190 S. W. 307.

⇒814(17) (Tex. Cr. App.) Requested instruction on circumstantial evidence was properly refused, although victim did not herself testify, where there was res gestæ testimony of condition and complaint of the victim; this being positive testimony.—Marion v. State, 190 S. W. 499.

⇒822(1) (Tex.Cr.App.) When any part of the charge is attacked, the whole charge must be looked to, and if no injury is shown thereby there is no error.—Bell v. State, 190 S. W. 732.

⇒823(2) (Ark.) In prosecution for homicide by poisoning, such as to constitute only murder in the first degree, abstract instruction that, the killing being proved, the burden of proving circumstances of mitigation justifying or excusing the homicide devolves on accused, *held* not assumption of fact in view of another instruction.—Wilson v. State, 190 S. W. 441.

⇒823(2) (Mo.) Instruction *held* not erroneous because assuming that club with which defendant struck and killed deceased was a deadly weapon, in view of another instruction.—State v. Fletcher, 190 S. W. 317.

⇒823(9) (Mo.) In a prosecution for carnally knowing a chaste girl, the refusal of a requested instruction that there was no presumption of prosecutrix's chastity, *held* not error in view of the instructions given.—State v. Volz, 190 S. W. 307.

(H) Requests for Instructions.

⇒824(4) (Mo.) Defendant, who requested no additional instructions, could not complain that no instruction was given, calling jury's attention to uncommunicated threats by deceased.—State v. Fletcher, 190 S. W. 317.

⇒829(1) (Ark.) Refusal of instructions covered by those given *held* not error.—Holt v. State, 190 S. W. 101.

⇒829(1) (Ark.) The refusal to give requested instructions is not error, where the substance of the instructions is covered by others given by the court of its own motion.—Pinkerton v. State, 190 S. W. 110.

⇒829(1) (Tex.Cr.App.) The accused cannot complain of refusal of a requested instruction, when the court gave a similar instruction which omitted only one word, but did not change the effect of that requested.—Lunsford v. State, 190 S. W. 157.

⇒829(4) (Tex.Cr.App.) Where court's main charge, and that specially requested by defendant, which was given, submitted every issue in favor of defendant raised by testimony, court properly refused others requested by defendant.—Waggoner v. State, 190 S. W. 493.

In prosecution for illegally selling intoxicants, charge at defendant's request *held* to embrace issue that, if defendant ordered whisky, and prosecuting witness paid him \$5 on or-

der, defendant was not guilty, so that another charge on issue was properly refused.—Id.

⇒829(5) (Tex.Cr.App.) In prosecution for assault to murder an officer, requested charge on defendant's right to resist *held* properly refused; other charges fully informing jury as to defendant's right to resist.—Kelley v. State, 190 S. W. 169.

⇒829(5) (Tex.Cr.App.) Where the court submitted self-defense fully, but did not limit the defense by reference to provoking difficulty, and there was no objection to the charge, it was not error to refuse special charge that accused had a right to carry his razor with him to deceased's wagon.—Ray v. State, 190 S. W. 1111.

⇒829(18) (Ark.) Refusal of a requested instruction on reasonable doubt is not reversible error where other portions of the charge covered the ground.—Holland v. State, 190 S. W. 104.

(K) Verdict.

⇒878(2) (Mo.) Where different counts charge four separate offenses, not the same offense in different ways, a general verdict is insufficient.—State v. Loeb, 190 S. W. 299.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⇒905 (Ky.) The purpose of the motion and grounds for the new trial authorized by Civ. Code Prac. § 340, is to direct the trial court's attention to the alleged errors so that it may duly consider them in granting or refusing a new trial.—Broadway & Newport Bridge Co. v. Commonwealth, 190 S. W. 715.

⇒913(3) (Tex.Cr.App.) Where accused sent interrogatories to a notary public in another state who was not authorized to take depositions, it was proper to refuse new trial because of lack of diligence.—Porter v. State, 190 S. W. 159.

Where accused made only one attempt to subpoena a witness residing in an adjoining county, although the witness was home part of the time during the trial, it was proper to refuse new trial because of accused's lack of diligence.—Id.

⇒917(2) (Tex.Cr.App.) When continuance for absence of witnesses is overruled, motion for new trial, if absent testimony would have been material, and proper diligence was used, should be granted.—Wilson v. State, 190 S. W. 155.

⇒923(2) (Mo.) An objection that there was a prejudicial discrepancy between the statements of a prospective juror and his subsequent testimony *held* too late when made for the first time in the motion for new trial.—State v. Bobbat, 190 S. W. 257.

⇒938(3) (Tex.Cr.App.) In prosecution for illegally selling intoxicants, testimony of party present when defendant claimed he made agreement with state's witness *held* not newly discovered.—Waggoner v. State, 190 S. W. 493.

⇒939(1) (Mo.) The question of diligence on the granting of a new trial for newly discovered evidence rests to an extent in trial court's sound discretion.—State v. Hayden, 190 S. W. 311.

⇒939(3) (Tex.Cr.App.) Where the application disclosed that the witness whose newly discovered testimony was its basis had been present at the trial and that no inquiry to secure her testimony was made, there was lack of diligence, and new trial should not be granted.—Bullington v. State, 190 S. W. 154.

⇒941(1) (Tex.Cr.App.) In prosecution for murder, court erred in not granting new trial for absence of three witnesses, materiality of whose testimony was made manifest, although testimony of one, defendant's mother, would be cumulative of his father's, and testimony of another would be cumulative to some extent.—Wilson v. State, 190 S. W. 155.

⇒958(3) (Mo.) Where facts stated by defendant in affidavit on motion for new trial for newly discovered evidence negatived the assertion of his diligence and his ignorance of the existence of the evidence, the denial of his motion was proper.—State v. Hayden, 190 S. W. 311.

⇒970(1) (Ky.) Where indictment was sufficient and stated a public offense within the jurisdiction of the court, the motion in arrest of judgment after verdict was properly overruled.—Hayes v. Commonwealth, 190 S. W. 700.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

⇒980(2) (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 566, and a charge that the jury could not convict defendant notwithstanding his plea of guilty unless satisfied beyond a reasonable doubt, the state could introduce all evidence it possessed of his guilt.—Kelley v. State, 190 S. W. 173.

⇒980(2) (Tex.Cr.App.) Introduction of evidence, provided for by Code Cr. Proc. 1911, art. 566, on a plea of guilty, may, under article 22, be waived.—Flores v. State, 190 S. W. 496; Diaz v. Same, Id. 498.

Express waiver of introduction of evidence under Code Cr. Proc. 1911, art. 566, on a plea of guilty, cannot be withdrawn after verdict.—Id.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇒1031(3) (Mo.) One who did not attack the indictment by motion to quash or plea in abatement before verdict cannot complain on appeal that the record does not show that the grand jury was composed of 12 men or that it was impeached and sworn.—State v. Stevens, 190 S. W. 866.

⇒1036(2) (Tex.Cr.App.) Answer of a witness, in impeaching accused that he made a statement to witness "just after he was tried for killing a man" cannot be complained of by accused, when it was promptly excluded and the jury directed not to consider it, in the absence of request for further instructions.—Bullington v. State, 190 S. W. 154.

⇒1037(2) (Tex.Cr.App.) Accused cannot complain of alleged improper argument of the prosecutor in the absence of requested instructions to disregard it.—Bullington v. State, 190 S. W. 154.

⇒1037(2) (Tex.Cr.App.) The accused cannot complain of alleged improper argument of the state's attorney in the absence of request for written charge to disregard it.—Dupree v. State, 190 S. W. 181.

⇒1037(2) (Tex.Cr.App.) The misconduct of the prosecuting attorney in his argument does not require a reversal, where accused did not request the court to charge the jury not to consider it.—Deisher v. State, 190 S. W. 729.

⇒1038(1) (Tex.Cr.App.) Where the first objection to a charge is in accused's motion for new trial, it is not reviewable.—Samples v. State, 190 S. W. 486.

⇒1056(1) (Mo.) Exceptions, general or special, to giving of any instruction or failure to more fully instruct, must be taken and saved during trial to warrant review.—State v. Smith, 190 S. W. 288.

⇒1063(4) (Ky.) Where in the prosecution of a bridge company for charging excessive tolls in violation of Ky. St. § 845, reversal was asked merely because the evidence in the agreed statement did not support the judgment, no motion and grounds for new trial were necessary.—Broadway & Newport Bridge Co. v. Commonwealth, 190 S. W. 715.

⇒1064(8) (Ky.) In trial for willful murder, where alleged misconduct of commonwealth's

attorney in argument to jury was not embraced in motion and grounds for a new trial, Court of Appeals was without authority to consider or to pass upon the objection made to it.—Cavanaugh v. Commonwealth, 190 S. W. 123.

⇒1064(7) (Mo.) Where accused desires to complain of inadequacy of the instructions, he should state in his motion for new trial in what particular the instructions are lacking.—State v. Fleetwood, 190 S. W. 1.

⇒1064(7) (Mo.) Where the motion for new trial was grounded, so far as the instructions were concerned, only on those given at the instance of the state, accused cannot object on appeal to instructions given by the court of its own motion.—State v. Stevens, 190 S. W. 866.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

⇒1076(4) (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 920, an appeal in a misdemeanor case tried in the county court can only be perfected by a recognizance in open court.—Whitcomb v. State, 190 S. W. 484.

An appeal bond will not answer the purpose of a recognizance required by Code Cr. Proc. 1911, art. 920, to perfect an appeal in a misdemeanor case tried in the county court, nor will it confer jurisdiction on the Court of Criminal Appeals.—Id.

An instrument not taken in open court and made a matter of record held not a recognizance required by Code Cr. Proc. 1911, art. 920, to confer jurisdiction on the Court of Criminal Appeals.—Id.

The county judge held without authority to order that a recognizance taken during the term be entered after the term nunc pro tunc.—Id.

⇒1083 (Tex.Cr.App.) Where trial court has lost jurisdiction by sentence being pronounced, notice of appeal given, and appeal recognizance entered into, motion for new trial cannot be considered.—Samples v. State, 190 S. W. 486.

(D) Record and Proceedings Not in Record.

⇒1088(19) (Mo.App.) In a prosecution for gaming, where no exception to denial of a motion for new trial is contained in bill of exceptions, though an exception appears in record proper, the court's action will not be reviewed.—State v. Ament, 190 S. W. 636.

⇒1090(1) (Ky.) No bill of exceptions is necessary where nothing occurred below to which defendant desired to or did make an objection or save an exception.—Broadway & Newport Bridge Co. v. Commonwealth, 190 S. W. 715.

Where, in a case submitted on an agreed statement of the facts, an exception was saved to a judgment finding a bridge company guilty of charging excessive tolls, and an appeal prayed, no bill of exceptions was necessary.—Id.

⇒1090(1) (Tex.Cr.App.) Where there is neither a statement of facts nor bills of exceptions, there is nothing to review.—Martinez v. State, 190 S. W. 727.

⇒1090(5) (Mo.) Error in denying motion to quash indictment for duplicity is reviewable only when preserved by bill of exceptions.—State v. Saak, 190 S. W. 296.

⇒1090(7) (Tex.Cr.App.) Where no bill of exceptions is reserved to refusal of continuance, it is not reviewable.—Carson v. State, 190 S. W. 145.

⇒1090(18) (Ky.) All errors occurring below must be complained of at the time of their occurrence, and, together with the objections and exceptions thereto, be incorporated in a bill of exceptions.—Broadway & Newport Bridge Co. v. Commonwealth, 190 S. W. 715.

⇒1091(1) (Ky.) A bill of exceptions is only a record, pointing out alleged errors committed below in relation to the evidence, as well as

other things.—*Broadway & Newport Bridge Co. v. Commonwealth*, 190 S. W. 715.

⇨1091(4) (Tex.Cr.App.) A bill of exceptions to the admission of an entry in a family Bible in evidence, which does not disclose the date of the birth or the age of prosecutrix as shown by the Bible entry, is defective.—*Deisher v. State*, 190 S. W. 729.

⇨1091(4) (Tex.Cr.App.) A bill of exceptions to testimony held insufficient in form to present a question for review.—*Ray v. State*, 190 S. W. 1111.

⇨1091(14) (Tex.Cr.App.) Accused should take a separate bill to the court's action in each instance where he does not correct or change his charge to meet accused's objection.—*Porter v. State*, 190 S. W. 159.

⇨1092(7) (Tex.Cr.App.) Where an order erroneously allowed defendant 90 days after adjournment, instead of after sentence, to file statement and bills of exception, statement and bills filed more than 90 days from sentence will not be considered.—*Carter v. State*, 190 S. W. 731.

⇨1092(9) (Tex.Cr.App.) To authorize the filing of bills of exception, an extension order should be made before the expiration of 80 days from the date of sentence.—*Samples v. State*, 190 S. W. 486.

⇨1093 (Tex.Cr.App.) Accused's bill to refusal to give instruction requested, stating merely that at the proper time he presented his said charge, and asked that it be given, and that the court refused to give it, did not authorize or require review of such refusal.—*Porter v. State*, 190 S. W. 159.

⇨1093 (Tex.Cr.App.) Bills of exceptions to the admission of the entire evidence as to resistance to arrest are not sufficient to show error in admitting evidence of the details and circumstances of the resistance.—*Kelley v. State*, 190 S. W. 173.

⇨1099(5) (Tex. Cr. App.) Where defendant moved for new trial for newly discovered evidence, and court heard testimony on motion during term time, but testimony was not filed until nearly 20 days after term time, ruling denying new trial cannot be reviewed.—*Waggoner v. State*, 190 S. W. 493.

⇨1099(6) (Tex.Cr.App.) Appellant has 90 days from the date of sentence in which to file statement of facts.—*Samples v. State*, 190 S. W. 486.

⇨1099(6) (Tex.Cr.App.) Where an order erroneously allowed defendant 90 days after adjournment instead of after sentence to file statement and bills of exception, statement and bills filed more than 90 days from sentence will not be considered.—*Carter v. State*, 190 S. W. 731.

⇨1104(3) (Ky.) A transcript of the evidence may contain merely the evidence.—*Broadway & Newport Bridge Co. v. Commonwealth*, 190 S. W. 715.

⇨1115(2) (Mo.) Defendant's contention that the court erred in failing to sustain a challenge will not be reviewed where the bill of exceptions fails to disclose any such challenge.—*State v. Bobbat*, 190 S. W. 257.

⇨1116 (Mo.) A plea in abatement can be properly preserved for review only when included in the bill of exceptions.—*State v. Hayden*, 190 S. W. 311.

⇨1120(6) (Mo.) Refusal to allow accused to explain his inculpatory statement could not be reviewed, where there was no showing that explanation would, if given, have been an excuse.—*State v. Dixon*, 190 S. W. 290.

⇨1124(1) (Ky.) Lack of motion and grounds for new trial and bill of exceptions in a criminal case held not to require dismissal of appeal, but to merely eliminate certain questions from consideration.—*Broadway & Newport Bridge Co. v. Commonwealth*, 190 S. W. 715.

⇨1124(1) (Mo.) Where the bill of exceptions does not contain, or call for, a motion for new trial and in arrest of judgment, the review is limited to the record proper.—*State v. Cooper*, 190 S. W. 257.

⇨1125 (Mo.) Where the bill of exceptions does not contain, or call for, a motion for new trial and in arrest of judgment, the review is limited to the record proper.—*State v. Cooper*, 190 S. W. 257.

(F) Dismissal, Hearing, and Rehearing.

⇨1131(4) (Tex.Cr.App.) Under Code Cr. Proc. arts. 902, 904, providing for prisoner's release pending appeal on giving of a recognizance in term time, or an appeal bond during vacation, the Court of Criminal Appeals acquires no jurisdiction of appeal where appellant gives appeal bond during term time.—*Lang v. State*, 190 S. W. 146.

(G) Review.

⇨1137(3) (Tex.Cr.App.) Accused cannot complain of instructions literally following the special charge requested by him.—*Bell v. State*, 190 S. W. 732.

⇨1144(½) (Ky.) In the absence of a bill of exceptions, the court will presume that no error was committed below and affirm the judgment if supported by the pleadings and evidence, but a judgment not so supported will be reversed.—*Broadway & Newport Bridge Co. v. Commonwealth*, 190 S. W. 715.

⇨1144(6) (Tex.Cr.App.) Where the record showed a motion for change of venue which was contested, but failed to show what testimony was heard, the legal presumption is that the court's action was right.—*Bell v. State*, 190 S. W. 732.

⇨1144(17) (Ky.) Where judgment sentencing defendant to house of reform for boys until he should become 21 recited that defendant's age, as fixed, was shown by evidence heard, in absence of contrary showing, court will assume that evidence was heard by court after trial, and that it sustains finding as to defendant's age.—*Fuson v. Commonwealth*, 190 S. W. 1095.

⇨1144(18) (Tex.Cr.App.) Court of Criminal Appeals cannot review denial of motion for new trial for newly discovered testimony, where trial judge heard evidence and found against defendant, in absence of testimony on which trial judge based his finding, presumption obtaining that he ruled correctly.—*Caldwell v. State*, 190 S. W. 152.

⇨1144(18) (Tex.Cr.App.) Where the record shows that on denial of motion for new trial the court heard evidence as to newly discovered testimony, but does not show what the evidence was, the court on appeal must presume that he was clearly authorized to refuse new trial.—*Ray v. State*, 190 S. W. 1111.

⇨1144(19) (Tex.Cr.App.) Where, in bill of exception, defendant recites testimony heard on motion for new trial for newly discovered evidence, and that bill was filed on day court adjourned, Court of Criminal Appeals will presume it was filed before actual adjournment.—*Waggoner v. State*, 190 S. W. 493.

⇨1153(2) (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. 1916, art. 788, as to competency of infant witnesses, the court will not revise an order permitting deceased's seven-year old son to testify as to the homicide in the absence of showing that the discretion of the court was abused.—*Bell v. State*, 190 S. W. 732.

⇨1154 (Ark.) Except in cases of manifest abuse of discretion, Supreme Court will defer largely to conclusions of trial court as to whether prejudice resulted from improper remarks of counsel and whether court has taken affirmative action necessary to remove possible prejudice.—*Wilson v. State*, 190 S. W. 441.

¶1159(2) (Ky.) In criminal case, where defendant's guilt depends upon whether the witnesses for commonwealth or for defendant are to be believed, the verdict will be sustained unless flagrantly against the evidence.—Cavanaugh v. Commonwealth, 190 S. W. 123.

¶1159(4) (Tex.Cr.App.) Credibility of witnesses was question for lower court.—Waggoner v. State, 190 S. W. 493.

¶1166½(12) (Tex.Cr.App.) In trial for aggravated assault, a comment by the court on the legal aspects of certain evidence held not such as to justify reversal.—Porter v. State, 190 S. W. 159.

¶1168(2) (Tenn.) Where a witness, under rule, when examined before the court, stated that a purported dying declaration had been read over to deceased, though an attorney then explained to the witness that such had been the testimony of a former witness, and the jury was then brought in and the witness repeated his testimony, error, if any, was not prejudicial.—Pennington v. State, 190 S. W. 546.

¶1169(2) (Tex.Cr.App.) In a prosecution for rape of a girl under 15, where the undisputed evidence of prosecutrix and her parents was that she was only 13, error in admitting an entry from the family Bible in evidence was harmless.—Deisher v. State, 190 S. W. 729.

¶1169(5) (Tex.Cr.App.) Where inadmissible testimony has been admitted, but is thereafter clearly excluded by the court's charge given at accused's instance, it is not reversible error.—Porter v. State, 190 S. W. 159.

¶1169(5) (Tex.Cr.App.) Error in admitting answer to question whether the victim had ever been mistreated before was not reversible, where the court later expressly withdrew all such testimony and charged the jury to entirely disregard it.—Marion v. State, 190 S. W. 499.

¶1169(9) (Mo.) Admission of opinion testimony as to how far witness could have heard blow defendant struck deceased held harmless.—State v. Fletcher, 190 S. W. 317.

¶1170½(5) (Mo.) Cross-examination, outside the scope of accused's examination in chief, as to his hostility to deceased, was not reversible error under Rev. St. 1909, § 5242, where accused only answered that he had seen persons he liked better.—State v. Dixon, 190 S. W. 290.

¶1171(1) (Tex.Cr.App.) Where evidence on issue of insanity was conflicting, held, in view of testimony and juror's question to witness, that prosecutor's argument that state had no place to confine insane persons except the penitentiary, implying that, if acquitted and found insane, he would be discharged, was reversible error.—Kiernan v. State, 190 S. W. 165.

¶1171(5) (Mo.) A severe rebuke of special prosecutor for referring to defendant's failure to testify, held not to cure the error in view of other improper argument which was not rebuked.—State v. Volz, 190 S. W. 307.

¶1172(1) (Mo.) The giving of an instruction that defendant must be 16 years of age instead of 17, as required by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218, held harmless under uncontradicted evidence that he was 21.—State v. Volz, 190 S. W. 307.

A grammatical error in an instruction which could not mislead the jury does not require reversal of a conviction.—Id.

¶1172(1) (Tex.Cr.App.) Where accused objected to the charge on principals, and the court then stated that he would give the charge requested by accused and withdraw his own charge, but through error withdrew only a part thereof, but his attention was not called to it until the motion for new trial, was no reversible error.—Bell v. State, 190 S. W. 732.

¶1172(2) (Ky.) In prosecution of two defendants for chicken stealing, instruction on matter of reasonable doubt held harmless.—Fuson v. Commonwealth, 190 S. W. 1095.

¶1172(7) (Mo.) Accused cannot complain of error in an instruction fixing the maximum punishment at only one-half that fixed by statute.—State v. Volz, 190 S. W. 307.

¶1172(8) (Tex.Cr.App.) The question of correctness of court's refusal to instruct as to matters pertaining to a charge of assault to murder passes out on accused's acquittal of such offense.—Porter v. State, 190 S. W. 159.

¶1172(9) (Ky.) In prosecution for chicken stealing, court's error in instructing under law enacted at 1916 session of Legislature, repealing indeterminate sentence law, but which did not become effective until June, 1916 (Acts 1916, c. 39), held harmless, where the court sentenced accused under indeterminate law.—Fuson v. Commonwealth, 190 S. W. 1095.

¶1172(9) (Mo.) The giving of an instruction which erroneously states the punishment is harmless where the statute makes it the court's duty to fix the punishment.—State v. Volz, 190 S. W. 307.

(H) Determination and Disposition of Cause.

¶1186(4) (Ky.) Under Cr. Code Prac. § 340, relating to unprejudicial errors, error in refusing to permit defendant to impeach moral character of witness for commonwealth held not ground for reversal.—Cavanaugh v. Commonwealth, 190 S. W. 123.

Court of Appeals will not reverse a judgment or remand case for new trial except as authorized by Cr. Code Prac. § 340, prohibiting the reversal of conviction, unless upon consideration of the whole case it is satisfied that substantial error exists.—Id.

¶1186(4) (Ky.) The overruling of defendant's motion for a directed verdict in prosecution for obtaining money under false pretenses on ground of a technical variance as to the name of company whose agent he represented himself to be was not prejudicial, in view of Cr. Code Prac. § 353.—Hayes v. Commonwealth, 190 S. W. 700.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

¶1207 (Ky.) Defendants accused of chicken stealing in March, 1916, were entitled to be tried under indeterminate sentence law (Ky. St. § 1136), in force when offense was committed, and it was error to instruct under law enacted at 1916 session of Legislature, repealing the indeterminate sentence law, but not effective till June, 1916 (Acts 1916, c. 39).—Fuson v. Commonwealth, 190 S. W. 1095.

CROSS-COMPLAINT.

See Pleading, ¶148.

CROSS-EXAMINATION.

See Witnesses, ¶274, 277, 330, 350, 372.

CROSSINGS.

See Railroads, ¶95, 303-351.

CRUELTY.

See Divorce, ¶27.

CUMULATIVE EVIDENCE.

See Criminal Law, ¶941.

CURTSEY.

See Dower.

CUSTOMS AND USAGES.

See Master and Servant, ¶135.

¶8 (Mo.App.) In action against automobile manufacturer for agent's fraud, evidence by defendant of a custom among motorcar manufacturers of using such terms as "agents" and "commissions" in a sense opposite to their legal and generally understood meaning was inadmissible; it being a palpable distortion of common terms.—Renick v. Brooke, 190 S. W. 641.

DAMAGES.

See Appeal and Error, ¶1004, 1068, 1140, 1171; Assault and Battery, ¶39; Carriers, ¶319, 321, 382; Death, ¶99; Eminent Domain, ¶141; Evidence, ¶532; Fraud, ¶47, 59; Injunction, ¶17; Libel and Slander, ¶120; Logs and Logging, ¶3; Mortgages, ¶217; Municipal Corporations, ¶404; Sales, ¶418; Trial, ¶256.

I. NATURE AND GROUNDS IN GENERAL.

¶6 (Mo.App.) That damages are based on profits or other elements, making them more or less indefinite and speculative, is not ground for denying them when they can be estimated with a reasonable degree of certainty.—Young v. Tilley, 190 S. W. 95.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

¶22 (Tex.Civ.App.) Damages which naturally follow the breach of the contract, not accompanied by notice of special conditions, are direct damages, while damages affected by such notice are consequential.—McKibbin v. Pierce, 190 S. W. 1149.

¶23 (Tex.Civ.App.) Where one party has defaulted a contract with another on account of a third party's default, if third party knew of circumstances creating special damages, such damages are recoverable.—McKibbin v. Pierce, 190 S. W. 1149.

Damages from breach of contract affected by notice of special conditions are consequential damages.—Id.

Where party has notice of special conditions producing increase of liability and makes contract, protesting he will not be liable for such damages, the other party not consenting thereto, he will be bound to such damages.—Id.

Where agreement is made with reference to special conditions producing increased liability, notice of such conditions is not necessary.—Id.

¶30 (Mo.App.) In action for injuries sustained, plaintiff held entitled to fair compensation for pain and anguish of body and mind, and for loss of earnings before and after bringing suit directly caused by injury.—Dittrich v. American Mfg. Co., 190 S. W. 1006.

(B) Aggravation, Mitigation, and Reduction of Loss.

¶62(4) (Ky.) One injured by violation of an agreement to do a specific act is not ordinarily required to seek and perform other contracts, and thereby reduce the loss to the original contract breaker.—R. Burleigh & Sons v. Overton, 190 S. W. 472.

(C) Interest, Costs, and Expenses of Litigation.

¶69 (Mo.App.) Interest is not recoverable on a claim ex delicto against a railroad company for fires prior to rendition of judgment.—Oliver v. St. Louis, I. M. & S. Ry. Co., 190 S. W. 361.

IV. LIQUIDATED DAMAGES AND PENALTIES.

¶81 (Tex.Civ.App.) Stipulation in contract for sale of land for forfeiture as liquidated damages of earnest money for failure to accept deed, money to be returned if a good merchantable title could not be shown, held valid stipulation for liquidated damages.—Nelson v. Butler, 190 S. W. 811.

¶85 (Tex.Civ.App.) A contract for sale of land having fixed a certain amount as liquidated damages for vendee's refusal to accept deed, the vendor cannot have greater damages.—Nelson v. Butler, 190 S. W. 811.

V. EXEMPLARY DAMAGES.

¶87(2) (Mo.App.) Nominal actual damages will support a verdict for punitive damages.—Reber v. Bell Telephone Co. of Missouri, 190 S. W. 612.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

¶105 (Mo.App.) The measure of damages against a railroad for killing stock is the value of the stock in the vicinity where and when the animals were killed.—Shahan v. Lusk, 190 S. W. 43.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

¶131(3) (Mo.App.) In action for injuries received, a verdict for \$1,500 held not excessive where plaintiff's hands were seriously crippled, and he was unable to work for six months.—Dittrich v. American Mfg. Co., 190 S. W. 1006.

¶132(6) (Mo.App.) A verdict of \$3,250 for injuries to a servant by which the muscles in his leg between the ankle and the knee were mashed, was not so excessive as to indicate passion or prejudice or improper persuasion.—Allen v. Quercus Lumber Co., 190 S. W. 86.

¶132(8) (Tex.Civ.App.) In servant's action for injuries resulting in disability of hand, verdict for \$4,500 held not excessive.—Marshall Mill & Elevator Co. v. Scharnberg, 190 S. W. 229.

¶134(1) (Ark.) A verdict of \$1,000 for severe injuries to the back and knee, resulting in intense suffering and diminished earning capacity, held not excessive.—St. Louis, I. M. & S. Ry. Co. v. Cobb, 190 S. W. 107.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

¶168(2) (Mo.App.) In a servant's action for injuries, though no claim was made for loss of services, evidence tending to show that plaintiff had not been working and was unable to work, since he had left hospital, held admissible where offered only to show permanency and extent of plaintiff's injuries and disabilities.—Stobile v. McMahon, 190 S. W. 652.

¶174(2) (Mo.App.) In an action against a railroad for killing plaintiff's animals, the amount he paid for them one year before is not evidence of their value at the time and place where they were killed.—Shahan v. Lusk, 190 S. W. 43.

¶189 (Mo.App.) Evidence held sufficient for estimating damages for breach of contract to furnish work cutting timber, at a certain price per thousand, and a certain number of boarders at a certain price, where one boarder and work was furnished for part of the time.—Young v. Tilley, 190 S. W. 95.

(C) Proceedings for Assessment.

¶208(5) (Tex.Civ.App.) In suit to cancel deed on ground of fraudulent representations, etc., court did not err in submitting issue of plain-

tiff's reasonable and necessary expense in going to and returning from land, where there was evidence authorizing its submission.—*Pitt v. Gilbert*, 190 S. W. 1157.

⚡217 (Mo.App.) An instruction that the jury, if they found for plaintiff, should assess the value of the dog killed, while wrongfully retained by defendant, at its fair market value at the time suit was brought, *held proper*.—*Penter v. Ritter*, 190 S. W. 29.

DEATH.

See Abatement and Revival; Executors and Administrators, ⚡11, 12; Partnership, ⚡243; Witnesses, ⚡139, 159.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

⚡2(1) (Mo.) Whether circumstances surrounding assured's disappearance were such as to raise presumption of death after seven years was a question for the jury.—*Bonslett v. New York Life Ins. Co.*, 190 S. W. 870.

⚡2(2) (Mo.) Death is not presumed at any particular time within the seven years' absence necessary to raise that presumption, but a definite date may be circumstantially shown.—*Bonslett v. New York Life Ins. Co.*, 190 S. W. 870.

⚡2(3) (Mo.) Evidence showing a motive for assured's disappearance, to rebut the presumption of death, was proper.—*Bonslett v. New York Life Ins. Co.*, 190 S. W. 870.

Statutes of another state regarding crimes, where there was no substantial evidence showing insured guilty of such crimes, were inadmissible to show motive for his disappearance and to rebut presumption of death.—*Id.*

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⚡32 (Mo.App.) Under the federal Employers' Liability Act, the sister of a deceased employé, his only next of kin, who had received occasional gifts of money from him and who might have received other gifts had he lived, was not a dependent.—*Smith v. Pryor*, 190 S. W. 69.

(D) Pleading and Evidence.

⚡49(1) (Mo.) In administrator's action, under Rev. St. 1909, § 5425, as amended by Laws 1911, p. 203, for death of railroad's switchman, petition, which averred deceased left no surviving wife or children, but did not aver he left surviving any person capable of inheriting, stated no cause of action.—*Lyons v. St. Louis Southwestern Ry. Co.*, 190 S. W. 859.

⚡57 (Ky.) A defense that the father of a boy under 16 years permitted him to work in a coal mine contrary to Ky. St. § 331a, subsec. 9, prohibiting such employments, is not available to defendant employer, in an action for the minor's death, although the father would receive any damages recovered, unless pleaded in the answer.—*Carter Coal Co. v. Love*, 190 S. W. 481.

⚡58(1) (Mo.) In action for death of servant, where no one saw the accident, and no eye-witness testified on the subject, the law presumes that at the time of the injury the servant was exercising due care for his own safety.—*Grant v. Kansas City Southern Ry. Co.*, 190 S. W. 588.

⚡72 (Tex.Civ.App.) In action for death of plaintiffs' minor intestate employed by defendant, evidence as to plaintiffs' property *held* admissible to show reasonable expectation of pecuniary assistance from deceased, but not to increase amount of damages.—*Southwestern Portland Cement Co. v. Presbitero*, 190 S. W. 778.

(E) Damages, Forfeiture, or Fine.

⚡99(3) (Ky.) Five thousand dollars damages *held* not excessive for the death of a minor about 16 years of age, working in a coal mine.—*Carter Coal Co. v. Love*, 190 S. W. 481.

⚡99(5) (Mo.App.) It is only the present value of her loss that the dependent next of kin of a deceased employé can recover under the federal Employers' Liability Act, and hence a verdict of \$1,500 amounting to twice the present value of contributions to next of kin during her life expectancy was excessive.—*Smith v. Pryor*, 190 S. W. 69.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

DECEIT.

See Fraud.

DECLARATION.

See Pleading, ⚡56, 64.

DECLARATIONS.

See Criminal Law, ⚡413, 417; Evidence, ⚡266, 271; Principal and Agent, ⚡22.

DECREE.

See Equity, ⚡427.

DEDICATION.

I. NATURE AND REQUISITES.

⚡20(6) (Mo.App.) Voluntary acts of railroad in opening street across right of way *held* to constitute voluntary dedication in pais of street across right of way.—*Phillips v. Pryor*, 190 S. W. 1027.

⚡37 (Mo.App.) Where intention to dedicate street is unequivocally manifested, dedication is complete, and no user for any definite period is necessary, so that street dedicated by railroad across right of way became a lawfully established street, and crossing required was such as law demanded.—*Phillips v. Pryor*, 190 S. W. 1027.

DEEDS.

See Cancellation of Instruments; Covenants; Estoppel, ⚡38; Fraudulent Conveyances; Mortgages; Reformation of Instruments; Specific Performance; Taxation, ⚡760, 788; Vendor and Purchaser, ⚡230.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

⚡17(1) (Mo.) Where mother executed warranty deed to son and took a note secured by a mortgage on property and recognized the mortgage as valid, a purpose is evidenced as declared in deed to transfer legal title and to secure mortgage lien for any remainder of purchase price.—*Shafer v. Shafer*, 190 S. W. 323.

⚡19 (Mo.) Where three promises of grantee were not so mutually dependent that his failure to perform one of such promises would not render performance of either of other promises impossible, there remained sufficient consideration to sustain the deed as against suit in equity to rescind.—*Shafer v. Shafer*, 190 S. W. 323.

(B) Form and Contents of Instruments.

⚡38(1) (Tex.Civ.App.) A deed, to a place "known as the place built on by Thos. Davis and lastly occupied by G. N. Breckenridge" was not void for uncertainty as the land might be identified by extrinsic evidence.—*Petty v. Wilkins*, 190 S. W. 531.

(E) Validity.

⚡72(1) (Ky.) An influence, acquired by modest persuasion, by arguments and appeals to the affections, not destroying free agency, do not amount to undue influence, but the influence obtained by excessive importunity, superiority of will or mind destroying free agency avoids the deed, etc., thereby procured.—*Beard v. Beard*, 190 S. W. 708.

III. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⚡93 (Mo.) To properly construe a deed, court must look at its entire face and ascertain grantor's intention from all language used.—*Tennison v. Walker*, 190 S. W. 9.

Where deed shows ignorance of writer technical meaning of words used therein should not be too closely adhered to, but intent of grantor should be ascertained from entire instrument.—*Id.*

In construing deed which on its face bears evidence of ignorance of writer, courts should recognize his unskillfulness and gather true intention of grantor from the entire instrument.—*Id.*

⚡100 (Ky.) Deed should be interpreted in light of character, situation, and purposes of parties, and of law in force when executed and delivered.—*Board of Education for Jefferson County v. Littrell*, 190 S. W. 465.

⚡109 (Mo.) Where the grantee purchases property and it is not a gift by grantor, it will not be presumed the latter intended to make same limitations against former's right of alienating property as if property had been a gift by grantor.—*Tennison v. Walker*, 190 S. W. 9.

(B) Property Conveyed.

⚡118 (Ky.) Evidence held to sustain conclusion of the chancellor that certain deeds embraced the land in controversy.—*Hardaway v. Webb*, 190 S. W. 1071.

(C) Estates and Interests Created.

⚡120 (Mo.) If grantor of land at time of executing deed had acquired title by adverse possession, her title would pass regardless of what either party thought about effect of transaction.—*Connor Realty Co. v. Sparlin*, 190 S. W. 6.

⚡124(4) (Mo.) A deed granting title to grantor's daughter "and her bodily heirs and assigns," but using apt words to convey a fee in other clauses, construed, and held to convey a fee simple to daughter.—*Tennison v. Walker*, 190 S. W. 9.

⚡127(2) (Ky.) In husband's conveyance, in consideration of love and affection for wife and their children, to her "and her bodily heirs by" S. such words were intended to be synonymous with "children," and were words of purchase, and not of limitation.—*Scott v. Scott*, 190 S. W. 143.

⚡127(2) (Mo.) Under Rev. St. 1909, § 2872, a conveyance to the grantee "and his bodily heirs, creating an estate tail at common law," would have given to the grantee a life estate and heirs of her body a remainder in fee.—*Tennison v. Walker*, 190 S. W. 9.

⚡129(4) (Ky.) In determining whether a husband's conveyance to his wife and their children passes to the wife a joint estate with the children, or a life estate, with remainder to children, the relationship of the parties and the language of the deed are to be considered, and unless a contrary intent appears the wife will be held to receive a life estate only.—*Scott v. Scott*, 190 S. W. 143.

⚡130 (Ky.) Estate which grantor and heirs had in land conveyed to trustees of school district by deed, providing that it should revert when it ceased to be used for public school purposes,

held a present vested interest of the nature of a reversion.—*Board of Education for Jefferson County v. Littrell*, 190 S. W. 465.

(E) Conditions and Restrictions.

⚡155 (Mo.) Where a deed is based on an agreement to support the grantor, the presence of a condition subsequent is a prerequisite to the granting of relief to the grantor by setting aside and canceling the deed for breach.—*Shafer v. Shafer*, 190 S. W. 323.

⚡160 (Mo.) The effect of the breach of a condition subsequent is the forfeiture of a vested estate, and hence not to be favored.—*Shafer v. Shafer*, 190 S. W. 323.

(F) Loss or Relinquishment of Rights.

⚡177 (Tenn.) Where a grantor made two conveyances correctly describing land, but staked off a part of the first as belonging to the second, held, that nothing else appearing, successors in title of first grantee may recover that portion of their lot as shown by their deed, which was staked off as belonging to second.—*Ferguson v. Prince*, 190 S. W. 548.

IV. PLEADING AND EVIDENCE.

⚡211(3) (Mo.) In a mother's suit in equity to set aside and cancel her warranty deed to her son, evidence held not to show any fraud in procuring the conveyance.—*Shafer v. Shafer*, 190 S. W. 323.

DE FACTO OFFICERS.

See Municipal Corporations, ⚡147.

DEFAULT.

See Appeal and Error, ⚡957; Judgment, ⚡92-143.

DEFINITIONS.

See Criminal Law, ⚡800; Trial, ⚡219.

DELEGATION OF DUTY.

See Master and Servant, ⚡103.

DELEGATION OF POWER.

See Intoxicating Liquors, ⚡10, 12.

DELIVERY.

See Bills and Notes, ⚡64, 517; Carriers, ⚡91; Insurance, ⚡136; Sales, ⚡181.

DEMAND.

See Exchange of Property.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ⚡404.

DEMURRER.

See Appeal and Error, ⚡927, 997; Criminal Law, ⚡752; Pleading, ⚡205-214; Quo Warranto, ⚡52.

DEPARTURE.

See Pleading, ⚡420.

DEPOSITIONS.

See Appeal and Error, ⚡236, 242, 260, 683.

⚡17 (Ky.) Civ. Code Prac. § 606, subsec. 8, providing for examination of adverse party before trial, gives a party the unrestricted right to take the deposition of the adverse party, though the witness does not belong to the class named in section 554, specifying when a deposition may be read.—*Christian's Adm'r v. Ennis*, 190 S. W. 675.

§19 (Ky.) Under Civ. Code Prac. § 574, providing that if all the parties against whom deposition is read are under certain disabilities, the deposition must be taken upon interrogatories, applies where the deposition is read against only an infant defendant, although there are other parties defendant.—*Luscher v. Julian's Adm'r*, 190 S. W. 692.

§49 (Tex.Cr.App.) Code Cr. Proc. 1911, art. 820, does not authorize a notary public in another state to take depositions of residents thereof in criminal cases.—*Porter v. State*, 190 S. W. 159.

§98 (Tex.Civ.App.) Under Rev. St. 1911, art. 3677, as to depositions, and articles 7778, 7779, as to trial or right of property, depositions taken by claimants *held* to be in claimant's suit, although entitled in original suit.—*Dawedoff v. Hooper*, 190 S. W. 522.

DEPOSITS.

See Ball, §73; Banks and Banking, §127; Damages, §81; Garnishment, §56.

DEPOSITS IN COURT.

See Garnishment, §59.

DEPOTS.

See Covenants, §1.

DERRICKS.

See Master and Servant, §233.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Wills.

I. NATURE AND COURSE IN GENERAL.

§8 (Ky.) An heir inherits no interest in property which his ancestor had an oral contract to purchase, where another heir after the ancestor's death paid a small balance due and took a conveyance to himself.—*Vanover v. Steele*, 190 S. W. 687.

§15 (Ky.) On the death of an infant intestate without issue, property acquired by him from his paternal grandfather, who died after the death of the infant's father and before the infant, descends to the infant's mother, under Ky. St. § 1393, not to his brothers, under section 1401.—*Vanover v. Steele*, 190 S. W. 667.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§71(6) (Ky.) In a suit for partition, evidence *held* to show that deceased brother of plaintiff was an infant when he died, so that his interest in the land inherited from his father passed to his brother, under Ky. St. § 1401, instead of to his mother, under section 1393.—*Vanover v. Steele*, 190 S. W. 667.

§91(1) (Tex.Civ.App.) For an heir to sue a debtor of his ancestor's estate, he must allege and prove there was no administration and none necessary.—*Freeman v. Klaerner*, 190 S. W. 543.

DESCRIPTION.

See Boundaries, §3, 11; Deeds, §38; Disorderly House, §12; Frauds, Statute of, §110.

DESTRUCTION.

See Bills and Notes, §70.

DETINUE.

See Replevin.

DIRECTING VERDICT.

See Trial, §168, 169.

DIRECTORS.

See Banks and Banking, §51, 57; Corporations, §415, 425.

DISCHARGE.

See Bankruptcy, §435, 436; Bills and Notes, §52; Criminal Law, §576; Principal and Surety, §195; Release.

DISCRETION OF COURT.

See Appeal and Error, §957, 959; Criminal Law, §699, 939, 1153, 1154; Judgment, §139; Pleading, §236; Specific Performance, §8.

DISMISSAL AND NONSUIT.

See Appeal and Error, §627, 773-792; Costs, §48; Criminal Law, §1131; Judgment, §654; Justices of the Peace, §166; Limitation of Actions, §130.

I. VOLUNTARY.

§18 (Mo.) Rev. St. 1909, § 1980, *held* not to authorize plaintiff after trial, where verdict for defendant is set aside, to take a nonsuit pending the term, against the consent of a defendant who prays an appeal from the order granting new trial.—*State ex rel. J. Hahn Bakery Co. v. Anderson*, 190 S. W. 857.

II. INVOLUNTARY.

§56 (Tex.Civ.App.) All parties necessary to the final disposition of main issue in a suit should be joined, and their omission will require either a dismissal or a stay of proceedings until brought in.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

DISORDERLY HOUSE.

See Criminal Law, §419, 420, 811; Indictment and Information, §128, 132.

§4 (Mo.) In prosecution for keeping a bawdyhouse, etc., contrary to Rev. St. 1909, § 4758, instruction that accused, a hotel keeper, might furnish lodging even for prostitutes, his only duty being not knowingly to permit them to ply their avocation about his premises, was improperly refused.—*State v. Malloch*, 190 S. W. 266.

§12 (Mo.) An indictment for keeping a bawdyhouse, contrary to Rev. St. 1909, § 4758, need not charge knowledge by accused that the house was kept for immoral purposes.—*State v. Malloch*, 190 S. W. 266.

An indictment for keeping bawdyhouse, describing the house as located at the northwest corner of the intersection of certain streets, sufficiently designated the house.—*Id.*

§13 (Mo.) In prosecution for keeping a bawdyhouse, the indictment covering only a hotel building, admission of evidence of arrest in hotel "annex" in another building of persons charged with lewd conduct was error.—*State v. Malloch*, 190 S. W. 266.

§16 (Tex.Cr.App.) In a trial for keeping a house for prostitutes, testimony of a witness *held* admissible, on question of conveying knowledge to accused of character of women residing at house, and that they were plying their vocation.—*Wyatt v. State*, 190 S. W. 153.

§16 (Tex.Cr.App.) In a prosecution under Pen. Code 1911, art. 500, relative to keeping disorderly houses, evidence that the house in question was in the "reservation district" was admissible.—*Speers v. State*, 190 S. W. 164.

DISPUTE.

See *Compromise and Settlement*, ¶6; *Executors and Administrators*, ¶251.

DISSOLUTION.

See *Banks and Banking*, ¶316; *Corporations*, ¶617-621; *Partnership*, ¶328-342; *Schools and School Districts*, ¶44.

DISTRICT AND PROSECUTING ATTORNEYS.

See *Corporations*, ¶613; *Criminal Law*, ¶700, 1087; *Evidence*, ¶44; *Officers*, ¶100; *Statutes*, ¶102.

¶5(1) (Mo.) In view of Const. art. 9, § 28. Rev. St. 1908, § 3508, and section 8057, subd. 19, *held*, that the word "counties" in Laws 1913, p. 110, as to payment by "counties" of fees to prosecuting or circuit attorneys for attending coroners' inquests, should be construed to include the city of St. Louis, so that such city is responsible for the attorney's fees.—State ex rel. Harvey v. Sheehan, 190 S. W. 864.

DISTRICTS.

See *Drains*; *Highways*, ¶90; *Levees*, ¶5, 11; *Schools and School Districts*.

DITCHES.

See *Drains*.

DIVISION.

See *Levees*, ¶5.

DIVORCE.

See *Courts*, ¶474; *Insane Persons*, ¶87, 94.

II. GROUNDS.

¶25 (Tex.Civ.App.) Husband's refusal to sell their home and move to some other community did not entitle wife to divorce.—Hartman v. Hartman, 190 S. W. 846.

¶27(1) (Ky.) There is no settled rule as to what is necessary to show such cruel and inhuman behavior as to indicate a husband's settled aversion toward his wife, except that his behavior need not be brutal or violent.—Burns v. Burns, 190 S. W. 683.

¶29 (Mo.App.) Where a wife thought she was acting for her husband's benefit in consigning him unnecessarily to a hospital for insane, her innocent wrong cannot be construed as an indignity within meaning of divorce statutes.—Wilson v. Wilson, 190 S. W. 53.

Where a wife was acting in good faith with support of probable cause in opposing termination of her guardianship over husband, her action was not an indignity, within meaning of divorce statutes.—Id.

¶38 (Ky.) Under Ky. St. § 2121, authorizing divorce, the "other cause" is one which in severity rises above the ordinary, common, and trivial disputes and differences occurring between husband and wife, though falling below conduct furnishing cause for an absolute divorce.—Burns v. Burns, 190 S. W. 683.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(C) Pleading.**

¶91 (Tex.Civ.App.) In divorce case, petition should follow language of statute respecting jurisdictional facts of residence in state and county.—Bloch v. Bloch, 190 S. W. 528.

¶93(8) (Tex.Civ.App.) In wife's suit for divorce on ground of cruel treatment, in absence of an allegation of physical violence or imputa-

tion of want of chastity, petition must allege such treatment as will produce a degree of mental distress which threatens to impair her health.—Bloch v. Bloch, 190 S. W. 528.

In wife's suit for divorce on ground of cruel treatment, a petition which failed to specifically state time, place, and material circumstances of acts of cruel treatment alleged *held* insufficient upon special exception, as stating merely conclusion of pleader.—Id.

¶108 (Tex.Civ.App.) In wife's suit for divorce on ground of cruel treatment, husband need not answer at all to render it court's duty to hear testimony showing that wife has been guilty of similar acts of misconduct toward husband.—Hartman v. Hartman, 190 S. W. 846.

In wife's divorce suit for cruel treatment, husband's answer alleging facts as to wife's cruelty toward him as justification of his having her tried on charge of insanity *held* to plead such cruel acts of wife sufficiently to admit evidence of them.—Id.

(D) Evidence.

¶124 (Ky.) Under Ky. St. § 2121, evidence in a suit for absolute divorce, *held* sufficient to show a cause other than the statutory grounds for divorce, authorizing the court in its discretion to grant alimony.—Burns v. Burns, 190 S. W. 683.

¶132 (Mo.App.) In a wife's suit for divorce on ground of indignities constituting a statutory cause for divorce, in which husband filed a cross-petition for divorce on same ground, evidence *held* to sustain a judgment refusing each party a divorce.—Wilson v. Wilson, 190 S. W. 53.

(E) Dismissal, Trial or Hearing, and New Trial.

¶150(2) (Tex.Civ.App.) In divorce case, where evidence was conflicting upon material issues, failure of court to file findings of fact and conclusions of law upon seasonable request therefor *held* error.—Bloch v. Bloch, 190 S. W. 528.

(G) Appeal.

¶184(10) (Mo.App.) While the appellate court is not bound by findings of the trial court in divorce cases, where evidence is conflicting and does not greatly preponderate either way, deference will be given to judgment of trial judge who had the advantage of personal contact with parties and witnesses.—Wilson v. Wilson, 190 S. W. 53.

(H) Fees and Costs.

¶197 (Ky.) Under Ky. St. § 900, in action for alimony or divorce, wife may properly be allowed, as part of her costs, a reasonable attorney's fee, which the husband must pay.—Edelston v. Edelston, 190 S. W. 1083.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

¶227(1) (Ky.) In wife's suit for absolute divorce and for alimony and to recover certain personal property, etc., not presenting any difficult legal question nor requiring an unreasonable time in taking the proof, the allowance of an attorney's fee of \$300 to the wife was sufficient.—Burns v. Burns, 190 S. W. 683.

¶240(2) (Ky.) On absolute divorce, where it appeared that during the 15 years of their married life the property of the parties had increased by about \$12,000, to which the wife had largely contributed, she should be allowed alimony in the amount of \$4,000.—Burns v. Burns, 190 S. W. 683.

¶240(2) (Mo.App.) A gift of a note by a husband to sister on eve of separation from his wife, obviously done for purpose of reducing alimony, should not be listed as a liability in determining his estate for purpose of fixing amount of alimony.—Griffith v. Griffith, 190 S. W. 1021.

☞240(4) (Mo.App.) Where a wife was awarded a divorce and custody of minor child, it appearing that defendant's net worth was \$3,000 and net annual income \$900, an allowance of \$20 per month without allowance for maintenance of child was inadequate and should be at least \$30 per month.—Griffith v. Griffith, 190 S. W. 1021.

☞240(5) (Mo.App.) Where a wife was awarded custody of a minor child, if alimony in gross be awarded including maintenance of child, an amount equal to a moiety of defendant's net worth of \$3,000 would not be excessive.—Griffith v. Griffith, 190 S. W. 1021.

☞252 (Ky.) Where the wife obtained a judgment for an absolute divorce, an organ, a sewing machine, a number of rugs, and other household furniture purchased by her out of her own means should be adjudged to her.—Burns v. Burns, 190 S. W. 683.

☞254 (Tex.Civ.App.) Allegation of original and supplemental petitions in action for divorce, relating to the separate property of plaintiff and the claims of defendant with reference thereto, held to authorize judgment that plaintiff owned land in her own separate right and quieting title thereto as against defendant.—Borton v. Borton, 190 S. W. 192.

☞282 (Mo.App.) Where defendant consented in open court to an order allowing suit money to plaintiff, and did not object or except to the allowance the trial court cannot be convicted of error.—Wilson v. Wilson, 190 S. W. 53.

☞286 (Ky.) The Supreme Court has no authority to disturb a judgment for divorce granted by the trial court, and, on appeal, can only determine whether the court under the proof properly adjudged alimony to the plaintiff.—Burns v. Burns, 190 S. W. 683.

Under Ky. St. § 2121, and where the evidence would have justified a decree a mensa, the facts may be looked into upon the question of the allowance of alimony.—Id.

VI. CUSTODY AND SUPPORT OF CHILDREN.

☞308 (Mo.App.) Where a wife has been awarded a divorce and custody of a minor child, whether alimony in gross or monthly alimony be allowed, such amount should include an allowance for maintenance of child.—Griffith v. Griffith, 190 S. W. 1021.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Boundaries, ☞36; Criminal Law, ☞663; Evidence, ☞354-366.

DOGS.

See Animals, ☞100.

DOMICILE.

See Divorce, ☞91.

DONATIONS.

See Gifts.

DOWER.

I. NATURE AND REQUISITES.

☞26 (Ark.) In view of Kirby's Dig. § 2691, the right of dower cannot exist against the holder of a vendor's lien.—Bothe v. Gleason, 190 S. W. 562.

II. INCHOATE INTEREST.

(A) Rights and Remedies of Wife.

☞29 (Mo.) An inchoate right of dower prior to the death of husband is a contingent right, and in no sense vested, but a mere expectancy or possibility incident to the marriage relation,

contingent on survival.—First Nat. Bank v. Kirby, 190 S. W. 597.

☞35 (Mo.App.) In an action to recover plaintiff's interest in real estate formerly conveyed by herself and husband to defendant, upon defendant's oral promise to pay plaintiff value of her interest, plaintiff could recover for value of her inchoate right of dower.—Grayson v. Grayson, 190 S. W. 930.

(B) Bar, Release, or Forfeiture.

☞49(4) (Mo.) Under Rev. St. 1909, § 2788, providing that the wife may relinquish dower by joint deed with the husband, acknowledged and certified, section 8304, providing that a married woman shall be deemed a feme sole, did not enable her by a simple deed without acknowledgment and certification to pass her inchoate right of dower in real estate owned by the husband.—First Nat. Bank v. Kirby, 190 S. W. 597.

III. RIGHTS AND REMEDIES OF WIDOW.

☞84 (Mo.App.) Rev. St. 1909, §§ 8499-8501, providing for ascertainment of uncertain or contingent values by mortality tables are not necessarily exclusive and do not refer to an inchoate dower estate.—Grayson v. Grayson, 190 S. W. 930.

DRAINS.

See Eminent Domain, ☞2; Statutes, ☞123.

I. ESTABLISHMENT AND MAINTENANCE.

☞2(1) (Mo.) Act March 27, 1913 (Laws 1913, p. 271), as to constructing and improving ditches, held not invalid.—Barnes v. Pikey, 190 S. W. 883.

☞13 (Mo.) Drainage districts are public corporations and their ditches are devoted to, and therefore are, public uses.—State ex rel. McWilliams v. Little River Drainage Dist., 190 S. W. 897.

☞28 (Mo.) Since the statutes as to organization of drainage districts are remedial and require liberal construction, although Laws 1913, p. 241, § 16, requires procedure as to condemnation of lands for drains to follow that provided for telephone and railroad rights of way, and Rev. St. 1909, § 2360, as to telephone and railroad rights of way, requires that the petition shall show that an effort has been made to agree with the owner, nevertheless the petition for appraisal of land for drainage purposes need not so allege.—Big Lake Drainage Dist. v. Rolwing, 190 S. W. 261.

☞39 (Ark.) As it was duty of property owner when made a party to a suit to foreclose a lien for drainage assessments then to set up all his defenses against organization of drainage district, errors and any defects will not be considered in a suit to set aside foreclosure decree.—Neely v. Lee Wilson & Co., 190 S. W. 431.

☞45 (Mo.) In view of Const. art. 6, § 12, as to jurisdiction of county courts, and article 9, § 1, recognizing counties as legal subdivisions of the state, the Legislature may grant drainage districts the right to cross public highways without obtaining the consent of counties or county courts.—State ex rel. McWilliams v. Little River Drainage Dist., 190 S. W. 897.

☞55 (Mo.) Under the circuit court act as to drainage districts, now found, with amendments, as sections 5496-5541, Rev. St. 1909, where a drainage canal crosses the public highway, the duty of paying for a bridge across the canal rests on the county.—State ex rel. McWilliams v. Little River Drainage Dist., 190 S. W. 897.

II. ASSESSMENTS AND SPECIAL TAXES.

☞76 (Mo.) Where the minutes of one board meeting of a drainage district showed that the

engineer recommended that certain lands be condemned, or that no benefits be assessed, and the board postponed action for one meeting, and at a subsequent meeting, the minutes showed that it was voted to assess the property, the proceedings were not invalidated by insertion of the advisory clause; the engineer having no power in the matter.—*Big Lake Drainage Dist. v. Rolling*, 190 S. W. 261.

☞79 (Mo.) Act March 27, 1913 (Laws 1913, p. 271), as to ditches requiring (section 5611b) apportionment of maintenance tax on the basis of "benefits assessed for original construction," held satisfied by order, in view of Rev. St. 1909, §§ 5589, 5591.—*Barnes v. Pikey*, 190 S. W. 883.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Criminal Law, ☞53; Municipal Corporations, ☞804.

DUE PROCESS OF LAW.

See Constitutional Law, ☞289-314.

DUPLICITY.

See Pleading, ☞64.

DURESS.

See Release, ☞18.

DYING DECLARATIONS.

See Homicide, ☞203-216.

EASEMENTS.

See Frauds, Statute of, ☞60; Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

☞1 (Tex.Civ.App.) An "easement" is the right which one person has to use the land of another for a specified purpose.—*Callan v. Walters*, 190 S. W. 829.

☞7(2) (Tex.Civ.App.) To acquire easement of way by prescription, limitation must have continued for period of ten years.—*Callan v. Walters*, 190 S. W. 829.

☞8(1) (Tex.Civ.App.) Use of wooden stairway outside of building did not create easement in owner's adjoining lot; for no man can have easement on his own property.—*Callan v. Walters*, 190 S. W. 829.

Where owner of building with outside stairway conveyed adjoining lot to bank of which he was president and principal stockholder, there was nothing in bank's use of wall as partition wall to cause inquiry as to what consideration was being paid therefor.—*Id.*

☞8(4) (Tex.Civ.App.) Use of way over land of another when owner is also using it is not such adverse possession as will serve as notice of claim of right; as it is not inconsistent with license from owner.—*Callan v. Walters*, 190 S. W. 829.

☞12(2) (Tex.Civ.App.) An easement may be created by grant, in which case it must be done with same formality as is necessary for conveyance of fee.—*Callan v. Walters*, 190 S. W. 829.

☞17(1) (Tex.Civ.App.) Under deed of house built with outside stairway and to which after conveyance of adjoining lots, entrance had been made to building thereon, held, that grantee took no right of use.—*Callan v. Walters*, 190 S. W. 829.

☞18(2) (Tex.Civ.App.) An easement by way of necessity arises where owner of land sells part thereof, and it is necessary to pass over

land sold to reach that which he has retained.—*Callan v. Walters*, 190 S. W. 829.

☞18(3) (Tex.Civ.App.) Use of stairway in new adjoining building for access to existing building in place of former outside stairway held not necessary to use of upper story of original building.—*Callan v. Walters*, 190 S. W. 829.

☞35 (Tex.Civ.App.) If there are exceptions taking case of prescriptive easement of way out of statute, they must be pleaded.—*Callan v. Walters*, 190 S. W. 829.

☞36(1) (Tex.Civ.App.) Rule that one asserting right of way over another's land by prescription has burden of establishing negative fact that owners of servient estate were free from legal disability during prescription period applies only where prescription is claimed against those who are not parties to suit.—*Callan v. Walters*, 190 S. W. 829.

EIGHT-HOUR LAW.

See Master and Servant, ☞13.

EJECTION.

See Carriers, ☞357, 382.

EJECTMENT.

See Judgment, ☞194; Tenancy in Common, ☞55; Trespass to Try Title.

I. RIGHT OF ACTION AND DEFENSES.

☞9(2) (Tenn.) A widow, not being the heir of the husband, cannot recover in ejectment.—*Ferguson v. Prince*, 190 S. W. 548.

☞13 (Mo.) Ejectment is a legal action, and can only be maintained on a showing of existing legal title in the plaintiff or a legally devised title from a common source.—*McQuitty v. Steckdaub*, 190 S. W. 590.

ELECTION.

See Criminal Law, ☞678; Indictment and Information, ☞132; Pleading, ☞369.

ELECTION OF REMEDIES.

☞12 (Mo.App.) A claimant of attached goods is not barred, on theory of election, from claiming the goods by interpleader, by his having made a third party claim in the attachment action under the laws applicable to the city of St. Louis as to indemnifying bond in attachment (Rev. St. 1899, p. 2550; Rombauer's Compilation of Rev. Code of St. Louis [Ed. 1912] pp. 22-27), where the officer has not taken a lawful bond.—*Highfield v. United Magazine Press*, 190 S. W. 926.

ELECTIONS.

See Intoxicating Liquors, ☞12; Mandamus, ☞74; Municipal Corporations, ☞918.

IV. QUALIFICATIONS OF VOTERS.

☞76 (Mo.App.) Whether a student intends to reside at place to which he comes to attend school is question of intention, not, however, determined conclusively by his testimony.—*Goben v. Murrell*, 190 S. W. 986.

Students coming to city for sole purpose of studying at an institution of learning with intention of remaining three years and then locating at places elsewhere for practice of their profession had no such residence in city as qualified them to vote at a city election.—*Id.*

☞81 (Tex.Civ.App.) In view of Const. art. 8, § 1, a person who owned any property subject to taxation was a property tax payer within Vernon's Sayles' Ann. Civ. St. 1914, art. 2831, prescribing the qualifications of voters at an

election on the issuance of school bonds.—Lane v. Herring, 190 S. W. 778.

A thing without value is not subject to taxation, and therefore its ownership does not make the owner a property tax payer qualified to vote at a school bond election.—Id.

X. CONTESTS.

☞269 (Tex.Civ.App.) Remedy given by statute relative to election contests for irregularities, such as illegal throwing out of votes or denying to qualified voters right to vote, is exclusive.—Robertson v. Haynes, 190 S. W. 735.

☞271 (Tex. Civ. App.) Property owners of school district could have successfully contested election to determine whether special tax should be levied and collected on property in district, resulting in affirmative vote of 24 to 22, by proving that negative votes of two qualified voters were illegally thrown out, and that another qualified voter was not permitted to vote.—Robertson v. Haynes, 190 S. W. 735.

☞291 (Mo.App.) Where students were allowed to vote by election officers of a city, they are presumed to be legal voters, and burden of showing that they were not qualified voters is on party contesting their right to vote.—Goben v. Murrell, 190 S. W. 986.

EMINENT DOMAIN.

See Limitation of Actions, ☞32.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

☞2(11) (Ark.) In dividing levee district, Legislature could not make property owners of original district liable for levee work done in new district, after passage of dividing act, under contract made by original district, as that would be taking property without compensation.—Second Division of Laconia Levee Dist. v. Laconia Levee Dist., 190 S. W. 438.

☞2(11) (Tex. Civ. App.) Reassessment of a paving assessment to correct mistake in owner's name made under charter adopted in accordance with Acts 38d Leg. c. 147, held not a taking of property without compensation in violation of Const. art. 1, § 17.—Gallahar v. Whitley, 190 S. W. 757.

☞13 (Tex.Civ.App.) Taking private property for the benefit of an individual by a municipal body is a legal fraud upon the owner's rights, although there was no fraudulent intent in doing so.—Moseley v. Bradford, 190 S. W. 824.

☞47(5) (Mo.) A city has no power to condemn for street purposes land actually in use for school purposes.—City of St. Louis v. Moore, 190 S. W. 867.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

☞75 (Tex.Civ.App.) Private lands cannot be taken from owner by a city for public use as a reservoir by an exercise of the right of eminent domain without paying therefor at time of taking.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

(C) Measure and Amount.

☞141(2) (Mo.App.) The permanent damages recoverable for constructing a railroad in the street in front of lots are the difference in the value of the lots before and after such construction.—Williams v. Deering Southwestern Ry., 190 S. W. 367.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

☞172 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, and chapter 21A, art. 1283c, 1283d, district court has jurisdiction, in action by railroad in trespass to try title, to adjudge condemnation in favor of defend-

ant electric light and ice company.—Pecos & N. T. Ry. Co. v. Malone, 190 S. W. 809.

☞198(1) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1121, § 73, determination by electric light and ice company that condemnation of land of railroad was necessary could not be reviewed by courts, in absence of abuse, or showing that use of right of way is impaired.—Pecos & N. T. Ry. Co. v. Malone, 190 S. W. 809.

☞198(1) (Tex.Civ.App.) Recitals as to necessity in condemnation proceedings to establish a public road do not controvert positive and uncontroverted testimony, upon an injunction hearing that there was no public necessity for the road.—Moseley v. Bradford, 190 S. W. 824.

☞224 (Tex.Civ.App.) A defendant railroad company, permitted to condemn land under a plea filed under Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, cannot secure a new trial for newly discovered evidence as to its claim of title.—Quannah, A. & P. Ry. Co. v. Collett, 190 S. W. 1128.

☞241 (Mo.App.) In action for damages for constructing a railroad in street in front of plaintiff's lots, where neither the instructions nor the evidence distinguished the permanent damages from temporary damages from overflow of the lots, judgment for plaintiff was erroneous.—Williams v. Deering Southwestern Ry., 190 S. W. 367.

☞262(2) (Tex.Civ.App.) A railroad appealing from an award of damages on its plea for condemnation filed under Vernon's Sayles' Ann. Civ. St. 1914, art. 6531, but not questioning the judgment of condemnation, is estopped to raise questions affecting its original claim of title.—Quannah, A. & P. Ry. Co. v. Collett, 190 S. W. 1128.

IV. REMEDIES OF OWNERS OF PROPERTY.

☞307(2) (Tex.Civ.App.) Evidence of increased value of land held, under Vernon's Sayles' Ann. Civ. St. 1914, art. 6521, not to deprive plaintiff of his right to recover for lands not condemned, but, at most, make it a question for the jury.—Quannah, A. & P. Ry. Co. v. Collett, 190 S. W. 1128.

EMPLOYERS' LIABILITY ACTS.

See Commerce, ☞27; Master and Servant, ☞179, 351.

EMPLOYERS' LIABILITY INSURANCE.

See Insurance, ☞388, 512, 513, 535.

ENTRY.

See Adverse Possession, ☞15.

ENTRY, WRIT OF.

See Ejectment.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, ☞245.

EQUITABLE ESTOPPEL

See Estoppel, ☞62-98.

EQUITABLE LIENS.

See Vendor and Purchaser, ☞246, 254.

EQUITY.

See Account; Appeal and Error, ☞1009; Cancellation of Instruments; Ejectment, ☞13; Fraudulent Conveyances; Injunction; Interpleader; Judgment, ☞461; Jury, ☞14;

Nuisance, ¶77; Partition; Quieting Title; Receivers; Reformation of Instruments; Subrogation; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

¶39(1) (Mo.App.) Where a case is submitted by both parties as one in equity, the court will decide the whole issues, and award complete relief.—Buckner v. Midland Farm & Land Co., 190 S. W. 419.

II. LACHES AND STALE DEMANDS.

¶67 (Mo.) Laches not amounting to an estoppel is a defense only to equitable causes of action.—Paxton v. Flx, 190 S. W. 328.

X. DECREE AND ENFORCEMENT THEREOF.

¶427(3) (Mo.) Where a petition in equity contains a prayer for general relief, the plaintiff is entitled to any relief within the scope of the pleading which is sustained by the evidence, though not entitled to the special relief prayed for.—McQuitty v. Steckdaub, 190 S. W. 590.

ESCAPE.

¶2 (Ky.) Under Ky. St. § 1338, defendant, who while in the custody of an officer under arrest went into a house, and from there went home, leaving word that he had done so, and was not again seen or pursued, was not guilty of an escape.—Maggard v. Commonwealth, 190 S. W. 666.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Joint Tenancy; Landlord and Tenant; Life Estates; Remainders; Tenancy in Common; Trusts; Wills.

ESTATES TAIL

See Deeds, ¶127.

ESTOPPEL.

See Appeal and Error, ¶154, 882; Assignments, ¶8; Boundaries, ¶47; Champerty and Maintenance, ¶7; Corporations, ¶425; Criminal Law, ¶1137; Insurance, ¶668; Judgment, ¶590-743; New Trial, ¶10; Principal and Agent, ¶25.

II. BY DEED.

(B) Estates and Rights Subsequently Acquired.

¶38 (Tenn.) Where grantor in a general warranty deed was without title, upon his subsequent acquisition of title it immediately inured to benefit of grantee by virtue of warranty.—Ferguson v. Prince, 190 S. W. 548.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

¶62(4) (Ky.) Where by Acts 1890, c. 1537, boundaries of city were definitely fixed, and city by invalid ordinances in 1906 and 1913 attempted to strike certain territory from its limits, the city was not estopped, by lapse of time or by attempted enactment of such ordinances, to assert jurisdiction over persons selling intoxicating liquors within territory attempted to be stricken.—City of Highland Park v. Reker, 190 S. W. 706.
¶62(6) (Tex.Civ.App.) City, which purchased lands for reservoir, used only part, and failed to pay part of price, could not retain the lands, while repudiating its obligation to pay on ground that its promise was illegal, because no provision was made for payment, as required

by Const. art. 11, §§ 5, 7.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

¶62(8) (Ky.) Since the body enacting a measure can repeal it only in the same manner as that in which it was enacted, the city by acquiescence in violation of an ordinance cannot be estopped to enforce the ordinance.—Bates v. City of Monticello, 190 S. W. 1074.

(B) Grounds of Estoppel.

¶68(3) (Mo.) Where plaintiffs in a will contest alleged title in the testator, they were estopped in a subsequent action of ejectment to question his title, though the allegation of title in the will case was withdrawn prior to rendition of judgment, after which the trial proceeded upon the same theory.—Wilson v. McDaniel, 190 S. W. 3.

¶92(2) (Mo.App.) Where a contract was not signed by two of parties, plaintiffs, who have received and retained the full benefits accruing to them under contract which they signed and delivered as their contract, cannot repudiate its obligations on ground that it was not signed by all of parties named therein.—State, to Use of Goodman, v. Regent Laundry Co., 190 S. W. 951.

(C) Persons Affected.

¶98(3) (Mo.) Administrator de bonis non representing principal beneficiary under a will held estopped from complaining of an agreement between such beneficiary and the executor as to the value of certain property on which the executor should receive a 5 per cent. commission on final settlement.—In re Bryan's Estate, 190 S. W. 581.

EVIDENCE.

See Criminal Law, ¶351-564; Depositions; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ¶661-678; Trial, ¶41-105.

I. JUDICIAL NOTICE.

¶5(2) (Tex.Civ.App.) The court could not judicially know, nor could the jury from common knowledge say, that mud and water two inches deep was injurious or uncomfortable to hogs during summer months.—Ft. Worth & D. O. Ry. Co. v. Atterberry, 190 S. W. 1133.

¶44 (Mo.) The court takes judicial notice that the city of St. Louis is the only city or county that has a circuit attorney.—State ex rel. Harvey v. Sheehan, 190 S. W. 864.

II. PRESUMPTIONS.

¶67(1) (Mo.App.) Where ground on both sides of railroad, where crossing was located, was shown to be within city limits, such condition was presumed to continue until contrary was shown, and, the road's evidence failing to show the contrary, crossing must be accepted as being within city.—Phillips v. Pryor, 190 S. W. 1027.

¶75 (Tex.Civ.App.) Failure to produce evidence peculiarly within knowledge of a party will raise a presumption against him on that issue.—Atchison, T. & S. F. Ry. Co. v. Smith, 190 S. W. 761.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

¶106(5) (Tex.Civ.App.) In an action for damages caused by defendant's automobile driven by employé, testimony that driver had appeared intoxicated once held incompetent.—Gordon

v. Texas & Pacific Mercantile & Mfg. Co., 190 S. W. 748.

—114 (Mo.App.) In an action to recover plaintiff's interest in real estate previously conveyed by plaintiff and her husband to defendant upon defendant's oral agreement to pay plaintiff value of her interest, collateral evidence of plaintiff's troubles with her husband held not admissible.—Grayson v. Grayson, 190 S. W. 930.

—114 (Tex.Civ.App.) In suit for rescission of purchase of land, held, that defendant should have been required to answer question if it was not true that consideration mentioned in deed to him for land was not in fact paid by transfer of interest in maize header patented to him, in which the two other defendants had an interest.—Barbian v. Grant, 190 S. W. 789.

(C) Similar Facts and Transactions.

—131 (Tex.Civ.App.) In an action for price of silo, evidence that similar silos, when properly constructed, filled, and taken care of, would make and keep good ensilage, held not admissible.—Ames Portable Silo & Lumber Co. v. Gill, 190 S. W. 1139.

V. BEST AND SECONDARY EVIDENCE.

—158(5) (Ark.) In an action for malicious prosecution oral proof held competent to show an abandonment by defendant of a criminal prosecution instituted by him against plaintiff before a justice of the peace.—Twist v. Mullinix, 190 S. W. 851.

—158(17) (Ky.) Parol evidence cannot be received to prove the enactment of a city ordinance, the records of the city council being alone competent.—City of Highland Park v. Reker, 190 S. W. 706.

—158(28) (Mo.App.) In suit on note by receiver of bank, where bank's books were voluminous, witness who had never audited bank books before could show condition in which he found books and what he discovered while going through them as auditor.—Citizens' Trust Co. v. Ward, 190 S. W. 364.

—177 (Mo.App.) Where books of original entry which would have been admissible in evidence were in another state, and could not be produced in evidence, it was proper to admit copies, which testimony of witness having supervision of the original books showed were exactly same as originals.—Schwall v. Higginsville Milling Co., 190 S. W. 959.

—181 (Ark.) In view of Kirby's Dig. §§ 2149, 4562, 4604, in relation to justices of the peace, in an action for malicious prosecution, oral proof of a judgment of dismissal by a justice of the peace in criminal prosecution instituted by defendant against plaintiff would not be competent until a sufficient foundation had been laid by showing that justice had kept no docket or that his docket had been lost or destroyed.—Twist v. Mullinix, 190 S. W. 851.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

—213(2) (Mo.) The admission of letters between company and beneficiary merely showing negotiations without mention of compromise did not violate rule against proof of negotiations for compromise.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

—215(1) (Mo.App.) Certificate of insured's physician, constituting part of proofs of death, is admissible, in action against insurer, on ground that answers constitute admissions on beneficiary's part, subject, however, to contradiction or explanation.—Hicks v. Metropolitan Life Ins. Co., 190 S. W. 661.

(C) By Grantors, Former Owners, or Privies.

—230(1) (Tex.Civ.App.) In suit to rescind purchase of land for fraud, testimony that defendant stated in presence of another defendant that land was rich and good agricultural land, and was north of a certain town, which was not the case, was admissible as in nature of admission against interest.—Barbian v. Grant, 190 S. W. 789.

—233 (Tex.Civ.App.) Declarations by defendant subsequent to claimed gift of a note to his wife held not admissible to show his ownership of the notes.—Earhart v. Agnew, 190 S. W. 1140.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

—266 (Tex.Civ.App.) Conversation between third parties, outside hearing of plaintiff, ordinarily would not be admissible against him.—Tyler v. McChesney, 190 S. W. 1115.

—271(18) (Tex.Civ.App.) In action on account, a declaration of plaintiff's agent that he did not intend to release defendant by accepting notes of other parties was not inadmissible as self-serving, where it was part of a conversation wherein defendant's attorney admitted defendant did not claim a release by acceptance of such notes.—Wilson v. J. W. Crowder Drug Co., 190 S. W. 194.

IX. HEARSAY.

—317(1) (Mo.) Details of conversation between witness and persons not parties or other witnesses, being hearsay, were properly excluded.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

—317(2) (Tex.Civ.App.) Where a shipper did not accompany cattle, his testimony that they brought him a certain amount, that the commission company stated they weighed a certain amount, and that one animal killed in transit weighed a certain amount at destination, was inadmissible as hearsay.—Panhandle & S. F. Ry. Co. v. Curtis, 190 S. W. 837.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

—354(26) (Mo.App.) In action for breach of contract to sell and deliver flour, carrier's books of original entry, showing time of arrival, storage, notice to consignees, etc., the entries being made by various clerks in the usual course of business, were admissible on account of their own probative force.—Schwall v. Higginsville Milling Co., 190 S. W. 959.

—359(1) (Mo.App.) Photographs of defendant's automobile, which collided with plaintiff's, held admissible notwithstanding changes in the automobile's condition necessary to take it home.—Young v. Dunlap, 190 S. W. 1041.

(D) Production, Authentication, and Effect.

—366(12) (Mo.) An altered record of proceedings of drainage district board is admissible in proceeding to confirm the commissioners' report when the only evidence as to the alteration is that of the president of the board, that the alteration was made at his suggestion that the minutes might correctly state the business transacted.—Big Lake Drainage Dist. v. Rolwing, 190 S. W. 261.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

—397(1) (Mo.App.) Where a written contract is unambiguous, it cannot be contradicted by any letter or letters written by one of the parties.—Antrim Lumber Co. v. Daly, 190 S. W. 971.

⇒417(16) (Mo.App.) Bill of lading constitutes the contract between shipper and carrier, and, where no more appeared than that it was intention of shipper and initial carrier that shipment was to be made and the charges therefor collected from the consignee at destination, its terms could not be varied.—Yazoo & M. V. R. Co. v. Picher Lead Co., 190 S. W. 387.

⇒420(7) (Mo.App.) Parol evidence is admissible to show that a note was signed for accommodation, to be used for a certain purpose only.—Schlamp v. Manewal, 190 S. W. 658.

(C) **Separate or Subsequent Oral Agreement.**

⇒441(9) (Ark.) Where order for purchase of sewing machines stipulated that no agreement other than contained in such order should be any part of contract, and also that order was subject to approval of vendor, evidence that in mailing order purchaser attached a written stipulation, reserving right to return certain unsold machines, was not objectionable as tending to vary the written contract.—White Sewing Mach. Co. v. Atkinson & Son, 190 S. W. 111.

⇒441(11) (Tex.Civ.App.) In an action on notes transferred as part consideration for an exchange of property under a written contract agreeing to sell and convey notes, parol evidence held inadmissible to prove terms either additional to or different from those contained in writing.—Borschow v. Wilson, 190 S. W. 202.

⇒443(2) (Ark.) Parol evidence of representations made by selling agents of a corporation that corporation would create and maintain a surplus fund out of money received in excess of face value of capital stock is not admissible to vary a written subscription contract for stock.—Hicks v. Helm, 190 S. W. 564.

⇒444(2) (Mo.App.) The fact of a conditional delivery of a written contract to a party to it cannot be proved by parol.—Stimson v. Brinkman, 190 S. W. 646.

Where salesman's written contract of employment was unambiguous, proof that it was delivered on condition that another contract should be drawn up later was inadmissible in action on the original contract.—Id.

(D) **Construction or Application of Language of Written Instrument.**

⇒448 (Tex.Civ.App.) In the absence of ambiguity in a written contract, and of fraud, accident, or mistake, evidence to establish preliminary negotiations for the contract or to show an intention of the parties thereto at variance with its terms is inadmissible.—Davis v. Wynne, 190 S. W. 510.

XII. OPINION EVIDENCE.

(A) **Conclusions and Opinions of Witnesses in General.**

⇒471(2) (Tex.Civ.App.) In partner's suit for dissolution and accounting, held, that court properly excluded general question to a defendant as to what book of firm's accounts he would look to to ascertain amount of cash received and paid out.—Tyler v. McChesney, 190 S. W. 1115.

⇒471(24) (Mo.App.) In insurers' action to recover loss paid upon property alleged to have been destroyed by fire started by defendant's engine, question to insurance agent, tending to show that the fire might have been started by tramps, campers, etc., held properly excluded.—Belt v. St. Louis, I. M. & S. Ry. Co., 190 S. W. 1002.

⇒471(26) (Tex.Civ.App.) In trespass to try title by plaintiff claiming under forfeiture and award of lands to him by general land office, certificate of acting commissioner that lands "were forfeited" held inadmissible.—Speed v. Sadberry, 190 S. W. 781.

⇒471(35) (Tex.Civ.App.) In action for delay in shipment of live stock, question to plaintiffs as to difference in market on Thursday and on Tuesday "when you should have gotten there" held improper as calling for expression of opinion and conclusion on mixed question of law and fact.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, 190 S. W. 819.

In action for delay in shipping cattle, plaintiffs held properly allowed to testify as to difference in market value of cattle on Thursday and Tuesday, rather than stating what the market value was on such dates, and leaving to jury question of difference.—Id.

⇒481(3) (Tex.Civ.App.) In action for negligent carriage of cattle, testimony that the difference in value of the cattle was \$5 a head on account of their actual appearance on arrival compared with what their appearance would have been if they had arrived after a run in reasonable time was inadmissible, being an answer on a mixed question of law and fact.—Kansas City, M. & O. Ry. Co. of Texas v. James, 190 S. W. 1136.

(B) **Subjects of Expert Testimony.**

⇒505 (Mo.App.) In a servant's action for injuries, a physician's statement in answer to a question whether plaintiff will be able to continuously do hard labor, held admissible as expert opinion, and did not call for a conclusion.—Stobile v. McMahon, 190 S. W. 652.

⇒506 (Mo.App.) In an action for personal injuries, a physician testifying as an expert may state that plaintiff's rupture might or could result from the injury, but cannot assume the function of the jury by stating that it did so result.—Ruch v. Pryor, 190 S. W. 1037.

⇒528(1) (Mo.App.) In an action for injuries resulting from an automobile collision, testimony of experts, who examined the breakage and marks on defendant's car, as to the manner of the collision, is admissible.—Young v. Dunlap, 190 S. W. 1041.

⇒528(2) (Mo.App.) In an action for personal injuries, a physician testifying as an expert may state that plaintiff's rupture might or could result from the injury.—Ruch v. Pryor, 190 S. W. 1037.

⇒532 (Tex.Civ.App.) In action for personal injuries, evidence by a physician that there was such a thing as exaggeration of injuries, especially where they occurred as a result of railroad accidents, held properly excluded.—Kansas City, M. & O. Ry. Co. of Texas v. Finke, 190 S. W. 1143.

(C) **Competency of Experts.**

⇒543(2) (Mo.App.) A witness shown to be a carpenter of 80 years' experience and to have worked on the building in question held competent to testify to the cost of repairing plastering.—Moore v. McCutchen, 190 S. W. 350.

⇒543(4) (Tex.Civ.App.) In action for value of a lost picture, witness held not qualified sufficiently to make her opinion admissible.—Wells Fargo & Co. v. Long, 190 S. W. 530.

In action for value of lost water color painting, witness with experience in selling such paintings held qualified to testify as to its value.—Id.

⇒544 (Tex.Civ.App.) In action for negligent carriage of cattle, an experienced cattleman may qualify to testify what the condition of cattle would be if confined in cars from 40 to 48 hours without unloading, although such witness has never accompanied a shipment of cattle.—Kansas City, M. & O. Ry. Co. of Texas v. James, 190 S. W. 1136.

(F) **Effect of Opinion Evidence.**

⇒572 (Ky.) On issue whether part of a tract was embraced in a patent prior to that under

which plaintiff claimed, opinion of surveyor who made no survey of later patent and did not know of its lines, but had been informed as to location of a corner, constituted no evidence as to where the lines of such patent would be located on a survey.—*Tennis Coal Co. v. Sackett*, 190 S. W. 130.

⚡572 (Tex.Civ.App.) In an action by an inexperienced shipper of live stock for damages in transit, where he was permitted to testify as an expert as to the shipment, his inexperience went only to the weight of his testimony.—*Panhandle & S. F. Ry. Co. v. Curtis*, 190 S. W. 837.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

⚡580 (Mo.App.) In an action by purchaser of a note, evidence by payee, in another action involving other notes as to the ownership of the notes in suit, is not admissible, where plaintiff in pending action was not a party to or interested in the action in which the testimony was given.—*Willis v. Reed*, 190 S. W. 377.

XIV. WEIGHT AND SUFFICIENCY.

⚡588 (Mo.App.) In an action for injuries resulting from an automobile collision at the intersection of two streets, plaintiff's evidence held not incredible or inconsistent with the physical facts.—*Young v. Dunlap*, 190 S. W. 1041.

⚡588 (Tex.Civ.App.) The jury may disregard testimony of either party or his witnesses.—*Blount-Decker Lumber Co. v. Martin*, 190 S. W. 232.

⚡589 (Tex.Civ.App.) The jury may disregard testimony of either party.—*Blount-Decker Lumber Co. v. Martin*, 190 S. W. 232.

⚡593 (Tex.Civ.App.) Where there is no evidence to support the judgment save inadmissible hearsay evidence, it must be reversed.—*Panhandle & S. F. Ry. Co. v. Curtis*, 190 S. W. 837.

EXAMINATION.

See Witnesses, ⚡237-277.

EXCEPTIONS.

See Appeal and Error, ⚡248-260, 501; Criminal Law, ⚡695½, 1056; Indictment and Information, ⚡111; Pleading, ⚡228.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡544-554; Criminal Law, ⚡1090-1093, 1116.

II. SETTLEMENT, SIGNING, AND FILING.

⚡39(1) (Tex.Civ.App.) A bill of exceptions not filed within the time given by statute, or any extension thereof, cannot be considered.—*Pearce v. Supreme Lodge, Knights and Ladies of Honor*, 190 S. W. 1156.

⚡54 (Ky.) If the trial court arbitrarily refuses to permit counsel to save exceptions to alleged error in the selection of a jury, the proper method is to prepare a bystanders' bill and file it in the Court of Appeals as part of the record, as provided by Civ. Code Prac. § 337, covering cases where the court refuses to sign a bill of exceptions.—*Carter Coal Co. v. Love*, 190 S. W. 481.

EXCESSIVE DAMAGES.

See Damages, ⚡131-134.

EXCHANGE OF PROPERTY.

See Frauds, Statute of, ⚡69; Specific Performance, ⚡32.

⚡5 (Tex.Civ.App.) Where plaintiff as soon as he returned to county of the venue, about a year after the exchange of lands in which he claimed to have been defrauded, filed suit to cancel defendant's deed, and tendered a recon-

veyance, no formal notice or demand for rescission was necessary.—*Pitt v. Gilbert*, 190 S. W. 1157.

In suit to cancel a deed of land given in exchange for land, plaintiff, who had nothing to do with trade between another party and defendant, and who had never been in possession of note given by such party to defendant, would not be denied a rescission because he did not offer to return such note to defendants.—Id.

EXCLUSIVE JURISDICTION.

See Courts, ⚡489.

EXECUTION.

See Attachment; Chattel Mortgages, ⚡157; Homestead; Judicial Sales; Mandamus, ⚡3, 55; Municipal Corporations, ⚡1035; Sheriffs and Constables.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

⚡74 (Mo.) Under Rev. St. 1909, § 2172, as to right to execution, it is not prerequisite to an execution that an express order for its issuance be made.—*State ex rel. Captain v. Gravae*, 190 S. W. 859.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

⚡146(2) (Tex.Civ.App.) Fact that sheriff left live stock in a lot over night after making levy of execution, until arrangements could be made to care for it, did not release or invalidate levy.—*Hopping v. Hicks*, 190 S. W. 1119.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

⚡172(2) (Tex.Civ.App.) In a suit under *Vernon's Sayles' Ann. Civ. St. 1914, art. 4643*, to restrain the sale of a wife's separate property under execution against the husband, the husband being only a formal party, plaintiffs need not offer to pay the debt for which the execution was levied.—*City Nat. Bank of Eastland v. Kinnebrew*, 190 S. W. 536.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

⚡220 (Tex.Civ.App.) Under Rev. St. 1911, arts. 3760, 3762, requiring personal property taken under execution to be present at sale when it is susceptible of being exhibited, presence of property is only excused when its nature prevents it being exhibited and not because of nature of premises or remoteness thereof.—*Hopping v. Hicks*, 190 S. W. 1119.

⚡245 (Tex.Civ.App.) In a suit by surety on a secured note, as assignee of note after payment, seeking payment from maker and to establish a lien on chattels mortgaged, evidence held to warrant a finding that neither mortgagor nor plaintiff waived statutory requirement that property taken under execution must be present and exhibited at sale.—*Hopping v. Hicks*, 190 S. W. 1119.

(B) Title and Rights of Purchaser.

⚡288 (Tex.Civ.App.) Where a sale of chattels taken on execution was void because of failure to comply with statutes requiring presence of property at sale, purchaser at sale, having wrongfully taken possession of property over protest of owner, held guilty of conversion and liable to parties sustaining damages.—*Hopping v. Hicks*, 190 S. W. 1119.

VIII. RETURN.

⚡344 (Tex.Civ.App.) In a suit by surety on a secured note, as assignee of note after payment, seeking payment from maker and to establish a lien on chattels mortgaged, plaintiff, not being a party to a judgment under which

execution was levied on the mortgaged property, may attack return on execution and show that there was no levy or sale thereunder.—*Hopping v. Hicks*, 190 S. W. 1119.

EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival; Descent and Distribution; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡11 (Tex.Civ.App.) In view of Acts Cong. April 22, 1908, § 1, and April 5, 1910, § 2, providing that interstate carriers are liable in damages to injured servants or their survivors, and that the right of action shall survive to their personal representatives, such right is an estate on which administration may be granted.—*St. Louis Southwestern Ry. Co. of Texas v. Smitha*, 190 S. W. 237.

⚡12 (Tex.Civ.App.) Where a switchman was injured in interstate commerce, and could under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1830, subd. 26, have sued in any county where the carrier had an agent, and he sued in one county, his cause did not continue transitory, but, being fixed, survived to his administrator in that county.—*St. Louis Southwestern Ry. Co. of Texas v. Smitha*, 190 S. W. 237.

As a general rule, for the purpose of founding administration, simple contract debts, and tort actions, are assets of the domicile of the debtor.—*Id.*

Where a switchman was injured in interstate commerce on a Texas railroad operating wholly within the state and was entitled to recover under Act Cong. April 22, 1908, as amended by Act Cong. April 5, 1910, but died pending suit, an administrator was properly appointed in the Texas county where deceased sued.—*Id.*

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

⚡223 (Mo.App.) The provision of Rev. St. 1909, § 191, as amended by Laws 1911, p. 81, barring claims against estates not presented within one year from date of letters, where notice is published within ten days after letters, is not affected by the amendment of Rev. St. 1909, § 82, by Laws 1911, p. 79, giving form of notice for publication, which states the one-year limitation as dating from the last publication.—*C. H. Albers Commission Co. v. Vogel-sang*, 190 S. W. 1058.

The effect of Rev. St. 1909, § 191, as amended by Laws 1911, p. 81, to bar within one year from date of letters, where notice is published within ten days after granting such letters, all claims against an estate, is not affected by publication in the form prescribed by Rev. St. 1909, § 82, as amended by Laws 1911, p. 79, which states the limitation as one from the date of last publication.—*Id.*

(C) Disputed Claims.

⚡251 (Mo.App.) As against a claim in probate court, an executor need not plead the statute limiting time in which to present claims, Rev. St. 1909, § 191, as amended March 13, 1911 (Laws 1911, p. 81); it being sufficient to raise the point in such a way as to make it clear to court and counsel that the executor is relying upon the statute.—*C. H. Albers Commission Co. v. Vogelsang*, 190 S. W. 1068.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

⚡330 (Ky.) In an action to settle the estate of decedent in which infants are interested, a judgment directing sale of more land than nec-

essary to pay decedent's debts will be void as to the interest of the infants, unless the case is prepared as provided in the Code sections relating to sales of infants' real estate.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

(B) Application and Order.

⚡337 (Ark.) A judgment ordering sale of land of intestate for payment of debts without publication of notice required by Kirby's Dig. § 195, will be set aside upon direct review.—*Harper v. Wisner*, 190 S. W. 589.

⚡358(4) (Ky.) Where judgment directing the sale of infant's lands for their ancestor's debts is void because including more land than necessary to pay the debts, the reversal of the judgment of sale for such reason will not affect the title of the purchaser of the tract which it was necessary to sell.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

X. ACTIONS.

⚡438(5) (Mo.App.) Where legatees and devisees were not named as parties, but administrator was so named, there was no defect of parties as to legatees, whom the administrator represented.—*Buck v. Mayer*, 190 S. W. 907.

XI. ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

⚡473, 474(2) (Ky.) One claiming title to property under an execution sale and by adverse possession, who was not a party to a suit by administrator of record owner of land against heirs and creditors for a settlement of the estate, held not entitled to notice of any proceedings therein.—*Wallace v. Lackey*, 190 S. W. 709.

(C) Charges and Credits.

⚡478 (Mo.) Interest paid by executor on loan obtained on stock according to an agreement between himself and principal beneficiary in anticipation of his agreed commission and before final settlement held not a charge against the estate.—*In re Bryan's Estate*, 190 S. W. 581.

(D) Compensation.

⚡491 (Mo.) Nothing in Rev. St. 1909, § 229, precludes the beneficiary of an estate and the executor from agreeing upon the "value" of certain items of the estate and fixing a 5 per cent. commission which the executor should receive on his final settlement.—*In re Bryan's Estate*, 190 S. W. 581.

(E) Stating, Settling, Opening, and Review.

⚡506(3) (Mo.) On settlement of deceased executor's account by his executors, evidence, including letters between deceased executor and principal beneficiary, held to show their agreement that executor, when making and filing his final settlement, should receive a 5 per cent. commission, amounting to \$19,509.88.—*In re Bryan's Estate*, 190 S. W. 581.

EXEMPLARY DAMAGES.

See Damages, ⚡87.

EXEMPTIONS.

See Homestead; Taxation, ⚡204, 241.

EXPECTANCY.

See Assignments, ⚡8.

EXPERT TESTIMONY.

See Evidence, ⚡505-572.

EXPLOSIVES.

See Master and Servant, ¶276.

EXPRESS TRUSTS.

See Trusts, ¶17-59.

EXTENSION.

See Contracts, ¶71.

EXTRA SESSIONS.

See Statutes, ¶5.

FACTORS.

See Brokers.

FAILURE OF CONSIDERATION.

See Deeds, ¶19.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FALSE PRETENSES.

¶11 (Ky.) The property alleged to have been obtained in an indictment for obtaining property by false pretenses must be such as is the subject of larceny.—Hayes v. Commonwealth, 190 S. W. 700.

¶32 (Ky.) In view of Cr. Code Prac. § 122, subsec. 2, and section 137, relating to form and language of indictments, an indictment for obtaining by false pretenses "the sum of \$2.50" sufficiently describes the property alleged to have been obtained.—Hayes v. Commonwealth, 190 S. W. 700.

Under Cr. Code Prac. § 128, an indictment for obtaining money by false pretenses alleging that the fraud was perpetrated upon a named person, without expressly alleging that she was the owner of the money obtained, was sufficient.—Id.

FARES.

See Carriers, ¶357.

FEDERAL COURTS.

See Courts, ¶365, 499, 493.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Death, ¶32, 99; Commerce, ¶27; Master and Servant, ¶279, 286, 296.

FEES.

See Attorney and Client, ¶143-167; Commerce, ¶50; Corporations, ¶37; District and Prosecuting Attorneys; Divorce, ¶197, 227; Statutes, ¶102.

FEE SIMPLE.

See Deeds, ¶124.

FELLOW SERVANTS.

See Constitutional Law, ¶245; Master and Servant, ¶177-216, 279, 287, 294.

FELONY.

See Criminal Law, ¶27.

FENCES.

See Railroads, ¶411.

FILING.

See Appeal and Error, ¶621-629; Criminal Law, ¶663; Exceptions, Bill of, ¶39.

FINAL JUDGMENTS AND DECREES.

See Appeal and Error, ¶80.

FINDINGS.

See Appeal and Error, ¶999-1017; Trial, ¶351.

FIRE INSURANCE.

See Insurance.

FIRES.

See Railroads, ¶260-273, 461-482.

FLIGHT.

See Criminal Law, ¶351.

FLOWAGE.

See Waters and Water Courses, ¶171, 179.

FORBEARANCE.

See Contracts, ¶71.

FORCE.

See Rape, ¶6.

FORECLOSURE.

See Mortgages, ¶497; Municipal Corporations, ¶1038.

FOREIGN CORPORATIONS.

See Corporations, ¶673.

FOREMAN.

See Master and Servant, ¶103, 189, 190.

FORFEITURES.

See Corporations, ¶613; Mines and Minerals, ¶78.

FORGERY.

See Limitation of Actions, ¶19.

FORMA PAUPERIS.

See Appeal and Error, ¶589.

FORMER ADJUDICATION.

See Judgment, ¶590-743.

FORMER JEOPARDY.

See Criminal Law, ¶200.

FORNICATION.

See Prostitution.

FRAUD.

See Action, ¶27; Appeal and Error, ¶1068; Compromise and Settlement, ¶18; Contracts, ¶270; Corporations, ¶121; Deeds, ¶211; False Pretenses; Frauds, Statute of; Fraudulent Conveyances; Insurance, ¶256, 281, 379, 552, 553, 668, 723; Limitation of Actions, ¶37; Principal and Agent, ¶158; Release, ¶17; Trial, ¶253, 296; Vendor and Purchaser, ¶33-45.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

¶11(2) (Mo. App.) Where entire holdings of an oil company consisted of undeveloped property of speculative value, fraud was not to be ascribed to representations of a seller of its stock as to value of such properties, because partly based on elements of speculation.—Viles v. Viles, 190 S. W. 41.

⚡13(1) (Tex.Civ.App.) Representations to warrant relief, must be false at time of representation, and change in circumstances making them incorrect does not render them fraudulent.—*Ore City Co. v. Rogers*, 190 S. W. 228.

⚡13(2) (Tex.Civ.App.) If representations made by a seller of land were false and material and induced its purchase, the seller's belief in their truth would not relieve him from liability for consequences resulting from them.—*Ford v. Sims*, 190 S. W. 1165.

⚡13(3) (Tex.Civ.App.) Where the seller of land stated as a fact that it was level not knowing whether it was or not, and in fact it was not, he was liable for damages to purchaser relying thereon.—*Ford v. Sims*, 190 S. W. 1165.

⚡22(1) (Tex.Civ.App.) One induced to purchase 300 acres of land by false representations that it was level; that water would stand on only about 3 acres; that 150 acres were cleared; that was all tillable, etc.—could recover for the fraud whether or not he used care in ascertaining the truth of the representations.—*Ford v. Sims*, 190 S. W. 1165.

II. ACTIONS.

(B) Parties and Pleading.

⚡47 (Tex.Civ.App.) Where a count charged alleged partner of indorsee of notes with conspiracy to convey to plaintiff notes worth less than face value, no injury to plaintiff, first essential in action for fraud, was shown, and there was no liability.—*Borschow v. Wilson*, 190 S. W. 202.

(D) Damages.

⚡59(1) (Mo.App.) The measure of damages for alleged fraudulent sale of land by which the plaintiff was deprived of his security for a note is the amount of the note.—*Hunter v. Sloan*, 190 S. W. 57.

⚡59(3) (Tex.Civ.App.) In action for fraud inducing purchase of land for an agreed price, other land being taken in part payment therefor at an agreed valuation, damages recoverable were the difference between the market value of the land when purchased and the amount paid, the land taken in part payment to be considered as cash.—*Ford v. Sims*, 190 S. W. 1165.

(E) Trial, Judgment, and Review.

⚡67 (Mo.App.) In an action for damages for fraud by a sale of land which destroyed the security of a note, the measure being the amount of the note, it was proper for the note and deed of trust securing it to be delivered to the court and disposed of by the judgment.—*Hunter v. Sloan*, 190 S. W. 57.

FRAUDS, STATUTE OF.

See Trusts, ⚡17, 18.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.

⚡26(6) (Mo.App.) If a physician before treating defendant's adult son called defendant in and exacted from him a promise to pay for the services, the agreement was binding notwithstanding a statute of frauds, the debt then becoming primarily that of the father as well as of the son.—*Mitchell v. Davis*, 190 S. W. 357.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⚡60(1) (Tex.Civ.App.) Oral agreement that owner of lots should have easement of way to his adjoining building in consideration of use of its wall by grantee, even if use of wall might be considered in payment of purchase price, was within statute of frauds.—*Callan v. Walters*, 190 S. W. 829.

⚡69 (Tex.Civ.App.) Contract for exchange of land not signed by one of the parties was in contravention to the statute of frauds (*Vernon's Sayles' Ann. Civ. St. 1914, art. 3965*), and not binding upon him without allegations showing his right to specific performance by reason of possession, part payment, etc.—*Clegg v. Brannan*, 190 S. W. 812.

⚡70 (Ky.) Where the dividing line is uncertain and agreement between adjoining landowners as to such line, executed by marking the line or building a fence thereon, is not prohibited by the statute of frauds, nor is it within the laws regulating conveyances.—*Garvin v. Threlkeld*, 190 S. W. 1082.

Parol agreement that a certain old line should be established by surveyor and a division fence erected thereon, which was never executed, but was subject to subsequent establishment of the line, was within the statute.—*Id.*

VII. SALES OF GOODS.

(A) Contracts Within Statute.

⚡83 (Mo.App.) The contract arising from an order for shoes, though they are thereafter manufactured, is one of sale, as regards the statute of frauds.—*Krippendorf-Dittman Co. v. Hunt-Riddick Mercantile Co.*, 190 S. W. 44.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⚡103(2) (Tex.Civ.App.) An instrument, leasing land for one year and also giving exclusive option to lessee during the year, although signed by both parties, was not an option accepted in writing, and hence not enforceable in equity.—*Petty v. Wilkins*, 190 S. W. 531.

⚡110(1) (Tex.Civ.App.) A memorandum of agreement for exchange of lands, which did not describe a tract of land or give field notes from which it could be identified, was insufficient.—*Clegg v. Brannan*, 190 S. W. 812.

IX. OPERATION AND EFFECT OF STATUTE.

⚡129(7) (Tex.Civ.App.) Piping a house for gas and slight expenditure for wall paper held so insignificant as not to amount to improvements taking an oral contract for sale of the land out of the statute of frauds (*Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4*).—*Ryan v. Lofton*, 190 S. W. 752.

⚡129(9) (Tex.Civ.App.) Where, to enforce an oral contract to convey, reliance is had upon the claimant's possession and improvement of the premises, the value of the improvements must be shown to be such proportion of the value of the property and made in such reliance upon the contract as to give the claimant equitable rights.—*Ryan v. Lofton*, 190 S. W. 752.

⚡131(1) (Tex.Civ.App.) Under the statute of frauds (*Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 5*) as to agreements not to be performed within one year, a written agreement to secure subtenants for a 5-year term could not be modified by parol agreement to accept tenants for a term of 4 years and 11 months.—*Burgher & Co. v. Canter*, 190 S. W. 1147.

⚡133 (Mo.App.) Where parties have carried out an oral agreement to convey land and only thing left undone is payment of purchase price, statute of frauds does not apply.—*Grayson v. Grayson*, 190 S. W. 930.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡158(3) (Tex.Civ.App.) Parol evidence is inadmissible to add the description of land contained in a memorandum, relied on to take a contract out of the statute of frauds.—*Clegg v. Brannan*, 190 S. W. 812.

§159 (Mo.App.) Evidence of sale of goods, to be delivered at two stores, being one sale, so that acceptance of those delivered at one store would, under Rev. St. 1909, § 2784, take the contract out of the statute of frauds, held sufficient to go to the jury.—Krippendorf-Dittman Co. v. Hunt-Riddick Mercantile Co., 190 S. W. 44.

§160 (Mo.App.) If instructions in action by physician to recover for services to defendant's adult son required the jury to find before returning verdict for physician that he rendered services at the special request of defendant relying on his promise to pay therefor, they were not defective as omitting consideration.—Mitchell v. Davis, 190 S. W. 357.

FRAUDULENT CONVEYANCES.

See Homestead, §177; Principal and Agent, §105.

I. TRANSFERS AND TRANSACTIONS INVALID.

(B) Nature and Form of Transfer.

§41 (Mo.App.) Where a Missouri corporation assumed a chattel mortgage given by its promoter, and, having defaulted, the mortgage was foreclosed and the property purchased by the mortgagee which then sold it to an Arkansas corporation, with practically the same name, and organized by the same promoter, creditor of the Missouri corporation could not attach such property.—Knott v. Fisher Vehicle Woodstock & Lumber Co. of Erin, Ark., 190 S. W. 378.

(C) Property and Rights Transferred.

§44 (Tex.Civ.App.) A vendor cannot commit a fraud on creditors by making a deed to a grantee to whom the land already belongs by equitable title.—Fidelity Trust Co. v. Rector, 190 S. W. 842.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§57(1) (Mo.App.) Where the alleged fraudulent transfer was made when transferor was not insolvent and did not render him insolvent, the conveyance cannot be set aside as in fraud of creditors.—Christopher-Simpson Iron Works Co. v. Bajohr, 190 S. W. 615.

§57(4) (Mo.App.) That a grantor ultimately became insolvent does not render transfer when he was solvent fraudulent.—Christopher-Simpson Iron Works Co. v. Bajohr, 190 S. W. 615.

§57(5) (Tex.Civ.App.) A husband can lawfully give any of his property or his interest in the community property to his wife, provided he is solvent.—Earhart v. Agnew, 190 S. W. 1140.

§71 (Ky.) Under Ky. St. §§ 1906, 1907, conveyance actually fraudulent as to grantor's creditors is void as to subsequent purchasers for value.—Scott v. Scott, 190 S. W. 143.

(E) Consideration.

§75 (Ky.) Under Ky. St. §§ 1906, 1907, conveyance merely voluntary, and only constructively fraudulent, is void as to such purchasers without actual notice of the conveyance.—Scott v. Scott, 190 S. W. 143.

§80 (Ky.) Contract by grantee to support grantor during his life in consideration of a conveyance of grantor's property renders the conveyance constructively fraudulent as to grantor's creditors.—Morton v. Young, 190 S. W. 1090.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(B) Remedies on Ground of Nullity of Transfer.

§228 (Mo.App.) Under Rev. St. 1909, § 2294, and the Bulk Sales Act, §§ 1, 4a, the latter act

can be invoked in ordinary attachment proceedings begun within the time limited.—Riley Pennsylvania Oil Co. v. Symmonds, 190 S. W. 1038.

Bulk Sales Act, § 2, giving a remedy against the buyer to creditors who can identify goods sold by them, does not prevent the remedy by attachment under the act.—Id.

The remedies by attachment under section 1, Bulk Sales Act, and by receivership in favor of creditors who can identify goods sold by them, under section 2, are not inconsistent.—Id.

(D) Jurisdiction, Limitations, and Laches.

§248 (Ky.) Whether conveyance is actually or constructively fraudulent as to grantor's creditors, grantee's title is perfect after the 10-year statute has run, and a purchaser from the grantor after that time is then as much bound to take notice of prior conveyance as if grantee therein was innocent purchaser for value.—Scott v. Scott, 190 S. W. 143.

(G) Evidence.

§273 (Mo.App.) The burden is upon one attacking a transfer as fraudulent to show that the alleged transfer was made with intent to defraud the grantor's creditors, and that such was its effect.—Christopher-Simpson Iron Works Co. v. Bajohr, 190 S. W. 615.

§299(11) (Ky.) In creditor's bill to set aside debtor's deeds to his daughter and his mortgage to a nephew as being made to defraud creditors in violation of Ky. St. § 1906, evidence held to support a finding that such deed and mortgage were fraudulent as to creditors.—Morton v. Young, 190 S. W. 1090.

FRIVOLOUS APPEAL

See Costs, §260, 263.

FUTURE ESTATES.

See Assignments, §8.

GAMING.

See Commerce, §59; Criminal Law, §27; Statutes, §5, 118.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§72½ [New, vol. 8 Key-No. Series] (Mo.) Rev. St. 1909, § 4749, penalizing stakeholding, makes it a felony to act as stakeholder for bettors, even though the bettors are private.—Fleming v. Wengler, 190 S. W. 875.

(B) Prosecution and Punishment.

§90(2) (Mo.) Information for violating Rev. St. 1909, § 4750, held not to describe the poker table, kept by defendant, with sufficient definiteness to show that it was within the terms of the statute.—State v. Harper, 190 S. W. 272.

GARNISHMENT.

See Appeal and Error, §1052; Attachment; Courts, §207; Trial, §255.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§56 (Tex.Civ.App.) Funds deposited to the credit of mule buyer by his principal held subject to garnishment under a judgment against the mule buyer; the garnishee bank paying checks drawn by buyer out of proceeds of loan to him, instead of such funds.—Winfield State Bank v. First Nat. Bank, 190 S. W. 220.

§58 (Ky.) Without statutory authority, property in custodia legis cannot be reached by garnishment proceedings.—Burdine v. White, 190 S. W. 687.

§59 (Ky.) Uncollected sale bonds, due or undue, taken by commissioner from purchaser for price of land sold in heirs' suit for division, held

a fund in court which could be reached by a judgment creditor of the heirs under Civ. Code Prac. § 207.—Burdine v. White, 190 S. W. 687.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

§93 (Ky.) Attachment served on clerk of circuit court by judgment creditor of heirs of decedent to reach proceeds of sale of decedent's lands *held* to sufficiently specify the fund sought to be reached, as required by Civ. Code Prac. § 207.—Burdine v. White, 190 S. W. 687.

Notice specifying fund sought to be attached in court under Civ. Code Prac. § 207, need not be separate and apart from the order of attachment.—Id.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§161 (Tex.Civ.App.) Where the action against the debtor and the garnishment proceedings are heard at the same time, the answer of the garnishee is admissible in evidence as between plaintiff and garnishee.—Earhart v. Agnew, 190 S. W. 1140.

GAS.

See Mines and Minerals, §78.

GIFTS.

See Evidence, §238; Husband and Wife, §266.

I. INTER VIVOS.

§31(1) (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 3868, does not make delivery and possession of a note essential to the validity of a gift thereof.—Earhart v. Agnew, 190 S. W. 1140.

§49(4) (Tex.Civ.App.) Evidence, in an action to restrain an execution sale of property, *held* to sustain a finding that the property was acquired by the principal defendant as a gift, and not as part consideration for property sold to the donor.—Fidelity Trust Co. v. Rector, 190 S. W. 842.

GRAIN.

See Commerce, §50; Weights and Measures, §2, 8.

GRAND JURY.

See Criminal Law, §393, 1081; Libel and Slander, §38.

GUARANTY.

See Principal and Surety.

II. CONSTRUCTION AND OPERATION.

§27 (Ark.) Where contract to sell goods and a guaranty of payment therefor by the buyer, although on separate papers, were made as one transaction on the same day, and the contract of guaranty referred to the selling contract as if part thereof, the two were to be regarded as one instrument.—Fluhart v. W. T. Rawleigh Co., 190 S. W. 118.

IV. REMEDIES OF CREDITORS.

§82(3) (Ark.) Under Kirby's Dig. §§ 6009, 6010, providing for joinder in one action of persons jointly bound, *held*, guarantors on the same instrument could be sued jointly with the principal.—Fluhart v. W. T. Rawleigh Co., 190 S. W. 118.

§94 (Ark.) In suit against guarantors and principal, when, on overruling of defendants' demurrer for misjoinder, the defendants, who were guarantors, declined to plead further and the principal answered denying indebtedness, it was error to render judgment against the guarantor defendants for the amount claimed; no judgment having been rendered against the

principal.—Fluhart v. W. T. Rawleigh Co., 190 S. W. 118.

GUARDIAN AND WARD.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§108 (Ky.) Whatever interest guardian had in land with his infant wards, *held* to have passed under a commissioner's deed which was void as to the wards.—Ford v. May, 190 S. W. 1066.

GUARDS.

See Master and Servant, §14, 112; Municipal Corporations, §796.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§85(1) (Mo.App.) Evidence in habeas corpus proceeding *held* to show that the child's best interests would not be promoted by transferring custody to father from grandparents, with whom she had lived all her life, and to whose custody the father had for a long period assented.—Ex parte Crockett, 190 S. W. 81.

While it is the universal presumption that, as between the father and grandparents of an infant, the father is entitled to the custody, such presumption should not be indulged to override evidence to the contrary.—Id.

HARMLESS ERROR.

See Appeal and Error, §1082-1073, 1170; Criminal Law, §1166½-1172; Homicide, §338-340.

HEARSAY.

See Criminal Law, §419, 420; Evidence, §317, 593.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Eminent Domain, §198; Municipal Corporations, §705-821; Railroads, §95; Trial, §191.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§20 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 6860, 6861, 6871, 6883, 6886, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists.—Moseley v. Bradford, 190 S. W. 824.

§55 (Tex.Civ.App.) Plaintiffs did not waive their right to enjoin the opening of a public road by presenting to the condemnation commissioners a claim for damages which reserved the right to contest such opening, especially where waiver was not pleaded.—Moseley v. Bradford, 190 S. W. 824.

Waiver of the right to contest the opening of a road upon the ground of lack of public necessity is not available unless pleaded.—Id.

§64 (Tex.Civ.App.) While the commissioners' court has wide discretion in opening a public road, an abuse thereof may be enjoined, especially as Vernon's Sayles' Ann. Civ. St. 1914, art. 6882, confines the issues upon appeal to the amount of damages.—Moseley v. Bradford, 190 S. W. 824.

(C) Alteration, Vacation, or Abandonment.

§71 (Ark.) Under Acts 1915, p. 1400, providing for the establishment of road improvement

districts, and section 36, the commissioners have no power to change the route of a county road, unless the county court orders the change.—*Jones v. Road Improvement Dist. No. 1 of Sevier County*, 190 S. W. 567.

(D) Title to Fee and Rights of Abutting Owners.

§80 (Mo.) In dealing with public highways, the several counties and the county courts thereof are but state agencies, acting by delegated authority, and holding title to fee or easements in highways merely as legal subdivisions of the state.—*State ex rel. McWilliams v. Little River Drainage Dist.*, 190 S. W. 897.

§88 (Mo.) In exercising its power over public highways, the state may not through its Legislature either trench upon private rights, or devote such highways to a wholly incompatible use, or to a use which is not a public one.—*State ex rel. McWilliams v. Little River Drainage Dist.*, 190 S. W. 897.

II. HIGHWAY DISTRICTS AND OFFICERS.

§90 (Ark.) Under Acts 1915, p. 1400, the request of the county judge or ten or more land-owners within the proposed district to the state highway commission for the preparation of preliminary plans is merely directory and not jurisdictional.—*Jones v. Road Improvement Dist. No. 1 of Sevier County*, 190 S. W. 567.

Acts 1915, p. 1400, providing for the establishment of road improvement districts, gives the right to add names to the petitions sufficient to make a majority up to the time of the final presentation of the petitions in the county court.—*Id.*

Under Acts 1915, p. 1403, § 1, subds. "a," "b," providing for establishment of road improvement districts, petitions must be filed before county court is authorized to publish notice, but additional petitions may be filed up to hearing, and all petitions are considered in determining whether a majority of owners signed.—*Id.*

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§165 (Mo.) That the state has delegated power over its highways to the counties and county courts, does not prevent the state from reasserting control.—*State ex rel. McWilliams v. Little River Drainage Dist.*, 190 S. W. 897.

(C) Injuries from Defects or Obstructions.

§191(6) (Mo.App.) In action for damages in collision between automobiles, instruction assuming that failure of plaintiff's driver to give signal on approaching curve amounted to negligence in law held erroneous.—*Lumb v. Forney*, 190 S. W. 988.

HOLIDAYS.

See Sunday.

HOMESTEAD.

NATURE, ACQUISITION, AND EXTENT.

(D) Property Constituting Homestead.

§59 (Mo.) Prior to amendment of the homestead statute by Laws 1887, pp. 197, 198, homestead exemption extended only to lands acquired by deed and not by devise under a will, though the executor conveyed the land to the devisee upon the devisee's paying to the executor a sum of money, upon the payment of which the devise was conditioned.—*Schneiderheime v. Berg*, 190 S. W. 593.

§66 (Ky.) Where a debtor has a life estate only in land occupied as a homestead, the debtor is entitled to a homestead exemption only in such part of the land as is worth \$1,000, and

not such quantity of the land that the life estate therein would be worth \$1,000.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

§82 (Ky.) One occupying land in which he has an estate for life is entitled to a homestead therein.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§139 (Mo.App.) Where a widow purchased the homestead property at a foreclosure sale under a trust deed to protect the homestead of herself and minor children, her interest therein cannot be seized under execution against her for an antecedent debt, notwithstanding Rev. St. 1909, § 6711.—*McMichaels v. Reece*, 190 S. W. 51.

§144 (Mo.App.) The mother and guardian of minor children cannot oust them as cotenants in the homestead by purchasing it at sale on foreclosure of a trust deed, but holds the title purchased for the benefit of all.—*McMichaels v. Reece*, 190 S. W. 51.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§177(1) (Ky.) The cancellation of a deed as being fraudulent as to grantor's creditors does not deprive grantor of his homestead which is exempt from execution and not lost by such conveyance.—*Morton v. Young*, 190 S. W. 1090.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§203 (Mo.App.) Execution cannot, during the existence of a homestead right, be levied upon the land for the purpose of selling the interest in the fee subject to the homestead estate.—*McMichaels v. Reece*, 190 S. W. 51.

§209½ (Tex.Civ.App.) Plaintiffs held entitled to a temporary injunction restraining sale of alleged homestead, until case was tried on merits.—*Canales v. Canales*, 190 S. W. 842.

§216 (Tex.Civ.App.) Special findings by the jury in an action in which defendant's wife claimed a note as the proceeds of the homestead, held sufficiently clear and to determine the issue of homestead adversely to the wife.—*Earhart v. Agnew*, 190 S. W. 1140.

HOMICIDE.

See Criminal Law, §364, 368, 390, 404, 413, 450, 451, 595, 719, 728, 761, 778, 783, 792, 814, 823, 829, 941; Insurance, §784; Witnesses, §37.

I. THE HOMICIDE.

§3 (Mo.) Club or stick of wood, 3 feet long and 2½ inches wide, with which defendant struck and killed deceased, was a dangerous and deadly weapon per se.—*State v. Fletcher*, 190 S. W. 317.

III. MANSLAUGHTER.

§33 (Ky.) To constitute voluntary manslaughter, the killing must be done either in a sudden affray or in sudden heat of passion, and upon provocation ordinarily calculated to excite the passion beyond control.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

§45 (Mo.) Words of reproach, however grievous, are not sufficient to free a defendant in a case of homicide from the guilt of murder, nor will contemptuous or insulting actions or gestures, unaccompanied by an assault, reduce the killing to manslaughter.—*State v. Fletcher*, 190 S. W. 317.

§79 (Mo.) Manslaughter in fourth degree is intentional killing in heat of passion on reasonable provocation without malice or premeditation, under such circumstances as will not render killing justifiable or excusable, and the

provocation, at common law and by Rev. St. 1909, § 4468, must consist of personal violence.—*State v. Fletcher*, 190 S. W. 317.

IV. ASSAULT WITH INTENT TO KILL.

⇒96(1) (Tex.Cr.App.) One is not justified in resisting officers attempting to arrest him if he knew that they were officers and what their purpose was, even though they did not inform him of those facts.—*Kelley v. State*, 190 S. W. 169.

VI. INDICTMENT AND INFORMATION.

⇒127 (Mo.) An information for a murder by poison held not defective for failing to repeat allegations of "premeditation and malice in an averment connected by "then and there" with a previous averment in which malice and premeditation were alleged.—*State v. Taylor*, 190 S. W. 330.

⇒135(1) (Tex.Cr.App.) In an indictment for murder by "cutting" deceased "with a sharp instrument," the grand jury should have charged the character of the instrument used if they could obtain the information.—*Carr v. State*, 190 S. W. 727.

⇒135(5) (Mo.) An information for murder by poison held not defective for substituting the words "poisonous substances" for the words "bichloride of mercury" used in an earlier allegation.—*State v. Taylor*, 190 S. W. 330.

An information for a murder by poison need not specify the particular kind or quantity of poison used.—*Id.*

VII. EVIDENCE.

(B) Admissibility in General.

⇒156(2) (Tex.Cr.App.) In prosecution of brothers for murder, declarations of deceased that he had been hired by defendant to kill wife of one of the defendants brought to that defendant's knowledge, were admissible against defendants to show motive.—*Sapp v. State*, 190 S. W. 489.

⇒158(1) (Mo.) Sustaining of an objection to witness' testimony that deceased, just before making threats, "had some whisky and we took a dram," held not error, where it did not appear that such testimony was material.—*State v. Fleetwood*, 190 S. W. 1.

⇒158(3) (Mo.) Evidence that accused, shortly before the killing, stated that two or three might get hurt, although he made no specific reference to deceased, was admissible.—*State v. Dixon*, 190 S. W. 290.

⇒158(3) (Mo.) Testimony that a witness heard defendant say, while at the scene of the killing on the day when it took place, "I am going to get him some day," mentioning no name, was competent to show defendant's general malicious purpose to kill some one.—*State v. Fletcher*, 190 S. W. 817.

⇒163(2) (Mo.) Testimony by the state to bolster up the reputation of deceased as a peaceable citizen was inadmissible where that reputation was not attacked by accused except by evidence that deceased was drunk and disorderly in the afternoon of the killing, and that he had, upon some indefinite occasion, carried a pistol.—*State v. Dixon*, 190 S. W. 290.

⇒163(2) (Tex.Cr.App.) It was proper to exclude questions whether deceased did not inquire where he could get whisky, and if he did not drink quite a lot on the evening of the murder.—*Ray v. State*, 190 S. W. 1111.

Though witnesses stated that they got acquainted with deceased 15 or 20 years before the killing, but did not state what his reputation was at that time, their evidence was not inadmissible as too remote.—*Id.*

⇒169(1) (Tex.Cr.App.) In trial for murder, conductor's testimony that there was no doubt that deceased and one of the defendants got off

his train at a certain time and place and took an automobile driven by the other defendants, was admissible.—*Sapp v. State*, 190 S. W. 489.

⇒169(1) (Tex.Cr.App.) It was proper to exclude testimony that deceased on the morning of the homicide passed near the witness' house, did not speak to her, and appeared to be in a solemn mood.—*Bell v. State*, 190 S. W. 732.

⇒169(3) (Mo.) The state may not show an altercation by defendant with another person than deceased, several hours before the homicide, a separate and disconnected matter.—*State v. Swearingin*, 190 S. W. 268.

⇒169(3) (Mo.) The court properly excluded testimony as to the difficulty in which deceased had been engaged with a third person before deceased was struck by defendant.—*State v. Fletcher*, 190 S. W. 317.

⇒169(4) (Mo.) In prosecution for murder, evidence constituting chain of incriminating circumstances showing defendant's connection with his alleged conspirators and principal participants in crime was competent.—*State v. Smith*, 190 S. W. 288.

⇒173 (Tex.Cr.App.) In murder trial, evidence that accused had given the victim "rough on rats," pretending it was medicine, was admissible; it appearing that "rough on rats" contains arsenic, and arsenic in quantities was found in the victim's stomach.—*Carson v. State*, 190 S. W. 145.

⇒174(7) (Tex.Cr.App.) In murder trial, testimony that the witness, searching for evidence of cause of the death at accused's home, found a trunk packed with clothes of deceased and another, accused of part in the crime, was admissible as evidence of readiness for flight.—*Carson v. State*, 190 S. W. 145.

⇒175 (Mo.) The question to a medical witness who examined deceased as to which side of the head he was struck on was proper, as seeking to definitely locate wound.—*State v. Fletcher*, 190 S. W. 317.

⇒186(6) (Tex.Cr.App.) The exclusion of evidence of instances when deceased was armed, not brought to defendant's attention and occurring more than two months prior to the homicide, held error.—*Becker v. State*, 190 S. W. 185.

Evidence of deceased carrying a pistol on occasions of which defendant was not aware and prior to his first difficulty with defendant are not admissible in a prosecution for murder.—*Id.*

⇒189 (Tex.Cr.App.) It was error to exclude testimony by defendant's wife corroborating his testimony that his difficulty with deceased began when he protested against deceased paying attention to his daughter.—*Becker v. State*, 190 S. W. 185.

⇒190(3) (Mo.) Testimony as to deceased's uncommunicated threats is admissible where there is a doubt as to who was the aggressor in the fatal affray.—*State v. Fletcher*, 190 S. W. 317.

⇒191 (Tex.Cr.App.) Evidence of an assault by deceased on defendant's son, not known to deceased, before the homicide, is inadmissible.—*Becker v. State*, 190 S. W. 185.

Evidence that, when deceased was arrested with a pistol on him prior to the homicide, he was near where defendant's daughter then was, held admissible.—*Id.*

(C) Dying Declarations.

⇒203(2) (Ky.) The law does not require as a condition to the competency of a statement as to a dying declaration that the injured party shall in express words declare that he knows he is about to die, or that he shall use equivalent language.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⇒209 (Tenn.) That an attendant present just before deceased's death said on preliminary hearing that she had not read the paper purporting to be deceased's dying declaration over

to him, did not render the declaration inadmissible.—*Pennington v. State*, 190 S. W. 546.

A dying declaration held under the evidence admissible, though unsigned.—Id.

⇒214(1) (Ky.) Declarations of deceased that he was shot by defendant, that he was not doing anything when shot, that he had had no previous trouble with defendant, were admissible, in connection with his further declaration that he believed death inevitable and near at hand.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⇒214(2) (Ark.) The declaration of a third person who was fatally wounded by accused's victim is inadmissible on accused's behalf, as a dying declaration.—*Holland v. State*, 190 S. W. 104.

⇒215(4) (Ky.) In trial for willful murder, part of deceased's statement to another to whom he said that he was going to die, that he was shot without cause, and his statement to other parties that "he shot me just because he could," was inadmissible, as being a mere expression of opinion.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⇒216 (Tenn.) Where deceased said he could not live until the doctor came, and was praying, and an attendant who observed his condition, testified that he knew he was going to die, his dying declarations were admissible.—*Pennington v. State*, 190 S. W. 546.

A witness who remains with the deceased a considerable time before his death, hears him talk, witnesses his demeanor and has full opportunity for reaching a correct conclusion, may testify to the opinion or conclusion formed from such circumstances that the deceased was aware of impending dissolution.—Id.

(E) Weight and Sufficiency.

⇒228(2) (Mo.) In a prosecution of defendant for poisoning his wife, evidence held sufficient, though circumstantial, to establish the corpus delicti.—*State v. Taylor*, 190 S. W. 330.

⇒234(1) (Mo.) In prosecution for murder, evidence held sufficient to sustain verdict of guilty.—*State v. Smith*, 190 S. W. 288.

⇒237 (Ark.) In a prosecution for homicide tests for determining insanity interposed as a defense, which must be shown by a preponderance of the evidence, stated.—*Diggs v. State*, 190 S. W. 448.

⇒244(1) (Ark.) Evidence held to sustain a conviction for murder against a plea of self-defense.—*Holland v. State*, 190 S. W. 104.

⇒250 (Ky.) Evidence held to sustain a conviction of willful murder.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⇒250 (Mo.) In a prosecution of defendant for poisoning his wife, evidence held sufficient, though circumstantial, to sustain a conviction.—*State v. Taylor*, 190 S. W. 330.

⇒257(1) (Mo.) Evidence in a prosecution for an assault with intent to kill held to sustain a conviction.—*State v. Hayden*, 190 S. W. 311.

VIII. TRIAL.

(B) Questions for Jury.

⇒276 (Tex.Cr.App.) In prosecution for assault to murder an officer, evidence held sufficient to take to the jury the issue whether defendant knew that the other was an officer.—*Kelley v. State*, 190 S. W. 169.

(C) Instructions.

⇒285 (Mo.) Where defendant struck deceased but one blow with a club, fracturing his skull, there was nevertheless a "beating" or "wounding," justifying the use of the terms in an instruction.—*State v. Fletcher*, 190 S. W. 317.

⇒286(1) (Tex.Cr.App.) Upon trial for murder, where nothing indicated that weapon used was a deadly one, and the wound's fatality could be accounted for without imputing intent to kill, ** could not be presumed that appellant had

such intent, and it was error not to so instruct the jury.—*Carr v. State*, 190 S. W. 727.

⇒283(3) (Mo.) An instruction defining "deliberately" and stating that there was no evidence to show sudden passion or just cause of provocation held not erroneous.—*State v. Bobbst*, 190 S. W. 257.

⇒289 (Tex.Cr.App.) In prosecution for murder of named party instruction that defendants could not be convicted of the killing of other parties, though that might be considered on question whether defendants killed named party, should be omitted on defendant's objection, and if necessary to caution jury should not state directly that defendant killed either of such other parties.—*Sapp v. State*, 190 S. W. 489.

⇒294(1) (Ark.) When the killing is admitted, and defense of insanity offered, after the court declares the tests of insanity and burden of proof, it is the better practice to instruct that if jury believed from preponderance of evidence that appellant was insane, they should convict, but otherwise acquit.—*Diggs v. State*, 190 S. W. 448.

Instructions on the issue of insanity, interposed as a defense to a charge of murder, held correct.—Id.

⇒294(1) (Mo.) Refusal of an instruction that if the evidence showed that accused was in a habitual, permanent, or chronic state of insanity prior to the homicide, such insanity would be presumed to have continued up to the time of the homicide held not error, in view of the facts shown.—*State v. Bobbst*, 190 S. W. 257.

⇒300(2) (Ark.) Instruction that accused was justified in shooting if he believed, "acting as a reasonable person," he was in danger, etc., is not reversible error because of the quoted words, where accused was not shown to have been of inferior mental capacity.—*Holland v. State*, 190 S. W. 104.

⇒300(3) (Mo.) Instruction on self-defense, containing all material elements necessary to properly present doctrine under which self-defense is applicable to a case of character involved, was proper.—*State v. Fletcher*, 190 S. W. 317.

⇒300(3) (Tex.Cr.App.) In a prosecution for assault to murder an officer, instructions as to appellant's right to defend his person and an intrusion into his room held sufficient.—*Kelley v. State*, 190 S. W. 169.

⇒300(7) (Mo.) An instruction on self-defense, mentioning as ground for self-defense only a blow struck by deceased, whereas there was evidence that deceased was reaching for his hip pocket when accused fired the fatal shot, was erroneous.—*State v. Dixon*, 190 S. W. 290.

⇒300(7) (Mo.) Instruction on self-defense held not erroneous for requiring jury to find that deceased was of "rash, turbulent, and violent" disposition, because witnesses had testified that he was of "turbulent, quarrelsome, and dangerous" disposition.—*State v. Fletcher*, 190 S. W. 317.

⇒304 (Tex.Cr.App.) In prosecution of schoolboy for shooting teacher, where issue of accidental discharge of pistol was not in case, court properly refused special charge presenting it.—*Wilson v. State*, 190 S. W. 155.

⇒307(1) (Ky.) The practice of giving the law to the jury on the subject of murder and manslaughter in one instruction is proper.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⇒308(3) (Mo.) Refusal of an instruction on murder in the second degree held not error under the evidence.—*State v. Bobbst*, 190 S. W. 257.

⇒308(3) (Mo.) An instruction as to the presumption from an intentional killing with a deadly weapon has no place where all the facts are known by eyewitnesses.—*State v. Swearingin*, 190 S. W. 268.

⇒309(4) (Tex.Cr.App.) On trial of schoolboy for shooting teacher, where there was evidence

that teacher had gone forward to punish boy with his fists after having stated he would beat him up, issue of manslaughter should have been submitted.—*Wilson v. State*, 190 S. W. 155.

⚡309(6) (Mo.) Where there was no evidence of physical violence toward defendant by deceased, an instruction on manslaughter in the fourth degree was not authorized.—*State v. Fletcher*, 190 S. W. 317.

(D) Verdict.

⚡312 (Mo.) In trial for assault with pistol with intent to kill, verdict finding defendant guilty of assault with intent to kill with malice aforethought, and assessing his punishment, apart from surplusage, *held* a general verdict and good.—*State v. Hayden*, 190 S. W. 311.

X. APPEAL AND ERROR.

⚡338(1) (Ky.) In prosecution for willful murder, question to defendant as to whether he shot deceased in self-defense was properly excluded, where defendant in answer to another question had said that he shot to protect himself and believed that deceased was coming on him with a knife to do him some injury.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

In trial for willful murder, court's failure to exclude single expression of opinion contained in deceased's statements to his wife and brother was not prejudicial to defendant, in view of competency of those statements in other respects, and of those made by deceased in presence of another witness in which there was no such expression of opinion.—*Id.*

⚡338(4) (Mo.) Error in admitting testimony as to defendant's conduct and imprecations, hurled at a nephew of deceased a short time after defendant struck the latter, was cured by the court's ordering it to be stricken from the record.—*State v. Fletcher*, 190 S. W. 317.

⚡339 (Mo.) Error in sustaining state's objection to question to defendant whether he intended to kill deceased when he struck him *held* harmless where he answered no.—*State v. Fletcher*, 190 S. W. 317.

⚡340(2) (Mo.) The homicide being actually accomplished by intentional use of a deadly weapon on a vital spot, defendant may not complain of instruction to acquit if defendant had cause to and did believe it necessary to shoot "and kill" to protect himself.—*State v. Swearingin*, 190 S. W. 268.

⚡340(4) (Ark.) In prosecution for wife murder by administering strychnine, error, if any, in giving abstract instruction that, the killing being proved, burden of proving circumstances of mitigation in justification or excuse devolved on accused, *held* harmless, in view of verdict for murder in second degree.—*Wilson v. State*, 190 S. W. 441.

⚡340(4) (Mo.) Where defendant was convicted of manslaughter in the fourth degree, an erroneous instruction on second degree murder was harmless.—*State v. Fleetwood*, 190 S. W. 1.

HOSTILE WITNESS.

See Witnesses, ⚡244.

HOURS OF LABOR.

See Master and Servant, ⚡13.

HUMANITARIAN DOCTRINE.

See Railroads, ⚡338, 390.

HUSBAND AND WIFE.

See Criminal Law, ⚡717; Divorce; Dower; Fraudulent Conveyances, ⚡57; Trial, ⚡296; Vendor and Purchaser, ⚡279; Witnesses, ⚡189.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⚡14(4) (Ky.) Father's deed to daughter and her husband, showing on face it was advancement to daughter and intended to convey separate estate to her, *held* to give daughter and husband each undivided half interest in land, and on death of daughter before Weisinger Act of 1894, husband became entitled to life interest in her half.—*Ford v. May*, 190 S. W. 1066.

⚡15(4) (Tex.Civ.App.) There is no consideration for a wife's signature to a deed to property which was not the homestead and which the husband could convey without her signature.—*Barhart v. Agnew*, 190 S. W. 1140.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(C) Contracts.

⚡83 (Ark.) Under the Married Woman's Act giving married women right to acquire and hold property, it is competent for a married woman to bind herself personally on contracts for household supplies and necessities.—*Adair v. Arendt*, 190 S. W. 445.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

⚡119(5) (Mo.) Where a husband and wife deeded land to a third person, who reconveyed to the wife, she owned a fee-simple legal estate, and not a separate estate, nor one acquired with her separate means, and her subsequent deed to the husband was a nullity, passing neither legal nor equitable title.—*Wilson v. McDaniel*, 190 S. W. 8.

VI. ACTIONS.

⚡205(4) (Tex.Civ.App.) A wife may sue her husband for protection of separate property in his possession against waste or damage, for the recovery of her separate estate, wrongfully converted by him, and to have resulting trust declared.—*Borton v. Borton*, 190 S. W. 192.

Under Acts 33d Leg. c. 32, a wife may sue her husband to quiet title to land claimed as her separate property, to which he is asserting title adverse to her.—*Id.*

⚡232(3) (Ark.) In an action for groceries sold a married woman used by family, evidence *held* to support a verdict for plaintiff for full amount of account.—*Adair v. Arendt*, 190 S. W. 445.

⚡235(3) (Ark.) In an action against a married woman for groceries used in her family, an instruction, although argumentative in form and unhappily phrased, *held* not erroneous in substance.—*Adair v. Arendt*, 190 S. W. 445.

⚡235(4) (Tex.Civ.App.) A special finding by the jury that a wife signed a deed upon condition that she was to have the value of the land does not conflict with a finding that the note therefor was not given to her.—*Earhart v. Agnew*, 190 S. W. 1140.

VII. COMMUNITY PROPERTY.

⚡248 (Tex.Civ.App.) Community status, like partnership, has elements of gains and losses based on presumed labors of each, irrespective of real industry of either.—*Briggs v. McBride*, 190 S. W. 1123.

⚡265 (Tex.Civ.App.) Husband has management of community estate, with exception of conveyance of homestead, or when the wife is abandoned by the husband, or the property is conveyed in fraud of the wife.—*Briggs v. McBride*, 190 S. W. 1123.

⚡266 (Tex.Civ.App.) In a suit to restrain the sale of land under an execution against the husband, evidence *held* to show a gift from the husband of his interest in the money with which the land was bought to the wife, which was valid against a subsequent creditor under Ver-

non's Sayles' Ann. Civ. St. 1914, art. 3967.—City Nat. Bank of Eastland v. Kinnebrew, 190 S. W. 536.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

☞278(1) (Tex.Civ.App.) Where, at time of wife's suit for divorce and division of property, husband was not contributing to her support, and prior thereto each party had determined not to live together, and agreement for division of property was entered into by them when wife was of sound mind, agreement for division was enforceable in suit at instance of next friend of wife, because insane.—Skeen v. Skeen, 190 S. W. 1118.

ICE.

See Municipal Corporations, ☞771, 812.

IDEM SONANS.

See Names, ☞16.

IDENTITY.

See Larceny, ☞49.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, ☞121, 146.

IMPEACHMENT.

See Witnesses, ☞330-414.

IMPLIED CONTRACTS.

See Account Stated; Sales, ☞33.

IMPRISONMENT.

See Bail; Habeas Corpus.

IMPROVEMENTS.

See Constitutional Law, ☞289, 290; Levees; Life Estates, ☞17; Mechanics' Liens; Municipal Corporations, ☞302-530.

INCHOATE DOWER.

See Dower, ☞29-49.

INCONSISTENT DEFENSES.

See Pleading, ☞93.

INCRIMINATION.

See Criminal Law, ☞393.

INCUMBRANCES.

See Life Estates, ☞16.

INDEMNITY.

See Guaranty; Principal and Surety.

INDICTMENT AND INFORMATION.

See Criminal Law, ☞970, 1090; Disorderly House, ☞12, 13; False Pretenses, ☞32; Gaming, ☞90; Homicide, ☞127, 135; Intoxicating Liquors, ☞205-223; Larceny, ☞31, 32; Libel and Slander, ☞152; Names, ☞16.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

☞79 (Tex.Cr.App.) An indictment alleging sale of liquors after an election "therefore duly made and published" was good; the word "there-

fore" being a clerical error for "theretofore."—Dupree v. State, 190 S. W. 181.

☞86(8) (Mo.) Under Rev. St. 1909, §§ 5107, 5115, relating to allegations of venue and sufficiency of indictment in that respect, an indictment, not specifically averring that person alleged to have been assaulted with intent to kill was present at the time and place of assault, was sufficient.—State v. Hayden, 190 S. W. 311.

☞110(3) (Ark.) An indictment for accepting earnings of a prostitute, substantially in the language of Acts 1913, p. 407, as to pandering, is good.—Sweat v. State, 190 S. W. 433.

☞111(2) (Mo.) In prosecution for practicing medicine without a license, contrary to Rev. St. 1909, § 8315, an information need not charge that accused did not come within the exception allowing physicians registered before March 12, 1901, to practice, as the exception was not in the portion of the statute defining the offense.—State v. Saak, 190 S. W. 296.

☞119 (Tex.Cr.App.) An indictment alleging sale of liquors after an election "therefore duly made and published" was good; the word "therefore" being surplusage.—Dupree v. State, 190 S. W. 181.

VI. JOINDER OF PARTIES, OFFENSES AND COUNTS, DUPLICATION, AND ELECTION.

☞128 (Tex.Cr.App.) In an indictment for keeping, aiding and abetting keeping of a house for prostitutes, two counts on same transaction held proper; it being permissible to charge offense, in different counts, in any of ways denounced by statute.—Wyatt v. State, 190 S. W. 153.

☞132(4) (Tex.Cr.App.) Where indictment for keeping a house for prostitutes contained two counts based on same transaction, state held not required to elect.—Wyatt v. State, 190 S. W. 153.

INDIGNITIES.

See Divorce, ☞29, 132.

INDORSEMENT.

See Bills and Notes, ☞183-280.

INFANTS.

See Adoption; Bastards; Depositions, ☞19; Guardian and Ward; Habeas Corpus, ☞85; Limitation of Actions, ☞72; Master and Servant, ☞95, 153.

III. PROPERTY AND CONVEYANCES.

☞24 (Ky.) Where the party's adverse possession began and continued for some time during the life of an adult owner, it was not interrupted by such owner's death leaving infant children.—Ross v. Richardson, 190 S. W. 1087.

☞37 (Ky.) A court's power to order the sale of an infant's real estate is derived solely from the statutes which must be strictly followed.—Luscher v. Julian's Adm'r, 190 S. W. 692.

☞38 (Ky.) A chancellor is without authority to sell an infant's real estate for his maintenance and education except when clearly necessary and when his parents are unable to maintain and educate him.—Luscher v. Julian's Adm'r, 190 S. W. 692.

☞39 (Ky.) Under Civ. Code Prac. § 126, requiring material allegations against infants to be proven, section 127 defining material allegations, and section 429 requiring a petition for sale of infant's property to show that the personalty is insufficient, insufficiency of personalty must affirmatively appear.—Luscher v. Julian's Adm'r, 190 S. W. 692.

That an infant's personalty was insufficient to pay his debts is not sufficiently established where the petition refers to an administrator's

settlement in proof of this fact, but the settlement was not filed until after the sale.—Id.

In proceedings to sell an infant's real estate to secure funds for his maintenance, that the infant's mother filed an answer after the sale stating her inability to support him did not remedy the lack of proper proof when the sale was ordered.—Id.

VI. CRIMES.

⚡68 (Ky.) It was court's duty, when possible minority of a defendant was brought to its attention, to hear proof of and determine his age, and enter judgment committing him to the house of reform for boys until he became 21, under Ky. St. § 2095h.—Fuson v. Commonwealth, 190 S. W. 1095.

VII. ACTIONS.

⚡115 (Ky.) Infant remaindermen contesting order of sale of their estate held not barred from appealing by purchasing one of the tracts of land sold.—Todd's Ex'r v. First Nat. Bank, 190 S. W. 468.

INHERITANCE.

See Descent and Distribution.

INITIAL CARRIER.

See Carriers, ⚡177.

INJUNCTION.

See Appeal and Error, ⚡253; Corporations, ⚡620; Execution, ⚡172; Highways, ⚡55, 64; Intoxicating Liquors, ⚡274, 275; Jury, ⚡31; Municipal Corporations, ⚡323; Nuisance, ⚡77; Schools and School Districts, ⚡32.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

⚡17 (Ky.) Where damages will fully compensate for an injury and defendant is solvent and able to respond, no injunction should issue, but case plaintiff must resort to an action at law for damages sustained.—Campbell v. Irvine Toll Bridge Co., 190 S. W. 1098.

⚡18 (Ky.) Ordinarily the solvency or insolvency of defendant is not important where injunction is sought for impossibility of measuring injury in money, or where the remedy at law is inadequate.—Campbell v. Irvine Toll Bridge Co., 190 S. W. 1098.

II. SUBJECTS OF PROTECTION AND RELIEF.

(C) Contracts.

⚡59(1) (Ky.) In action for mandatory injunction to compel defendant bridge company to accept plaintiff as a lessee for a fixed rental, not alleging company's insolvency, and where damages were readily ascertainable, plaintiff had an adequate remedy at law, so that injunction would be dissolved.—Campbell v. Irvine Toll Bridge Co., 190 S. W. 1098.

(E) Public Officers and Boards and Municipalities.

⚡88 (Ky.) Where city commissioner accepted office of city engineer, and another was elected his successor as commissioner, and qualified, such other could restrain city officials from paying former commissioner salary attached to office of commissioner.—Lampe v. City of Newport, 190 S. W. 678.

(F) Criminal Acts, Conspiracies, and Prosecutions.

⚡103 (Mo.) Power of equity to enjoin acts threatening irreparable injury to property rights is inherent and cannot be divested because such

acts may violate the criminal law.—State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk, 190 S. W. 877.

III. ACTIONS FOR INJUNCTIONS.

⚡114(1) (Tex.Civ.App.) In a suit to enjoin the redistricting of a county brought by 48 out of 137 school districts, the remaining districts held not necessary parties.—Collin County School Trustees v. Stiff, 190 S. W. 216.

⚡114(2) (Ark.) Commissioners of a sewer improvement, whose sewer has not been turned over to the city, may enjoin one constructing a system of sewers for private profit, from making connection with the improvement district sewer until reasonable compensation is made for such connection, in view of Kirby's Dig. § 5726.—Peay v. Kinsworthy, 190 S. W. 565.

⚡122 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4649, in an action by school districts of a county to enjoin redistricting of county, affidavit may be made by any one of joint applicants cognizant of facts.—Collin County School Trustees v. Stiff, 190 S. W. 216.

INNKEEPERS.

See Disorderly House, ⚡4.

INSANE PERSONS.

See Criminal Law, ⚡814; Homicide, ⚡237, 294.

VIII. CRIMES.

⚡83 (Tex.Cr.App.) An insane person cannot legally be held responsible for his criminal acts.—Kiernan v. State, 190 S. W. 165.

⚡86 (Tex.Cr.App.) The fact that the state provides no adequate means to confine an insane person committing a crime in an asylum would not authorize his confinement in the penitentiary as a criminal.—Kiernan v. State, 190 S. W. 165.

IX. ACTIONS.

⚡87 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 4632, prohibits granting of divorce when either spouse is insane, and, where insanity of a spouse exists, a next friend, intervening during pendency of the insane spouse's suit for divorce, cannot prosecute it to termination.—Skeen v. Skeen, 190 S. W. 1118.

In view of law recognizing rights of husband and wife to agree as to division of property when living apart or in view of separation, in insane wife's suit for divorce, the court, having jurisdiction of parties, could take charge of their property and grant partition thereof at instance of next friend of wife.—Id.

⚡94(1) (Tex.Civ.App.) Where wife suing for divorce and division of property became insane, no guardian being appointed to represent her, it was proper for her to be represented in her suit by next friend.—Skeen v. Skeen, 190 S. W. 1118.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances, ⚡57; Injunction, ⚡18; Sales, ⚡291.

INSPECTION.

See Commerce, ⚡50.

INSTRUCTIONS.

To jury, see Criminal Law, ⚡761-829; Trial, ⚡191-296.

INSURANCE.

See Accord and Satisfaction, ⚡12; Courts, ⚡91; Death, ⚡2; Evidence, ⚡215; Pleading, ⚡369; Trial, ⚡127, 194, 253; Witnesses, ⚡219.

II. INSURANCE COMPANIES.

(A) Stock Companies.

—32 (Mo.) Under Rev. St. 1909, § 6900, providing for preliminary incorporation of insurance companies to secure subscriptions, such a corporation cannot pay commission for the sale of or subscription to stock out of the amounts paid by subscribers.—*Reynolds v. Whittemore*, 190 S. W. 594.

One receiving from an insurance company tentatively organized under Rev. St. 1909, § 6900, money of such corporation in payment of the debt to him of a promoter thereof has the burden of showing that such promoter was either the beneficial owner of the money, or that he had authority from the company to appropriate it.—*Id.*

The advancement of money for promotion expenses of a corporation tentatively organized to secure subscriptions, under Rev. St. 1909, § 6900, does not create an indebtedness against the preliminary corporation or the subscribers, even though used in securing stock subscriptions.—*Id.*

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

—130(2) (Tex.Civ.App.) Where an application for fire insurance provided that no liability should attach until the application was actually approved by the home office, there can be no recovery where the jury found that the application had not been approved.—*Merchants' & Bankers' Fire Underwriters v. Parker*, 190 S. W. 525.

—136(4) (Mo.App.) Condition of life policy that no obligation was assumed by defendant unless on day of issue insured was alive and in sound health was controlled by the "misrepresentation statute," Rev. St. 1909, § 6987.—*Hicks v. Metropolitan Life Ins. Co.*, 190 S. W. 661.

(B) Construction and Operation.

—146(1) (Mo.) A contract of insurance is to be construed by the same rules as other contracts, aside from the phases of equitable jurisdiction and a waiver, strict construction against the writer and abhorrence of forfeiture.—*State ex rel. American Fire Ins. Co. v. Ellison*, 190 S. W. 879.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

—183 (Mo.App.) Under term policy for five years, whereby whole premium was earned unless policy was canceled in accordance with its provisions, insured was not entitled to reduction of his premium note on his failure to comply with contract, and after default insurer was entitled to recover full amount of note.—*Continental Ins. Co. of New York v. Phipps*, 190 S. W. 994.

—187(3) (Mo.App.) Where fire insurance policy was issued for indivisible period of five years, for certain indivisible premium, that is, \$15 and a premium note for \$60, the note was as much a part of the consideration for insurance as the cash, so that it could not be claimed that there was no consideration for the note.—*Continental Ins. Co. of New York v. Phipps*, 190 S. W. 994.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

—226 (Mo.App.) Where policy had become effective between parties, neither could cancel or terminate it without the other's consent, except upon strict compliance with conditions provided there for its cancellation.—*Continental Ins. Co. of New York v. Phipps*, 190 S. W. 994.

—238(1) (Mo.App.) Where a five-year policy differed from oral representations of insurer's agent that it would be for one year, and insured, having right to cancel policy at any time upon

terms provided therein, retained it without objection from spring to fall, it was too late to refuse it on ground of such misrepresentations.—*Continental Ins. Co. of New York v. Phipps*, 190 S. W. 994.

Provision in five-year policy of fire insurance that insured could cancel it by paying premium note in full, whereupon insurer would take out usual short rates and expense of taking risk and return balance, whether reasonable or not, was a valid provision which parties had right to make.—*Id.*

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

—256(1) (Ky.) It is the purpose of the Ky. St. § 639, providing that misrepresentations in insurance application, unless material or fraudulent, shall not prevent recovery, to prevent loss of indemnity on misrepresentations not fraudulent or material.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

—268 (Ky.) It is the purpose of the Ky. St. § 639, providing that misrepresentations in insurance application, unless material or fraudulent, shall not prevent recovery, to prevent loss of indemnity on warranties not fraudulent or material.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

(B) Matters Relating to Property or Interest Insured.

—281 (Ky.) No different rule should be applied as to misrepresentations of the price paid for live stock and misrepresentations as to value of any other property insured.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

The material question in fixing insurable value of live stock is not the price paid, but its true value, so that, where the statement that the value of a horse was \$1,200 was in no way contradicted, the fact that the owner falsely stated that he paid \$1,100 for it was not material.—*Id.*

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(E) Nonpayment of Premiums or Assessments.

—358 (Ark.) Where insurance company authorizes an agent to take note for premium in his own name, the company looking to him for the cash, the company is bound by his extension of the note.—*Hutchins v. Globe Life Ins. Co.*, 190 S. W. 446.

—365(1) (Mo.App.) Policy of fire insurance construed, and held a term policy for five years under which whole premium was earned, unless it was canceled in accordance with its provisions, but which insured could have kept in force or reinstated after default by paying installments due.—*Continental Ins. Co. of New York v. Phipps*, 190 S. W. 994.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

—379(4) (Ark.) Where the examining physician of an insurance company knew that the application answers he wrote down for an illiterate insured were false, the company cannot set up their falsity as breach of warranty.—*Hutchins v. Globe Life Ins. Co.*, 190 S. W. 446.

—388(5) (Mo.App.) Acts of agent of corporation issuing employer's liability policy to partners who subsequently incorporated same business held to foreclose defendant's rights to insist on formal written assignment of policy to corporation and its consent indorsed thereon, as provided by policy.—*Compton Heights Laundry*

Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

Since an insurer in an employer's liability insurance policy can refuse to defend an action for damages only at its peril, it cannot be held to have waived any defense under the policy by defending or negotiating for a compromise settlement, so long as any peril exists.—Id.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance.

☞512 (Mo.App.) Where there is or may be different grounds of liability asserted, for some of which an insurer in an employer's liability insurance policy is liable, and for some of which the employer must stand the loss, neither party can exclude the other from participating in the defense.—**Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.**

☞513 (Mo.App.) That liability insurer had offered employer free use of its legal departments after repudiating liability under the policy held not to prevent employer's recovery of attorney's fee incurred in defending suit for injury.—**Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.**

XIV. NOTICE AND PROOF OF LOSS.

☞535 (Mo.App.) A provision for notice of accidents in an employer's liability policy is of essence of contract, and a breach of such provision by assured will prevent a recovery under policy on ground of nonperformance of a condition precedent, although policy contains no stipulation for forfeiture.—**United States Fidelity & Guaranty Co. v. W. P. Carmichael Co., 190 S. W. 648.**

☞552 (Ky.) It is the purpose of the Ky. St. § 639, providing that misrepresentations in insurance application, unless material or fraudulent, shall not prevent recovery, to prevent loss of indemnity on misrepresentations or warranties not fraudulent or material, either in the application or proof of loss.—**Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697.**

☞553(1) (Mo.App.) In action on fire insurance policy, a sworn statement falsely including a claim for damage to a boiler, held to deprive plaintiff of his right to recover.—**Arel v. First Nat. Fire Ins. Co., 190 S. W. 78; Same v. Girard Fire & Marine Ins. Co., Id. 81.**

XVI. RIGHT TO PROCEEDS.

☞585(5) (Ky.) Where a life insurance policy gave insured right to change beneficiary, and on maturity of policy to withdraw cash value, take an annuity, or continue policy as a paid-up participating policy, insured might take its cash surrender value without the consent of beneficiaries.—**Cooper v. West, 190 S. W. 1085.**

Where insured in a policy of life insurance was informed at its maturity of alternatives open to him, his reply by letter held an election to take cash surrender value of policy.—Id.

☞590 (Ky.) Where insured in a policy of life insurance accepted cash surrender value and company had forwarded a check to its agent to be delivered upon execution of a proper release, fund was subject to attachment as property of insured.—**Cooper v. West, 190 S. W. 1085.**

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

☞607 (Tex.Civ.App.) Where, upon payment of theft policy, the owner's interest, in a stolen automobile and a bill of sale of the car is assigned to the insurance company, the latter may maintain suit as claimant upon sequestration

of the automobile.—**Dawedoff v. Hooper, 190 S. W. 522.**

XVIII. ACTIONS ON POLICIES.

☞622(3) (Mo.) Where a policy provided for payment upon "receipt and approval of proofs of death," statute of limitations did not commence running until refusal of company to concede death.—**Bonslett v. New York Life Ins. Co., 190 S. W. 870.**

The fact that beneficiary could have treated the company's delay in paying claims as rejection and brought suit will not make statute of limitations run from date of death, where policy provides that payments are not to begin until action upon proofs of death.—Id.

☞645(3) (Tex.Civ.App.) In an action on a fire insurance policy, plaintiff cannot rely on the estoppel of defendant to deny the agency of the one who took plaintiff's application in premium, unless he specially pleads it.—**Merchants' & Bankers' Fire Underwriters v. Parker, 190 S. W. 525.**

☞646(4) (Mo.App.) Where insured's prior payments of premiums entitled him to loan on life policy under its provisions, presumption, in administratrix's action on policy, was that a loan made insured, the note itself reciting it was for a loan, was a loan in reality, and not a note given on account of a premium due.—**Crowe v. Bankers' Life Ins. Co., 190 S. W. 960.**

☞646(5) (Mo.App.) Where an employer's liability insurer recognized an accident as covered by its policy and proceeded to act thereunder according to its terms, the insured was conclusively presumed to have been prejudiced by such conduct.—**Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.**

☞646(6) (Ky.) In an action on a policy of burglary insurance, it is incumbent upon plaintiff to show a loss by burglary, and no presumption in his favor will arise from failure of defendant to introduce evidence on question.—**National Surety Co. v. Redmon, 190 S. W. 1081.**

☞650 (Mo.App.) In action on life policy, where neither application nor substance was attached to or indorsed on policy, as required by Rev. St. 1909, § 6978, defense predicated on misrepresentations by insured in obtaining policy, consisting of false answers in application, was not available, and application should have been excluded.—**Hicks v. Metropolitan Life Ins. Co., 190 S. W. 661.**

☞665(3) (Ky.) Evidence held to show that statements in procuring insurance on a horse, while false, were neither material nor fraudulent, so that the policy was not thereby avoided.—**Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697.**

☞665(3) (Mo.App.) In administratrix's action on life policy where case turned on whether insured paid fifth premium or gave note, trial court was not bound to believe statements in testimony of insurer's witness concerning what record of company showed, but could find for plaintiff on her prima facie case.—**Crowe v. Bankers' Life Ins. Co., 190 S. W. 960.**

In administratrix's action on life policy, evidence held sufficient to justify trial court in finding that entry on insurer's record, representing fifth premium, was cash payment.—Id.

☞665(4) (Ky.) Although it is not necessary to establish the corpus delicti by direct testimony in an action on a policy of burglary insurance, it is essential to show some facts from which inference of a loss by burglary reasonably follows.—**National Surety Co. v. Redmon, 190 S. W. 1081.**

In an action on a policy of burglary insurance where plaintiff, although insured against loss by burglary, theft, or larceny, based his entire case on claim of burglary, evidence of marks on

a window screen and footprints on roof, discovered three weeks after loss, held insufficient to take case to the jury.—Id.

—665(7) (Ky.) Evidence held to show that statements in proof of loss, while false, were neither material or fraudulent, so that policy was not thereby avoided.—Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697.

—665(8) (Mo.App.) In action on employer's liability policy by employer suffering judgment in employer's action on ground of its negligence in not protecting mangling machines, evidence held to show insurer's waiver of rider relieving it of liability for personal injury resulting from such negligence.—Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

—666 (Mo.) Where installments of insurance were due upon acceptance of proofs of death and annually thereafter, a verdict should have included only installments falling due prior to bringing the action with interest until time of trial.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

—668(1) (Mo.App.) In employer's action upon employer's liability policy after suffering a judgment in employer's suit for personal injury, evidence held to make defendant's vexatious refusal to pay amount due under its policy, subjecting it to damages, etc., a question for jury.—Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

—668(6) (Ky.) Evidence held insufficient to warrant determination as a matter of law that statements of price paid for horse in application for insurance thereon were fraudulent.—Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697.

—668(7) (Mo.App.) In action on life policy, question whether insured was in sound health when policy was issued held for jury.—Hicks v. Metropolitan Life Ins. Co., 190 S. W. 661.

—668(8) (Ark.) Whether an insurance company authorized its soliciting agent to accept a note payable to himself for the premium, and whether he was authorized to and did extend time for payment thereof, was for the jury.—Hutchins v. Globe Life Ins. Co., 190 S. W. 446.

—668(11) (Mo.) In action on life policy, a conflict of evidence on question of identity of defendant's witness claiming to be insured, makes the question one for the jury.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

—668(14) (Mo.App.) In an action to recover premiums on indemnity policies in which defendant filed a counterclaim for amount paid to compromise a claim for injuries which plaintiff had refused to defend, evidence of defendant's stenographer held sufficient to take question of whether she mailed a notice to plaintiff, to jury.—United States Fidelity & Guaranty Co. v. W. P. Carmichael Co., 190 S. W. 648.

—668(15) (Ark.) Whether the examining physician of an insurance company knew that the answers he wrote in the application of an illiterate insured were false was for the jury.—Hutchins v. Globe Life Ins. Co., 190 S. W. 446.

XX. MUTUAL BENEFIT INSURANCE.

(B) The Contract in General.

—723(7) (Tex.Civ.App.) As statements of family history in an application for fraternal insurance cannot be held to be warranties, such statements, when believed to be true, would not necessarily vitiate a certificate, warranting truth of applicant's answers.—Loesch v. Supreme Tribe of Ben Hur, 190 S. W. 506.

In view of the provisions of constitution of defendant fraternal society, held that warranties in relation to family history in application for certificate were intended to protect society only against misrepresentations of facts material to risk.—Id.

That an applicant for a certificate of benefit insurance stated in application that she had one sister dead would put on notice as to cause of deceased sister's death.—Id.

—726 (Tex.Civ.App.) The ordinary rules governing construction of contracts would apply to construction of a contract of benefit insurance unless changed or abrogated by statute.—Loesch v. Supreme Tribe of Ben Hur, 190 S. W. 506.

(B) Beneficiaries and Benefits.

—782 (Tenn.) Where insured in a certificate of fraternal insurance has right to change beneficiary, while beneficiary does not have a vested interest, it does have a contingent right subject to be defeated by an exercise of power of substitution substantially in manner provided by laws of the order.—Davis v. Davis, 190 S. W. 459.

—784(1) (Tenn.) Where deceased stated his intention to change beneficiary in his certificate of fraternal insurance, but made no effort to comply with the by-laws, held, that he had not made an attempt sufficient to invoke rule that a reasonable attempt to comply with by-laws will be treated in equity as consummating change in equitable contemplation.—Davis v. Davis, 190 S. W. 459.

Where by-laws of a fraternal order provided for change of beneficiary and that any attempt to change beneficiary by assignment, shall be null and void, held, that deceased did not, by delivery of certificate to wife, vest in her right to take its proceeds as assignee.—Id.

—787 (Mo.App.) By-laws of a fraternal beneficial association, providing that if the member's death be caused by any beneficiary no benefit shall be paid, held to apply where the named beneficiary murders the member but dies before her, notwithstanding a by-law as to payment if the designated beneficiary dies before the member.—Greer v. Supreme Tribe of Ben Hur, 190 S. W. 72.

In an insurance policy containing provisions forfeiting the same absolutely in case the death of the insured is caused by the beneficiary, the term "beneficiary" means the person who is designated such directly or indirectly by the policy and is not limited to such persons who survive the insured.—Id.

Provisions in the by-laws of benefit societies providing for absolute forfeiture in case the death of the member is caused by the beneficiary are not in conflict with another provision of the by-laws dealing with policies which survive the member's death and providing who shall receive the benefits in case of the prior death of the named beneficiary.—Id.

—788(1) (Ky.) Where a certificate provided that if a member should die by his own hand, sane or insane, certificate should be void, if an insured voluntarily and intentionally drank carbolic acid, when he knew probable consequence of his act, certificate was forfeited, but not if taken by accident or mistake.—Sovereign Camp of Woodmen of the World v. Valentine, 190 S. W. 712.

Where a certificate of benefit insurance provided that if insured should die by own hand, sane or insane, certificate should be forfeited, if insured drank carbolic acid while insane the certificate was forfeited, unless insured did not have enough mind to know his act would probably result in death.—Id.

(F) Actions for Benefits.

—814 (Tex.Civ.App.) Under Acts 33d Leg. c. 113, § 17 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4844), service of process on a fraternal benefit society, whether incorporated or not, can be made only by serving the insurance commissioner.—International Order of Twelve, Knights and Daughters of Tabor, v. Brown, 190 S. W. 251.

—817(2) (Tex.Civ.App.) In an action on a certificate of benefit insurance, burden of proof was on defendant to establish alleged falsity of answer of insured on application as to cause of

her mother's death.—*Loesch v. Supreme Tribe of Ben Hur*, 190 S. W. 506.

—817(3) (Ky.) In an action on a benefit certificate, burden was on defendant to prove that insured committed suicide.—*Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712.

—819(2) (Tex.Civ.App.) In an action on a certificate of benefit insurance, evidence held insufficient to show that it was not family history that insured's mother died of typhoid fever, that applicant willfully concealed knowledge of death of sister, or to establish suicidal death of sister, or to show that real facts, as disclosed by evidence would have been material or affected risk.—*Loesch v. Supreme Tribe of Ben Hur*, 190 S. W. 506.

—819(4) (Ky.) Evidence held insufficient to show that death of insured resulted from drinking carbohic acid, or that if he did it was intentionally done, or that he was insane at time.—*Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712.

In an action on a benefit certificate, beneficiary made out a prima facie case by proving that insured was dead.—*Id.*

—825(1) (Ky.) In an action on a benefit certificate, evidence held sufficient to take the case to jury.—*Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712.

—826(2) (Ky.) In an action on a fraternal benefit certificate, an instruction, that if death of insured was caused by his voluntary taking carbohic acid jury should find for defendant, held properly refused as misleading.—*Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712.

INSURANCE COMMISSIONER.

See Insurance, —814.

INTENT.

See Criminal Law, —390; Deeds, —98; Fraudulent Conveyances, —71, 273; Homicide, —286; Statutes, —181; Wills, —439.

INTEREST.

See Damages, —69; Executors and Administrators, —478; Life Estates, —16; Trusts, —219, 231; Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

—21 (Mo.App.) Where defendant did not make tender of any amount to plaintiff, the fact that plaintiff was found not to be entitled to the full amount claimed will not bar recovery for interest upon the sum recovered.—*Merkel v. St. Louis Hide & Tallow Co.*, 190 S. W. 611.

II. RATE.

—34 (Tex.Civ.App.) Under charter of city of Mineral Wells adopted August 19, 1913, in accordance with Acts 33d Leg. p. 147, § 8, city's assignable certificates for special assessments, fixing interest not to exceed 8 per cent. might be enforced, notwithstanding general statute relating to interest.—*Gallahar v. Whitley*, 190 S. W. 757.

INTERMEDIATE COURTS.

See Appeal and Error, —1082.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

—8(2) (Mo.App.) In suit on certified check, held, that the bank was entitled to have the drawer impleaded, under Acts 1915, p. 148, § 94, providing for interpleader in actions against

banks wherein others than the plaintiff claim the fund involved.—*City of Brunswick v. People's Savings Bank*, 190 S. W. 60.

II. PROCEEDINGS AND RELIEF.

—32 (Tex.Civ.App.) Where, in an action to recover money, the defendant disclaims any interest and intervener claims it, but neither plaintiff nor intervener establishes title, the money should be left in the hands of the defendant.—*Carranza v. Hicks*, 190 S. W. 540.

INTERROGATORIES.

See Depositions.

INTERSTATE COMMERCE.

See Commerce.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Criminal Law, —361, 564, 820, 938; Indictment and Information, —79, 119.

I. POWER TO CONTROL TRAFFIC.

—10(3) (Tex.Cr.App.) Under Acts 33d Leg. c. 147, § 4, the city is empowered to prohibit absolutely the sale of liquor in certain districts.—*Le Gois v. State*, 190 S. W. 724.

Under Acts 33d Leg. c. 147, § 5, providing that enumeration of powers shall never be construed to preclude a city from local self-government, the city may prohibit sale of liquors in certain districts even if the specific power of section 4 to establish saloon districts and prohibit sales of liquor did not cover such prohibition.—*Id.*

—10(4) (Tex.Cr.App.) Under Acts 33d Leg. c. 147, § 4, the city is empowered to license saloons and wholesale houses in certain districts.—*Le Gois v. State*, 190 S. W. 724.

—12 (Tex.Cr.App.) Where a city at a special election adopted a charter provision prohibiting sale of liquor in certain districts, such charter provision was not in violation of Const. art. 16, § 20, authorizing the people to adopt prohibition by a vote.—*Le Gois v. State*, 190 S. W. 724.

III. LOCAL OPTION.

—39 (Tex.Cr.App.) In prosecution for pursuing occupation of selling intoxicants in dry territory, state was properly permitted to introduce orders of commissioners' court ordering election and declaring result, and certificate of county judge showing publication had been made.—*Vance v. State*, 190 S. W. 176.

In a prosecution for pursuing occupation of selling intoxicants in dry territory, only such orders of commissioners' court as evidence that prohibition has been legally adopted need be introduced in evidence.—*Id.*

V. REGULATIONS.

—130 (Tex.Cr.App.) An ordinance of a city prohibiting license to sell liquors in certain territory held not subject to the criticism that it does not prohibit sale of liquors in view of Pen. Code 1911, art. 130, and Acts 31st Leg. c. 17, § 1.—*Le Gois v. State*, 190 S. W. 724.

VI. OFFENSES.

—139 (Mo.App.) Rev. St. 1909, § 7227, providing that no person shall keep for another in a county that has adopted local option law any intoxicating liquors of any kind, applies to towns of 2,500 inhabitants having local option and located in county that has adopted it.—*State v. Leonard*, 190 S. W. 957.

VIII. CRIMINAL PROSECUTIONS.

☞205(2) (Tex.Cr.App.) Under Rev. St. 1911, art. 5728, as to conclusiveness of prohibition election in the absence of contest, *held*, that indictment for illegal sale of intoxicating liquor need not allege that notice of result of election for prohibition was published.—*Cleveland v. State*, 190 S. W. 177.

☞205(2) (Tex.Cr.App.) Under Rev. St. 1911, art. 5728, as to conclusiveness of prohibition election in the absence of contest, *held*, that indictment for illegal sale of intoxicating liquor need not allege that notice of result of election for prohibition was published.—*Dupree v. State*, 190 S. W. 181.

☞212 (Tex.Cr.App.) Indictment for pursuing occupation of selling intoxicants in prohibition territory *held* not to allege joint sale to persons named, but that sales were made to each.—*Vance v. State*, 190 S. W. 176.

☞219 (Mo.App.) A charge of unlawfully keeping liquor for and delivering it to another is complete without naming the particular person for whom it was kept.—*State v. Leonard*, 190 S. W. 957.

The word "sale" in respect to a sale of intoxicating liquor, *vi ex termini*, includes a person to whom the sale is made.—*Id.*

In an information charging that defendant unlawfully kept for and delivered intoxicating liquor, charge that it was kept for a person unknown could be treated as surplusage, so that information was not invalid as not stating name of real party for whom it was kept.—*Id.*

☞223(2) (Tex.Cr.App.) In prosecution for pursuing business of selling intoxicants in dry territory, introduction in evidence of order of commissioners' court ordering election and declaring result, and certificate of county judge showing publication had been made, did not present variance as to necessary allegations in indictment.—*Vance v. State*, 190 S. W. 176.

☞223(6) (Mo.App.) Under information for unlawfully keeping liquor for one "John Doe whose true name is unknown," variance, if any, in proof that party for whom it was kept was one John Medley was no ground for reversal, unless trial court found that variance was material and prejudicial to defense, as provided by Rev. St. 1909, § 5114.—*State v. Leonard*, 190 S. W. 957.

☞223(6) (Tex.Cr.App.) In prosecution for pursuing occupation of selling intoxicants in prohibition territory, persons not named in indictment were properly allowed to testify they purchased whisky from defendant.—*Vance v. State*, 190 S. W. 176.

In prosecution for pursuing occupation of selling intoxicants in dry territory, state must prove defendant made at least two sales to persons named in indictment, in addition to proving he pursued the occupation.—*Id.*

☞233(1) (Ark.) That defendant several times ordered whisky in another's name *held* a material circumstance, tending to prove that defendant was in the liquor business.—*Holt v. State*, 190 S. W. 101.

☞236(11) (Ark.) Evidence *held* to show when and where the liquor was sold and to sustain a conviction of unlawfully selling intoxicating liquor.—*Holt v. State*, 190 S. W. 101.

☞238(2) (Tex.Cr.App.) In prosecution for selling intoxicants in prohibition county, whether defendant sold intoxicating liquors to state's witness, and did not deliver liquor to him under agreement that he should order it for him, *held* for jury.—*Waggoner v. State*, 190 S. W. 493.

☞239(10) (Ark.) An instruction that it is not unlawful to use another's name in ordering whisky *held* properly refused, as tending to divert the minds of the jury from the issue whether defendant sold the whisky.—*Holt v. State*, 190 S. W. 101.

X. ABATEMENT AND INJUNCTION.

☞274 (Mo.) In state's suit to enjoin railroad from transporting and delivering intoxicants, allegations of petition substantially averring violation of three sections of criminal law relative to receiving, storing, keeping, or delivering of intoxicants, *held* insufficient to give equity court jurisdiction.—*State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk*, 190 S. W. 877.

☞274 (Tex.Civ.App.) Petition *held* not to show present, actual, threatened, or contemplated pursuit of liquor business without license, so as to authorize injunction under Rev. St. art. 4674, as for a nuisance, but rather a violation some time in the past.—*Union Men's Fraternal & Beneficiary Ass'n v. State*, 190 S. W. 242.

☞275 (Mo.App.) In injunction suit, evidence *held* not to show that defendant was guilty of maintaining a public nuisance, as distinguished from a mere violation of liquor laws.—*State ex rel. Alton v. Salley*, 190 S. W. 940.

INTOXICATION.

See Evidence, ☞106; Municipal Corporations, ☞804.

INVENTION.

See Patents.

INVESTMENT.

See Trusts, ☞217.

INVITED ERROR.

See Appeal and Error, ☞882.

ISSUE.

See Pleading, ☞370.

JEOPARDY.

See Criminal Law, ☞200.

JOINDER.

See Action, ☞50; Indictment and Information, ☞128; Parties, ☞15-31.

JOINT LIABILITIES.

See Railroads, ☞260, 266; Trespass, ☞31.

JOINT TENANCY.

See Tenancy in Common.

☞8 (Tex.Civ.App.) A joint tenant or co-owner has the right to use and enjoyment of whole property to extent of his interest only.—*Beall v. Clack*, 190 S. W. 774.

One joint owner in possession of a secured note payable to order of co-owner has no authority to dispose of co-owner's interest in note or convert it to its own use.—*Id.*

☞10 (Tex.Civ.App.) If one joint owner of a secured note assumed authority to deal with interest of co-owner, and loss ensued, measure of damages would be value of co-owner's interest.—*Beall v. Clack*, 190 S. W. 774.

JUDGES.

See Appeal and Error, ☞571; Criminal Law, ☞655; Justices of the Peace.

IV. DISQUALIFICATION TO ACT.

☞42 (Tex.Civ.App.) Where a judge of the county court was made a party in case by allegations of a cross-action of a suit in the justice court, he should have held himself disqualified to sit in case on appeal to county court.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

☞45 (Tex.Civ.App.) A judge who presided at trial of cause, who was related within third degree to a surety on appellant's bond, should have excused himself as disqualified, and de-

clined to make any order in case.—First Nat. Bank v. Herrell, 190 S. W. 797.

JUDGMENT.

See Execution; Pleading, ¶350.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

¶5 (Ky.) Judgment in suit involving mutual accounts, which decided neither case presented by petition nor case shown by counterclaim, was prima facie erroneous.—Somerset Stave & Lumber Co. v. Brown, 190 S. W. 680.

¶17(1) (Tex.Civ.App.) A judgment by default on a cross-action by one defendant against another can be set aside where the record is silent as to service of citation in that cross-action against the defendant.—Wood v. Love, 190 S. W. 235.

¶17(1) (Tex.Civ.App.) Where, in suit by the state for unpaid land taxes, the amended petition sued for larger amount than the original, claiming taxes for additional years, and a number of defendants sued in the first were not joined in the second, default judgment on the amended petition without service of citation thereon was unauthorized.—Hill v. State, 190 S. W. 255.

¶17(11) (Mo.App.) In attachment against a nonresident served only by publication, where no property was seized and the garnishee denied possessing property of the defendant, it was improper to render judgment by default against defendant before finding that the garnishee possessed property belonging to defendant.—Riley Pennsylvania Oil Co. v. Symmonds, 190 S. W. 1038.

IV. BY DEFAULT.

(A) Requisites and Validity.

¶92 (Mo.App.) In action on note before justice court in which defendants, after judgment, appealed to circuit court, judgment of that court against defendants because of their failure to appear entered on plaintiff's waiver of a jury and a hearing of evidence was not a "default judgment."—Munroe v. Dougherty, 190 S. W. 1022.

¶101(1) (Tex.Civ.App.) Under Rev. St. art. 7688, requiring petition in suit to collect delinquent taxes to be verified, etc., an unverified petition will not support judgment by default.—Hill v. State, 190 S. W. 255.

¶107 (Tex.Civ.App.) A judgment by default when an answer was on file will not be set aside, where the defendant did not call the trial court's attention to the answer or move to set the judgment aside during the term at which it was rendered.—Wood v. Love, 190 S. W. 235.

(B) Opening or Setting Aside Default.

¶139 (Mo.App.) The setting aside of a default judgment is largely in discretion of trial court.—Munroe v. Dougherty, 190 S. W. 1022.

¶143(2) (Mo.App.) To justify trial court in setting aside a judgment by default, it is necessary for movants to show that they had good reason for failing to appear when judgment was rendered and that they had a meritorious defense.—Munroe v. Dougherty, 190 S. W. 1022.

¶143(7) (Mo.App.) A defendant cannot ordinarily procure the setting aside of a judgment against him on ground of a mistaken belief that he has obtained an attorney to protect his interest, but he must see to it that attorney understands and accepts retainer.—Munroe v. Dougherty, 190 S. W. 1022.

¶143(10) (Mo.App.) If defendants appealing from a judgment for plaintiff had employed an attorney to appear for and represent them and

he had neglected to look after the case, his neglect would have been their neglect.—Munroe v. Dougherty, 190 S. W. 1022.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

¶194 (Mo.) Under Rev. St. 1909, §§ 1871, 2097, the court cannot give judgment on a count in the petition for ejectment before determining the issues on another count to establish plaintiff's equitable title.—McQuitty v. Steckdaub, 190 S. W. 590.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

¶248 (Mo.App.) Rev. St. 1909, §§ 1818, 1831, providing that only substantive facts necessary to cause of action or defense need be pleaded, and that pleadings shall be liberally construed, were not intended to aid judgment based on entire failure of proof, or on case made by evidence presenting entirely different cause of action from that stated in petition.—Bradshaw v. Lusk, 190 S. W. 400.

¶249 (Mo.App.) A petition, alleging facts creating an equitable cause of action upon contract entitling plaintiff to be made a pretermitted heir, praying a money judgment "and all other proper relief," was properly regarded as an equitable cause, and the court could give the proper relief required.—Buck v. Meyer, 190 S. W. 997.

¶250 (Mo.App.) In a suit under Rev. St. 1909, § 5448, providing treble damages for removal of timber, where plaintiff did not establish his cause of action under statute, held that he could not recover as on common-law action for conversion.—King v. Sligo Furnace Co., 190 S. W. 368.

¶252(2) (Ky.) Under Civ. Code Prac. § 125, subd. 2, an adjudication of land to defendant in an action to quiet title, where his answer had only denied allegations of petition entitling plaintiff to relief, was erroneous.—Patton v. Stewart, 190 S. W. 1062.

¶252(5) (Mo.) A purchaser held entitled to have the title to land declared vested in her by her contract under the pleadings and evidence and prayer for general relief, though not entitled to reformation of a deed prayed for.—McQuitty v. Steckdaub, 190 S. W. 590.

¶252(5) (Mo.) A court sitting as chancellor is not bound by plaintiff's specific prayer, if plaintiff's pleadings and proof show right to any relief, and there is a prayer for general relief.—State ex rel. McWilliams v. Little River Drainage Dist., 190 S. W. 897.

¶253(1) (Tex.Civ.App.) In suit to cancel deed, where pleading only authorized recovery of rent for year 1914 at \$150 and an item of \$80 for expense, it was error to render judgment against defendant for \$380, \$300 of which was rent for two years.—Pitt v. Gilbert, 190 S. W. 1157.

¶256(1) (Tex.Civ.App.) Judgment must follow verdict, and an assignment questioning court's authority to enter a judgment contrary to the verdict simply because verdict is unsupported by evidence cannot be sustained.—Atchison, T. & S. F. Ry. Co. v. Smith, 190 S. W. 761.

(D) Arrest of Judgment.

¶266 (Mo.App.) A motion in arrest goes only to defects appearing on face or record proper.—Benning v. Farmers' Bank of Odessa, 190 S. W. 983.

X. EQUITABLE RELIEF.

(B) Jurisdiction and Proceedings.

¶461(3) (Ark.) In a suit to set aside a decree foreclosing a lien for drainage assessment, evidence held to sustain a finding that service was had upon plaintiff in foreclosure suit.—Neely v. Lee Wilson & Co., 190 S. W. 481.

—481(4) (Tex.Civ.App.) Equity should not set aside a judgment for lack of service of process upon defendant, except on clear, satisfactory, and convincing proof of lack of such service.—*Pierce-Fordyce Oil Ass'n v. Staley*, 190 S. W. 814.

In suit to set aside a default judgment for failure to serve plaintiff, plaintiff's testimony contradicted by testimony of the constable serving the process and another, *held* not to warrant awarding relief.—*Id.*

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

—481 (Ky.) Where a consent judgment is attacked collaterally, it must be conclusively presumed that all parties to suit agreed to it.—*Wallace v. Lackey*, 190 S. W. 709.

(B) Grounds.

—486(1) (Ky.) A decree or judgment which is not void cannot be attacked except by direct proceedings to vacate judgment.—*Wallace v. Lackey*, 190 S. W. 709.

—495(1) (Ky.) The judgment of a court of general jurisdiction cannot be collaterally attacked and will not be held void unless want of jurisdiction of court appears upon record in action in which judgment was rendered, as it will be presumed that court has not proceeded without its jurisdiction.—*Wallace v. Lackey*, 190 S. W. 709.

—499 (Ky.) In an action for trespass and removal of timber, parol proof as to validity of orders of court reinstating an action by administrator of record owner against heirs and creditors and ordering execution of a deed to plaintiffs, *held* incompetent.—*Wallace v. Lackey*, 190 S. W. 709.

—501 (Ky.) In an action for trespass and removal of timber, a judgment offered in evidence as part of plaintiff's chain of title could not be objected to because irregular or erroneous, but only on ground that it is void.—*Wallace v. Lackey*, 190 S. W. 709.

A decree or judgment of a court having jurisdiction is not void, although it may be erroneous.—*Id.*

—504(1) (Mo.) Where a court has jurisdiction of the persons of defendants and the subject-matter of the action, none of its proceedings are open to collateral attack for simple irregularities.—*Schneiderhelnze v. Berg*, 190 S. W. 593.

(C) Proceedings.

—518 (Ky.) In a suit for trespass and removal of timber an attack upon validity of an order in proceedings by administrator of record owner of land, reinstating case upon docket and directing execution of a deed to plaintiffs, *held* collateral.—*Wallace v. Lackey*, 190 S. W. 709.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

—590(2) (Tex.Civ.App.) Where pleadings put in issue plaintiff's right to recover upon two causes of action, judgment on one, silent as to the other, was *prima facie* an adjudication that he was not entitled to recover upon other cause, and was *res adjudicata* as to it.—*Pitt v. Gilbert*, 190 S. W. 1157.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

—654 (Mo.App.) Although a nonsuit was involuntary and affirmed on appeal it was not a final judgment upon merits or *res adjudicata* as to cause of action.—*State, to use of Goodman, v. Regent Laundry Co.*, 190 S. W. 951.

(B) Persons Concluded.

—675(1) (Mo.) Whenever a person interested in the subject-matter of a defense is placed in control of litigating the defense, he is as much bound by the judgment as a named defendant.—*State ex rel. Kern v. Stone*, 190 S. W. 601.

—707 (Ky.) An agreed judgment declaring certain land to have descended to plaintiff's grantor does not bar partition by the real heir, who was not a party to the former action.—*Vanover v. Steele*, 190 S. W. 667.

—707 (Mo.App.) Where administrator, but not devisees, was party to suit, devisees' interest in real estate, not being represented by the administrator, could not be affected by the decree.—*Buck v. Meyer*, 190 S. W. 997.

—707 (Tex.Civ.App.) A junior incumbrancer or lienholder, of whose rights the senior lienholder had notice when he sued to foreclose, and who was not joined as a party, is not bound by the judgment of foreclosure.—*Wiggins v. Wagley*, 190 S. W. 736.

(C) Matters Concluded.

—743(2) (Mo.) A judgment in a contest of a will which purported to devise lands is as conclusive of title in the testator as against the parties thereto, as a judgment in a suit to test the validity of a deed to land.—*Wilson v. McDaniel*, 190 S. W. 8.

JUDICIAL NOTICE.

See Evidence, —5, 44.

JUDICIAL SALES.

See Execution, —220-288; Executors and Administrators, —330-358; Guardian and Ward; Infants, —37-39; Life Estates, —27; Taxation, —698-788.

—31(3) (Ark.) In view of Kirby's Dig. § 6236, relating to judicial sales where a decree in a suit to foreclose a lien for drainage assessments failed to specify terms of sale, defect not being jurisdictional, *held* cured by confirmation of sale.—*Neely v. Lee Wilson & Co.*, 190 S. W. 431.

JUNIOR INCUMBRANCES.

See Mortgages, —497.

JURISDICTION.

See Appeal and Error, —21, 23, 184, 359, 911, 987; Courts; Eminent Domain, —172; Executors and Administrators, —11, 12; Judgment, —495, 499; Justices of the Peace, —36.

JURY.

See Appeal and Error, —200; Criminal Law, —923, 1115; New Trial, —44; Trial, —108½, 806.

II. RIGHT TO TRIAL BY JURY.

—14(1) (Mo.App.) On dissolution of a corporation, a suit by directors and stockholders for accounting against other directors who, as trustees, were to convert the property into cash to pay off creditors and divide the remainder, and asking injunction, *held* a suit in equity.—*Wank v. Peet*, 190 S. W. 88.

—31(3) (Mo.App.) While an injunction will lie to abate a public nuisance, although maintaining the nuisance involves a crime, it will not lie to prevent or punish commission of a crime, which would evade constitutional provisions for a jury in criminal cases.—*State ex rel. Alton v. Salley*, 190 S. W. 940.

—33(2) (Mo.) Variance between statements of a prospective juror on his examination *voir dire* and his subsequent testimony as a witness relative to the sanity of accused *held* not to present a discrepancy on which error could be predicated.—*State v. Boobst*, 190 S. W. 257.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

⚡36(2) (Ark.) In action in justice court for conversion of crop of peaches, where plaintiff asserted title under mortgage which conveyed only an interest in the personal property, justice court had jurisdiction as against objection that title to realty was in controversy.—*Crigler v. Alma Cash Store*, 190 S. W. 99.

IV. PROCEDURE IN CIVIL CASES.

⚡76 (Mo.App.) Plaintiff's statement in justice court, showing his cause of action barred by the general statute of limitations, need not allege facts showing an exception to an operation of the statute.—*Steinbruegge v. Prudential Ins. Co. of America*, 190 S. W. 1018.

If defendant wishes to raise the point that plaintiff's statement shows his cause of action is barred, he must do so by either pleading the statute relied on or by invoking the same in some appropriate manner.—*Id.*

⚡91(1) (Mo.App.) Rev. St. 1909, § 7412, as to pleading in justice court, providing that no formal pleadings shall be required from either party, but plaintiff shall file either the instrument sued on or a statement of the account, etc., does not require the same particularity as is required in a petition in court of record by section 1704, as to contents of such petition.—*Highfield v. United Magazine Press*, 190 S. W. 928.

Where a statement in justice court was entitled against a certain named corporation, "also doing business as" a certain named printing company, but did not otherwise indicate that the action was against the printing company, it was insufficient to show that the action was against the printing company.—*Id.*

⚡91(1) (Mo.App.) Under Rev. St. 1909, § 7412, as to pleadings in a justice's court, technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice.—*Steinbruegge v. Prudential Ins. Co. of America*, 190 S. W. 1018.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

⚡146(1) (Tex.Civ.App.) A judgment in a justice court in favor of plaintiff, though it failed to expressly dispose of the defendant's cross-action or plea in reconvention, held a "final judgment," which will support an appeal.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

⚡162(2) (Mo.App.) When a case is appealed from a justice of the peace to the circuit court, the general rules of practice in the circuit court govern.—*Steinbruegge v. Prudential Ins. Co. of America*, 190 S. W. 1018.

⚡166(5) (Mo.App.) Appeal to circuit court vacated judgment of justice's court, at least until appeal was finally disposed of; but, on dismissal of appeal, the judgment, or whatever part of it was valid, became a finality.—*Walther v. Woodson*, 190 S. W. 61.

⚡171(1) (Mo.App.) Appeal from judgment of justice's court on merits and on question of costs removed entire case bodily to circuit court for trial de novo, without regard to any error or imperfection in judgment below.—*Walther v. Woodson*, 190 S. W. 61.

⚡174(8) (Tex.Civ.App.) Act of county court in permitting plaintiffs in suit on note in justice court to amend on appeal to allege that they were a partnership and not a corporation, as alleged in justice court, held not violative of Rev. St. 1911, art. 759.—*Scott & Co. v. O. D. Mann & Sons*, 190 S. W. 847.

⚡174(22) (Mo.App.) Where an action originates before a justice of the peace and is appealed to the circuit court, the sufficiency of the state-

ment or petition, although amended in the circuit court after appeal, is to be determined by the requirements as to justice courts' statements.—*Steinbruegge v. Prudential Ins. Co. of America*, 190 S. W. 1018.

⚡183(2) (Mo.App.) Under Rev. St. 1909, §§ 7579, 7584, circuit court, on defendants' appeal from justice court and on appellee's waiver of notice of appeal by appearance and on defendants' failure to appear, having jurisdiction of cause and of parties, was bound to hear appellee's evidence and render judgment thereon.—*Munroe v. Dougherty*, 190 S. W. 1022.

⚡191(2) (Ark.) On bond on appeal, from justice to circuit court, in action against two defendants on a claim of joint liability, a verdict against one of them and for the other does not release the sureties from their undertaking as to judgment against the unsuccessful defendant.—*Pillow v. Hodge*, 190 S. W. 434.

(B) Certiorari.

⚡202(2) (Ark.) Certiorari will not be granted to quash judgment obtained against petitioner before justice of peace for goods sold, where the petition did not deny sale or value of the goods, but merely alleged that petitioner was not indebted therefor.—*Hollis v. Hogan*, 190 S. W. 117.

LACHES.

See Equity, ⚡67; Taxation, ⚡698.

LANDLORD AND TENANT.

See Appeal and Error, ⚡1064, 1068; Frauds, Statute of, ⚡103; Life Estates, ⚡25; Mechanics' Liens, ⚡20.

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

⚡55(1) (Mo.App.) Even if it was an unwarranted use of the premises for a tenant to cover one entire outside wall with a sign if tenant permitted a third party to paint sign, the latter is liable to landlord only when sign has done substantial damage to freehold.—*Kretzer Realty Co. v. Thomas Cusack Co.*, 190 S. W. 1011.

⚡55(3) (Mo.App.) Where tenant permitted a third party to cover one outside wall with a sign, in an action by landlord against third party, an instruction, attempting to cover case and direct a verdict, but failing to require jury to find that property was substantially damaged, held defective.—*Kretzer Realty Co. v. Thomas Cusack Co.*, 190 S. W. 1011.

In an action by a landlord against a third person for damages caused by a sign painted on outer wall by authority of the tenant, evidence that value of property was substantially damaged immediately upon painting of the sign held admissible.—*Id.*

In an action by a landlord against third person for damages caused by painting of sign on outer wall by authority of tenant, evidence that after sign had been painted another building was erected which covered sign held properly excluded.—*Id.*

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

⚡116(4) (Tex.Civ.App.) Where tenant paid rent monthly in advance, agreeing to surrender premises on demand, this was a periodic monthly tenancy, and landlord could not demand premises until expiration of the month.—*McKibbin v. Pierce*, 190 S. W. 1149.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(A) Description, Extent, and Condition.

⚡122 (Mo.App.) A tenant in possession is entitled to use of outside walls, and can delegate

that use to a third person, but cannot so use them as to injure freehold or for purposes inconsistent with lawful and reasonable enjoyment of property.—Kretzer Realty Co. v. Thomas Cusack Co., 190 S. W. 1011.

(B) Possession, Enjoyment, and Use.

§144 (Tex.Civ.App.) Where tenant had notice of landlord's penalizing contract with future tenant and agreed to vacate, his attempted repudiation of increased liability will not excuse him.—McKibbin v. Pierce, 190 S. W. 1149.

LAND PATENTS.

See Public Lands, §151.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, §372, 393, 408, 417, 419, 420, 564, 792, 1172, 1207; False Pretenses; Insurance, §607; Names, §16.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§13 (Mo.) No conviction for larceny can be predicated on the taking of goods to which the owners consented for the purpose of apprehending the one receiving the goods.—State v. Loeb, 190 S. W. 299.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§31 (Ky.) Indictment which charged defendants with grand larceny, denounced by Ky. St. § 1194, by stealing chickens of value of more than \$2, offense denounced by section 1201c, was sufficient to support conviction of having stolen chickens of value alleged.—Fuson v. Commonwealth, 190 S. W. 1095.

§32(1) (Tex.Cr.App.) In an indictment for larceny, if the injured party was generally known by the name alleged, his true name was immaterial.—Lunsford v. State, 190 S. W. 157.

(B) Evidence.

§46 (Ky.) Market value of stolen chickens, and not price at which they were sold, or their value for eating purposes alone, was proper standard of their value.—Fuson v. Commonwealth, 190 S. W. 1095.

§49 (Tex.Cr.App.) In a trial for horse theft, where a number of witnesses testified accused was one of men in a wagon, fact that four other witnesses were unable to identify accused as one of the men would not render their testimony inadmissible when they do identify wagon.—Lunsford v. State, 190 S. W. 151.

§50 (Tex.Cr.App.) In a prosecution for stealing cotton, a witness could testify as to letters on shoulder strap of sack containing the stolen cotton, and that he inquired where the cotton came from, and observed on the ground tracks of two persons around the cotton, and found where an automobile had stopped and leaked oil.—Lunsford v. State, 190 S. W. 157.

§55 (Mo.) Larceny and place of its commission may be shown by circumstantial, as well as direct, evidence.—State v. Pace, 190 S. W. 15.

Evidence held sufficient to show larceny of rings from a railway coach.—Id.

§55 (Tex.Cr.App.) Testimony of the victim, who was drunk, and of one who saw defendant putting his hands in the victim's pockets, held sufficient to sustain a conviction of larceny from the person.—Bell v. State, 190 S. W. 727.

§62(1) (Mo.) In a prosecution of two convicts for larceny of goods from a prison contractor, evidence held not sufficient to connect the defendants with shipments made from the prison

to one who received the stolen goods outside the prison.—State v. Loeb, 190 S. W. 299.

LAST CLEAR CHANCE.

See Railroads, §338, 390.

LAW OF THE CASE.

See Appeal and Error, §1097.

LEADING QUESTIONS.

See Witnesses, §240, 244.

LEASE.

See Landlord and Tenant; Life Estates, §25; Mechanics' Liens, §20; Mines and Minerals, §78.

LEAVE OF COURT.

See Pleading, §236, 237.

LEGISLATIVE POWER.

See Statutes, §4, 5.

LEVEES.

See Constitutional Law, §290.

§5 (Ark.) Judgment against two levee districts for damages to contractor by their conduct in preventing him from completing his contract with the original district made before passage of Acts 1913, p. 579, dividing such district into the two, was not an indebtedness existing when act was passed, and so not to be prorated under it, where the damage accrued after division.—Second Division of Laconia Levee Dist. v. Laconia Levee Dist., 190 S. W. 438.

Though Legislature, dividing levee district, may define boundaries and adjust liabilities after separation, adjustment must not be arbitrary, but have reasonable basis.—Id.

In dividing levee district, Legislature could not make property owners of original district liable for levee work done in new district, after passage of dividing act, under contract made by original district.—Id.

§11 (Ark.) In suit between levee districts, evidence held sufficient to support finding that work for which original district paid was done subsequent to passage of Acts 1913, p. 579, dividing it into the two, and prorating indebtedness existing at act's passage.—Second Division of Laconia Levee Dist. v. Laconia Levee Dist., 190 S. W. 438.

In suit by levee district against one from which it was formed by Acts 1913, p. 579, dividing original district and prorating indebtedness, to determine their liabilities for amount under contract, burden held on plaintiff to show that warrants were issued and paid by original district on indebtedness in existence when act was passed.—Id.

LEWDNESS.

See Prostitution.

LIBEL AND SLANDER.

See Criminal Law, §678; Trial, §233, 253, 296.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§7(2) (Mo.) The words "he buys warrants against the editor" are libelous as charging bribery; the statutes as to issuance of warrants nowhere providing for buying them.—State v. Pardo, 190 S. W. 264.

§9(1) (Ky.) To say of a tobacco grader that he received compensation from one purchasing from the association employing him is actionable per se as prejudicing him in his trade.—Marksberry v. Weir, 190 S. W. 1108.

⇒10(6) (Ky.) To say of a tobacco grader, an employé of an association, that he also received compensation from purchaser from the association, is actionable per se as imputing unfitness to perform duties, and needed no innuendo to support the action.—*Marksberry v. Weir*, 190 S. W. 1108.

⇒19 (Mo.App.) In determining whether alleged false statement was a libel, jury could take into consideration entire article wherein it was published.—*Byrne v. News Corp.*, 190 S. W. 933.

⇒21 (Mo.) An article about the priest of a certain parish is none the less libelous because of mentioning him by name.—*State v. Pardo*, 90 S. W. 264.

Nor because the writer does not know who is he priest.—*Id.*

⇒24 (Mo.App.) It is not enough to constitute libel that defendants knew of whom they were writing, but other persons, who read the libel, must have reasonably understood that plaintiff was referred to.—*Byrne v. News Corp.*, 190 S. W. 933.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

⇒38(4) (Ky.) Evidence of what defendant said when before the grand jury was properly excluded.—*Marksberry v. Weir*, 190 S. W. 1108.

III. JUSTIFICATION AND MITIGATION.

⇒64 (Ky.) Although it is no justification to say that defendant merely repeated what he had heard, he can show in mitigation of damages that the rumor was generally known in the neighborhood.—*Marksberry v. Weir*, 190 S. W. 1108.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

⇒100(4) (Ky.) Mitigating facts may be shown under the general issue as tending to negative the charge of malice and defining the extent of actual damages.—*Marksberry v. Weir*, 190 S. W. 1108.

(C) Evidence.

⇒111 (Mo.App.) In action for libel against newspaper, evidence as to paper's owner telling plaintiff that if he wanted any statement or explanation printed they would be glad to print it for him was properly excluded; the offer having been made after suit was brought.—*Byrne v. News Corp.*, 190 S. W. 933.

⇒112(1) (Mo.App.) Where libelous article is ambiguous, either as to its meaning or as to person to whom it applies, there must be some proof that third persons understood its actual meaning, and also to whom its words applied.—*Byrne v. News Corp.*, 190 S. W. 933.

(D) Damages.

⇒120(2) (Mo.App.) In action for libel, jury may award punitive damages based merely on malice implied by law.—*Byrne v. News Corp.*, 190 S. W. 933.

(E) Trial, Judgment, and Review.

⇒124(3) (Ky.) As the question of malice is never submitted to the jury except as to the amount of damages, an instruction requiring the jury to find malice as prerequisite to a verdict for the plaintiff was erroneous.—*Marksberry v. Weir*, 190 S. W. 1108.

In action for slander by words tending to prejudice the plaintiff in his employment, it was error to instruct the jury that, if defendant meant to charge lack of integrity, a recovery was authorized; what he meant not being for the jury, but whether he used the words charged.—*Id.*

⇒124(3) (Mo.App.) In action for libel against newspaper and writer of letter to its People's Forum, instruction held erroneous as invitation to jury to consider actual malice of individual defendant in fixing amount of punitive damage it would assess against both, without regard as to whether the codefendant was guilty of actual or implied malice.—*Byrne v. News Corp.*, 190 S. W. 933.

⇒124(4) (Mo.App.) Where libelous article complained of did not on face refer to plaintiff, jury should have been required to find that readers understood article referred to plaintiff, and instruction authorizing verdict without such finding was erroneous.—*Byrne v. News Corp.*, 190 S. W. 933.

In action for libel, plaintiff's instruction held not erroneous because failing to require jury to specifically find according to innuendo that defendants charged that plaintiff committed crime of obtaining registration of hogs by making false pedigrees, denounced by Rev. St. 1909, § 4539.—*Id.*

⇒124(8) (Mo.App.) Defendant newspaper held not entitled to instructions stating that the jury cannot find punitive damages.—*Byrne v. News Corp.*, 190 S. W. 933.

VI. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

⇒152(5) (Tex.Cr.App.) The offense of slander alleged to have been committed by communicating certain words to certain persons is not made out by a showing that such words were communicated to one of such persons apart from the others.—*Owens v. State*, 190 S. W. 487.

An indictment for slander alleging that accused said of a certain girl that he had had sexual intercourse with her, will not support a conviction where the only evidence was that of certain witnesses that he told them that he had got a piece from her.—*Id.*

LICENSES.

See Appeal and Error, ⇒36.

I. FOR OCCUPATIONS AND PRIVILEGES.

⇒16(9) (Tenn.) Acts 1915, c. 101, §§ 2, 3, 4, do not subject oil dealers to the general merchants' tax in addition to the special privilege tax imposed on them.—*Gulf Refining Co. of Louisiana v. City of Chattanooga*, 190 S. W. 463.

LIENS.

See Carriers, ⇒197; Mechanics' Liens; Principal and Agent, ⇒90; Taxation, ⇒514; Vendor and Purchaser, ⇒246-289.

⇒16 (Mo.App.) The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender, or waive his lien for the sum really due.—*Collins v. John Pängsten Leather Co.*, 190 S. W. 990.

LIFE ESTATES.

See Deeds, ⇒129; Dower; Homestead, ⇒82; Remainders; Wills, ⇒614.

⇒6 (Ky.) Where life tenant is to have an income of money or similar property devised, the possession of which is to be given her, she may be compelled to execute a bond to remaindermen that it will be forthcoming at termination of particular estate.—*Kelly v. Anderson*, 190 S. W. 1101.

⇒12 (Mo.App.) Since the life tenant can do nothing to destroy or diminish the value of the inheritance he cannot, where no mines have already been opened, either in person or by

tenant, open such mines or extract mineral from the land.—*Matlack v. Kline*, 190 S. W. 408.

Since the remaindermen could have given or withheld the consent to having the land mined by the life tenant, where he did consent, the rent or royalty which follow the ownership of the land would go to the remaindermen when the estate of the life tenant ceased.—*Id.*

Where the remaindermen consented to a lease by the life tenant granting the right to mine the land for a certain royalty for a period of 20 years to be paid to the lessor or his heirs, the word "heirs" designated the successors to the land on the life tenant's death, and on his death the remaindermen became entitled to the royalty, though they could not terminate the lease.—*Id.*

§16 (Ky.) A life tenant paying off an incumbrance on the fee is entitled to reimbursement from the remaindermen and lien therefor on the remaindermen's share.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

It is the duty of a life tenant of property to keep down the interest accruing on incumbrances on the entire estate, at least to the extent of the income of the property.—*Id.*

Where the life tenant, by discharging an incumbrance against the entire estate, acquires a lien thereon as against remaindermen, his creditors are subrogated to his rights.—*Id.*

§16 (Mo.App.) A life tenant without the consent of the remaindermen has no power to incumber land beyond the period of his life, and any incumbrance terminates ipso facto on his death.—*Matlack v. Kline*, 190 S. W. 408.

§17 (Ky.) A life tenant cannot charge the remainder estate or remainderman personally with improvements on the land, though such life tenant believed that he had absolute title to property.—*Stovall v. Mayhew*, 190 S. W. 675.

§18 (Ky.) It is the duty of the life tenant estate to pay the taxes on the entire property during the continuance of the life estate.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

§20 (Ky.) Ordinary expenses of the care and management of life estates must be paid by the life tenant.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

§25 (Mo.App.) A life tenant without the consent of the remaindermen has no power to lease land beyond the period of his life, and any lease terminates ipso facto on his death.—*Matlack v. Kline*, 190 S. W. 408.

The mere giving consent by the remaindermen to the making of a lease by the life tenant for a term which may extend beyond the life tenancy would not alone have any greater effect than to prevent the remaindermen from terminating the lease on the death of the life tenant, and the lease would continue in force, but the rent would go to the remaindermen after such death.—*Id.*

§27(3) (Ky.) On the sale of land by commissioner in satisfaction of judgment, where defendant's title was merely a life estate, purchaser at sale and his subsequent grantees acquired only a life estate.—*Stovall v. Mayhew*, 190 S. W. 675.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Criminal Law, §150; Equity, §67; Executors and Administrators, §228, 251; Fraudulent Conveyances, §248; Justices of the Peace, §76; Taxation, §589, 698; Vendor and Purchaser, §278.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§19(1) (Tex.Civ.App.) The five-year statute of limitations, declaring that no one claiming

under a forged deed shall be allowed its benefits, refers to the deeds relied on in support of the plea, and not to prior deeds in the chain of title not necessary to support the plea.—*Olsen v. Greele*, 190 S. W. 240.

§32(1) (Tex.Civ.App.) A petition for damages to an automobile during shipment held to state an action in tort to which the two-year statute of limitation applied.—*Panhandle & S. F. Ry. Co. v. Hubbard*, 190 S. W. 793.

§32(2) (Tex.Civ.App.) The two-year statute of limitation does not bar recovery in condemnation proceedings of the incidental damages to plaintiff's land not taken caused by the proper construction of the railroad along the right of way condemned.—*Quannah, A. & P. Ry. Co. v. Collett*, 190 S. W. 1128.

§37(2) (Tex.Civ.App.) Where equitable action of party induced by deceit to buy lands has not been barred by limitation, court will not apply differing standards of limitation to right to rescission and right to damages, but, upon establishment of plaintiff's right to rescind, will proceed to administer all relief, legal and equitable, to which plaintiff may show himself entitled.—*Barbian v. Grant*, 190 S. W. 789.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§43 (Mo.App.) Limitation statutes generally do not begin to run until the cause of action asserted accrued to the person asserting it.—*State ex rel. Fehrenbach v. Logan*, 190 S. W. 75.

A right of action accrues whenever such a breach of duty has accrued, or such a wrong has been sustained, as will give a right to then sustain suit.—*Id.*

In view of Rev. St. 1909, § 1887, limitations will not bar an action until the statutory period has elapsed after the cause of action has come into substantial being, and the party asserting it has a right to sue.—*Id.*

§46(7) (Tex.Civ.App.) There never having been acceptance of any renunciation by vendor of contract to convey and pay commissions, limitations do not, on the theory of anticipatory breach, commence to run against action for commissions till time fixed in contract for payment.—*Leonard v. Kendall*, 190 S. W. 788.

§57(1) (Mo.App.) There is a distinction between breaches of public duty and breaches of private duty as applied to public officers, and in case of a public duty the violation gives rise to a right of action in favor of individual only when he sustains damages as a consequence thereof, and the statute runs from that time, and not from the time when the duty is violated.—*State ex rel. Fehrenbach v. Logan*, 190 S. W. 75.

Where a public officer commits a wrongful act, not directly against an individual, a cause of action does not accrue, so as to set in motion limitations, until the damage occurs.—*Id.*

Action on official bond of county recorder for breach of duty in entering satisfaction of trust deed without production of note secured held not barred by the three-year statute of limitations, where plaintiff did not acquire an interest in the land until more than three years after entry of satisfaction; his right not accruing until acquisition of interest.—*Id.*

(C) Personal Disabilities and Privileges.

§72(3) (Tenn.) Where possession of an adverse holder was less than 20 years when owner died leaving minor children, one of the children still a minor is entitled to recover his interest in the property; the presumption not having completely run as to him during his disability.—*Ferguson v. Prince*, 190 S. W. 548.

As three years' saving for infants prescribed by statute of limitations has no bearing upon presumption of title to land from lapse of time,

where one was an infant at time of inheriting land to which another claims title by adverse possession, only time during which the disability existed will be counted out of the adverse holding.—Id.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

⚡102(8) (Tex.Civ.App.) Limitations held not to commence to run against cause of action to establish trust till discovery of omission of plaintiffs' names from deed.—Briggs v. McBride, 190 S. W. 1123.

(H) Commencement of Action or Other Proceeding.

⚡119(2) (Tex.Civ.App.) Where the citation was not sent to the sheriff for service until two months after it was issued, and after the right of action was barred, plaintiff must show a bona fide intention to have it served and a reasonable excuse for not having done so.—Panhandle & S. F. Ry. Co. v. Hubbard, 190 S. W. 793.

⚡127(13) (Tex.Civ.App.) Where petition to recover damages was filed within statute of limitation, amended petition filed more than four years later, alleging same and additional facts merely setting out entire contract, no new cause of action was stated, and statute of limitations could not be urged.—Silver Valley Horse Co. v. C. V. Evans & Co., 190 S. W. 794.

⚡127(17) (Tex.Civ.App.) In action for delay in shipping cattle, a trial amendment to the petition alleging that the cattle were on the cars for 43 hours, and plaintiffs were refused permission to unload, feed, and water them during that time, etc., did not set up a new cause of action, and was not barred by limitation.—Kansas City, M. & O. Ry. Co. of Texas v. James, 190 S. W. 1136.

⚡130(2) (Tenn.) Where plaintiff instituted an action and within a year, taking a voluntary nonsuit, began a second action in which he again took a nonsuit, held, under Shannon's Code, § 4446, he could not, limitations having run, begin a third suit within a year after the last nonsuit.—Reed v. Cincinnati, N. O. & T. P. Ry. Co., 190 S. W. 458.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⚡148(4) (Tex.Civ.App.) The extension of a vendor's lien note signed by the party to be charged, as required by Vernon's Sayles' Ann. Civ. St. art. 5705, permits personal recovery on the note after the expiration of the limitation period from its original maturity, though not recorded so as to renew the lien.—Adams v. Harris, 190 S. W. 245.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡177(2) (Mo.App.) If a cause of action is barred by the statute of limitations, except for an exception to the operation of the statute, plaintiff must plead the facts bringing the case within such exception.—Steinbruegge v. Prudential Ins. Co. of America, 190 S. W. 1018.

⚡180(2) (Mo.App.) Statute of limitations can be invoked by special demurrer where petition discloses that the action is barred, and nothing is pleaded as an exception relieving against the bar.—Steinbruegge v. Prudential Ins. Co. of America, 190 S. W. 1018.

⚡199(1) (Mo.) Where assured disappeared and negotiations were pending between beneficiary and company, the question of a reasonable time for company to accept or reject proof of death so as to start the running of limitations against an action on the policy is for the jury.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

⚡199(1) (Tex.Civ.App.) Where a citation was not sent for service until two months after it was issued, and after the right of action was barred by limitations, plaintiff's intention to have it served and the reasonableness of his excuse present questions for the jury.—Panhandle & S. F. Ry. Co. v. Hubbard, 190 S. W. 793.

LIMITATION OF INDEBTEDNESS.

See Municipal Corporations, ⚡865.

LIMITATION OF LIABILITY.

See Carriers, ⚡150-163, 180, 218, 223.

LIQUIDATED DAMAGES.

See Damages, ⚡81, 85; Specific Performance, ⚡58.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

⚡4 (Ky.) The lis pendens statute, Ky. St. § 2358a, does not apply to a case where a person sells, leases, or incumbers realty not his own and which he never had owned.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

⚡13 (Ky.) Ky. St. § 2358a, requiring lis pendens in order to affect right or title of subsequent purchaser of realty for value and without notice, is necessary in order that proceeding or judgment may affect title of purchaser, etc., of realty involved in suit in federal court.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

⚡25(7) (Ark.) Lumber company, which purchased lands without notice of lis pendens filed in attachment against one under whom it did not claim, held an innocent purchaser, though holding under quitclaim deed, and entitled to protection as such.—Case v. Caddo River Lumber Co., 190 S. W. 440.

LIVE STOCK.

See Carriers, ⚡218-230.

LOANS.

See Usury, ⚡20, 57.

LOCAL OPTION.

See Intoxicating Liquors, ⚡12, 39, 205.

LOGS AND LOGGING.

⚡3(15) (Ky.) Where buyer refused to accept timber still uncut, the measure of damages is the difference between the contract price and what it would cost plaintiff to complete the work, the defendant not being entitled to have deducted therefrom the value of the standing timber.—R. Burleigh & Sons v. Overton, 190 S. W. 472.

In action for breaching a timber purchase contract, plaintiff's testimony that defendant's manager admitted the logs conformed to the contract requirements is admissible.—Id.

Evidence of plaintiff and admissions of defendant's agent, held sufficient to sustain findings for plaintiff in suit for breach of a timber purchase contract.—Id.

The measure of damages for refusal of purchaser of timber to accept is the contract price, less any amount paid thereon.—Id.

Where defendant buyer breached a timber purchase contract by refusing to permit performance, the measure of damages is the difference between the contract price and the reasonable cost to plaintiff of performance.—Id.

Where buyer of timber breached contract by refusing to permit plaintiff to cut the timber,

plaintiff cannot recover for expenditures made on logs cut, but not delivered, in addition to the difference between contract price and the reasonable cost of performing the contract.—Id.

LOST INSTRUMENTS.

See Corporations, ¶109.

LUNATICS.

See Insane Persons.

MALICIOUS PROSECUTION.

See Evidence, ¶158, 181.

IV. TERMINATION OF PROSECUTION.

¶34 (Ark.) In an action for malicious prosecution, it is necessary for plaintiff to show that prosecution complained of has been legally terminated.—Twist v. Mullinix, 190 S. W. 851.

¶35(1) (Ark.) When a justice of the peace dismissed a prosecution and discharged defendant therein without objection or protest by the prosecutor, there was an abandonment of proceedings by prosecutor.—Twist v. Mullinix, 190 S. W. 851.

V. ACTIONS.

¶64(1) (Ark.) In an action for malicious prosecution, evidence held sufficient to show that defendant had abandoned a criminal prosecution instituted by him against plaintiff before a justice of the peace.—Twist v. Mullinix, 190 S. W. 851.

MANDAMUS.

See Appeal and Error, ¶571.

I. NATURE AND GROUNDS IN GENERAL.

¶3(5) (Tex.Civ.App.) Plaintiff's remedy to determine whether or not a judgment in his favor ordering return of property has been satisfied in accordance with its terms is by suit between parties, and not by mandamus to compel sheriff to levy execution.—Seagraves v. Scarborough, 190 S. W. 1154.

¶3(8) (Tex.Civ.App.) Mandamus held not to lie to compel sheriff to levy execution issued upon money judgment, as adequate remedy is provided by Vernon's Sayles' Ann. Civ. St. 1914, art. 3776, by action against sureties.—Seagraves v. Scarborough, 190 S. W. 1154.

¶5 (Mo.) Where a drainage district conducted defense of action of a drainage contractor against the county, it was bound by the money judgment against the county directing that the judgment "be paid and discharged from and out of the funds raised against lands in" the drainage district, and could not, while appeal was pending, maintain mandamus against the county to turn over funds claimed by the contractor as applicable to such judgment.—State ex rel. Kern v. Stone, 190 S. W. 601.

¶10 (Mo.) Relator, asking mandamus, must have a clear legal right to the thing demanded, and it must be the imperative duty of respondent to perform the act required.—State ex rel. Kern v. Stone, 190 S. W. 601.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

¶55 (Mo.) Order requiring trustee to pay to two relators, in equal proportions, funds in its hands, less proper charges and expenses and to stand discharged on filing vouchers showing compliance, where trustee filed report, admittedly correct, showing exact amount due it held it was sufficiently definite upon which to award mandamus to compel execution.—State ex rel. Captain v. Graves, 190 S. W. 859.

Mandamus to clerk of court is a proper remedy to compel issuance of a writ of execution.—Id.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶73(1) (Mo.) When defunct trust company relator complied fully with the law as to return of securities on deposit, and the insurance superintendent performed all statutory duties preliminary to returning the securities, the return of which is commanded by Rev. St. 1909, § 7072, peremptory writ requiring performance of such ministerial duty will issue.—State ex rel. Commonwealth Trust Co. v. Chorn, 190 S. W. 17.

¶74(1) (Mo.) In view of Const. art. 4, § 57, authorizing the initiative, where all the provisions of Rev. St. 1909, c. 59, were complied with, save that the Secretary of State declined to certify copies to the county clerks, peremptory writ of mandamus was ordered to compel him to perform such ministerial duty.—State ex rel. Stokes v. Roach, 190 S. W. 277.

MANSLAUGHTER.

See Homicide.

MANUFACTURES.

See Frauds, Statute of, ¶83.

MARKETABLE TITLE.

See Vendor and Purchaser, ¶130.

MARRIAGE.

See Divorce; Husband and Wife.

MASTER AND SERVANT.

See Appeal and Error, ¶999, 1066, 1097; Carriers, ¶283; Commerce, ¶27; Constitutional Law, ¶245; Damages, ¶132, 168; Evidence, ¶444; Negligence, ¶101; Partnership, ¶243; Pleading, ¶127, 406; Release, ¶12, 17, 18, 19; Trial, ¶191, 240, 252, 253, 256, 296, 350, 365.

I. THE RELATION.

(B) Statutory Regulation.

¶13 (Tex.Cr.App.) To authorize conviction of permitting one to work in violation of the eight hour labor law, it is essential that defendant shall have had some control over the laborer.—Perkins v. State, 190 S. W. 168.

¶14 (Mo.) Rev. St. 1909, § 3163, as to blocking guard rails, is not void for uncertainty, at least as respects a case in which the daily penalty clause does not apply.—Bowman v. Wabash R. Co., 190 S. W. 579.

¶16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

¶18 (Tex.Cr.App.) Evidence in a prosecution for violating the eight hour labor law held insufficient to show that defendant had any control over the laborer.—Perkins v. State, 190 S. W. 168.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

¶80(4) (Mo.App.) A servant's complaint for wages, alleging that defendants are indebted to her for work and labor performed at their instance, and that they agreed to pay her certain specified amounts, states a cause of action.—Volk v. Zepp, 190 S. W. 609.

¶80(5) (Mo.App.) In a servant's action for wages, there is no fatal variance between allegations that defendants were copartners under a certain name and proof that they did business

under such name, although their partnership agreement used a slightly different name.—*Volk v. Zepp*, 190 S. W. 609.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⇒87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇒ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

⇒88 (4) (Ky.) Machine foreman of coal mine, injured when he heard shot fired out of time and went to see if there had been an accident, could not recover, being a volunteer.—*Harris v. Lam Coal Co.*, 190 S. W. 121.

⇒95 (Ky.) Under Ky. St. § 331a, subsec. 9, prohibiting employment of children under 16 years in mines, a verdict for the death of a minor employed by a mining company may properly be rested on a finding that he was under such age.—*Carter Coal Co. v. Love*, 190 S. W. 481.

(B) Tools, Machinery, Appliances, and Places for Work.

⇒101, 102(8) (Ky.) Master's duty to furnish a reasonably safe place for work applies only to the place which the servant is required to use.—*Christian's Adm'r v. Ennis*, 190 S. W. 875.

⇒101, 102(8) (Mo.App.) It is not only duty of master to exercise reasonable and ordinary care to furnish servant a reasonably safe place to work, but to keep it reasonably safe for servant to perform labor required of him.—*Stobille v. McMahon*, 190 S. W. 652.

⇒103(2) (Ky.) Machine foreman, acting as mine foreman in absence of foreman, injured when miner fired shot, believing in good faith that the proper time had come, held unable to recover from employer.—*Harris v. Lam Coal Co.*, 190 S. W. 121.

⇒107(1) (Mo.App.) If the master was negligent in supplying servant with a defective claw bar which slipped and caused the servant to fall, the master was responsible for all consequences, though the result was made unusually disastrous by the exposed condition of ties in the track over which the servant worked.—*Bootman v. Lusk*, 190 S. W. 414.

⇒107(2) (Mo.App.) If a master is negligent by building and using skids for loading timbers in an improper way so as to create a dangerous place in which to work, and the servant is thereby injured, he has a cause of action.—*Allen v. Quercus Lumber Co.*, 190 S. W. 86.

⇒107(2) (Mo.App.) A safe place to work does not ordinarily include a safe place to light in case of an accidental fall, unless the probability of the falling was so obvious as to require precautions with reference to a safe lighting place.—*Bootman v. Lusk*, 190 S. W. 414.

⇒107(3) (Mo.App.) The rule relieving master from liability for servant's injury in making a dangerous place safe did not apply where laborer was injured by caving in on him of an earth embankment while working at its base digging a place opposite the embankment in which to insert a plank to shore up the embankment, where the servant had no supervision over the work.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

⇒112(2) (Mo.) In an action by railroad employé, catching his foot between the main and guard rail, because of failure of defendant railroad to properly fill or block the guard rail with the "best-known appliances" for such purposes, as required by Rev. St. 1909, § 3163, where defendant's own proof was that the proper method of blocking guard rails was by a block of wood, it could not be said that coal dust accidentally sifted between the rails was such block-

ing or filling as required by the statute.—*Bowman v. Wabash R. Co.*, 190 S. W. 579.

A railroad employé who caught only his toe and not his whole foot, between the guard rail and the main rail, was within the protection of Rev. St. 1909, § 3163, as to blocking guard rails.—*Id.*

⇒129(1) (Mo.App.) Where a servant in loosening a bolt in a truck of a freight car pried with a claw bar, which slipped, causing him to fall on the ties, in his action alleging master's negligence in failing to furnish a safe place to work, held, that the slipping of the claw bar and his fall, and not exposed ties, were the proximate cause.—*Bootman v. Lusk*, 190 S. W. 414.

(C) Methods of Work, Rules, and Orders.

⇒135 (Mo.App.) That the master conducts his business in the manner customarily followed by experienced men in the same line of business is conclusive against negligence only if the jury believe that these other men have acted with ordinary prudence in adopting such method.—*Fairfield v. Bichler*, 190 S. W. 32.

⇒137(2) (Ky.) A coal mining company was not negligent in bringing empty coal cars down an inclined track for loading at the tippie at some six miles an hour by having its employé start them with a pinch bar, gravity bringing them down.—*West Kentucky Coal Co. v. Heady's Adm'r*, 190 S. W. 475.

⇒137(4) (Mo.App.) A carpenter injured by a switch engine while stooping near track, whose duties did not require his presence on or about tracks, does not fall within class to which a railroad's servants do not owe a lookout duty.—*Dunn v. Missouri Pac. Ry. Co.*, 190 S. W. 966.

(D) Warning and Instructing Servant.

⇒153(4) (Mo.App.) That a minor servant misrepresented his age to obtain employment would not estop him from showing that he was young and inexperienced as to dangers arising in the employment.—*Zimmerman v. Pryor*, 190 S. W. 28.

(E) Fellow Servants.

⇒177 (Ark.) If the injuries to a vice principal result from acts of the subordinate under the orders of the vice principal, without negligence on the subordinate servant's part, the employer is not liable.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

⇒179 (Ark.) Under Employers' Liability Act, a railroad is liable for injuries to a vice principal resulting from the negligence of his subordinate employé.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

⇒185(22) (Ark.) The act of a fellow servant, chipping out Babbitt metal, in unexpectedly striking the chisel with the hammer so as to chip a piece of metal into the eye of the other servant, was negligent.—*Caddo River Lumber Co. v. Grover*, 190 S. W. 560.

⇒185(23) (Mo.App.) Where master keeps a dangerous substance where employes are required to work, careless handling of which would affect their safety, his duty as to custody and control thereof cannot be delegated to fellow servant.—*Markow v. Gross-O'Reilly Chandelier Co.*, 190 S. W. 624.

⇒189(2) (Mo.App.) Where plaintiff's fellow servant had authority to give orders and had control over an alcohol can, defendant was chargeable with his negligence in directing plaintiff to solder the can, which he knew contained alcohol.—*Markow v. Gross-O'Reilly Chandelier Co.*, 190 S. W. 624.

⇒189(5) (Ky.) Despite Ky. St., § 2726, if mine foreman employs assistant, who acts with acquiescence of superintendent or operator, and person is injured by his negligence or while acting under his direction, coal company is responsible as if he had been appointed by operator

or superintendent.—*Harris v. Lam Coal Co.*, 190 S. W. 121.

☞190(18) (Mo.App.) Where plaintiff blacksmith was ordered to repair a cordage machine by the defendant's machinist, machinist was a vice principal, and defendant would be liable for his negligence in failing to signal operator of machine that repair work was to be done.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

In a servant's action for injuries, *held*, that defendant was guilty of gross negligence in failing to take precautions to guard safety of plaintiff in repairing a cordage machine.—*Id.*

☞190(19) (Mo.App.) If it was defendant's duty to notify operator of a cordage machine before starting to repair it, if such notice was given, it was immaterial whether person who gave it was plaintiff or another.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

☞191(1) (Mo.App.) Where operators of cordage machines had nothing to do with repairing them, and blacksmiths and machinists who repaired them had nothing to do with operating them, operators and blacksmiths were not fellow servants.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

☞191(2) (Mo.App.) An injured servant's recovery for negligence cannot be defeated on the ground that it is the negligence of his fellow servants, where such servants are under another foreman, though employed by the same master.—*Allen v. Quercus Lumber Co.*, 190 S. W. 88.

☞201(1) (Mo.App.) A master's negligence, causing injury to a servant, is not excused by fact that negligence of fellow servant of plaintiff contributed to that of master.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

(F) Risks Assumed by Servant.

☞216(3) (Mo.App.) Where section foreman called section hand to ask him if it would be any use to drive spike into post of fence they were repairing, section hand, in coming up and answering, did not assume risk of injury when foreman negligently or prematurely struck spike, which glanced.—*Bradshaw v. Lusk*, 190 S. W. 400.

☞217(26) (Ky.) Employé of coal mining company, who went between two cars after he must have been advised of cars approaching down an incline by noise of collision between them and another, assumed risk of injury.—*West Kentucky Coal Co. v. Heady's Adm'r*, 190 S. W. 475.

☞219(1) (Mo.App.) The doctrine of assumption of risk as such, unless danger is obvious, does not exist in Missouri.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

☞219(4) (Tex.Civ.App.) An employé assumes risks which are so obvious that an ordinarily prudent person must necessarily have appreciated them.—*Kansas City, M. & O. Ry. Co. v. Finke*, 190 S. W. 1143.

☞219(5) (Mo.App.) In a railroad servant's action for injuries caused to his eye by a silver of metal, while he was holding a rail which was being cut by a metal hammer and a chisel, the simple tool rule had no application.—*Haire v. Schaff*, 190 S. W. 56.

☞219(5) (Mo.App.) Where a car repairer picked up a claw bar, for momentary use which was defective and caused him to fall, *held*, that the simple tool doctrine should not be applied to defeat, as a matter of law, the servant's recovery.—*Bootman v. Lusk*, 190 S. W. 414.

Where a car repairer picked up a claw bar for momentary use, which was defective and caused him to fall, *held* that the master should not be excused on the theory that the car repairer himself selected the tool which caused the injury.—*Id.*

☞226(1) (Mo.App.) A servant never assumes the risk of his master's negligence.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

☞226(2) (Tex.Civ.App.) An employé does not assume risks arising from his employer's negligence of which he has no knowledge and is not charged with knowledge.—*Kansas City, M. & O. Ry. Co. v. Finke*, 190 S. W. 1143.

(G) Contributory Negligence of Servant.

☞233(2) (Ky.) Stonecutter's act in leaving the shed provided and voluntarily approaching a derrick, which fell on him, *held* to bar recovery for his death.—*Christian's Adm'r v. Ennis*, 190 S. W. 675.

☞234(4) (Mo.App.) Knowledge of a servant of danger in his work precludes recovery by him from injuries therefrom only when the danger was so obvious that a man of ordinary prudence would have refused to do the master's bidding.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

☞236(15) (Ky.) Employé of coal mining company, whose work was to move loaded cars from under tippie and to place for loading empty cars sent down incline to him, *held* required to keep lookout for movement of empties.—*West Kentucky Coal Co. v. Heady's Adm'r*, 190 S. W. 475.

☞238(4) (Mo.App.) An employé, who has chosen an unsafe method of work when there is a safe way, may recover for resulting injuries unless way chosen was so dangerous that an ordinary prudent man would not have chosen it.—*Dittrich v. American Mfg. Co.*, 190 S. W. 1006.

☞248 (Mo.App.) In an action against a railroad for injury to employé struck by a switch engine, based upon the humanitarian rule alone, contributory negligence is not a defense.—*Dunn v. Missouri Pac. Ry. Co.*, 190 S. W. 966.

(H) Actions.

☞250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ☞ number sections 348-420, at the end of this topic, where the matter in this and future index digests will be found.

☞258(3) (Mo.App.) Where section hand lost his eye when struck by a spike being driven by section foreman, the case was not one where the doctrine of *res ipsa loquitur* applied to aid the petition, which failed to plead specific acts of negligence.—*Bradshaw v. Lusk*, 190 S. W. 400.

☞258(11) (Mo.App.) In railroad section hand's action for loss of eye when struck by spike being driven by section foreman, petition *held* not to charge negligence sufficiently in use of improper tool by foreman, improper use of tool, or in not giving plaintiff time to move to safety.—*Bradshaw v. Lusk*, 190 S. W. 400.

☞258(19) (Mo.App.) Petition in servant's action for injury, not demurred to, *held* to allege defendant's knowledge or opportunity to know of presence of cement on boards and its dangerous character and its knowledge of servant's youth and inexperience.—*Zimmerman v. Fryor*, 190 S. W. 26.

☞264(10) (Ky.) Variance between cause of action set out in petition of machine foreman of coal mine, suing for injuries, and that attempted to be proved, *held* fatal under Civ. Code Prac. § 181.—*Harris v. Lam Coal Co.*, 190 S. W. 121.

☞264(11) (Mo.) Where plaintiff's evidence did not sustain the only ground of negligence alleged in his petition in suddenly starting its train, it is error to overrule a demurrer to the evidence and permit recovery on negligence in giving a signal to increase the speed of the train before plaintiff alighted therefrom.—*Wampler v. Atchison, T. & S. F. Ry. Co.*, 190 S. W. 908.

☞265(5) (Ky.) While the doctrine *res ipsa loquitur* applies to masters and servants, it does not apply with the same weight as in other cases, since the master need not furnish absolutely safe appliances with which to work.—

Hartung v. Ten Broeck Tyre Co., 190 S. W. 677.

⇨265(5) (Mo.App.) In a servant's action for injuries, where petition charged negligence of defendant's foreman in allowing plaintiff's place of work to become unsafe and dangerous, *held*, that doctrine of *res ipsa loquitur* was not invoked, and does not apply.—**Stobile v. McMahon**, 190 S. W. 652.

⇨265(11) (Mo.App.) In servant's action for injury, he had the burden of proving the facts as to master's knowledge of dangerous character of his work, and of his youth and inexperience alleged as a cause of action.—**Zimmerman v. Pryor**, 190 S. W. 26.

⇨276(1) (Mo.App.) In action for death of servant by explosion of oxygen acetylene welding apparatus, evidence of insufficient instruction of decedent and improper location of the gas tanks, etc., *held* sufficient to establish plaintiff's case.—**Fairfield v. Bichler**, 190 S. W. 32.

⇨276(2) (Mo.) In action against railroad for death of servant, evidence as to how accident occurred *held* insufficient to sustain verdict for plaintiff.—**Grant v. Kansas City Southern Ry. Co.**, 190 S. W. 586.

⇨276(2) (Mo.App.) Evidence in minor servant's action for injury, *held* to point with certainty to poisoning of his eye by blowing into it of cement dust arising from boards from the floor of a car, which boards he was directed to take away.—**Zimmerman v. Pryor**, 190 S. W. 26.

⇨276(2) (Mo.App.) Evidence *held* not to warrant holding as a matter of law that the servant's injuries resulted wholly from his diseased condition, and not from his accidental fall caused by defective appliances.—**Bootman v. Lusk**, 190 S. W. 414.

⇨276(3) (Mo.App.) In a railroad servant's action for injuries caused to his eye by a sliver of metal, while he was holding a rail which was being cut by a metal hammer and chisel, evidence *held* to justify a finding that sliver came from rail.—**Haire v. Schaff**, 190 S. W. 56.

⇨276(6) (Mo.) In action by railroad employé catching his foot under guard rail not maintained as required by Rev. St. 1909, § 3163, evidence *held* sufficient to show that plaintiff was injured at the point on the guard rail where blocking is required.—**Bowman v. Wabash R. Co.**, 190 S. W. 579.

⇨276(8) (Tex.Civ.App.) In an action for injuries to a roadmaster who ran his motorcar into an open switch, evidence *held* sufficient to show that the open switch was the proximate cause of the injury.—**Kansas City, M. & O. Ry. Co. of Texas v. Finke**, 190 S. W. 1143.

⇨276(9) (Tex.Civ.App.) In railroad employé's action for injuries, evidence *held* to support the jury's findings that another employé of the road was guilty of negligence which was the proximate cause of the injury.—**Atchison, T. & S. F. Ry. Co. v. Smith**, 190 S. W. 761.

⇨276(3) (Ky.) When the servant sues for injury due to defective appliances, the mere breaking of the tool does not of itself make a *prima facie* case, but the master must have known, or have been able, with ordinary care, to have known, of the defect.—**Hartung v. Ten Broeck Tyre Co.**, 190 S. W. 677.

⇨278(5) (Ky.) Where the injured servant was in charge of the machine, and had used it but a short time before the accident, and testified that he knew when he started to use it that it was all right, and there was no defect discoverable by ordinary care, the master was not liable.—**Hartung v. Ten Broeck Tyre Co.**, 190 S. W. 677.

⇨278(18) (Tex.Civ.App.) In an action for injuries to a roadmaster who ran his motorcar into an open switch, evidence *held* sufficient to support the jury's finding that defendant was negligent in leaving the switch open.—**Kansas**

City, M. & O. Ry. Co. of Texas v. Finke, 190 S. W. 1143.

⇨278(20) (Mo.App.) A complaint in servant's action for injuries, *held* to sufficiently allege inexperience of plaintiff.—**McDonald v. Central Illinois Const. Co.**, 190 S. W. 633.

⇨279(5) (Mo.App.) In action under federal Employers' Liability Act for death of section hand, evidence *held* not to sustain charge of foreman's negligence in not knowing, or by the exercise of ordinary care knowing, that a freight train was approaching, in time to have avoided a collision with their hand car.—**Smith v. Pryor**, 190 S. W. 69.

⇨285(1) (Mo.App.) In servant's action for injury, master's evidence that injury resulted from a germ infection, merely raised an issue of fact for the jury, and did not destroy or impair the probative effect of servant's evidence.—**Zimmerman v. Pryor**, 190 S. W. 26.

⇨286(1) (Mo.App.) In action for injuries received while repairing a cordage machine, question of defendant's negligence *held* for jury.—**Dittrich v. American Mfg. Co.**, 190 S. W. 1006.

⇨286(4) (Mo.App.) In action under federal Employers' Liability Act for injury to section man from defective hammer with which he was ordered to use old spikes to fasten rails to new ties, evidence *held* to make defendant's negligence a question for jury.—**Dowell v. Wabash Ry. Co.**, 190 S. W. 939.

⇨286(25) (Mo.App.) In minor servant's action for destruction of his eye from cement dust blown into it from boards from a car, *held* on the evidence, that master's actual or constructive knowledge of the presence and character of cement on the boards, and of special danger to servant by reason of his inexperience, was for the jury.—**Zimmerman v. Pryor**, 190 S. W. 26.

⇨286(30) (Mo.) In an action for injuries to a railroad employé, an instruction that plaintiff could not recover on the ground of negligence in suddenly starting the train with an unusual jerk *held* proper.—**Wampler v. Atchison, T. & S. F. Ry. Co.**, 190 S. W. 908.

⇨286(41) (Mo.App.) That minor servant misrepresented his age to obtain employment was only a circumstance for the jury in determining whether or not master had exercised reasonable care in not warning him of a danger which would be unknown to inexperienced servant.—**Zimmerman v. Pryor**, 190 S. W. 26.

⇨287(4) (Ark.) In an action for personal injuries to a section foreman, evidence *held* sufficient to warrant submitting to the jury the issue of negligence of the subordinate employé.—**St. Louis, I. M. & S. Ry. Co. v. Cobb**, 190 S. W. 107.

⇨287(4) (Ky.) Evidence *held* to sustain a verdict against a mining company for the death of a minor employé, where another employé drove a car through a door without waiting for plaintiff's intestate to open it, killing plaintiff's intestate who was standing in front thereof.—**Carter Coal Co. v. Love**, 190 S. W. 481.

⇨287(5) (Mo.App.) Evidence in a servant's action for injury in the boarding of a power car used by a section crew *held* insufficient to go to the jury on the issue of another member of the crew having negligently jumped against plaintiff as they were leaping on the car.—**Holtzclaw v. Chicago, B. & Q. R. Co.**, 190 S. W. 91.

⇨287(5) (Tex.Civ.App.) Whether another railroad employé pulled the stake that released timbers that fell, and whether the timbers fell as a result of the act, *held* for the jury.—**Atchison, T. & S. F. Ry. Co. v. Smith**, 190 S. W. 761.

⇨288(12) (Tex.Civ.App.) That a roadmaster ran his motorcar into an open switch, the position of which was correctly indicated by the switch target, does not charge him with assumption of risk of an obvious danger as a matter of

law.—Kansas City, M. & O. Ry. Co. of Texas v. Finke, 190 S. W. 1148.

☞289(1) (Mo.App.) In action for injuries received while repairing a cordage machine, question of contributory negligence *held* for jury.—Dittrich v. American Mfg. Co., 190 S. W. 1006.

☞289(6) (Mo.App.) Where a car repairer in removing a bolt from a truck, requiring considerable force, jerked down on a claw bar, he was not necessarily guilty of contributory negligence as a matter of law, but the question was for the jury.—Bootman v. Lusk, 190 S. W. 414.

☞289(22) (Mo.App.) Whether plaintiff was negligent in failing to exercise ordinary care to discover presence of alcohol in a can placed before him by a fellow servant, standing in relation of vice principal, to be soldered, *held* for jury.—Markow v. Gross-O'Reilly Chandelier Co., 190 S. W. 624.

☞289(27) (Mo.App.) A servant engaged in loading timbers *held* not, as a matter of law, guilty of contributory negligence in loading them in certain ways so as to increase the danger, of which he did not know.—Allen v. Quercus Lumber Co., 190 S. W. 86.

☞289(37) (Mo.App.) Where a servant engaged in shoring up an embankment was utterly inexperienced and the danger of the embankment's caving in did not appear imminent, his obeying the foreman's order to do such work did not convict him of negligence as a matter of law.—McDonald v. Central Illinois Const. Co., 190 S. W. 633.

☞289(40) (Mo.App.) In an action against a railroad for injury to its carpenter struck by an engine near a switch track, evidence *held* sufficient to take question whether defendant's servants on engine saw plaintiff in imminent peril in time to have stopped or to have warned him to jury.—Dunn v. Missouri Pac. Ry. Co., 190 S. W. 966.

☞291(4) (Mo.App.) In a servant's action for injuries, an instruction containing the words "negligently and carelessly allowed hoisting machine and bucket to be operated on a dump near the plaintiff" *held* not erroneous as broadening allegations of petition by adding words "and bucket" to words "hoisting machine."—Stobile v. McMahon, 190 S. W. 662.

☞291(13) (Mo.App.) In action for death of employé by explosion of oxygen acetylene welding apparatus, instruction for plaintiff submitting defendant's negligence in failing to erect a barrier between the tanks and the place of work was erroneous which failed to submit the question whether such negligence caused the death.—Fairfield v. Bichler, 190 S. W. 32.

☞293(1) (Mo.App.) In an action for death of employé by explosion of oxygen acetylene welding apparatus, instructions basing plaintiff's recovery upon explosion from certain causes, not mentioning defendant's negligence, were error; the defendants not being insurers of the safety of the apparatus.—Fairfield v. Bichler, 190 S. W. 32.

☞293(1) (Mo.App.) In absence of instruction defining issues and acts of negligence on which jury could find for plaintiff, instruction that if jury found issues for plaintiff they should assess damages for compensation for injuries caused by spike striking plaintiff, *held* erroneous.—Bradshaw v. Lusk, 190 S. W. 400.

☞293(1) (Mo.App.) An instruction that plaintiff could not recover if the injury was the result of an accident "and not the negligence of defendants" was not error as indicating plaintiff could recover if defendants were negligent in any way.—McDonald v. Central Illinois Const. Co., 190 S. W. 633.

☞293(1) (Mo.App.) Where, in action to recover for plaintiff's injuries, the negligence claimed was the failure of defendant's foreman to warn plaintiff before he did, it was erroneous not to submit this issue to the jury.—Lafever v. Pryor, 190 S. W. 644.

☞294(5) (Ark.) In an action against an employer for negligence of fellow servant, an instruction holding the master to the exercise of ordinary care to protect plaintiff from danger *held* proper.—Oaddo River Lumber Co. v. Grover, 190 S. W. 560.

☞296(1) (Tex.Civ.App.) In an action under the federal Employers' Liability Act, *held* not error to refuse a requested charge that it was plaintiff's duty to exercise ordinary care to avoid the accident.—Kansas City, M. & O. Ry. of Texas v. Finka, 190 S. W. 1143.

☞296(8) (Mo.App.) In a servant's action for injuries by explosion of a can containing alcohol, an instruction *held* to direct a verdict for defendant only upon finding that plaintiff knew, or by ordinary care might have known, that can contained alcohol.—Markow v. Gross-O'Reilly Chandelier Co., 190 S. W. 624.

☞296(10) (Ky.) In action by miner for injuries from fall of slate, defendant was entitled to an instruction that, if plaintiff failed to attend to the safety of the roof as authorized, he could not recover.—Consolidation Coal Co. v. Spradlin, 190 S. W. 1069.

☞296(11) (Ky.) In action by miner for injuries from fall of slate, refusal to instruct that, if place where he worked was so imminently dangerous without shooting down the roof that an ordinarily prudent man would not work there, verdict should be for defendant, was error.—Consolidation Coal Co. v. Spradlin, 190 S. W. 1069.

☞297(4) (Mo.App.) In employé's action for personal injury alleging as the sole ground of negligence the employer's failure to guard a mangling machine as required by law, the verdict and judgment therein for the employé must be held to have been responsive to that issue.—Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

☞298 (Mo.App.) In employé's action for personal injury alleging as the sole ground of negligence the employer's failure to guard a mangling machine as required by law, the verdict and judgment for the employé must be *held* to have been responsive to that issue.—Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

☞302(1) (Mo.App.) In action for injuries from collision with defendant's chauffeur, that after defendant's departure from the city the chauffeur consulted an expert repairman as directed by defendant and was returning to look for keys he thought he had lost on such errand *held* to show chauffeur was within scope of defendant's employment.—Whimster v. Holmes, 190 S. W. 62.

☞302(2) (Tex.Civ.App.) The owner of an automobile who was not present at the infliction of an injury cannot be held liable unless person in charge was not only his agent, but was at time engaged in his business.—Gordon v. Texas & Pacific Mercantile & Mfg. Co., 190 S. W. 748.

Commitment of automobile to general control of employé to deliver merchandise *held* not to authorize conclusion that he could use it for other purposes.—Id.

(C) Actions.

☞330(1) (Tex.Civ.App.) Although proof that automobile causing injury is being driven by servant raises inference that driver was engaged in master's business, burden of proof as matter of law remains upon plaintiff to establish material allegations upon which right of recovery rests.—Gordon v. Texas & Pacific Mercantile & Mfg. Co., 190 S. W. 748.

↪330(8) (Tex.Civ.App.) In an action for damages caused by defendant's automobile while driven by employe, evidence that servant was acting outside scope of his employment held to justify a verdict for defendant.—Gordon v. Texas & Pacific Mercantile & Mfg. Co., 190 S. W. 748.

↪332(4) (Tex.Civ.App.) In an action for damages caused by an automobile operated by defendant's servant, requested instruction, making defendant liable for accident if machine was defective, although not used in his business, held properly refused.—Gordon v. Texas & Pacific Mercantile & Mfg. Co., 190 S. W. 748.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

↪351 (Tex.Civ.App.) Employers' Liability Act, pt. 4, § 2, held to bring within act not only every employer who has become a subscriber to the Insurance Association, but also every employer who has procured insurance, in some other insurance company, so that, despite part 3, §§ 6, 9-11, operation of act is not dependent upon whether employer elects to subscribe to association.—Marshall Mill & Elevator Co. v. Scharnberg, 190 S. W. 229.

MASTER IN CHANCERY.

See Account, ↪20.

MEASURE OF DAMAGES.

See Damages, ↪105, 217.

MECHANICS' LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

↪20 (Tex.Civ.App.) Under Const. art. 16, § 37, providing for mechanics' liens, and the mechanic's lien statutes, in view of Rev. St. 1911, Final Title, § 3, held, that holder of a 99-year lease had right to subject property to mechanic's lien, and its estate was subject to such lien.—Ogburn Gravel Co. v. Watson Co., 190 S. W. 205.

II. RIGHT TO LIEN.

(E) Subcontractors' and Contractors' Workmen and Materialmen.

↪115(4) (Tex.Civ.App.) When materialman furnishes material used in construction of building, and gives notice to owner before payment of contract price, failure to give notice of each item held immaterial to fix lien.—Ogburn Gravel Co. v. Watson Co., 190 S. W. 205.

III. PROCEEDINGS TO PERFECT.

↪132(3) (Mo.App.) For lien purposes, date material is put into building determines accrual of indebtedness therefor, as against building, and, if there was no lien for material not becoming permanent part of finished building, date the material torn down went back permanently into building determined date of accrual of indebtedness.—Benning v. Farmers' Bank of Odessa, 190 S. W. 983.

VII. ENFORCEMENT.

↪263(1) (Mo.App.) Under Act April 3, 1911 (Laws 1911, p. 314), held that, in materialman's proceeding to enforce liens against contractor and subcontractor, there was no misjoinder of parties.—Benning v. Farmers' Bank of Odessa, 190 S. W. 983.

↪281(1) (Mo.App.) Evidence, in action to enforce liens for material furnished contractor and subcontractor in construction or reconstruction of building, held sufficient to sustain finding that material was used in construction of

building.—Benning v. Farmers' Bank of Odessa, 190 S. W. 983.

MEMORANDA.

See Frauds, Statute of, ↪103, 110; Witnesses, ↪255.

MINES AND MINERALS.

See Life Estates, ↪12; Master and Servant, ↪103, 187, 189, 217, 236.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

↪49 (Ky.) Under Ky. St. § 2366a, vendor in possession of surface when he sold minerals, who thereafter remained in possession for statutory period, gave purchaser a valid title, but if, before statutory period expired, vendor abandoned possession or was evicted by paramount title, the purchaser's title failed.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

Under Ky. St. § 2366a, relating to continuity of mineral rights, judgment against claimants of surface in suit to quiet title in federal District Court broke continuity of their possession, and was conclusive as against purchaser from them.—Id.

(C) Leases, Licenses, and Contracts.

↪78(1) (Tex.Civ.App.) An oil and gas lease of 19 quarter sections held separate leases of each quarter section, requiring the sinking of a well on each to avoid forfeiture.—Producers' Oil Co. v. Snyder, 190 S. W. 514.

MINORS.

See Infants.

MISLEADING INSTRUCTIONS.

See Criminal Law, ↪809.

MISREPRESENTATION.

See False Pretenses; Fraud.

MISTAKE.

See Indictment and Information, ↪79.

MITIGATION.

See Libel and Slander, ↪84, 111.

MODIFICATION.

See Appeal and Error, ↪1149, 1152; Frauds, Statute of, ↪131; Trusts, ↪58.

MORTALITY TABLES.

See Dower, ↪84.

MORTGAGES.

See Chattel Mortgages; Corporations, ↪477.

IV. RIGHTS AND LIABILITIES OF PARTIES.

↪217 (Mo.App.) As against strangers, mortgagor of realty remains owner, and they cannot plead mortgage in defense to actions for trespass or injuries to property.—King v. Sligo Furnace Co., 190 S. W. 368.

X. FORECLOSURE BY ACTION.

(1) Judgment or Decree and Execution.

↪497(1) (Tex.Civ.App.) Judgment in foreclosure suit in which mortgagors and junior mortgagees were joined, distributing proceeds of sale, held res judicata of the correctness of such distribution.—Freeman v. Klaerner, 190 S. W. 543.

MOTIONS.

See Appeal and Error, ¶236, 237, 361; Criminal Law, ¶696; New Trial, ¶159, 163; Pleading, ¶350.

MOTIVE.

See Criminal Law, ¶673; Homicide, ¶156.

MUNICIPAL CORPORATIONS.

See Appeal and Error, ¶1064; Commerce, ¶10; Counties; District and Prosecuting Attorneys, ¶5; Eminent Domain, ¶2, 75; Estoppel, ¶62; Evidence, ¶158; Intoxicating Liquors, ¶10, 12; Pleading, ¶403; Telegraphs and Telephones, ¶10; Trial, ¶253.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

¶33(2) (Ky.) Where no advertisement was made of the enactment of an ordinance striking territory from city limits, as required by Ky. St. § 3664, the ordinance is of no effect.—City of Highland Park v. Reker, 190 S. W. 706.

Under Ky. St. § 3664, before territory can be stricken from the limits of a city, there must be an ordinance defining territory to be stricken, published as required by statute, and, after proper publication no remonstrance filed, the city council may, by a second ordinance, strike territory described in first ordinance.—Id.

Where city attempted to strike certain territory from its limits by ordinances in 1906 and 1913, not complying with Ky. St. § 3664, there had been no such acquiescence and recognition in 1916 by city and its inhabitants in boundaries as determined by such ordinances as would exclude territory sought to be stricken.—Id.

(C) Amendment, Repeal or Forfeiture of Charter, and Dissolution.

¶48(1) (Tex. Cr. App.) Under Const. art. 11, § 5, the power of the city to adopt a charter is not dependent on grant from the Legislature, but is to be governed only by the limitations found in the acts of the Legislature.—Le Gois v. State, 190 S. W. 724.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

¶57 (Mo.) Charter powers of municipality have origin in police powers of state.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

¶58 (Tex. Cr. App.) Under Const. art. 11, § 5, the power of the city to pass an ordinance is not dependent on grant from the Legislature, but is to be governed only by the limitations found in the acts of the Legislature.—Le Gois v. State, 190 S. W. 724.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(A) Meetings, Rules, and Proceedings in General.

¶100 (Ky.) Where a city council failed to keep a record of its proceedings, showing compliance with Ky. St. § 3664, in striking certain territory from city limits, the existence of valid ordinances, striking such territory, was not shown.—City of Highland Park v. Reker, 190 S. W. 706.

(B) Ordinances and By-Laws in General.

¶105 (Ky.) Since no municipality has any authority except expressly or impliedly given by charter, the power to enact ordinances must be exercised in the manner pointed out in Ky. St. §§ 3636, 3638 as to notice, balloting, etc., and

if not so exercised the purported ordinance is void.—Bates v. City of Monticello, 190 S. W. 1074.

¶122(2) (Ky.) If city ordinances appear to be regular, the burden is on one denying their validity to show the irregularity of their enactment.—Bates v. City of Monticello, 190 S. W. 1074.

¶122(3) (Ky.) Under Ky. St. §§ 3636, 3638, since the record of the council is evidence of no facts except those required to be shown by such sections, vitiating facts showing the invalidity of an ordinance can be shown by evidence aliunde the record.—Bates v. City of Monticello, 190 S. W. 1074.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

¶147 (Ark.) Officers elected as officers of city of first class, under special act raising city to that class and before such acts were declared unconstitutional, held at least de facto officers, so that their notice calling in city's warrants as authorized by Kirby's Dig. § 5508, were valid as to holders thereof.—Eureka Fire Hose Co. v. Furry, 190 S. W. 427.

¶162(5) (Ky.) Where commissioner of city accepted office of city engineer, and another was elected his successor as commissioner, and qualified, city engineer was not entitled to draw salary as commissioner.—Lampe v. City of Newport, 190 S. W. 678.

(B) Municipal Departments and Officers Thereof.

¶181 (Mo.) Rev. St. 1909, § 8770, when contrasted with section 8773, does not require the Governor to give a police commissioner of a city of the first class notice of charges and an opportunity to be heard before removing him.—State on Inf. of Barker v. Crandall, 190 S. W. 839. Same v. McDonald, Id. 894.

Rev. St. 1909, § 8770, does not give a police commissioner a fixed tenure, but only prescribes the maximum term conditioned on the nonexercise by the Governor of his power to remove for official misconduct.—Id.

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

¶302(3) (Ky.) Under Ky. St. § 3706, board of trustees of city of sixth class, where work was not ordered on petition, or upon ten-year bond plan, had no authority to order cost of constructing sidewalk against abutting owners, except when ordered at regular meeting at which at least four members voted therefor.—Town of Walton v. Diers, 190 S. W. 1099.

¶321(1) (Ky.) The power to open and improve streets, etc., is discretionary with the proper municipal authorities, if the governing law has been observed, and is not subject to judicial review except where the municipal authorities have acted fraudulently.—Marz v. City of Newport, 190 S. W. 670.

¶323(1) (Ky.) That contract awarded provided for a wood block pavement when a vitrified brick pavement would be cheaper was immaterial, where council acted in good faith in changing the material, and would not subject city to an injunction.—Marz v. City of Newport, 190 S. W. 670.

¶323(3) (Ky.) Under Ky. St. § 3096, relating to cost of paving and street improvement, petition in action for injunction in respect to duty of street railway held not to show any irregularity or illegality in the contract so as to justify injunction.—Marz v. City of Newport, 190 S. W. 670.

Petition in action to enjoin construction of street held not to allege that improvement would impose a liability on city under Const. §§ 157, 158, which it had no funds to meet.—Id.

(C) Contracts.

⇒330(3) (Mo.App.) Where contract for street paving in city provided brick must be manufactured in state, and brick so manufactured could be purchased for less price than brick manufactured outside, contract was not void as stifling competition and cutting off right of selection of equally good brick from other states.—*Pasche v. South St. Joseph Town-Site Co.*, 190 S. W. 30.

(D) Damages.

⇒404(5) (Mo.App.) Where cause of action pleaded against city was for damages to plaintiff by changing grade of sidewalk, ordinances, not purporting to change grade, but providing for establishment of grade, were improperly admitted.—*Berglar v. University City*, 190 S. W. 620.

In action against city for damages from changing grade of sidewalk, ordinances relative to the work, which were not in terms pleaded, were admissible to show that it had been done by authority of city.—Id.

(E) Assessments for Benefits, and Special Taxes.

⇒455 (Tex.Civ.App.) An assessment of property for a street improvement can in no case be made without proper notice of the contemplated assessment to the owner and an opportunity given him to resist it for any legal cause.—*Gallahar v. Whitley*, 190 S. W. 757.

⇒524 (Tex.Civ.App.) Under charter of city of Mineral Wells adopted August 19, 1913, in accordance with Acts 33d Leg. c. 147, § 8, and in absence of any power given to city to impose any penalty for failure to promptly pay special assessment, no attorney's fee could be added to amount of certificate for special assessment, with interest.—*Gallahar v. Whitley*, 190 S. W. 757.

Acts 33d Leg. c. 147, § 8, and Rev. St. 1911, art. 1011, did not apply to an improvement assessment made by city under its charter pursuant to Acts 38d Leg. c. 147, and hence did not authorize city to impose attorney's fees.—Id.

(F) Enforcement of Assessments and Special Taxes.

⇒530 (Tex.Civ.App.) That suit upon an improvement certificate was brought within the ten days in which, under charter, defendant might have instituted suit to set assessment aside, was immaterial, where it did not appear how the suit prevented such suit by defendant, or that defendant could have successfully maintained such suit.—*Gallahar v. Whitley*, 190 S. W. 757.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

⇒592(1) (Mo.App.) A city ordinance, stating what shall be presumptively not careful speed of automobiles, held not an unlawful attempt to prescribe presumptions of evidence.—*Young v. Dunlap*, 190 S. W. 1041.

(B) Violations and Enforcement of Regulations.

⇒644 (Mo.App.) Rev. St. 1909, §§ 5377-5379, providing that the state and county shall pay costs upon conviction in certain cases, does not warrant taxing costs against a city which unsuccessfully prosecuted an alleged ordinance violation.—*City of Greenfield v. Farmer*, 190 S. W. 406.

Rev. St. 1909, § 5380, providing that persons instituting prosecutions to recover fines, etc., shall pay the costs if defendant is acquitted, etc., refers only to personal offenses, and is inapplicable to a prosecution by a city for ordinance violation.—Id.

Rev. St. 1909, § 9344; allowing taxation of costs in malicious criminal prosecutions, does not authorize defendant taxing costs against a city unsuccessfully prosecuting an alleged ordinance violation, where the prosecution was not malicious.—Id.

A fourth class city is not liable for costs upon an unsuccessful prosecution of an alleged ordinance violation.—Id.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

⇒705(1) (Mo.App.) By Acts 1911, p. 330, persons operating automobiles on highways rest under highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons using such highways.—*Mitchell v. Brown*, 190 S. W. 354.

⇒705(2) (Mo.App.) Laws 1911, pp. 326, 327, requires automobile driver, traveling busy street of large city, when about to cross another much-used street, to slow down so as to have his car under control, and be able to stop, if necessary, in meeting another car at crossing.—*Mitchell v. Brown*, 190 S. W. 354.

⇒705(4) (Mo.App.) A proviso to a city ordinance regulating speed of automobiles held to make an excessive speed only presumptive evidence of negligence, and not absolute negligence.—*Young v. Dunlap*, 190 S. W. 1041.

⇒706(5) (Mo.App.) In action by automobile passenger for injuries received in collision, evidence held to warrant finding that driver of car with which one in which plaintiff rode collided was negligent.—*Mitchell v. Brown*, 190 S. W. 354.

In action for injuries in automobile collision, evidence held insufficient to warrant finding that collision was accident for which driver of neither car was to blame.—Id.

⇒706(6) (Mo.App.) In action for personal injuries by automobile passenger against owners of car in which she rode and another with which it collided, case against each defendant held for jury under evidence as to their negligence.—*Mitchell v. Brown*, 190 S. W. 354.

⇒706(8) (Mo.App.) In action for injuries in automobile collision, instruction held not erroneous as misleading jury into applying higher degree of care than required of persons operating automobiles on public highways.—*Mitchell v. Brown*, 190 S. W. 354.

⇒706(8) (Mo.App.) In an action for injuries resulting from an automobile collision at a street intersection, an instruction held erroneous as ignoring the allegations of the petition.—*Young v. Dunlap*, 190 S. W. 1041.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

⇒764(1) (Mo.App.) The grading by a city of a dedicated and publicly used street constitutes an assumption of control and invitation to use it as a street, which it is bound to keep reasonably safe for travel.—*Chance v. City of St. Joseph*, 190 S. W. 24.

⇒771 (Mo.App.) If ice on sidewalks is exceptional and becomes hazardous for other causes than its natural formation, so as to endanger pedestrians, a city is liable for injuries caused thereby.—*Krucker v. City of St. Joseph*, 190 S. W. 644.

⇒796 (Mo.App.) It is a city's duty to maintain a barrier across a street, where it ends abruptly at a precipitous bank.—*Chance v. City of St. Joseph*, 190 S. W. 24.

⇒804 (Mo.App.) A traveler, injured through a defect in a street, will not be held guilty of contributory negligence as matter of law, be-

cause drunk; but his conduct is to be judged by the rule of care exacted of an ordinarily careful and prudent sober person in his situation.—*Chance v. City of St. Joseph*, 190 S. W. 24.

☞805(7) (Mo.App.) As regards contributory negligence of a traveler, injured where a street ended at a precipice, *held*, in view of conditions of lights, that presence of a house in the street was not an indubitable warning of the street ending there.—*Chance v. City of St. Joseph*, 190 S. W. 24.

☞806(2) (Mo.) A pedestrian, in walking over sidewalk in which the boards were laid transversely, could presume that the walk was reasonably safe for ordinary travel.—*McNiell v. City of Cape Girardeau*, 190 S. W. 327.

☞807(1) (Mo.App.) Contributory negligence of a traveler, injured through a defect in a street, cannot be predicated on the fact that by going onto such street he had deviated from his direct route.—*Chance v. City of St. Joseph*, 190 S. W. 24.

☞807(1) (Mo.App.) A pedestrian need not abandon his customary route in a public street because of a defect, and is not guilty of contributory negligence in failing to do so, unless defect is so patently dangerous that no ordinarily prudent person would attempt to pass over it.—*Stephens v. City of Eldorado Springs*, 190 S. W. 1004.

☞812(7) (Mo.App.) A notice to defendant city, under Rev. St. 1909, § 8863, that plaintiff was injured by slipping on ice on sidewalk of a street between two other streets covering a distance of 420 feet *held* insufficient.—*Krucker v. City of St. Joseph*, 190 S. W. 644.

☞816(1) (Mo.App.) Petition in action against city *held* to declare upon defective condition of both stairway and banister, and to charge that defective condition of step which was obvious and had existed for sufficient time to charge city with notice thereof, caused plaintiff to take hold of banister which had a latent defect, and gave way, causing her to fall.—*Kingery v. City of Jefferson*, 190 S. W. 976.

☞819(4) (Mo.App.) In action against city for personal injury, evidence *held* to show that step in stairway in street, the defect in which was obvious and had existed for sufficient time to charge the city with notice, and the banister which possessed a latent defect only, both contributed to cause plaintiff's injury.—*Kingery v. City of Jefferson*, 190 S. W. 976.

☞819(6) (Mo.) Evidence *held* to warrant inference that the city knew of the defective condition of the sidewalk by which plaintiff was injured.—*McNiell v. City of Cape Girardeau*, 190 S. W. 327.

☞819(6) (Mo.App.) In action against city for personal injury from defective step and banister in stairway in street, evidence *held* to warrant finding that defective banister, if sole cause of fall, had existed for such time as to enable city in exercise of reasonable care to know of it, and to prevent accident by repairing it.—*Kingery v. City of Jefferson*, 190 S. W. 976.

☞821(20) (Mo.App.) In action against a city for personal injury from a defective step and banister on a stairway, evidence *held* not to show that plaintiff was guilty of contributory negligence as matter of law.—*Kingery v. City of Jefferson*, 190 S. W. 976.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

☞865(2) (Tex.Civ.App.) If landowner's petition against city presented only action on its contract to pay him more per acre for land purchased for reservoir, if another owner secured certain price or over in condemnation proceedings, sum sued for was "debt" within Const. art. 11, §§ 5, 7.—*City of Ft. Worth v. Reynolds*, 190 S. W. 601.

(B) Administration in General, Appropriations, Warrants, and Payment.

☞903 (Ark.) Where acts of de facto officers acting as officers of city of first class, in calling in city's warrants, were valid as to holder of such warrants, action on warrants after time allowed by notice was barred.—*Eureka Fire Hose Co. v. Furry*, 190 S. W. 427.

(C) Bonds and Other Securities, and Sinking Funds.

☞918(3) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914, arts. 606, 616, and 884*, the notice for an election on a municipal bond question need not specify the rate of the tax to be levied, but that is left to the city council or town board.—*Hunter v. Rice*, 190 S. W. 840.

(D) Taxes and Other Revenue, and Application Thereof.

☞974(1) (Mo.) Under Rev. St. 1909, §§ 11403, 11408, 11412, 11414, St. Louis Board of Equalization *held* without authority to change value and amount of corporate company's bank stock in city of St. Louis certified to them by state board of equalization.—*Mercantile Trust Co. v. Schramm*, 190 S. W. 886; *International Bank v. Same*, *Id.* 889; *Merchants' Laclede Nat. Bank v. Same*, *Id.*

XV. ACTIONS.

☞1038 (Tex.Civ.App.) Where city purchased land for reservoir, failed to pay part of price, and vendor sought to foreclose implied lien on part of land not used for reservoir, foreclosure was not in conflict with Const. art. 11, § 9, prohibiting forced sale of city's property owned for public purposes.—*City of Ft. Worth v. Reynolds*, 190 S. W. 501.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ☞723-826.

MUTUALITY.

See Specific Performance, ☞32.

NAMES.

See Corporations, ☞49; Taxation, ☞760.

☞16(2) (Tex.Cr.App.) In an indictment for larceny, the name "McKeg" is *idem sonans* with "McCaig," which was the true name of the victim of the larceny, so that the indictment was sufficient.—*Lunsford v. State*, 190 S. W. 157.

NAVIGABLE WATERS.

See Waters and Water Courses.

NECESSARIES.

See Husband and Wife, ☞83.

NECESSITY.

See Sunday.

NEGLIGENCE.

See Bailment, ☞11; Carriers, ☞121-382; Highways, ☞191; Master and Servant, ☞83-351; Municipal Corporations, ☞705-821; Principal and Agent, ☞159; Railroads, ☞113-482.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

☞2 (Mo.App.) Plaintiff to recover for injury on the ground of negligence must show a relationship to defendants involving duty by them

to her, and duty by them to others is not enough.—*Etchison v. Lusk*, 190 S. W. 345.

II. PROXIMATE CAUSE OF INJURY.

§56(1) (Mo.App.) There is no right to even nominal damages in an action founded on negligence, unless such negligence was the proximate cause of the injury.—*Harris v. Decker*, 190 S. W. 969.

§56(1) (Tex.Civ.App.) A defendant is not liable for damages for his negligence, if such negligence was not the proximate cause of plaintiff's injury.—*Scott v. Northern Texas Traction Co.*, 190 S. W. 209.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§82 (Tex.Civ.App.) That plaintiff in a suit for damages is guilty of negligence will not preclude recovery if such negligence did not proximately contribute to his injuries.—*Scott v. Northern Texas Traction Co.*, 190 S. W. 209.

(D) Comparative Negligence.

§87 (Tex.Civ.App.) The rule of comparative negligence prescribed by Rev. St. art. 6649, in case of injury to a carrier's employé, does not prevail in other cases of injury from negligence, and in them contributory negligence is a complete defense.—*Andrews v. Myntier*, 190 S. W. 1164.

§101 (Mo.App.) Where causal negligence is attributable partly to master and partly to injured employé, he should recover only a part of full damages in the proportion that master's negligence bears to negligence attributable to both.—*Dowell v. Wabash Ry. Co.*, 190 S. W. 939.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

§119(4) (Tex.Civ.App.) Where the petition in a negligence action alleges generally that the injury was the result of negligence, and then specifically sets up the acts of negligence relied on, the evidence will be confined to the specific allegations.—*Kansas City, M. & O. Ry. Co. of Texas v. James*, 190 S. W. 1136.

§119(6) (Mo.App.) Where evidence of plaintiff indisputably discloses negligence on his part as a contributory cause of the injury, defendant is entitled to a peremptory instruction, whether or not he has pleaded such negligence as a defense.—*Lumb v. Forney*, 190 S. W. 988.

Where evidence presents contributory negligence on plaintiff's part as controverted issue of fact, defendant cannot avail himself of defense without pleading it.—*Id.*

(B) Evidence.

§121(5) (Tex.Civ.App.) When one seeks to recover damages from negligence, it is incumbent on him to establish not only the negligence alleged, but also that it caused the injury.—*Etchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

(C) Trial, Judgment, and Review.

§136(26) (Ark.) In an action for personal injuries to a section foreman, evidence held sufficient to warrant submitting to the jury the issue of plaintiff's contributory comparative negligence.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

§141(3) (Tex.Civ.App.) Defendant has the right on request to have an affirmative presentation of facts well pleaded, and relied on by him in support of plea of contributory negligence if the evidence fairly supports an inference of negligence.—*Gulf, C. & S. F. Ry. Co. v. Sullivan*, 190 S. W. 739.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEUTRALITY LAWS.

See Contracts, §138.

NEWLY DISCOVERED EVIDENCE

See Criminal Law, §938-958.

NEWSPAPERS.

See Appeal and Error, §173.

NEW TRIAL.

See Appeal and Error, §301, 302, 528, 741, 933, 1015; Criminal Law, §905-958, 1063, 1064, 1083, 1096, 1124, 1144; Eminent Domain, §224.

I. NATURE AND SCOPE OF REMEDY.

§10 (Tex.Civ.App.) After judgment in accordance with verdict, losing party is not precluded from moving for new trial on ground of the insufficiency of evidence because previously to verdict he made an unsuccessful attempt to have a judgment rendered contrary to it.—*Etchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

II. GROUNDS.

(A) Errors and Irregularities in General.

§18 (Mo.App.) Defects in pleading are not, ordinarily, reached by motion for a new trial, but are reached either by objection to the reception of any evidence, or by demurrer, or by motion in arrest; and may even be reached in some cases for the first time in appellate court.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

(D) Disqualification or Misconduct of or Affecting Jury.

§44(3) (Tex.Civ.App.) In servant's action for injuries, trial court held not to have abused discretion in denying defendant's motion for new trial on ground of jury's misconduct in returning larger verdict because defendant was insured and plaintiff's attorneys were entitled to part of recovery.—*Marshall Mill & Elevator Co. v. Scharnberg*, 190 S. W. 229.

(F) Verdict or Findings Contrary to Law or Evidence.

§72 (Ark.) Where on motion for new trial court found specifically that verdict was against weight of evidence on an essential point, failure to set aside verdict held error.—*Twist v. Mullinix*, 190 S. W. 851.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§159 (Ark.) On motion for new trial, it is province of the trial court to review the evidence and determine whether jury has correctly applied law as contained in court's instructions, and whether verdict is responsive to preponderance of evidence.—*Twist v. Mullinix*, 190 S. W. 851.

§163(2) (Ark.) On motion for new trial by use of words "the verdict will not be disturbed merely because it is against the preponderance of the evidence," following a statement that a finding upon a question was against the preponderance of the evidence, the finding of the court held positive that verdict was against weight of evidence.—*Twist v. Mullinix*, 190 S. W. 851.

NEXT FRIEND.

See Insane Persons, §87, 94.

NONSUIT.

See Dismissal and Nonsuit.

NOTARIES.

See Depositions, ¶49.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, ¶417, 429, 509; Bills and Notes, ¶334, 342; Carriers, ¶218; Corporations, ¶613; Criminal Law, ¶663; Disorderly House, ¶12, 16; Executors and Administrators, ¶387; Insurance, ¶535; Lis Pendens; Mechanics' Liens, ¶115; Municipal Corporations, ¶455, 805, 812, 819; Vendor and Purchaser, ¶230.

¶1 (Ky.) Notice may be defined generally as that which imparts information of the fact to the one to be notified, and is divided into several classes, such as actual, constructive, implied, and presumptive notice.—*Burdine v. White*, 190 S. W. 687.

NOVATION.

¶5 (Tex.Civ.App.) Where retailer, indebted to a wholesaler, sold his business, the buyers undertaking to pay his debt for which they executed notes, the wholesaler, not releasing the retailer in fact, did not release him in law by taking such notes.—*Wilson v. J. W. Crowds Drug Co.*, 190 S. W. 194.

To produce a novation, the intention of the creditor to discharge the first debtor and accept the second in his stead must be perfectly evident.—*Id.*

¶12 (Tex.Civ.App.) In action on account for goods sold, the defense being that buyers of the business assumed it, a telegram from defendant's attorney, authorizing plaintiff to accept the buyers' notes for the account, was admissible as showing that plaintiff's giving the buyers such additional time was an accommodation to the debtor and not a novation.—*Wilson v. J. W. Crowds Drug Co.*, 190 S. W. 194.

NUISANCE.

See Jury, ¶31.

II. PUBLIC NUISANCES.

(C) Abatement and Injunction.

¶77 (Mo.) Power of equity to enjoin acts threatening or which would constitute public nuisance is inherent, and cannot be divested because such acts may be violation of criminal law.—*State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk*, 190 S. W. 877.

OBJECTIONS.

See Appeal and Error, ¶184-242; Criminal Law, ¶693, 695½, 728, 1031-1038; Parties, ¶84, 96; Pleading, ¶406-423; Trial, ¶81-105, 131, 274, 284.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ¶121, 146.

OFFER.

See Evidence, ¶213.

OFFICERS.

See Banks and Banking, ¶51, 57; Corporations, ¶415-432, 619; Counties, ¶74; District and Prosecuting Attorneys; Injunction, ¶88; Judges; Justices of the Peace; Limitation of Actions, ¶57; Mandamus, ¶73, 74; Municipal Corporations, ¶147-181; Receivers; Sheriffs and Constables.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(G) Resignation, Suspension, or Removal.

¶70 (Mo.) Where power is given to remove an appointive officer for cause, notice and a reasonable opportunity to be heard are indispensable, but where the officer is removable at will no question can arise except as to the fact of removal.—*State on Inf. of Barker v. Crandall*, 190 S. W. 889; *Same v. McDonald*, *Id.* 894.

¶72(1) (Mo.) Under a statute giving a board power to remove appointees if they are found not to possess the statutory qualifications or to be guilty of neglect of duty or of any misconduct, the board must conduct a semijudicial inquiry including notice of charges and an opportunity to be heard.—*State on Inf. of Barker v. Crandall*, 190 S. W. 889; *Same v. McDonald*, *Id.* 894.

II. TITLE TO AND POSSESSION OF OFFICE.

¶85 (Mo.) Under Rev. St. 1909, §§ 10405, 10409, 10412, and 10413, *held*, that warrant to surrender books of officer to his successor could not be issued by one judge.—*In re Letcher*, 190 S. W. 19.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

¶100(1) (Mo.) Laws 1913, p. 110, requiring prosecuting or circuit attorneys in cities of over 500,000 to attend coroner's inquests in certain cases and providing an additional fee therefor, does not violate Const. art. 14, § 8, prohibiting increasing of compensation or fees of officers during their terms.—*State ex rel. Harvey v. Sheehan*, 190 S. W. 864.

OIL DEALERS.

See Licenses, ¶16.

OPENING.

See Judgment, ¶139, 143.

OPINION EVIDENCE.

See Criminal Law, ¶448-451; Evidence, ¶471-572.

OPINIONS.

See Fraud, ¶11.

ORAL TRUSTS.

See Trusts, ¶17, 18.

ORDERS.

See New Trial, ¶163.

ORDINANCES.

See Municipal Corporations, ¶33, 105, 122.

PANDERING.

See Prostitution, ¶4.

PARDON.

¶9 (Tenn.) Under Acts 1913, c. 8, § 3, a paroled convict is still within the custody of the state, and cannot be imprisoned under a former conviction for a petty offense.—*State v. Bush*, 190 S. W. 453.

PARENT AND CHILD.

See Adoption; Bastards; Death, ¶99; Divorce, ¶308; Guardian and Ward; Habeas Corpus, ¶85; Infants.

PAROL.

See Pardon, ¶9.

PAROL EVIDENCE.

See Evidence, **§**397-448.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also, the various specific topics.

I. PLAINTIFFS.

(B) Joinder.

§15 (Mo.App.) Under Rev. St. 1909, **§** 1729, 1731, allowing all interested persons to join as plaintiffs, the buyer of an automobile and a conditional sale purchaser from him properly joined in an action against the seller for breach of the sales contract.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

II. DEFENDANTS.

(B) Joinder.

§27 (Mo.App.) Injured party may sue singly or jointly each tort-feasor whose negligence or wrongdoing contributes to injury.—*Mitchell v. Brown*, 190 S. W. 354.

§29 (Tex.Civ.App.) All parties necessary to the final disposition of main issue in a suit should be joined.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

§31 (Mo.App.) Injured party may sue singly or jointly each tort-feasor whose negligence or wrongdoing contributes to injury.—*Mitchell v. Brown*, 190 S. W. 354.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§64(2) (Tex.Civ.App.) Defect of the petition in suing one partner alone on the firm's obligation is waived by defendant not interposing plea in abatement.—*Carr v. Wright*, 190 S. W. 264.

§96(4) (Mo.App.) An answer waived objection that there was a misjoinder of parties plaintiff, as an answer is a waiver of a demurrer for any cause save jurisdiction, and a failure to allege facts sufficient to state a cause of action.—*Belt v. St. Louis, I. M. & S. Ry. Co.*, 190 S. W. 1002.

PARTITION.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§65 (Ky.) In a suit for partition by one claiming as heir, it is immaterial whether a conveyance of the widow's dower interest was void because she had remarried and her husband had not joined.—*Vanover v. Steele*, 190 S. W. 667.

PARTNERSHIP.

See Appeal and Error, **§**1068; Evidence, **§**471; Parties, **§**84; Trial, **§**296.

I. THE RELATION.

(A) Creation and Requisites.

§11 (Mo.App.) Where parties agreed to share profits of business without mentioning losses, that fact did not destroy the effect in creating a partnership of what was expressly said as to profits.—*Pasche v. South St. Joseph Town-Site Co.*, 190 S. W. 30.

(C) Evidence.

§54 (Mo.App.) In action on assigned special tax bills by parties who claimed to be partners, the jury could consider plaintiffs' acts and conduct in managing the business in determining whether plaintiffs intended to be and were partners.—*Pasche v. South St. Joseph Town-Site Co.*, 190 S. W. 30.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

§216(3) (Mo.App.) Plaintiffs, suing on special tax bills for street paving assigned to them jointly, claiming to be partners in the transaction, could recover, though not technically partners.—*Pasche v. South St. Joseph Town-Site Co.*, 190 S. W. 30.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

§243 (Mo.App.) Where the employé of two partners was so injured that he died afterwards, from negligent explosion which instantaneously killed one of the partners, the partnership estate was liable for damages for the employé's death.—*Fairfield v. Bichler*, 190 S. W. 32.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

§328(2) (Tex.Civ.App.) In suit for dissolution and accounting by partner in firm selling realty, testimony as to conversation between witness and federal district attorney, who came to investigate firm's manner of doing business, held immaterial to any issue.—*Tyler v. McChesney*, 190 S. W. 1115.

§333 (Tex.Civ.App.) In partner's suit for dissolution and accounting, two cash items, one representing attorney's fees paid in garnishment suit against defendant partners individually, the other representing traveling expenses of defendant on individual business, held not chargeable against partnership funds.—*Tyler v. McChesney*, 190 S. W. 1115.

§336(2) (Tex.Civ.App.) In partner's suit for dissolution and accounting, court properly refused to permit defendants to offer in evidence trial balance made from the firm's books, which would simply show they were in balance or out of balance, and not properly show net profits.—*Tyler v. McChesney*, 190 S. W. 1115.

§342 (Tex.Civ.App.) In suit for dissolution of partnership and accounting, verdict for plaintiff held not insufficient as vague and indefinite.—*Tyler v. McChesney*, 190 S. W. 1115.

PART PAYMENT.

See Accord and Satisfaction.

PART PERFORMANCE.

See Frauds, Statute of, **§**129, 133; Specific Performance, **§**43, 44.

PASSENGERS.

See Carriers, **§**283-382.

PATENTS.

See Public Lands, **§**151.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights of Patentees in General.

§192 (Tex.Civ.App.) Each of several assignees to whom an interest in a patent right is assigned has a right to manufacture and sell the patented article, no matter how small his interest may be.—*Davis v. Wynne*, 190 S. W. 510.

PAUPERS.

See Appeal and Error, **§**389.

PAYMENT.

See Accord and Satisfaction; Compromise and Settlement; Eminent Domain, **§75**; Insurance, **§358**, **365**; Mechanics' Liens, **§115**; Municipal Corporations, **§524**; Specific Performance, **§44**, **97**; Subrogation.

I. REQUISITES AND SUFFICIENCY.

§33 (Mo.App.) If two defendants had ordered whisky of plaintiff and remitted him cash to cover price and amount due on his judgment against third defendant, plaintiff could not have refused to ship the whisky, returned amount intended for it, and retained sufficient to satisfy judgment.—*B. J. Semms & Co. v. Barnett*, 190 S. W. 394.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§75 (Tex.Civ.App.) Evidence held to sustain a finding that a payment by defendant corporation was to be applied upon a debt due plaintiff from a firm which was closely connected with defendant, and which was defendant's creditor.—*Munday Trading Co. v. J. M. Radford Grocery Co.*, 190 S. W. 520.

PENALTIES.

See Damages, **§81**, **85**; Municipal Corporations, **§524**; Taxation, **§841**.

PENDENCY OF ACTION.

See *Lis Pendens*.

PERSONAL INJURIES.

See Carriers, **§283-347**; Constitutional Law, **§245**; Damages, **§131-134**; Evidence, **§528**, **532**; Highways, **§191**; Master and Servant, **§88-351**; Municipal Corporations, **§705-821**; Negligence; Railroads, **§275-400**.

PETITION.

See Pleading, **§56**, **64**.

PHOTOGRAPHS.

See Evidence, **§359**.

PHYSICAL FACTS.

See Evidence, **§588**.

PHYSICIANS AND SURGEONS.

See Evidence, **§506**, **528**, **532**; Frauds, Statute of, **§26**; Indictment and Information, **§111**.

§13 (Mo.App.) No financial value is necessary to constitute consideration for rendition of services by a physician, although the labor was of no benefit.—*Mitchell v. Davis*, 190 S. W. 357.

§13 (Mo.App.) The engaging of a physician and surgeon to care for a corporation's employé, by instruction by the corporation to "go on until you hear from" the corporation, carried with it an implied promise to pay the reasonable value of services thereunder.—*Wilson v. St. Louis Envelope & Paper Box Co.*, 190 S. W. 979.

§24(5) (Mo.App.) In physician's action for services rendered defendant's adult son at defendant's request, and on his promise to pay therefor, based on services distinct from any rendered solely on the boy's credit, the jury should not be required to find that the agreement was made before rendition of any services for the son.—*Mitchell v. Davis*, 190 S. W. 357.

Instruction that if physician gave the boy any credit he could not recover from defendant, was properly refused.—*Id.*

PISTOLS.

See Weapons, **§10**.

PLACE.

See Criminal Law, **§564**; Indictment and Information, **§86**; Taxation, **§276**.

PLAT.

See Boundaries, **§36**.

PLEADING.

See Judgment, **§101**, **107**, **248-253**; New Trial, **§18**; Parties, **§96**.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

§8(3) (Mo.) In state's suit to enjoin railroad from receiving shipments of intoxicants, allegation that road's acts constituted "public nuisance" was a conclusion and not sufficient to invoke power of equity to enjoin.—*State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk*, 190 S. W. 877.

§32 (Mo.App.) Petition, in action for damages for the destruction of goods during transportation, setting out shipping contract in *hac verba*, but failing to plead its legal effect, was demurrable.—*Wilson v. Chicago Great Western R. Co.*, 190 S. W. 22.

§34(1) (Mo.App.) The court in construing pleadings need not adopt the conclusions of the pleader nor be much influenced by the prayer for relief, but must ascertain the nature and class of the asserted cause by synthesizing the alleged ultimate facts and reaching its own conclusion thereon.—*Hunter v. Sloan*, 190 S. W. 57.

§34(3) (Mo.App.) A petition not demurred to, but answered, will be construed most favorably to plaintiff, and if a constitutive fact, not expressly stated, may be said to follow as a necessary implication from the facts alleged, it is sufficient to support a verdict.—*Chance v. City of St. Joseph*, 190 S. W. 24.

§34(3) (Tex.Civ.App.) Every reasonable indictment will be indulged in favor of the allegations in the petition under a general exception.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§56 (Mo.App.) Though facts constituting a good legal cause of action are stated in a petition, yet if it also appears that the plaintiff therein is not entitled to such action, no cause of action is stated.—*Belt v. St. Louis, I. M. & S. Ry. Co.*, 190 S. W. 1002.

§64(2) (Mo.App.) In action for personal injury based on negligent moving of cars so as to close an opening in crossing, without warning to plaintiff, pleading of an ordinance against blocking of crossing and its violation did not make count duplicitous as joining different causes of action.—*Israel v. Wabash R. Co.*, 190 S. W. 1015.

In action for injury while attempting to cross railroad track through an opening between freight cars closed without warning, allegation of cause of action under the humanitarian rule, where facts supporting it were not inconsistent or contradictory of cause of action for ordinary negligence, did not render count duplicitous.—*Id.*

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.**(A) Defenses in General.**

§85(4) (Mo.App.) Where defendant objected to trial on June 26th because plaintiff had not

filed amended petition until June 23d, nearly month after time allowed by court, and defendant had been granted five days thereafter to answer, it was error to force defendant to file answer and to go to trial before expiration of five-day period.—*Berglar v. University City*, 190 S. W. 620.

§93(2) (Mo.App.) In action on contract of sale, the defenses of false representations avoiding the contract and a breach of warranty are wholly repugnant.—*Stoutzenberger v. Lamb*, 190 S. W. 963.

(B) Dilatory Pleas and Matter in Abatement.

§110 (Tex.Civ.App.) Plea of privilege to be sued in county of defendant's residence held not waived by absence under belief that case would be called on following day.—*Johnson v. Waggoner*, 190 S. W. 835.

Plea of privilege to be sued in county of defendant's residence held not waived by failure in motion for new trial to reserve the right to insist on such plea if the motion were granted.—*Id.*

Plea of privilege to be sued in the county of defendant's residence held not waived by granting of continuances contested by such defendant.—*Id.*

(C) Traverses or Denials and Admissions.

§127(2) (Tex.Civ.App.) In suit for damages under Employers' Liability Act, interveners claiming under an assignment of part of cause of action were not excused from pleading and proving that plaintiff had a cause of action by the fact that defendant pleaded a settlement with plaintiff; such plea not amounting to an admission.—*Phoenix Const. Co. v. Witt & Saunders*, 190 S. W. 780.

(E) Set-Off, Counterclaim, and Cross-Complaint.

§148 (Tex.Civ.App.) In action to recover usury on notes, cross-bill, alleging a conspiracy between plaintiff and others to destroy defendant's banking business, held sufficient to show a cause of action in reconvention or cross-action, and authorizing admission of evidence.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§176 (Tex.Civ.App.) Under Rev. Civ. St. art. 1829, as amended by Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829), where answer alleged contributory negligence, supplemental petition denying such allegations was a proper pleading, notwithstanding substantial repetition of allegations as to nature of injuries.—*Caffarelli Bros. v. Bell*, 190 S. W. 223.

V. DEMURRER OR EXCEPTION.

§205(2) (Tex.Civ.App.) Where a petition to establish a trust stated a cause of action at least as to one-half of $\frac{31}{100}$ of the estate claimed by plaintiffs, a general demurrer should not be sustained.—*Briggs v. McBride*, 190 S. W. 1123.

§212 (Tex.Civ.App.) In landowner's suit against city, for price of land sold for reservoir and to foreclose implied lien, where general demurrer to petition, which did not affirmatively show that no provision had been made by city to provide for payment of the debt, as required by Const. art. 11, §§ 5, 7, was not called to attention of, or acted on, by court below, demurrer was waived.—*City of Ft. Worth v. Reynolds*, 190 S. W. 501.

§214(1) (Tex.Civ.App.) General demurrer to petition admits its allegations.—*Robertson v. Haynes*, 190 S. W. 735.

§214(1) (Tex.Civ.App.) For purpose of general demurrer allegations of a cross-bill must be

taken as true.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

§228 (Tex.Civ.App.) If a petition is defective in failing to plead several alternative allegations by separate counts, special exceptions should be made on that ground, which a general exception will not reach.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§236(3) (Tex.Civ.App.) Allowance of trial amendments to pleadings is a matter of discretion with trial judge.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

§236(6) (Tex.Civ.App.) Permission to plaintiff to interline words in petition in space left for the amount of special damages for medical attention and drugs was within the trial court's discretion.—*Caffarelli Bros. v. Bell*, 190 S. W. 223.

§237(7) (Ark.) Where a complaint did not seek an accounting as to transactions occurring after action brought, evidence concerning them was objected to, and the master did not consider them, held, that plaintiff was not entitled to have the pleadings amended to conform to the proof.—*Williams v. Thweatt*, 190 S. W. 113.

§248(2) (Tex.Civ.App.) Where evidence under third amendment could have been offered under its first and second, the same defenses urged, the same damages recovered, and recovery upon either barred recovery upon the others, no new cause of action is pleaded by the third.—*Silver Valley Horse Co. v. C. V. Evans & Co.*, 190 S. W. 794.

§248(4) (Tex.Civ.App.) Where a broker's petition for commissions alleged that the price at which he was to sell the land was \$8,000, \$2,500 to be paid in cash, a subsequent amendment, repeating the allegations of the petition, except that the amount of cash was not to be less than \$2,500, did not allege a new cause of action.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

§248(12) (Mo.App.) It is not a departure, in an action for negligently causing a fall, for the amended petition to contain an additional specification of negligence as a cause of the fall.—*Holtzclaw v. Chicago, B. & Q. R. Co.*, 190 S. W. 91.

§248(17) (Mo.) A departure held not to arise from amendment of petition setting out in detail the roundabout way in which defendant sold and received the price of a franchise, for his proportional part of which plaintiff sues.—*Longworth v. Kavanaugh*, 190 S. W. 315.

VII. SIGNATURE AND VERIFICATION.

§302 (Tex.Civ.App.) Under the verification of Pleading Act 83d Leg., an affidavit by an attorney that the pleadings were true to the best of his knowledge formed on information from his client is insufficient.—*Thomas v. Kean*, 190 S. W. 847.

XI. MOTIONS.

§350(3) (Mo.App.) In proceeding for prohibition directed to judge claiming to have jurisdiction of divorce suit by husband, wife's allegation of residence in another county than that of her husband is fact admitted as true by motion for judgment on the pleadings.—*State ex rel. Taubman v. Davis*, 190 S. W. 964.

§369(2) (Mo.) In action on insurance policy, one count alleging death of insured and another inferring death from circumstances of disappearance, there is no inconsistency warranting an election.—*Bonslett v. New York Life Ins. Co.*, 190 S. W. 870.

XII. ISSUES, PROOF, AND VARIANCE.

⚡370 (Mo.App.) Under Rev. St. 1909, §§ 1950, 1951, defining and classifying issues and prescribing when issue of law arises, an issue does not arise until demurrer or answer is filed.—Berglar v. University City, 190 S. W. 620.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡403(4) (Mo.App.) That a complaint for injury to a traveler, charging negligence of a city in maintaining a street without a barrier at its precipitous end, does not allege notice to the city of absence of a barrier, *held* a mere defect, cured by answer.—Chance v. City of St. Joseph, 190 S. W. 24.

⚡406(3) (Mo.App.) Where petition in action for damages for destruction of goods was demurrable for failure to plead legal effect of shipping contract, the right to demur was waived by an answer to the merits.—Wilson v. Chicago Great Western R. Co., 190 S. W. 22.

⚡406(3) (Mo.App.) Any defects in petition in servant's action for injury in respect to defendant's knowledge of dangerous conditions of work and of servant's youth and inexperience were mere irregularities cured by defendant's answer to the merits.—Zimmerman v. Fryor, 190 S. W. 26.

⚡406(3) (Mo.App.) By answering to the merits defendant waived mere formal irregularities and insufficiencies in the petition.—Armstrong v. Denver & R. G. R. Co., 190 S. W. 944.

⚡406(8) (Mo.App.) All question of misjoinder in a complaint is waived by answer.—Wank v. Peet, 190 S. W. 88.

⚡408 (Mo.App.) The objection that a complaint states no cause of action cannot be waived by answer.—Wank v. Peet, 190 S. W. 88.

⚡420(3) (Mo.App.) Any departure by amendment of petition is waived by defendant answering over and going to trial on the merits.—Holtzclaw v. Chicago, B. & Q. R. Co., 190 S. W. 91.

⚡423 (Ky.) The failure to file with a petition for partition written evidences of title as required by Civ. Code Prac. § 499, does not warrant dismissal where defendants did not move to dismiss, but pleaded title in the one from whom plaintiff claimed.—Vanover v. Steele, 190 S. W. 667.

⚡433(2) (Tex.Civ.App.) Where defendant city waived demurrer to plaintiff's petition, after verdict and judgment for plaintiff, petition should receive most liberal construction, and should be held sufficient if its terms are broad enough to support recovery on any theory.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

PLEDGES.

See Corporations, ⚡123.

POLICE COMMISSIONERS.

See Municipal Corporations, ⚡181.

POLICE POWER.

See Municipal Corporations, ⚡592, 644.

POLICY.

See Insurance.

POSSESSION.

See Adverse Possession; Assignments for Benefit of Creditors, ⚡45; Intoxicating Liquors, ⚡139; Property, ⚡10.

POWERS.

See Wills, ⚡693.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRECEDENTS.

See Courts, ⚡89-91.

PREDICATE.

See Criminal Law, ⚡427.

PRELIMINARY EVIDENCE.

See Criminal Law, ⚡427.

PRELIMINARY WRITS.

See Prohibition, ⚡23.

PREMATURE ACTION.

See Costs, ⚡48.

PREMIUMS.

See Insurance, ⚡183, 187, 358, 365, 668.

PRESCRIPTION.

See Adverse Possession; Easements, ⚡7, 8; Limitation of Actions.

PRESENTATION.

See Executors and Administrators, ⚡223, 251.

PRESENTMENT.

See Bills and Notes, ⚡407.

PRESIDENT.

See Corporations, ⚡423.

PRESUMPTIONS.

See Appeal and Error, ⚡907-934; Criminal Law, ⚡1144; Death, ⚡2; Evidence, ⚡67, 75.

PRINCIPAL AND ACCESSORY.

See Criminal Law, ⚡792.

PRINCIPAL AND AGENT.

See Banks and Banking, ⚡51, 54; Bills and Notes, ⚡123; Brokers; Corporations, ⚡432; Insurance, ⚡358, 379; Usury, ⚡57.

I. THE RELATION.**(A) Creation and Existence.**

⚡1 (Ky.) An "agent" is one who acts for or in the place of another by authority from him, whenever he undertakes to transact some business or manage some affair for another by authority and on account of the latter and to render an account for it.—Thomas B. Jeffrey Co. v. Lockridge, 190 S. W. 1103.

⚡19 (Mo.App.) The burden of proof is upon one asserting an agency to prove an act of the principal expressly or by implication or by estoppel conferring the authority of agency.—Renick v. Brooke, 190 S. W. 641.

⚡20(2) (Mo.App.) In an action against an automobile manufacturer for agent's fraud, correspondence between the principal and the alleged agent and between the principal and third persons tending to show that the alleged agent was in fact the general agent of the principal, and was being held out to the world as such, was admissible.—Renick v. Brooke, 190 S. W. 641.

⚡22(1) (Mo.App.) The fact of an alleged agency cannot be established by the mere declarations or acts of the agent.—Renick v. Brooke, 190 S. W. 641.

⚡23(2) (Mo.App.) The fact of real or apparent agency may be established by circumstantial evidence.—Renick v. Brooke, 190 S. W. 641.

⚡24 (Mo.App.) Where, in an action against two defendants for services, the evidence was conflicting on the issue whether one defendant acted as the others' agent in employing plaintiff, the court properly refused to direct a verdict for the alleged principal.—Risinger v. Begley, 190 S. W. 418.

⚡24 (Mo.App.) Whether an agency exists under an ascertained state of facts is a question of law, but where the evidence relating to the ultimate facts is conflicting, the ascertainment of the basic facts is for the jury.—Renick v. Brooke, 190 S. W. 641.

⚡24 (Tex.Civ.App.) In action against claimed principal on contract made by agent, court may take case from jury only if there is not sufficient evidence tending to prove agency.—Sanders v. Elberta Fruit Co., 190 S. W. 817.

⚡25(1) (Mo.App.) Though the act of a supposed agent was unauthorized, an alleged principal may be bound on the principle of estoppel, as where he has placed the alleged agent in a position as to his property calculated to deceive others.—Renick v. Brooke, 190 S. W. 641.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

⚡90(1) (Ark.) Contract of employment to purchase cotton seed held to entitle servant to an interest in or lien upon the seed purchased to the extent of the commission due for purchasing it and the charges for storing.—East v. Southern Cotton Oil Co., 190 S. W. 558.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

⚡103(1) (Tex.Civ.App.) Where manager of fruit company purchased farmer's tomatoes for company, and agreed to pay fixed price, farmer could recover such price of the company, unless manager was not acting within powers as agent.—Sanders v. Elberta Fruit Co., 190 S. W. 817.

⚡103(12) (Ark.) Where purchaser, in giving order for merchandise, attached stipulation to order and gave it to seller's agent, who had authority only to solicit orders, the seller was bound by conditions, whether attached when order was received from agent, or whether latter had detached them before forwarding order.—White Sewing Mach. Co. v. Atkinson & Son, 190 S. W. 111.

⚡105(4) (Mo.App.) A local sales agent has no authority by virtue of his employment to waive the provisions of the Bulk Sales Act.—Riley Pennsylvania Oil Co. v. Symmonds, 190 S. W. 1088.

⚡109(1) (Ky.) Where mother gave her son sole charge of a farm, she was liable on notes for money borrowed by him to purchase stock and other supplies and pay the running expenses.—Todd's Ex'r v. First Nat. Bank, 190 S. W. 468. A mother intrusting the management of a farm to her son was not liable on notes on which the manager was surety, given for a colt and buggy for his son.—Id.

⚡109(4) (Tex.Civ.App.) An indorsement of a note by an agent in his own name does not bind the principal.—Borschow v. Wilson, 190 S. W. 202.

⚡123(7) (Tex.Civ.App.) In action for price of tomatoes fruit company purchased through manager circumstance that plaintiff made no inquiry, and did not ask manager if he was acting for fruit company, could not be regarded as conclusively showing want of any contract to sell to fruit company.—Sanders v. Elberta Fruit Co., 190 S. W. 817.

⚡124(3) (Tex.Civ.App.) In action against fruit company to recover agreed price for tomatoes, which plaintiff claimed fruit company had bought through its manager whether manager was acting within scope of authority, held for jury.—Sanders v. Elberta Fruit Co., 190 S. W. 817.

In action against fruit company for price of tomatoes purchased through manager, whether plaintiff failed to use reasonable prudence in dealing with manager, as agent of company, held for jury.—Id.

(C) Unauthorized and Wrongful Acts.

⚡155(1) (Tex.Civ.App.) Where manager of fruit company undertook to handle and sell farmer's tomatoes solely for benefit of farmer, the manager was the farmer's agent, and manager, individually, and not fruit company, was liable to farmer for prices realized.—Sanders v. Elberta Fruit Co., 190 S. W. 817.

⚡158 (Mo.App.) Where an automobile manufacturer constituted one its general agent to sell automobiles, or held him out to the general public as such, the company was liable for such agent's fraud in selling a secondhand car as a new one.—Renick v. Brooke, 190 S. W. 641.

⚡159(1) (Tex. Civ. App.) Where attorneys wrongfully appropriated in behalf of a corporation proceeds of a secured note payable to plaintiff's order jointly owned by corporation and plaintiff, attorneys and corporation were joint tort-feasors, and were jointly and severally liable to plaintiff.—Beall v. Clack, 190 S. W. 774.

(D) Ratification.

⚡171(1) (Tex.Civ.App.) That principal received benefit of transaction is not alone sufficient to make him liable for agent's undertaking in own name.—Borschow v. Wilson, 190 S. W. 202.

⚡171(5) (Tex.Civ.App.) Where two defendants in suit for rescission by buyer of realty participated with another defendant in acquisition of plaintiff's property, they could not retain fruits of other defendant's fraud, if any, on ground that individually they made no representations.—Barbian v. Grant, 190 S. W. 789.

PRINCIPAL AND SURETY.

See Bail; Guaranty; Subrogation, ⚡7.

V. RIGHTS AND REMEDIES OF SURETY.

(C) As to Cosurety.

⚡195 (Tex.Civ.App.) The release of one of two accommodation makers on a note after he had become a cosurety would not release other accommodation maker, as it would in no manner impair his right of contribution.—First State Bank of Teague v. Hare, 190 S. W. 1113.

PRIORITIES.

See Chattel Mortgages, ⚡157; Courts, ⚡474; Dower, ⚡28.

PRIVATE ROADS.

See Easements.

PRIVATE SCHOOLS.

See Schools and School Districts.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, ⚡38; Witnesses, ⚡219.

PROBATE.

See Wills, ⚡255, 281.

PROCESS.

See Execution; Garnishment; Insurance, ¶814; Judgment, ¶17; Limitation of Actions, ¶119; Sequestration.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

¶6 (Tex.Civ.App.) When an amendment to petition presents new cause of action, citation must be issued thereon and served on defendant, to authorize judgment by default thereon.—Hill v. State, 190 S. W. 255.

¶24 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1852, a citation in partition of land which failed to give true date of filing of petition held fatally defective, and court acquired no jurisdiction.—Simms v. Mears, 190 S. W. 544.

II. SERVICE.

(B) Substituted Service.

¶70 (Mo.) Laws 1875, p. 105, repealed Gen. St. 1865, c. 164, § 7, requiring service of summons, when defendant is not found, by leaving copy with some white member of his family, and in latter act the word "white" is stricken out.—Schneiderheinze v. Berg, 190 S. W. 593.

(B) Return and Proof of Service.

¶149 (Tex.Civ.App.) The return of service by a sheriff or a disinterested person, authorized by law to make it, is prima facie evidence of the material facts recited therein.—Pierce-Fordyce Oil Ass'n v. Staley, 190 S. W. 814.

PROFITS.

See Partnership, ¶11.

PROHIBITION.

See Courts, ¶480; Intoxicating Liquors; Pleading, ¶350.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶23 (Mo.) A preliminary writ of prohibition commanding the trial court "to take no further action in the premises until the further order of" the appellate court inhibits all action by the trial court, including even such action as is not prohibited by the permanent writ applied for until such writ is quashed.—State ex rel. Powers v. Rassieur, 190 S. W. 915.

PROMISSORY NOTES.

See Bills and Notes.

PROMOTERS.

See Corporations, ¶30, 448.

PROOF OF LOSS.

See Insurance, ¶552.

PROPERTY.

¶10 (Ky.) One having no actual possession of land embraced within his deed, by a fiction of law, is in the constructive possession of all the land embraced therein, which is not in actual possession of another.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROSTITUTION.

See Disorderly House; Indictment and Information, ¶110.

¶4 (Ark.) Where one accused of pandering denied all the material evidence against him, evidence of his receiving goods and a store order,

for prostitution of a woman, was admissible as tending to show he was receiving the earnings of a prostitute.—Sweat v. State, 190 S. W. 433.

In trial for pandering, testimony of a witness that he paid accused money, although he testified that after payment he had no intercourse with the woman, was admissible.—Id.

PROVOCATION.

See Homicide, ¶45.

PROXIMATE CAUSE.

See Negligence, ¶56, 82.

PUBLIC CORPORATIONS.

See Drains, ¶13.

PUBLIC DEBT.

See Municipal Corporations, ¶865-974.

PUBLIC IMPROVEMENTS.

See Constitutional Law, ¶289, 290; Levees; Municipal Corporations, ¶302-530.

PUBLIC LANDS.

See Boundaries, ¶37.

III. DISPOSAL OF LANDS OF THE STATES.

¶151(7) (Ky.) A senior grant vests the legal title in the holder and is always the paramount title, unless it has been lost by another's adverse possession or the holder's renunciation; and the senior grantee is by operation of law in constructive possession, unless the land is in another's actual possession.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

In suit to establish ownership of various tracts of land conveyed to plaintiff by devisees under will of original patentee and to minerals thereunder, evidence held to show that such tracts were not embraced in any exception in the patent to original patentee or in plaintiff's deed from devisees under patentee's will.—Id.

Where plaintiff in suit to establish ownership of various tracts of land and to minerals thereunder had substantially shown that lands were within his grant and not included in any prior grants or exclusions, the burden shifted to defendant to show that lands were included in an exclusion or prior grant.—Id.

In suit to establish ownership of tract of land claimed to be embraced in a patent and in deed to plaintiff from devisees under patentee's will, evidence held to sustain finding of jury in favor of plaintiff as to certain tracts.—Id.

Plaintiff claiming title under patent should have recovered a tract not embraced by any other patent, unless defendant had title by adverse possession, or it was in adverse possession of defendant's vendor when deed to plaintiff from patentee's devisees was executed.—Id.

¶151(7) (Ky.) Where boundary of later patent laps over upon an earlier patent, the later patent, in so far as it interferes with the prior patent, is void.—Patton v. Stewart, 190 S. W. 1062.

¶172(9) (Tex.Civ.App.) By Vernon's Sayles' Ann. Civ. St. 1914, art. 5423, prescribing requirements of forfeiture of public lands sold by General Land Office, unless entry of forfeiture is made, both on application of grantee and in account kept with purchaser, no legal forfeiture results.—Speed v. Sadberry, 190 S. W. 781.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUNISHMENT.

See Criminal Law, ¶1207; Pardon; Schools and School Districts, ¶176.

PUNITIVE DAMAGES.

See Damages, ¶87.

QUALIFICATIONS.

See Elections, ¶76, 81; Judges, ¶42, 45.

QUIETING TITLE.

See Appeal and Error, ¶1073; Husband and Wife, ¶205.

II. PROCEEDINGS AND RELIEF.

¶30(3) (Mo.) In a suit against a subsequent grantee with notice to have the title vested in plaintiff under her prior contract for purchase, only the subsequent grantee need be made defendant.—McQuitty v. Steckdaub, 190 S. W. 590.

QUO WARRANTO.**I. NATURE AND GROUNDS.**

¶5 (Tex.Civ.App.) A suit by school districts and taxpayers against county school trustees to enjoin redistricting of the county could be maintained as an ordinary suit between the parties, and need not be by a proceeding by quo warranto under the statute.—Collin County School Trustees v. Stiff, 190 S. W. 216.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶52 (Mo.) In quo warranto, facts in return, where facts are in dispute as between petition and return, must, on general demurrer and motion for judgment on the pleadings, be taken as facts in case.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

RAILROADS.

See Appeal and Error, ¶1060, 1066; Carriers; Commerce, ¶27; Damages, ¶69, 105, 174; Dedication, ¶20; Eminent Domain, ¶141; Evidence, ¶471; Master and Servant; Pleading, ¶64; Trial, ¶191, 192, 252, 295; Waters and Water Courses, ¶171, 179.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

¶95(3) (Mo.App.) Under Rev. St. 1909, § 10626, railroad must maintain crossing planks 24 feet in length at street crossing within city limits, though street was voluntarily dedicated by it to public use, and was not opened by legal proceedings, or established by user and expenditure of public moneys.—Phillips v. Pryor, 190 S. W. 1027.

¶113(5) (Tex.Civ.App.) Under Rev. St. 1911, art. 6495, held that defendant railroad would be liable to plaintiff for damage caused by flooding of basement if caused by railroad's failure to construct culverts or sluices necessary to pass off surface water.—Pence v. Galveston, H. & S. A. Ry. Co., 190 S. W. 538.

As defendant railroad's liability for damages caused by surface water must be by failure to comply with Rev. St. 1911, art. 6495, it owed no duty to plaintiff to give notice that an opening had been washed through roadbed, that opening had been cribbed up, or that it intended to put a culvert under its roadbed.—Id.

¶113(10) (Mo.App.) Where injury to plaintiff's crops was caused by failure of the defendant railroad company to construct a drain, it could not escape liability by showing the floods causing the injury were unusually violent, where such floods were not unusual.—Carson v. Missouri, K. & T. Ry. Co., 190 S. W. 949.

¶114(1) (Tex.Civ.App.) In action against railroad for damages caused by flooding of plaintiff's basement by surface water, although plaintiff's cause of action was indefinitely stated and confused by failure to separate two counts and by immaterial facts, held sufficient, in absence of special exceptions, to state a failure to comply with Rev. St. 1911, art. 6495.—Pence v. Galveston, H. & S. A. Ry. Co., 190 S. W. 538.

¶114(4) (Mo.App.) In action against railroad for failure to construct ditches as provided by Rev. St. 1909, § 3150, evidence held sufficient to carry to jury the issue whether such failure caused plaintiff's damage.—Carson v. Missouri, K. & T. Ry. Co., 190 S. W. 949.

¶114(4) (Tex.Civ.App.) In action against a railroad for damages caused by flooding of plaintiff's basement by surface water, diverted from natural course by defendant's elevated roadbed, evidence held sufficient to take to jury question of defendant's failure to provide proper culverts or sluices as required by Rev. St. 1911, art. 6495.—Pence v. Galveston, H. & S. A. Ry. Co., 190 S. W. 538.

X. OPERATION.**(C) Companies and Persons Liable for Injuries.**

¶260 (Ark.) Where fire was set to cotton by engine of railway using tracks of another, both companies were responsible, but, if fire was set by engine of road owning tracks, it alone was responsible.—Memphis, D. & G. Ry. Co. v. Richardson, 190 S. W. 434.

¶266 (Ark.) Where fire was set to cotton by engine of railway using tracks of another, both companies were responsible, but if fire was set by engine of road owning tracks, it alone was responsible.—Memphis, D. & G. Ry. Co. v. Richardson, 190 S. W. 434.

Where fire was communicated to cotton from two engines, two roads operating over the same tracks each owning one, neither of roads could escape liability on ground that fire was also set by locomotive operated by other.—Id.

¶272 (Ark.) In suit against two railroads for destruction of cotton by fire, evidence held to warrant jury in drawing inference that either of two engines, one owned by each road, emitted sparks which set fire to cotton.—Memphis, D. & G. Ry. Co. v. Richardson, 190 S. W. 434.

¶273 (Ark.) In action against two railroads operating over same tracks for setting fire to cotton, verdict against one road was not inconsistent because there was also a finding that the fire was set by the locomotive of the other road.—Memphis, D. & G. Ry. Co. v. Richardson, 190 S. W. 434.

(D) Injuries to Licensees or Trespassers in General.

¶275(1) (Mo.App.) Defendant railway company was not negligent because its station agent permitted plaintiff, a minor, to assist the agent and plaintiff's father in spotting and moving an empty car at a stockyard chute.—Duncomb v. Lusk, 190 S. W. 397.

The company was not negligent because its train crew failed to spot an empty car at stockyard chute, where such place was already occupied, plaintiff's stock had not arrived, and the crew would return within an hour.—Id.

The company was not negligent because its agent permitted plaintiff, while so assisting, to pass out of the agent's sight to the forward part of the car where he was injured.—Id.

¶275(2) (Mo.App.) Plaintiff, assisting employes on defendant's boarding train, held not a trespasser, as regards duty of defendants for her safety, merely because of not having executed a release required by a rule of which she did not know.—Etchison v. Lusk, 190 S. W. 345.

Plaintiff assisting, with the knowledge of the

foreman, her son in his duties on a boarding train for a bridge crew, *held*, as regards duty of defendants to exercise reasonable care for her safety, a licensee with an interest.—*Id.*

—273(2) (Mo.App.) Where plaintiff, a minor, assisted his father and defendant railway company's agent in moving an empty car to a stock chute to load his father's stock, plaintiff was a licensee with an interest to whom the railway company was liable for its agent's negligence.—*Dunscumb v. Lusk*, 190 S. W. 397.

—282(16) (Mo.App.) A jury finding that defendant railway company had by its alleged acts violated some duty it owed plaintiff added nothing to plaintiff's case, since this was a question of law for the court.—*Dunscumb v. Lusk*, 190 S. W. 397.

(F) Accidents at Crossings.

—303(1) (Mo.App.) A railroad was guilty of negligence per se if it violated a statute by maintaining a street crossing within a city less than 24 feet in width, and, if the violation proximately caused injury to driver of wagon whose horse shied when frightened by locomotive, road was liable.—*Phillips v. Pryor*, 190 S. W. 1027.

—312(4) (Tex.Civ.App.) If railroad employes could not by keeping a lookout have discovered an automobile stalled on the track in time to have prevented injuring it, there was no negligence.—*Andrews v. Mynier*, 190 S. W. 1164.

—326(2) (Mo.App.) Direction of trainman at crossing blocked with cars that pedestrian could pass between cars, while imposing due care on railroad, did not relieve pedestrian of duty of using care commensurate with her surroundings.—*Spain v. St. Louis & S. F. R. Co.*, 190 S. W. 358.

Pedestrian who at railroad crossing blocked by cars was informed by trainman that she might pass between them became a "trespasser," and not an "invitee," if she went further down the yards than necessary, and, incurring unnecessary danger, was contributorily negligent.—*Id.*

—337(2) (Mo.App.) In action by pedestrian for injuries at crossing, violation of city ordinance prohibiting blocking of street for more than five minutes *held* not proximate cause of injury.—*Spain v. St. Louis & S. F. R. Co.*, 190 S. W. 358.

—337(3) (Mo.App.) Where railroad's locomotive let off steam, and horse attached to wagon shied at crossing maintained by road less than 24 feet wide in violation of statute, so that wagon jounced over rails and threw out driver, who was not guilty of contributory negligence, road was liable.—*Phillips v. Pryor*, 190 S. W. 1027.

—338 (Mo.App.) Failure of engineer to stop engine or give warning to plaintiff, who was standing in full view between tracks at crossing, awaiting the passage of another train, in attitude of attention to such train, was negligence to which plaintiff's contributory negligence was no defense.—*Waterfield v. Wabash Ry. Co.*, 190 S. W. 981.

—338 (Tex.Civ.App.) If plaintiff was negligent in going upon defendant's track with his automobile, and defendant's employes did not discover him and could not by ordinary care have discovered him in time to prevent injury, he could not recover for destruction of automobile.—*Andrews v. Mynier*, 190 S. W. 1164.

—345(2) (Mo.App.) In action against railroad for injuries to driver of delivery wagon at crossing, *held*, that there was no need for allegation, proof, or finding that 16-foot crossing was not sufficient to furnish ordinarily safe way; statute requiring crossings in cities and towns to be 24 feet wide.—*Phillips v. Pryor*, 190 S. W. 1027.

—348(2) (Mo.App.) In action for injuries at crossing, evidence *held* sufficient to justify finding that same trainman, with apparent author-

ity, directed plaintiff, whose way was blocked by cars, to go between them.—*Spain v. St. Louis & S. F. R. Co.*, 190 S. W. 358.

In pedestrian's action for injuries in attempting crossing blocked by cars, evidence *held* to show that main track was not blocked, and that plaintiff was already safely across blocked track when injured, and was going down track for other purpose than to cross.—*Id.*

—348(2) (Mo.App.) In action against railroad by driver of wagon for injuries when horse was frightened at crossing by engine, evidence *held* sufficient to justify finding that road's failure to have crossing 24 feet wide was proximate cause of injuries.—*Phillips v. Pryor*, 190 S. W. 1027.

—350(1) (Mo.App.) Where evidence most favorable to plaintiff showed that while standing between tracks at crossing, awaiting the passage of a train before crossing to station, he was struck by engine approaching without warning on another track, his faculties being unimpaired, *held* proper to submit case to jury.—*Waterfield v. Wabash Ry. Co.*, 190 S. W. 981.

—350(7) (Tex.Civ.App.) Evidence *held* to present a jury question whether one injured by railway cars received due warning of their approach.—*Gulf, C. & S. F. Ry. Co. v. Sullivan*, 190 S. W. 739.

—350(13) (Tex.Civ.App.) Evidence *held* to present a question for the jury whether a pedestrian, injured by railway cars, was negligent.—*Gulf, C. & S. F. Ry. Co. v. Sullivan*, 190 S. W. 739.

—350(14) (Mo.App.) In action against railroad for injuries at crossing when horse 15 year old plaintiff drove was frightened by engine and plaintiff was thrown out, whether he was guilty of contributory negligence *held* for jury.—*Phillips v. Pryor*, 190 S. W. 1027.

—351(2) (Mo.App.) In action against railroad for injuries at crossing when plaintiff's horse shied, and wagon, jouncing over projecting rails, threw plaintiff out, instruction *held* not erroneous for referring to rails, though negligence complained of was failure to maintain crossing as wide as required by statute.—*Phillips v. Pryor*, 190 S. W. 1027.

—351(5) (Mo.App.) In action against railroad for injuries to plaintiff at crossing when his horse shied and he was thrown out by his wagon jouncing over projecting rails, reference to such rails in instruction *held* not to require giving of one stating that road was not guilty of negligence in permitting ties and rails to project.—*Phillips v. Pryor*, 190 S. W. 1027.

—351(9) (Tex.Civ.App.) In a pedestrian's action for injuries when struck by railway cars, a charge that if the railway had no watchman on the cars and gave no signal by bell or whistle, it was liable, even though it had exercised ordinary care in other respects, and the plaintiff was adequately warned of the danger in crossing the track, was erroneous.—*Gulf, C. & S. F. Ry. Co. v. Sullivan*, 190 S. W. 739.

—351(12) (Mo.App.) In action for injuries to pedestrian, who, at invitation of trainman, attempted to pass between cars blocking crossing, road *held* entitled to instruction embodying defense of contributory negligence.—*Spain v. St. Louis & S. F. R. Co.*, 190 S. W. 358.

—351(21) (Mo.App.) In action against railroad for injuries to driver of wagon at crossing, instruction *held* not so misleading, confusing, and unintelligible that jury could not determine facts necessary to liability, though, in submitting question of proximate cause, that phrase was not used.—*Phillips v. Pryor*, 190 S. W. 1027.

(G) Injuries to Persons on or near Tracks.

—357 (Ky.) When it is said that an engineer must use ordinary care with the means he has at hand, this implies such care as a competent engineer would exercise, and the doing of such

things as a capable engineer would do.—*Louisville & N. R. Co. v. Perry's Adm'r*, 190 S. W. 1064.

⚡376(4) (Ky.) When an engineer discovers, while 200 feet or more from a pedestrian, that he was unconscious of the approach of the engine, it is then his duty at once to use ordinary care, with the means at his command, to stop the engine.—*Louisville & N. R. Co. v. Perry's Adm'r*, 190 S. W. 1064.

⚡379 (Ky.) In determining the degree of care to be exercised by an engineer who discovers a person walking on the tracks in front of the engine oblivious of the approach, it is immaterial whether the person has good or bad hearing, sight or health.—*Louisville & N. R. Co. v. Perry's Adm'r*, 190 S. W. 1064.

⚡390 (Mo.App.) In respect to negligence under the humanitarian rule contributory negligence is no defense, either under the laws of this state or of Colorado, where the cause of action for killing on defendant's track arose.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

An engineer's failure to keep a lookout may be an ingredient, but is not an indispensable element, of a cause of action predicated upon a breach of humanitarian duty.—*Id.*

Where an engineer was keeping a lookout, and saw and realized the full peril of one on the track, the humanitarian duty devolved upon him to exercise reasonable care to avert injury.—*Id.*

⚡394(6) (Mo.App.) Petition in action for death of telegraph foreman killed on defendant's track held to sufficiently allege cause of action based on last chance negligence.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

⚡396(1) (Mo.App.) In an action for the death of a telegraph foreman killed by a train, on ground of engineer's failure to give signals on entering curves and cuts, the burden of proving such negligence was upon plaintiff.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

⚡398(3) (Ky.) Where one in charge of a locomotive was not the regular engineer, but a fireman temporarily in charge, his evidence that he exercised all means at his command to stop the engine before striking deceased is not conclusive.—*Louisville & N. R. Co. v. Perry's Adm'r*, 190 S. W. 1064.

⚡400(6) (Mo.App.) In action for death of telegraph foreman killed by defendant's passenger train, evidence held insufficient to raise a debatable issue of fact as to negligence of defendant's engineer in failing to give warning signals on entering curves and cuts.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

⚡400(8) (Ky.) Evidence held to present a question for the jury whether the engineer, after seeing deceased on the track, could by ordinary care and with the means at his command have stopped the engine in time to have avoided injury.—*Louisville & N. R. Co. v. Perry's Adm'r*, 190 S. W. 1064.

⚡400(14) (Mo.App.) In action for death of telegraph foreman killed on defendant's track, evidence held sufficient to take the question of defendant's negligence under humanitarian rule to the jury.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

(H) Injuries to Animals on or near Tracks.

⚡411(18) (Mo.App.) When a road across a railway has become a public road, so that the railroad company is not bound to fence across it, it is bound to construct cattle guards.—*Le Master v. Butler County R. Co.*, 190 S. W. 88.

⚡441(6) (Mo.App.) In an action under Rev. St. 1009, § 3145, the burden is on plaintiff to prove that his animal entered the railroad right of way at a place where the statute required

fences or cattle guards, and that the statute had not been complied with.—*Le Master v. Butler County R. Co.*, 190 S. W. 88.

⚡446(7) (Mo.App.) The question whether the railroad was required to construct a cattle guard between the place where plaintiff's mare was killed and a nearby highway, held under the evidence for the jury.—*Le Master v. Butler County R. Co.*, 190 S. W. 88.

(I) Fires.

⚡461 (Tex.Civ.App.) Where one occupying a house on right of way of railroad operated by lumber company knew that sparks escaping from the engine had started fires on different occasions, she was not guilty of contributory negligence in failing to remove her property from the house, having the right to assume that the company would not operate its locomotives so as to endanger her property.—*Blount-Decker Lumber Co. v. Martin*, 190 S. W. 232.

⚡470 (Tex.Civ.App.) Where a lumber company owning houses occupied by its employés consented to an employé subletting his house, sublessee was not a trespasser, and the company owed her duty of exercising ordinary care in operating its locomotives so as not to fire house and destroy her household goods.—*Blount-Decker Lumber Co. v. Martin*, 190 S. W. 232.

⚡482(1) (Tex.Civ.App.) In a suit against defendant for negligently firing house in which plaintiff was living, evidence held to warrant a finding that plaintiff was continuing to occupy the premises which belonged to defendant, with its acquiescence.—*Blount-Decker Lumber Co. v. Martin*, 190 S. W. 232.

⚡482(2) (Mo.App.) In action by insurers who had paid for loss of cedar logs piled near defendant's track and alleged to have been destroyed by fire started by sparks from defendant's engine, evidence held to sustain verdict for plaintiffs.—*Belt v. St. Louis, I. M. & S. Ry. Co.*, 190 S. W. 1002.

RAPE.

See Criminal Law, ⚡200, 351, 363, 366, 665, 713, 722, 726, 809, 1169; Witnesses, ⚡847.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡6 (Mo.) The offense of carnally knowing a chaste girl between 14 and 18 years old, defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218, may be committed with or without force.—*State v. Volz*, 190 S. W. 307.

⚡13 (Mo.) The offense of carnally knowing a chaste girl between 14 and 18 years old, defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218, may be committed with or without consent of the girl.—*State v. Volz*, 190 S. W. 307.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

⚡36 (Mo.) In a prosecution for carnally knowing a chaste girl, there is no presumption that the prosecutrix was previously chaste as the chastity of the prosecutrix must be both charged and proved.—*State v. Volz*, 190 S. W. 307.

⚡40(3) (Tex.Cr.App.) In prosecution for an assault with intent to rape, evidence that prosecutrix had theretofore lived with another man at her house, and had had an illegitimate child, and had been compelled to leave her home on account of her immoral relations with men, was admissible.—*Jennings v. State*, 190 S. W. 733.

⚡48(1) (Tex.Cr.App.) In prosecution for assault with intent to rape, statements of party assaulted to certain witnesses, and her complaint of her injury soon after offense, held res-

gesta, and admissible.—*Jennings v. State*, 190 S. W. 733.

⚡48(2) (Tex.Cr.App.) Testimony of a neighboring woman, called in after the commission of the crime, that the victim told her who the party was who caused her injury, but not stating who this was, was proper.—*Marion v. State*, 190 S. W. 499.

⚡51(1) (Mo.) Testimony by the prosecuting witness that defendant stated he was 21 years old, is sufficient to justify the jury in finding that he was more than 17 years, so that he might be convicted of the offense defined by Rev. St. 1909, § 4472, as amended by Laws 1913, p. 218.—*State v. Volz*, 190 S. W. 307.

⚡52(1) (Tex.Cr.App.) Evidence of complaint and condition of victim, a child of eight, held sufficient to sustain conviction of rape.—*Marion v. State*, 190 S. W. 499.

(C) Trial and Review.

⚡55 (Mo.) Where the charge is one which produces prejudice, the prosecution must be conducted with scrupulous fairness to avoid the possibility of adding other prejudice.—*State v. Davis*, 190 S. W. 297.

⚡59(1) (Mo.) An instruction that the charge of rape is easy to make and hard to disprove, is objectionable as apt to mislead the jury as to the burden of proof which rests on the state throughout the whole case.—*State v. Davis*, 190 S. W. 297.

⚡59(1) (Tex.Cr.App.) In prosecution for an assault with intent to rape, where defendant's testimony made an issue as to self-defense, or of his going to see her at her invitation and having sexual intercourse with her, the failure to submit such defenses was reversible error.—*Jennings v. State*, 190 S. W. 733.

⚡59(12) (Mo.) In a prosecution for rape, an instruction declaring that it is no defense that prosecutrix made no outcry at the time or complaint thereafter, should be accompanied by an instruction that evidence of the failure to complain or outcry is material.—*State v. Davis*, 190 S. W. 297.

RATE.

See Carriers, ⚡30.

RATIFICATION.

See Principal and Agent, ⚡171.

REAL ACTIONS.

See Ejectment; Partition; Trespass to Try Title.

REASONABLE DOUBT.

See Criminal Law, ⚡829.

REBUTTAL.

See Trial, ⚡62; Witnesses, ⚡394.

RECEIVERS.

See Corporations, ⚡621; Novation, ⚡5, 12.

VI. ACTIONS.

⚡178 (Mo.App.) Where bank's receiver sues one of a number of indorsers of a note, court will, on application, order receiver to sue all parties to avoid multiplicity of suits.—*Citizens' Trust Co. v. Ward*, 190 S. W. 304.

RECEPTION OF EVIDENCE.

See Criminal Law, ⚡661-678; Trial, ⚡41-105.

RECITALS.

See Taxation, ⚡760; Vendor and Purchaser, ⚡230.

RECOGNIZANCES.

See Criminal Law, ⚡1076.

RECORDS.

See Appeal and Error, ⚡499-714; Boundaries, ⚡36; Courts, ⚡116; Criminal Law, ⚡1088-1125; Judgment, ⚡266; Municipal Corporations, ⚡100.

RECOUPMENT.

See Set-Off and Counterclaim.

REDEMPTION.

See Taxation, ⚡698; Vendor and Purchaser, ⚡289.

REFERENCE.

See Appeal and Error, ⚡1017.

REFORMATION OF INSTRUMENTS.

II. PROCEEDINGS AND RELIEF.

⚡45(5) (Ark.) To authorize reformation of a conveyance to include land, evidence must be clear that its omission was contrary to the intention of both parties.—*James Holcombe & Rainwater v. Furr*, 190 S. W. 444.

REFRESHING MEMORY.

See Witnesses, ⚡255, 257.

REFUNDING.

See Vendor and Purchaser, ⚡98.

REGISTERS OF DEEDS.

See Limitation of Actions, ⚡67.

REIMBURSEMENT.

See Contracts, ⚡233.

REINSTATEMENT.

See Insurance, ⚡365.

RELATION BACK.

See Trespass, ⚡19.

RELATIONSHIP.

See Judges, ⚡45.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Dower, ⚡49; Execution, ⚡146; Payment; Vendor and Purchaser, ⚡267.

I. REQUISITES AND VALIDITY.

⚡12(3) (Tex.Civ.App.) \$3,750 paid injured railroad employé for settlement held not so grossly inadequate as of itself to constitute a badge of fraud practiced upon him.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

⚡17(2) (Tex.Civ.App.) Misrepresentations by railroad's claim agent to its injured employé concerning the services to be rendered by some of his attorneys did not of themselves constitute a sufficient basis for rescission of the contract of settlement, where the employé's incompetency and the claim agent's fraud were not shown.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

Arguments made to its injured employé by railroad's claim agent, to induce him to settle, relative to delays and uncertainties of suits, held fraudulent.—Id.

⚡18 (Tex.Civ.App.) The distressed financial circumstances of railroad's employé when he settled his claim did not furnish sufficient basis for rescission of the settlement.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

⚡19 (Tex.Civ.App.) Arguments made to its injured employé by railroad's claim agent, to induce him to settle, relative to delays and uncer-

tainties of suits, *held* not to amount to undue influence.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§53 (Mo.App.) In servant's action for injuries, where release is pleaded and timely objection made by defendant that plaintiff had not tendered back the consideration, plaintiff must plead and prove excuse for failure to make tender.—*Wessel v. Wm. Waitke & Co.*, 190 S. W. 628.

§57(2) (Tex.Civ.App.) In railroad employe's action for injuries, evidence *held* insufficient to support findings that he was mentally incompetent to make a valid contract of settlement, and that he was induced to make it by misrepresentations by the claim agent of the railway and by undue influence exercised upon him.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

RELEVANCY.

See Criminal Law, §351-372.

REMAINDERS.

See Life Estates.

§17(2) (Mo.) If a deed conveyed a life estate with remainder over to grantee's children, in fee, a cause of action against a grantee of mother would not accrue until termination of life estate.—*Tennison v. Walker*, 190 S. W. 9.

REMISSION.

See Appeal and Error, §1140.

RE MOTENESS.

See Homicide, §163.

REMOVAL.

See Municipal Corporations, §181; Officers, §70, 72; Trusts, §167.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL

See Corporations, §37.

RENUNCIATION.

See Contracts, §313.

REOPENING CASE.

See Trial, §67.

REPLEVIN.

I. RIGHT OF ACTION AND DEFENSES.

§4 (Mo.App.) A paper in the form of a promissory note but not delivered nor supported by consideration may nevertheless be the subject of replevin by the maker.—*Pounds v. Farmers' Union Mercantile Co.*, 190 S. W. 374.

§12(2) (Mo.App.) In replevin for hides tanned for plaintiffs, defense being lien thereon for such tanning, plaintiffs could claim, by way of set-off or recoupment, a larger amount owing by defendant on debt growing out of the contract on which the lien claim was founded.—*Collins v. John Pfingsten Leather Co.*, 190 S. W. 900.

IV. PLEADING AND EVIDENCE.

§72 (Ark.) In a suit to recover a mule, in which it appeared that a note retaining title to mule was found among papers of defendant's testator, evidence *held* to warrant verdict for defendant.—*Clements v. Ferrell*, 190 S. W. 451.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§88 (Mo.App.) Where evidence of a substantial character is produced by the plaintiff in replevin action to rebut presumptions in favor of defendant, the question of whether such evidence overcomes the presumptions is for the jury.—*Pounds v. Farmers' Mercantile Co.*, 190 S. W. 374.

§106 (Mo.App.) Where stock of goods assigned for the benefit of creditors was taken under execution, and the trustee replevied it, but possession was decreed to the constable who levied execution on a judgment for a portion of the value of the goods, judgment for only actual amount due should have been entered.—*Meston v. Crawford*, 190 S. W. 391.

REPLY.

See Pleading, §176.

REPUDIATION.

See Corporations, §428.

REPUGNANCY.

See Witnesses, §379-394.

REPUTATION.

See Evidence, §106; Homicide, §163; Witnesses, §87.

REQUESTS.

See Criminal Law, §824, 829; Trial, §255-261.

RESCISSION.

See Cancellation of Instruments; Compromise and Settlement, §18; Contracts, §270; Exchange of Property; Sales, §121, 124; Vendor and Purchaser, §98-123.

RES GESTÆ.

See Criminal Law, §363-368; Rape, §48.

RESIDENCE.

See Divorce, §91; Elections, §76.

RES IPSA LOQUITUR.

See Master and Servant, §265.

RESISTING OFFICER.

See Homicide, §96, 276.

RES JUDICATA.

See Judgment, §590-743.

RESULTING TRUSTS.

See Trusts, §86.

RETROSPECTIVE LAWS.

See Constitutional Law, §188, 190.

RETURN.

See Execution, §344; Process, §149.

REVENUE.

See Taxation.

REVERSIONS.

See Deeds, §130; Landlord and Tenant, §55.

REVIEW.

See Appeal and Error, §840-1097.

REVIVAL.

See Abatement and Revival.

REVOCATION.

See Trusts, ¶59.

RIGHT OF WAY.

See Easements.

RISKS.

See Master and Servant, ¶216-226, 288.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, ¶351.

SAFE PLACE TO WORK.

See Master and Servant, ¶101, 102, 107.

SALES.

See Chattel Mortgages, ¶219; Corporations, ¶121; Evidence, ¶131, 354, 441; Execution, ¶220-288; Executors and Administrators, ¶330-358; Frauds, Statute of, ¶83; Guardian and Ward; Infants, ¶37-39; Intoxicating Liquors, ¶236; Judicial Sales; Life Estates, ¶27; Logs and Logging, ¶3; Parties, ¶15; Pleading, ¶83; Principal and Agent, ¶103; Sunday, ¶7; Taxation, ¶698-788; Trusts, ¶191; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶33 (Mo.App.) Where plaintiff had purchased his father's business without defendant's knowledge and sold grease to the latter, a contract to pay the reasonable value of grease received will be implied by law, and quantum meruit therefor sustained.—*Mexkel v. St. Louis Hide & Tallow Co.*, 190 S. W. 611.

¶52(2) (Mo.App.) The seller's acceptance of the buyer's order, referring thereto, held to make letters between the parties an essential part of the contract and admissible.—*Antrim Lumber Co. v. Daly*, 190 S. W. 971.

¶52(2) (Tex.Civ.App.) In an action against a railroad to recover for groceries furnished defendant's section hands and laborers pursuant to an alleged agreement with defendant's section foreman that defendant would be responsible, burden of proof was upon plaintiff to show right to recover.—*Texas & P. Ry. Co. v. Lucas*, 190 S. W. 800.

¶52(5) (Tex.Civ.App.) In an action against a railroad to recover for groceries furnished defendant's section hands and laborers pursuant to alleged agreement with defendant's foreman that defendant would be responsible, evidence held insufficient to support a verdict for plaintiff.—*Texas & P. Ry. Co. v. Lucas*, 190 S. W. 800.

¶52(6) (Tex.Civ.App.) In action for price for printing and supplies, evidence held to support verdict that plaintiff, through its agent, dealt with defendant, binding him individually.—*Luck v. Alamo Printing Co.*, 190 S. W. 204.

¶53(3) (Mo.App.) In suit on note, question whether defendant was deceived into giving order for goods, and into executing note therefor, by being made to think that his contract with plaintiff involved only making him agent for it, was for jury.—*Pioneer Stock Powder Co. v. Broyles*, 190 S. W. 643.

II. CONSTRUCTION OF CONTRACT.

¶68 (Mo.App.) An automobile sales contract providing that it was subject to acceptance by the seller who reserved right to fill orders to the extent of its ability, etc., refers to the automobile purchase, and not to subsequent orders

for repairs.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

¶81(1) (Mo.App.) Where defendant advised plaintiff that his order for new automobile parts would have prompt attention, but later advised it could not ship them for three weeks because the factory was not able to sooner supply them, held, defendant was not liable because plaintiff meanwhile lost profitable chances to sell his machine.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(C) Rescission by Buyer.**

¶121 (Mo.App.) Where buyer of showcases told seller that work was unsatisfactory and ordered him to take them back, his action in retaining showcases and using them as his own until bringing of an action to recover purchase price waived all rights to rescind the contract derived from his tender.—*St. Louis Carbonating & Mfg. Co. v. Loevenhart*, 190 S. W. 627.

¶124 (Mo.App.) The tender of property by buyer to seller in answer in an action to recover purchase price held not sufficient.—*St. Louis Carbonating & Mfg. Co. v. Loevenhart*, 190 S. W. 627.

IV. PERFORMANCE OF CONTRACT.**(C) Delivery and Acceptance of Goods.**

¶181(5) (Mo.App.) Where plaintiff buyer claimed that defendant seller breached a sales contract in not delivering automobile in good condition, evidence covering repairs of car for some 18 months after the delivery was inadmissible.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

Testimony that such car was of a kind and make of little inherent value, or that it had not the value placed on it by defendant, is incompetent.—*Id.*

¶181(11) (Tex.Civ.App.) Evidence, in an action for the price of gravel sold and shipped, held sufficient to sustain a finding of defendant having received it, except as to a car billed, without authority shown, to a town, instead of to defendant.—*Cobb v. Riley*, 190 S. W. 517.

¶181(13) (Tex.Civ.App.) Evidence, in an action for price of gravel sold and shipped, held sufficient to sustain a finding of none of it having been rejected as unfit.—*Cobb v. Riley*, 190 S. W. 517.

VI. WARRANTIES.

¶273(1) (Mo.App.) Where lumber is ordered for the specific purpose of building a boat, acceptance of such order indicates the seller undertakes to furnish lumber fit for that purpose, and he impliedly warrants that he will do so.—*Antrim Lumber Co. v. Daly*, 190 S. W. 971.

VII. REMEDIES OF SELLER.**(A) Stoppage in Transitu.**

¶291 (Mo.App.) The insolvency of a buyer is a sufficient justification for seller's refusal to ship goods or of his stopping shipments in transitu.—*Schwall v. Higginsville Milling Co.*, 190 S. W. 959.

(E) Actions for Price or Value.

¶345 (Mo.App.) Where defendant's note was given for goods to be shipped when ordered, and defendant ordered whole amount, and plaintiff shipped only portion, plaintiff could not recover full amount of note.—*Pioneer Stock Powder Co. v. Broyles*, 190 S. W. 643.

¶347(3) (Mo.App.) Where buyer retains the property, though not in compliance with contract specifications, he may plead failure or partial failure of consideration.—*Antrim Lumber Co. v. Daly*, 190 S. W. 971.

¶354(6) (Tex.Civ.App.) In an action for price of silo, allegations of answer held sufficient to

charge fraud in obtaining defendant's signature to contract of purchase.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

⚡358(4) (Tex.Civ.App.) In an action for price of a silo, where defendant offered evidence that the silo was of no value, evidence of cost of repairing all defects in silo *held* admissible.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

⚡359(1) (Ark.) In action by vendor for price of sewing machines, where defendant alleged return of a portion of machines, evidence *held* to sustain a verdict in the amount rendered for plaintiff as against his objection that defendant had previously offered to pay a larger amount.—*White Sewing Mach. Co. v. Atkinson & Son*, 190 S. W. 111.

⚡363 (Mo.App.) In action on note given for stallion, where defendants failed to establish defense that they were induced to the purchase by fraudulent representations as to his foal-getting qualities, but did not plead breach of warranty, it was proper to direct verdict for plaintiff.—*American Nat. Bank v. Allen*, 190 S. W. 947.

⚡364(4) (Tex.Civ.App.) In an action for price of silo, where defendant alleged fraud entitling him to a rescission, with an alternative plea of damage for breach of warranty if evidence failed to sustain allegations of fraud, charge should have covered both phases of case.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

⚡418(1) (Mo.App.) Where the buyer retains the property sent him, although it does not comply with contract specifications, he may plead failure or partial failure of consideration; the measure of his damage being the difference between the correct price and the actual value.—*Antrim Lumber Co. v. Daly*, 190 S. W. 971.

⚡418(19) (Mo.App.) Where buyer claimed seller breached automobile sales contract by not delivering the car in good condition, the measure of damages is the difference between car's value as delivered and in good condition, not exceeding the reasonable cost of putting it in good condition, together with the loss of the use of the car.—*Stanley v. Weber Implement & Vehicle Co.*, 190 S. W. 372.

(D) Actions and Counterclaims for Breach of Warranty.

⚡426 (Mo.App.) Where contract for sale of stallion warrants truth of seller's representations as to his foal-getting qualities and provides on breach thereof for his return, the buyer to receive another stallion, the buyer has no other remedy for such breach.—*American Nat. Bank v. Allen*, 190 S. W. 947.

⚡437(1) (Mo.App.) Where defendant, in an action for the price of a separator, claimed fraudulent representations, but not a warranty, he could not have the defense of warranty submitted.—*Stoutzenberger v. Lamb*, 190 S. W. 963.

⚡440(3) (Mo.App.) In action for price of lumber, defense being breach of warranty, the correspondence of the parties after the dispute arose concerning the quality of the lumber, offer to have it inspected, etc., was admissible.—*Antrim Lumber Co. v. Daly*, 190 S. W. 971.

⚡446(2) (Tex.Civ.App.) In an action for price of silo, where defendant alleged fraud entitling him to a rescission with an alternative plea of damage for breach of warranty if evidence failed to sustain allegations of fraud, charge should have covered both phases of case.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

⚡446(9) (Tex.Civ.App.) In an action for price of silo, refusal of a requested instruction, stat-

ing amount to be allowed for a breach of warranty alleged as defense, *held* error.—*Ames Portable Silo & Lumber Co. v. Gill*, 190 S. W. 1130.

SATISFACTION.

See Accord and Satisfaction.

SCHEDULE.

See Carriers, ⚡39.

SCHOOLS AND SCHOOL DISTRICTS.

See Constitutional Law, ⚡121; Eminent Domain, ⚡47; Quo Warranto, ⚡5.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

⚡32 (Tex.Civ.App.) In a suit to enjoin re-districting of a county, a petition, alleging that proposed acts are a gross abuse of authority and a fraud upon rights of plaintiffs *held* sufficient basis upon which to grant relief sought.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

A suit by school districts and taxpayers against county school trustees to enjoin a re-districting of the county could be maintained as an ordinary suit between the parties, and need not be by a proceeding by quo warranto under statute.—*Id.*

In a suit to enjoin re-districting of a county by county school trustees, evidence *held* to sustain a judgment granting an injunction pendente lite.—*Id.*

⚡33 (Mo.App.) Petition to enjoin formation of a consolidated school district is subject to demurrer, the acts and proposed acts alleged and complained of, though characterized as unlawful and harmful, being only such as are justified by Laws 1913, p. 722.—*Gross v. Moreland*, 190 S. W. 961.

⚡39 (Tex.Civ.App.) In view of Acts 34th Leg. c. 36, §§ 4a, 10 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4509, 4510), *held* that appeals from action of school trustees may be made to district court, since appeal provided by section 10 has reference to administrative acts.—*Collin County School Trustees v. Stiff*, 190 S. W. 216.

⚡41(3) (Mo.App.) Circuit court *held* without jurisdiction of suit by village school district, formed with another from territory of original district, to recover its share of funds of original district; Rev. St. 1909, §§ 10839, 10840, providing for determination by arbitration.—*Cleveland Village School Dist. No. 118 of Cass County v. Zion*, 190 S. W. 955.

⚡44 (Mo.App.) Laws 1891, pp. 204, 205, relating to moneys of disorganized school districts, does not apply to schools in counties under township organization where township trustee is treasurer of school district, and is not made applicable to township trustees, as to county treasurers, by Rev. St. 1909, § 10830.—*Cleveland Village School Dist. No. 118 of Cass County v. Zion*, 190 S. W. 955.

(D) District Property, Contracts, and Liabilities.

⚡65 (Ky.) Where deed conveyed property to trustees of school district providing it should revert when it ceased to be used for public school purposes, use as storage place for school materials or as meeting place for division board was not sufficient to prevent reversion.—*Board of Education for Jefferson County v. Littrell*, 190 S. W. 465.

Purpose of white grantor of land to white trustees of school district by deed providing that property should revert when it ceased to be used for public school purposes *held* to have been to convey site to be used for white school

purposes, and to provide for reversion in case it ceased to be used therefor.—Id.

Ky. St. § 4437, providing that any reversionary interest in land used as site for school-house shall not deprive district of improvements, if construed to apply to reversionary interests created by contract executed prior to its enactment, would impair obligation of contract.—Id.

(E) District Debt, Securities, and Taxation.

☞110 (Mo.App.) Money collected by taxation for school purposes cannot be diverted from one fund to another, and money in teachers' fund cannot be transferred to and used in incidental fund.—Cleveland Village School Dist. No. 118 of Cass County v. Zion, 190 S. W. 955.

(G) Teachers.

☞144(5) (Tex.Civ.App.) Where court found that contract to pay \$75 a month to relator as school principal and \$50 a month as janitor was made to evade Rev. St. 1911, arts. 2780, 2781, and that another was employed as janitor, vouchers for the additional salary as janitor were properly rejected.—Dodson v. Jones, 190 S. W. 253.

Rev. St. 1911, art. 2772, does not authorize payment from free school fund to principal as janitor.—Id.

(H) Pupils, and Conduct and Discipline of Schools.

☞176 (Tex.Cr.App.) A teacher is not authorized to use his fists in administering corporal punishment, even though the pupil conducts himself so as to demand discipline.—Wilson v. State, 190 S. W. 155.

SEALS.

See Corporations, ☞477.

SECONDARY EVIDENCE.

See Evidence, ☞158-181.

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SECURITY.

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SEDUCTION.

See Criminal Law, ☞150, 814, 823.

II. CRIMINAL RESPONSIBILITY.

☞45 (Mo.) In a prosecution for seduction under promise of marriage, evidence held insufficient to sustain a conviction.—State v. McFarland, 190 S. W. 8.

☞45 (Mo.) In prosecution for seduction, evidence held insufficient to show that the woman, after the first act of intercourse, and during the statutory period, had reformed and been again seduced.—State v. Stoker, 190 S. W. 294.

☞46 (Mo.) To sustain charge of seduction, testimony of injured person as to promise of marriage must be corroborated.—State v. Stoker, 190 S. W. 294.

SELF-DEFENSE.

See Criminal Law, ☞829; Homicide, ☞96, 188, 244, 276, 300.

SELF-SERVING DECLARATIONS.

See Criminal Law, ☞413; Evidence, ☞271.

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See Husband and Wife, ☞119.

SEPARATION.

See Criminal Law, ☞665; Husband and Wife, ☞278; Trial, ☞41.

SEQUESTRATION.

See Appeal and Error, ☞877.

☞18 (Tex.Civ.App.) One in lawful possession of personal property when stolen may tender issue as to title claimant upon sequestration thereof.—Dawedoff v. Hooper, 190 S. W. 522.

In claimant's issue in sequestration proceedings for trial of right of property of stolen automobile, the rule that the jury should pass on the testimony where the only evidence of title and right of possession is that of interested parties did not apply where disinterested witnesses not parties to the suit identified the car by its number, etc.—Id.

The burden of proving title and right of possession is on claimant if when levy was made the property was in the possession of the writ defendant.—Id.

The burden is on the plaintiff in the writ of proving that possession was in the writ defendant where the return of the officer does not disclose in whose possession the property was when levy was made.—Id.

Where it is uncertain in whose possession the property was when seized, the trial court should direct which party shall assume the burden of proof of ownership, etc.—Id.

SERVANTS.

See Master and Servant.

SERVICE.

See Process, ☞70, 149.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Appeal and Error, ☞1062.

II. SUBJECT-MATTER.

☞33(1) (Mo.App.) Where a chattel mortgage was executed in behalf of a corporation, without authority, to secure its debt, debt should be set off against conversion of the property under mortgage, and only difference recovered for its conversion.—Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co., 190 S. W. 35.

SETTING ASIDE.

See Judgment, ☞139, 143.

SETTLEMENT.

See Account Stated; Executors and Administrators, ☞473-506.

SHADE TREES.

See Telegraphs and Telephones, ☞20.

SHERIFFS AND CONSTABLES.

See Escape.

III. POWERS, DUTIES, AND LIABILITIES.

☞120 (Tex.Civ.App.) Where a sale of chattels taken on execution was void because of failure to comply with statutes requiring presence of property at sale, sheriff, having wrongfully taken possession of property over protest of

owner, held guilty of conversion and liable to parties sustaining damages.—Hopping v. Hicks, 190 S. W. 1119.

SIDEWALKS.

See Municipal Corporations, ¶771.

SIGNING.

See Appeal and Error, ¶571.

SIGNS.

See Landlord and Tenant, ¶55.

SIMPLE TOOLS.

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SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

¶7 (Tenn.) Where contracts for purchase of corporate stock, etc., were not completely executed within the time limit because of failure of purchasers to perform their part, seller was entitled to specific performance, having performed his part of agreement, notwithstanding other sellers under same contract, becoming alarmed at purchasers' delay, sold at less than contract price.—Starlipper v. Gray, 190 S. W. 553.

¶8 (Tex.Civ.App.) The granting of specific performance is not a matter of absolute right, but is within the discretion of the court, and it may be granted or rejected according to the circumstances of the particular case.—Clegg v. Brannan, 190 S. W. 812.

II. CONTRACTS ENFORCEABLE.

¶31 (Tex.Civ.App.) A contract to form a corporation cannot be specifically enforced, where there is no showing of an agreement upon the preliminary steps necessary to its formation, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1122.—Davis v. Wynne, 190 S. W. 510.

¶32(3) (Tex.Civ.App.) Contract for an exchange of land, not signed by the plaintiff, held a unilateral contract lacking in mutuality, so that plaintiff could not enforce specific performance thereof.—Clegg v. Brannan, 190 S. W. 812.

¶43 (Tex.Civ.App.) That a party to an oral contract to convey land has conveyed to the other party will not, standing alone, be accepted as a part performance, since such act is merely equivalent to a payment by him, not entitling him to specific performance.—Clegg v. Brannan, 190 S. W. 812.

¶44 (Tex.Civ.App.) Specific performance of an oral contract to convey land will not be enforced, in the absence of possession or permanent improvements made thereon, though the purchase money has been paid.—Clegg v. Brannan, 190 S. W. 812.

¶58 (Tex.Civ.App.) A contract for sale of land having fixed a certain amount as liquidated damages for refusal of vendees to accept deed, the vendor cannot have specific performance.—Nelson v. Butler, 190 S. W. 811.

¶66 (Ark.) Specific performance of contract to sell land may be enforced by vendor.—Wilkins v. Eanes, 190 S. W. 99.

III. GOOD FAITH AND DILIGENCE.

¶97(1) (Tex.Civ.App.) Where the title of the giver of an option on land was defective as to part, the option holder was not entitled

to specific performance of the option as to the part to which title was good, where he did not either pay or tender its proportionate value.—Petty v. Wilkins, 190 S. W. 531.

¶99 (Mo.App.) Where a vendee sued for damages for failure of vendor to care for orchard as agreed, and vendor made general denial and asked for specific performance, and the case was submitted in equity, vendor, though failing to perform, was entitled to specific performance, on allowing damages for such failure to perform.—Buckner v. Midland Farm & Land Co., 190 S. W. 419.

IV. PROCEEDINGS AND RELIEF.

¶121(4) (Mo.App.) In a suit in equity to sustain an oral contract, void under the statute of frauds, but for the fact of part performance, the proof must be so convincing as to leave no doubt that the particular contract, as alleged, existed.—Buck v. Meyer, 190 S. W. 997.

¶121(7) (Mo.App.) Evidence showing a definite oral contract to make plaintiff decedent's heir if she would move to America, and performed on her part, corroborated by every act of decedent except in will later made in second wife's favor, is sufficient for enforcement of contract in equity.—Buck v. Meyer, 190 S. W. 997.

SPEED.

See Municipal Corporations, ¶592.

SPIRITUOUS LIQUORS.

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STAKEHOLDING.

See Gaming, ¶72½.

STANDING TIMBER.

See Logs and Logging.

STATES.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

¶130 (Ark.) Under Const. art. 5, § 28, and Acts 1913, p. 1179, held, that state auditor was not authorized to issue, two years after act, a warrant on voucher of commissioner of state lands, highways, and improvements for petitioner's expenses as engineer, where no specific appropriation had been made.—Lund v. Dickinson, 190 S. W. 428.

STATUTE OF FRAUDS.

See Frauds, Statute of.

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STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

¶4 (Mo.) The Legislature's power to enact laws has no limitation except the express limitations of the state and federal Constitutions.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

¶5 (Mo.) Rev. St. 1909, § 4749, as to stakeholding, held within the purposes specified in the call made by the Governor for the reassembling of the Legislature after the adjournment of its regular term.—Fleming v. Wengler, 190 S. W. 875.

§84(2) (Ark.) Where portion of a section of Acts 1915, p. 338, was unconstitutional as an attempt to delegate legislative power to impose penalties void part being separable and distinct, remainder of act held valid.—Davis v. State, 190 S. W. 436.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§102(1) (Mo.) Laws 1913, p. 110, requiring prosecuting or circuit attorneys in cities of over 500,000 to attend coroner's inquests and making the city liable for their fees, held not local or special in violation of Const. art. 4, § 53, subds. 2, 15, 32.—State ex rel. Harvey v. Sheehan, 190 S. W. 864.

III. SUBJECTS AND TITLES OF ACTS.

§110½(1) (Tenn.) Acts 1905, c. 173, the title to which refers only to automobiles, but which regulates motorcycles, and other similar vehicles as well, does not violate Const. art. 2, § 17.—State v. Freels, 190 S. W. 454.

§113(3) (Mo.) The title of Laws 1913, p. 167, penalizing failure to make annual reports, etc., held not to support the provision of section 20 thereof that officers and directors of a corporation violating the act shall be liable as partners, etc., under Const. art. 4, § 28, requiring subject of bill to be expressed in title.—Woodward Hardware Co. v. Fisher, 190 S. W. 576.

§118(3) (Mo.) Rev. St. 1909, § 4749, penalizing stakeholding for bettors, is not unconsti-

tutional as not disclosing by its title the subjects covered by it.—Fleming v. Weangler, 190 S. W. 875.

§118(6) (Mo.) Act March 22, 1913 (Laws 1913, p. 222), relating to contagious diseases of animals, which purports to repeal Rev. St. 1909, § 4868, and to enact a new section in lieu thereof, held void as outside its title.—State v. McEniry, 190 S. W. 272.

§123(5) (Mo.) Act March 27, 1913 (Laws 1913, p. 271), entitled as one to repeal certain sections of Rev. St. 1909, c. 41, art. 4, as to construction and maintenance of ditches, and to enact new sections, held not to contravene Const. art. 4, § 28, as to subject and title of acts, because of new sections 5611a and 5611b, they being germane.—Barnes v. Pikey, 190 S. W. 883.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§181(1) (Ky.) In construing statute, intention and purpose of lawmaking body that enacted it will be looked to.—Burdine v. White, 190 S. W. 687.

§219 (Mo.) The uniform interpretation of a statute by the executive officers, whose duty it is to enforce it, which has not been questioned for a long period of time, is entitled to weight where there is doubt as to the meaning of the act.—State ex rel. Kinloch Telephone Co. v. Roach, 190 S. W. 862.

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See Insurance, ¶607; Life Estates, ¶16.

¶7(7) (Tex.Civ.App.) Where the surety on a note secured by chattel mortgage paid note, he was subrogated to rights of the mortgagee under mortgage and debt.—Hopping v. Hicks, 190 S. W. 1119.

¶23(3) (Ky.) Where life tenants, believing they owned the fee, mortgaged their supposed interest to pay an incumbrance on the fee, the mortgagee was entitled to subrogation to the lien of the life tenants on the estate of the remaindermen for reimbursement to the extent of the principal debt so discharged, but not for interest accruing after the life estate began.—Todd's Ex'r v. First Nat. Bank, 190 S. W. 468.

SUBSTITUTED SERVICE.

See Process, ¶70.

SUFFRAGE.

See Elections.

SUICIDE.

See Insurance, ¶788.

SUMMARY TRIAL

See Criminal Law, ¶260.

SUMMONS.

See Process.

SUNDAY.

¶7 (Ky.) Under the Sunday law, excepting "work of necessity," that failure to do something may cause inconvenience will not make the doing of the thing a work of necessity, but it must be something not to do which would work hardship.—McAfee v. Commonwealth, 190 S. W. 671.

The selling on Sunday by a confectioner of soda water, soft drinks, coco-cola, cigars, and tobacco violates the Sunday law, notwithstanding incidental sale of sandwiches, canned goods, etc.—Id.

SUPERINTENDENT OF INSURANCE.

See Mandamus, ¶73.

SUPPORT.

See Deeds, ¶155; Divorce, ¶308.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, ¶115.

SURPLUSAGE.

See Indictment and Information, ¶119.

SURPRISE.

See Continuance, ¶30.

SURVEYS.

See Boundaries, ¶36; Evidence, ¶572.

SURVIVAL.

See Abatement and Revival, ¶54.

SWINDLING.

See False Pretenses.

TACKING.

See Adverse Possession, ¶43.

TAXATION.

See Life Estates, ¶18; Municipal Corporations, ¶974; Schools and School Districts, ¶110.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

¶58 (Tenn.) The presumption is always against an intention to assess double taxes, and a statute will not be construed to impose such tax unless such construction is clearly required by its language.—Gulf Refining Co. of Louisiana v. City of Chattanooga, 190 S. W. 463.

(D) Exemptions.

¶204(2) (Ky.) Exemptions from taxation must be strictly construed and one claiming an exemption must show it to be clearly within the spirit and intent of the exception.—Vogt v. City of Louisville, 190 S. W. 686.

¶241(3) (Ky.) Lodge owning a building and renting rooms for lodge and religious purp. sec.

and extending benefits to its members and occasional donations to others, *held* not a purely public charity within Const. § 170, exempting purely public charity from taxation.—*Vogt v. City of Louisville*, 190 S. W. 895.

IV. PLACE OF TAXATION.

☞276 (Tex.) Prior to enactment of Acts 81st Leg. c. 108, making personal property of a home insurance company taxable at the company's home office, where notes, securities in which insurance company's capital was invested, were deposited with State Treasurer as permitted by Acts 30th Leg. c. 170, to enable the company to obtain better financial standing *held*, their situs was in Austin, and they were taxable there, under Const. art. 8, § 11, and Rev. St. arts. 7505, 7510.—*Guaranty Life Ins. Co. of Houston v. City of Austin*, 190 S. W. 189.

Where a particular business purpose can be accomplished only by locating corporate property at a certain place and the property is so located and devoted to the purpose for more than a temporary period, it clearly acquires a situs at that place.—*Id.*

VI. LIEN AND PRIORITY.

☞514 (Tex.Civ.App.) A lien for taxes was extinguished by the tender thereof made good by the payment in the registry of the court, so that the court properly refused to foreclose a lien on taxpayer's property.—*State v. Hoffman*, 190 S. W. 1163.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

☞589 (Ky.) Under Ky. St. §§ 2936, 2991, 2992, 2997, 3009, 4021, 4021a, *held* that, where suit within period of limitations to recover taxes was dismissed on learning that the person in whose name they were assessed was dead at the time of assessment, and original action started after the five-year period, it came too late.—*City of Louisville v. Clark*, 190 S. W. 478.

X. REDEMPTION FROM TAX SALE.

☞698 (Mo.) The application of a cestui que trust to redeem from a tax sale of land which stood in the name of his trustee is an application for equitable relief, to which laches is a good plea.—*Paxton v. Fix*, 190 S. W. 328.

A cestui suing to redeem land sold for taxes which stood in the name of his trustee was barred by laches where he delayed for nine years, in which time the land had greatly increased in value.—*Id.*

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

☞728 (Mo.) Where land is sold on judgment for taxes, to which the trustee, but not the cestui que trust, is a party, the purchaser acquires a title superior to that of the cestui que trust, whose only remedy is suit to redeem.—*Paxton v. Fix*, 190 S. W. 328.

(B) Tax Deeds.

☞760 (Mo.App.) A tax deed regular on its face, which recited a judgment against "Rynor" instead of "Rynor," then record holder, unless based on constructive service, conveyed lands, and not merely interest of a person or persons therein.—*King v. Sligo Furnace Co.*, 190 S. W. 388.

☞788(3) (Mo.App.) In an action by one in constructive possession under a tax deed, fair on its face, against a trespasser not asserting title, regularity of proceedings leading up to

tax deed will be presumed.—*King v. Sligo Furnace Co.*, 190 S. W. 388.

XII. FORFEITURES AND PENALTIES.

☞841 (Tex.Civ.App.) Under Rev. St. art. 7692, defendant, who tendered the amount of his legal taxes within the time allowed therefor, thereby relieved himself of all penalties, interests, and costs.—*State v. Hoffman*, 190 S. W. 1163.

TEACHERS.

See Schools and School Districts, ☞144.

TECHNICAL ERRORS.

See Appeal and Error, ☞1170; Criminal Law, ☞1186.

TELEGRAPHS AND TELEPHONES.

See Trespass, ☞81.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

☞10(15) (Mo.App.) A telephone company's right as a quasi public corporation to erect poles along the street and string wires was subject to the rights of abutting owners to maintain trees projecting over the street.—*Reber v. Bell Telephone Co. of Missouri*, 190 S. W. 612.

☞15(3) (Mo.App.) A telephone company, desiring to string wires along a street, could not take the law into its own hands and disfigure, mutilate, and damage the trees of abutting landowners at will without being liable in damages therefor.—*Reber v. Bell Telephone Co. of Missouri*, 190 S. W. 612.

☞20(2) (Mo.App.) It is no defense to action for damages against a telephone company for cutting shade trees that a street commissioner of the city was present, giving orders and directions regarding such cutting; it not appearing that the commissioner had authority to direct such cutting.—*Reber v. Bell Telephone Co. of Missouri*, 190 S. W. 612.

☞20(2) (Mo.App.) One sued as owner of a telephone line, the wires of which crossed those of plaintiff's line interfering with his service, may show it transferred ownership before plaintiff's line was built, and so owed no duty to plaintiff to keep the old line in repair.—*Harris v. Decker*, 190 S. W. 969.

☞20(6) (Mo.App.) Where a telephone company seriously injures valuable shade trees by cutting for its wires, punitive damages may be justified.—*Reber v. Bell Telephone Co. of Missouri*, 190 S. W. 612.

TELEPHONES.

See Telegraphs and Telephones.

TENANCY IN COMMON.

See Husband and Wife, ☞14; Joint Tenancy.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

☞15(7, 8) (Tex.Civ.App.) The execution of a deed by a tenant in common conveying the entire tract of land and its registration by the grantee, who took open and adverse possession thereunder and paid the taxes, was notice to the other cotenant of the assertion of an adverse claim.—*Olsen v. Greele*, 190 S. W. 240.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

☞55(3) (Tenn.) Tenants in common may sue together in ejectment, and one may recover and be entitled to a decree, although other be barred and fail to recover.—*Ferguson v. Prince*, 190 S. W. 548.

TENDER.

See Specific Performance, ¶97; Taxation, ¶514.

THEFT.

See Larceny.

THEFT INSURANCE.

See Insurance, ¶607.

THREATS.

See Homicide, ¶158, 190.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, ¶230, 621-629; Bills and Notes, ¶334; Contracts, ¶71, 270; Criminal Law, ¶693, 1092, 1099; Exceptions, Bill of, ¶39; Executors and Administrators, ¶223, 251; Insurance, ¶358; Mechanics' Liens, ¶132; Municipal Corporations, ¶530; Pleading, ¶85; Sales, ¶81.

TITLE.

See Banks and Banking, ¶127; Bills and Notes, ¶195, 200; Courts, ¶231; Ejectment; Estoppel, ¶68; Highways, ¶80, 88; Judgment, ¶743; Justices of the Peace, ¶36; Life Estates, ¶27; Quietting Title; Trespass, ¶19; Trespass to Try Title; Vendor and Purchaser, ¶130.

TOOLS.

See Master and Servant, ¶107.

TORTS.

See Action, ¶27; Assault and Battery, ¶39; Bailment, ¶11; Carriers, ¶121-382; Death, ¶32-99; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, ¶88-351; Municipal Corporations, ¶705-821; Negligence; Nuisance; Parties, ¶27, 31; Principal and Agent, ¶153, 159; Railroads, ¶113-482; Trespass, ¶81; Trover and Conversion.

TOWNS.

See Counties; Municipal Corporations.

TRANSCRIPTS.

See Criminal Law, ¶1104.

TRANSFER OF CAUSES.

See Courts, ¶487; Criminal Law, ¶1076, 1083; Justices of the Peace, ¶162.

TREES.

See Logs and Logging.

TRESPASS.

See Animals, ¶100; Judgment, ¶250; Mortgages, ¶217.

II. ACTIONS.**(A) Right of Action and Defenses.**

¶19(1) (Ky.) In an action for trespass and removal of timber, plaintiffs must recover, if at all, upon strength of their own title and not because of want of title in defendant.—Wallace v. Lackey, 190 S. W. 709.

As purchaser of land sold at a decretal sale in an administrator's action against heirs and creditors took equitable title to land upon confirmation of sale and payment of purchase price, a deed subsequently executed related back to confirmation of sale, giving purchasers title to

support an action for trespass committed before execution of deed.—Id.

¶31 (Mo.App.) When a trespass is committed by the joint act of two or more persons, each is liable for the injury.—Reber v. Bell Telephone Co. of Missouri, 190 S. W. 612.

Where servants of both a telephone and electric light company entered upon plaintiff's premises and cut shade trees to extend wires through them, both companies and their participating agents were jointly and severally liable.—Id.

(E) Trial, Judgment, and Review.

¶67 (Ky.) In an action for trespass and removal of timber, evidence held sufficient to take case to jury.—Wallace v. Lackey, 190 S. W. 709.

TRESPASS TO TRY TITLE.

See Ejectment; Evidence, ¶471; Trial, ¶105, 140.

L. RIGHT OF ACTION AND DEFENSES.

¶6(1) (Tex.Civ.App.) Plaintiff in trespass to try title, to be entitled to judgment, must show title superior to defendant's.—Speed v. Sadberry, 190 S. W. 781.

II. PROCEEDINGS.

¶35(1) (Tex.Civ.App.) In trespass to try title, defendants are entitled to give in evidence any lawful defense to the action, except the defense of limitation, without any special pleading as a predicate therefor.—Ryan v. Lofton, 190 S. W. 752.

¶38(1) (Tex.Civ.App.) In trespass to try title by plaintiff claiming that land was forfeited and awarded to him by general land office, plaintiff must show, not only that award was made, but that requirements of Vernon's Sayles' Ann. Civ. St. 1914, art. 5423, as to forfeiture, had been substantially complied with by general land office prior to award.—Speed v. Sadberry, 190 S. W. 781.

¶38(3) (Tex.Civ.App.) Where defendant in trespass to try title is in possession, there is a presumption of title in him, authorizing recovery against persons failing to make affirmative showing of title.—Speed v. Sadberry, 190 S. W. 781.

¶41(1) (Tex.Civ.App.) In suit for trespass to try title, the defense being equitable rights under an oral contract to convey, evidence held to show that plaintiff's creditor, an aged man, promised when title was taken in his own name to convey the property to defendants in consideration of support until his death, which was given him.—Ryan v. Lofton, 190 S. W. 752.

TRIAL.

See Continuance; Costs; Criminal Law, ¶636-878; Jury; New Trial.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

¶41(3) (Tex.Civ.App.) On rule for exclusion of witnesses, refusal to exclude next friend, suing for minor, after the minor's testimony has been given was not abuse of discretion in absence of showing that defendants were prejudiced.—Caffarelli Bros. v. Bell, 190 S. W. 223.

¶53 (Mo.App.) Where evidence that two days before accident, pedestrian who had complained of stairway to an aldermen was stricken out, it was brought back into case by defendant's recalling witness and eliciting that his complaint mentioned only steps and said nothing about banister.—Kingery v. City of Jefferson, 190 S. W. 976.

(B) Order of Proof, Rebuttal, and Re-opening Case.

⇨62(2) (Tex.Civ.App.) Introduction of additional testimony of physicians as to nature and extent of plaintiff's injuries in rebuttal of testimony for defendant controverting original testimony for plaintiff on that subject was proper.—Caffarelli Bros. v. Bell, 190 S. W. 223.

⇨67 (Mo.) Where a witness for defendant not subpoenaed failed to appear for re-examination, and defendant elected to proceed, suggesting a desire to re-examine if witness appeared, the court's refusal to allow examination upon witness' appearance some days later, and after defendant had closed his case was not error, where defendant failed to point out any material matter excluded.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

(C) Objections, Motions to Strike Out, and Exceptions.

⇨81 (Tex.Civ.App.) A party objecting to evidence should state his objections clearly and specifically, that they may be understood by the court and obviated by the opposing party.—Kansas City, M. & O. Ry. Co. of Texas v. James, 190 S. W. 1136.

⇨85 (Tex.Civ.App.) Admission of testimony of physician that plaintiff was very nervous, restless, and could not sleep at nights, over the objection that it was hearsay, was not error, the only portion that was hearsay being the reference to sleeping at nights.—Caffarelli Bros. v. Bell, 190 S. W. 223.

⇨105(1) (Tex.Civ.App.) A verdict cannot be sustained by incompetent testimony, even though admitted without objection.—Atchison, T. & S. F. Ry. Co. v. Smith, 190 S. W. 761.

⇨105(2) (Tex.Civ.App.) In trespass to try title by party to whom general land office awarded forfeited lands, where no objection was urged to defendant's hearsay testimony on that ground, court properly considered it as tending to show application by him to have his rights reinstated, and a tender of interest due.—Speed v. Sadberry, 190 S. W. 781.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⇨108½ (Ky.) In action for injuries through negligent operation of automobile, ruling refusing to permit plaintiff to ask jurors on their voir dire whether any were stockholders in defendant's insurer, etc., held within court's discretion.—Netter v. Caldwell, 190 S. W. 721.

⇨114 (Mo.App.) In action against city for personal injury from defective sidewalk, remarks of plaintiff's counsel addressed to facts in evidence and brought out by defendant's cross-examination were not improper.—Kinery v. City of Jefferson, 190 S. W. 976.

⇨121(2) (Tex.Civ.App.) Argument of plaintiff's counsel that defendant transferred the note to his wife to beat his debt to the plaintiff, held permissible as an inference from the evidence.—Earhart v. Agnew, 190 S. W. 1140.

⇨125(1) (Tex.Civ.App.) Argument that defendant transferred note garnished to his wife to beat his debt to plaintiff, held not inflammatory or intended to prejudice the jury.—Earhart v. Agnew, 190 S. W. 1140.

⇨127 (Tex.Civ.App.) In action for death of plaintiffs' minor intestate employed by defendant, where it was alleged that defendant was not insured in accordance with the Employers' Liability Act, allowance of question whether defendant posted notices that it carried such insurance held not error.—Southwestern Portland Cement Co. v. Presbitero, 190 S. W. 776.

⇨129 (Ark.) In a personal injury suit, argument of plaintiff's counsel that he would rather lose his arms than represent a corporation trying to defeat such a claim as he represented was not prejudicial error, where defendant's counsel

had argued plaintiff's testimony was false, but would be made plausible through the skill of plaintiff's counsel.—Caddo River Lumber Co. v. Grover, 190 S. W. 560.

⇨129 (Mo.App.) In an action against a city for personal injuries, where it appeared that city intended to spend \$2,000 to defeat plaintiff's action as a "holdup," held that remarks of counsel for defendant that city had money to throw to the birds, etc., might in discretion of court be allowed in absence of a specific objection.—Stephens v. City of Eldorado Springs, 190 S. W. 1004.

⇨131(3) (Mo.App.) An objection to remarks of counsel is insufficient which does not point out specific statement complained of and does not call attention of trial court to specific grounds upon which it is based.—Stephens v. City of Eldorado Springs, 190 S. W. 1004.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⇨139(1) (Mo.App.) There must be substantial evidence on the part of the plaintiff tending to establish the claim which he makes to warrant court in submitting case to the jury.—Van Zandt v. St. Louis Wholesale Grocer Co., 190 S. W. 1050.

⇨139(1) (Tex.Civ.App.) Though plaintiff makes out a prima facie case on undisputed evidence, some rebutting evidence alone carries the case to the jury.—Yeaman v. Galveston City Co., 190 S. W. 212.

⇨140(2) (Mo.App.) Where the testimony of a party is conflicting with itself and his testimony is the sole testimony in the case, which version of the transaction given by him is correct is for the jury.—Pounds v. Farmers' Union Mercantile Co., 190 S. W. 374.

⇨140(2) (Tex.Civ.App.) In trespass to try title, it was error for the court to direct a verdict for plaintiffs based on the testimony of one of them that her ancestors had a deed to the land from the original patentee, which deed had been lost.—Morris v. Parsons, 190 S. W. 241.

⇨141 (Mo.App.) Where plaintiff's own uncontroverted testimony shows that he is entitled to no relief, the trial court must direct a verdict for defendant.—Arel v. First Nat. Fire Ins. Co., 190 S. W. 78; Same v. Girard Fire & Marine Ins. Co., Id. 81.

(D) Direction of Verdict.

⇨168 (Ky.) The giving of a peremptory instruction where an issue is made upon the pleadings is always predicated upon the fact that all the evidence tends to support the contention of the party in whose favor the verdict is directed.—Tennis Coal Co. v. Sackett, 190 S. W. 130.

⇨169 (Ky.) Where, admitting all of plaintiff's evidence and all reasonable inference to be true, he failed to establish engagement in interstate commerce and did not amend petition to show common-law liability, defendant's motion for directed verdict should have been sustained.—Cincinnati, N. O. & T. P. Ry. Co. v. Hansford, 190 S. W. 690.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⇨191(6) (Mo.App.) In action against railroad for failure to drain waters, an instruction requiring the jury to find that in consequence of defendant's failure plaintiff's crops were injured, etc., held not erroneous as assuming as a matter of fact that the creek into which the drains led would have been sufficient to have carried off the overflow.—Carson v. Missouri, K. & T. Ry. Co., 190 S. W. 949.

☞191(8) (Tex.Civ.App.) In a pedestrian's action for injuries when struck by railway cars, instruction, assuming that, as a matter of law, if he attempted to cross the tracks without looking or listening and after warning he was negligent, was properly refused, when he testified that he did look.—Gulf, C. & S. F. Ry. Co. v. Sullivan, 190 S. W. 739.

☞191(10) (Mo.App.) In a railroad servant's action for injuries caused to his eye by a sliver of metal, while he was holding a rail which was being cut by a metal hammer and a chisel, instructions which assumed negligence of defendant and foreman held erroneous.—Haire v. Schaff, 190 S. W. 56.

☞191(10) (Mo.App.) An instruction that plaintiff, if the injury resulted from accident "and not the negligence of defendants," could not recover, was not erroneous as assuming defendants' negligence.—McDonald v. Central Illinois Const. Co., 190 S. W. 633.

☞191(10) (Mo.App.) Where plaintiff was injured in loading a timber for defendant, an instruction assuming that defendant was negligent was erroneous.—Lafever v. Pryor, 190 S. W. 644.

☞191(11) (Mo.App.) In action on quantum meruit for services and expenses in promoting, selling stock in and organizing corporation, instruction as to deducting amount already paid from expenses held erroneous; evidence being conflicting as to whether amount was paid for services and expenses, or for expenses alone.—Van Zandt v. St. Louis Wholesale Grocer Co., 190 S. W. 1050.

☞192 (Mo.App.) An instruction may assume facts uncontradicted or on which the evidence of both parties agrees.—Young v. Tilley, 190 S. W. 95.

☞192 (Mo.App.) In action against railroad for injuries at crossing to driver of delivery wagon, held, that court did not err in telling jury that law made it duty of road to construct crossing 24 feet wide.—Phillips v. Pryor, 190 S. W. 1027.

☞193(3) (Mo.App.) An instruction that plaintiff, if the injury resulted from accident and not from negligence of defendants, could not recover, was not erroneous as indicating the judge's opinion as to the facts.—McDonald v. Central Illinois Const. Co., 190 S. W. 633.

☞194(1) (Ark.) Under Const. art. 7, § 23, providing that courts may not charge jury on matters of fact, court cannot state weight to be given to testimony.—Twist v. Mullinix, 190 S. W. 851.

☞194(11) (Mo.App.) In employer's action upon employer's liability policy, instruction on insurer's waiver of exception in rider for plaintiff on finding of matters referred to therein was erroneous, as waiver is question for the jury.—Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 382.

☞194(13) (Mo.App.) An instruction, without qualification, that "defendant cannot make the defense that plaintiffs misrepresented to him the market price of said stock," was properly refused, when it was a question of fact as to whether defendant promptly rescinded contract to sell stock.—Dawson v. Flintom, 190 S. W. 972.

(B) Necessity and Subject-Matter.

☞203(1) (Tex.Civ.App.) In an action against a carrier of live stock for damages caused by delay in transportation, defendant held entitled to have its defense that delay was caused by unusual rains and floods on its road presented clearly, without being confused and mixed with other issues.—Ft. Worth & D. C. Ry. Co. v. Atterberry, 190 S. W. 1133.

☞210(2) (Mo.App.) The usual instruction as to disregarding the testimony of a witness falsely testifying falsely is not erroneous, where

there was a direct conflict in the testimony.—Volk v. Zepp, 190 S. W. 609.

☞210(3) (Mo.App.) The propriety of giving an instruction on the credibility of witnesses is left within the discretion of the trial court, and, where there was contradictory evidence upon a material point, such an instruction was proper.—Dawson v. Flintom, 190 S. W. 972.

☞214 (Tex.Civ.App.) A defendant may have presented to the jury any specified group of facts developed at trial, which, if true, would in law establish a given defense, provided the evidence represented is not substantially covered by the main charge.—Scott v. Northern Texas Traction Co., 190 S. W. 209.

☞219 (Mo.App.) An instruction to find for plaintiffs if they had "substantially" performed the building contracts sued on, without a "material omission or defect," held not misleading for failure to define the words quoted.—Moore v. McCutchen, 190 S. W. 350.

(C) Form, Requisites, and Sufficiency.

☞233(3) (Mo.App.) An instruction that, if defendant spoke the slanderous words "as charged in the petition," the law presumes they were spoken maliciously, etc., was improper because of use of the words "as charged in the petition."—Boomschaft v. Klauber, 190 S. W. 616.

☞233(3) (Mo.App.) Instruction should have explicitly told jury precise statement in article claimed to be false and libelous, and should not have instructed that if jury found and believed "the publication complained of" was false and libelous they should return verdict for plaintiff, requiring the jury to refer to the pleadings.—Byrne v. News Corp., 190 S. W. 933.

☞240 (Mo.App.) An instruction argumentative in form was properly refused.—Pasche v. South St. Joseph Town-Site Co., 190 S. W. 30.

☞240 (Mo.App.) In an action for injuries to an engine boiler washer, an instruction held erroneous as a persuasive argument in favor of plaintiff.—Ruch v. Pryor, 190 S. W. 1037.

☞244(2) (Mo.App.) An instruction singling out parts of the evidence for comment was properly refused.—Pasche v. South St. Joseph Town-Site Co., 190 S. W. 30.

(D) Applicability to Pleadings and Evidence.

☞251(1) (Mo.App.) An instruction should not be broader than the petition, whatever may be the scope of the evidence.—Young v. Dunlap, 190 S. W. 1041.

☞251(3) (Mo.App.) In shipper's action for damages to shipment of strawberries from defective refrigerator car, where answer was a general denial and there was no plea of shipper's negligence, instruction on his negligence was erroneous.—Seneker v. Lusk, 190 S. W. 96.

☞251(8) (Mo.App.) Where the complaint in personal injury action alleges several acts of negligence, but only one ground of negligence is alleged to have caused the injury, the jury must be confined to that ground.—Witham v. Lusk, 190 S. W. 403.

Instructions submitting issue of negligence to jury held not erroneous in not restricting the jury to the consideration of a single act of negligence, where the complaint recited several acts of negligence and alleged that they all contributed to the injury.—Id.

☞251(8) (Mo.App.) In an action for injuries to a boiler washer, an instruction submitting an issue as to the acts of another employe not within the pleadings held erroneous.—Ruch v. Pryor, 190 S. W. 1037.

☞252(1) (Mo.App.) Requested instructions submitting issues not made by the evidence were properly refused.—Mitchell v. Davis, 190 S. W. 357.

☞252(8) (Tex.Civ.App.) In an action for damages caused by defendant's automobile driven by

employé, where there was no evidence of incompetency or recklessness, an instruction on that subject held properly refused.—*Gordon v. Texas & Pacific Mercantile & Mfg. Co.*, 190 S. W. 748.

—252(9) (Mo.App.) In action for death of telegraph foreman on defendant's track, the submission of issues as to engineer's negligence in failing to give signals, where there was no evidence in support of that charge, was erroneous.—*Armstrong v. Denver & R. G. R. Co.*, 190 S. W. 944.

—252(11) (Ky.) In action by miner for injuries from fall of slate, an abstract instruction as to contributory negligence and refusal of concrete instruction setting out defendant's theory held error, as leaving to the jury the question of law whether facts testified to for defendant constituted contributory negligence.—*Consolidation Coal Co. v. Spradlin*, 190 S. W. 1066.

—252(12) (Tex.Civ.App.) In an action against a carrier of live stock for damages caused by delay in transportation, it was error to submit as an element of damage items of feed which plaintiff claimed was purchased en route, in absence of evidence that whole amount was necessary or price paid was reasonable.—*Ft. Worth & D. O. Ry. Co. v. Atterberry*, 190 S. W. 1133.

In an action against a carrier of live stock for damages caused by delay in transportation, as defendant employed a man to take care of stock, and there was no evidence showing amount plaintiff expended for labor to care for stock while unloaded, issue should not have been submitted to jury.—*Id.*

—252(20) (Mo.App.) In a railroad employé's action for injuries, where there was no proof of plaintiff's earnings, an instruction which directed jury to include in a verdict "his loss of time and earnings" held erroneous.—*Haire v. Schaff*, 190 S. W. 56.

—252(20) (Mo.App.) In action on quantum meruit for services and expenses in promoting corporation, selling its stock, and organizing it, instruction as to deduction of amount paid plaintiff from expenses held erroneous, in that there was no evidence tending to prove what expenses plaintiff was put to or had paid.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

—253(3) (Mo.App.) In action for fraud, instructions upon the whole case, directing the issues to be found for plaintiff, if facts hypothesized were found for him, were properly refused where they ignored an issue of compromise raised by defendant's evidence.—*Viles v. Viles*, 190 S. W. 41.

—253(3) (Mo.App.) In action for slander, an instruction covering the whole case, authorizing recovery without finding of publication was error.—*Boomshaft v. Klauber*, 190 S. W. 616.

—253(3) (Mo.App.) Where libelous article did not on face refer to plaintiff, instruction that there was only one point at issue, whether charge was true or false, was improper; there being also question whether any third person understood article to refer to plaintiff.—*Byrne v. News Corp.*, 190 S. W. 933.

—253(4) (Mo.) Instruction on due care of pedestrian in use of sidewalk held erroneous as omitting consideration of her right to presume the sidewalk to be reasonably safe.—*McNiell v. City of Cape Girardeau*, 190 S. W. 327.

—253(5) (Mo.App.) In employer's action upon liability policy, instruction on insurer's waiver of rider relieving it from liability for injury to employé from failure to guard mangling machines, etc., held erroneous, as not submitting whether insurer's agent, when investigating cause of accident, knew or should have known that such negligence caused injury.—*Compton Heights Laundry Co. v. General Ac-*

cident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 190 S. W. 882.

—253(5) (Mo.App.) Instruction which, while purporting to cover the whole case, entirely omitted any reference to defenses either as pleaded or in evidence, held erroneous.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

—253(6) (Mo.App.) Refusal of instruction ignoring issues raised by evidence is not error, even though such defect may be cured by another instruction submitting such issues.—*Viles v. Viles*, 190 S. W. 41.

—253(10) (Mo.App.) In action by salesman for commissions, there being evidence of services rendered, an instruction, denying recovery if his written contract was delivered conditionally, held error.—*Stimson v. Brinkman*, 190 S. W. 648.

—253(10) (Mo.App.) Instruction which, while purporting to cover the whole case, entirely omitted any reference to defenses either as pleaded or in evidence, held erroneous.—*Van Zandt v. St. Louis Wholesale Grocer Co.*, 190 S. W. 1050.

(E) Requests or Prayers.

—255(4) (Tex.Civ.App.) If defendant desired court to limit evidence as to plaintiffs' property to purpose for which it was admissible, it should have presented a special charge.—*Southwestern Portland Cement Co. v. Presbitero*, 190 S. W. 776.

—255(4) (Tex.Civ.App.) Where evidence admissible only against the garnishee was admitted at the consolidated trial of the garnishment proceedings and the main action, it was the duty of defendants to have requested a special charge limiting the effect of the evidence if they did not wish it considered against them.—*Eighth v. Agnew*, 190 S. W. 1140.

—256(10) (Tex.Civ.App.) In action for death of plaintiffs' minor intestate employed by defendant, charge held to sufficiently define degree of care required of defendant, in absence of a request for a special charge.—*Southwestern Portland Cement Co. v. Presbitero*, 190 S. W. 776.

—256(13) (Mo.App.) Instruction held not reversible error for failing to limit plaintiffs' damages where more specific instructions on the point were not requested by defendant.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

—256(13) (Mo.App.) In an action to recover value of plaintiff's interest in real estate conveyed by herself and husband on defendant's oral promise to pay plaintiff for her interest, where plaintiff's instruction as to value of her inchoate dower estate was generally good if defendant wished to restrict it, he should have asked an instruction himself on that subject.—*Grayson v. Grayson*, 190 S. W. 930.

—260(1). Refusal of a requested instruction substantially covered by given instructions is not error.

—(Ky.) *Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712;

(Mo. App.) *American Union Trust Co. v. Never Break Range Co.*, 190 S. W. 1045;

(Tex. Civ. App.) *Kansas City, M. & O. Ry. Co. of Texas v. Finke*, 190 S. W. 1143.

—260(1) (Mo.App.) Refusal to give a requested instruction, though it properly states the law, is excused by the giving of another instruction covering the same subject-matter.—*Allen v. Quercus Lumber Co.*, 190 S. W. 86.

—260(1) (Tex.Civ.App.) Where phase of case is sufficiently covered by court's charge, refusal of requested special charge on matter is not erroneous.—*Tyler v. McChesney*, 190 S. W. 1115.

—260(5) (Mo.App.) In replevin of a promissory note, a requested instruction that the bur-

den was on plaintiff to prove nondelivery, *held* covered by an instruction given.—*Pounds v. Farmers' Union Mercantile Co.*, 190 S. W. 374.
 ⚡261 (Mo.App.) Generally it is not error to deny a requested instruction unless it is correct in all respects.—*Viles v. Viles*, 190 S. W. 41.

(F) Objections and Exceptions.

⚡274 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, providing for submission to opposing counsel of requested instructions, does not require the submission to opposing counsel of objections made to the charges given.—*Atchison, T. & S. F. Ry. Co. v. Smith*, 190 S. W. 761.

⚡284 (Tex.Civ.App.) Mere failure to object to the general charge of the court does not estop a party from requesting instructions and excepting to their refusal since under Vernon's Sayles' Ann. Civ. St. art. 1971, if there is no objection to the general charge, the objection only is waived and the charge is not approved.—*Rabinowitz v. Smith Co.*, 190 S. W. 197.

(G) Construction and Operation.

⚡296(1) (Ky.) An instruction need not state all the law on the subject if it properly refers to other instructions which cover the subject.—*Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697.

⚡296(1) (Mo.App.) In a servant's action for wages, an instruction that defendants were partners if they combined for common profit, etc., is not erroneous where another instruction covered defendant's contention that any partnership had previously been dissolved, under Rev. St. 1909, § 1985.—*Volk v. Zepp*, 190 S. W. 609.

⚡296(2) (Ark.) In an action against a married woman for groceries used by her family, where court by a written instruction narrowed issue to disputed question of fact, an oral instruction, argumentative in form and referring to a statute passed subsequent to purchase, *held* not prejudicial error.—*Adair v. Arendt*, 190 S. W. 445.

⚡296(2) (Mo.App.) In action for fraud, instruction *held* not misleading when read in connection with other instructions given.—*Viles v. Viles*, 190 S. W. 41.

⚡296(2) (Mo.App.) An instruction as to the facts essential to recovery unless the jury find against plaintiffs on the defenses set up *held* not erroneous for failure to specify what the defenses were or what facts would sustain them, where defendants' instructions set forth their defenses.—*Moore v. McCutchen*, 190 S. W. 350.

⚡296(2) (Mo.App.) An instruction in action on slander authorizing recovery without proof of publication was not cured by defendant's instruction assuming such publication.—*Boomschaft v. Klauber*, 190 S. W. 616.

⚡296(3) (Mo.) In action by railroad employe catching his foot under guard rail not maintained as required by Rev. St. 1909, § 3163, an instruction stating defendant's duty as being both to fill and block the guard rail was not error, where later instructions were that the jury must find the guard rail was neither blocked nor filled before a verdict could be returned.—*Bowman v. Wabash R. Co.*, 190 S. W. 579.

⚡296(3) (Mo.App.) In a servant's action for injuries, error in stating in an instruction that law required defendant to furnish a reasonably safe place to work, etc., *held* cured by latter part of instruction that if jury found defendant's foreman had neglected to adopt suitable precautions for plaintiff's protection, etc.—*Stobille v. McMahon*, 190 S. W. 652.

⚡296(4, 5) (Ark.) The giving of an instruction, in an action for personal injuries, which erroneously ignored the issue of contributory comparative negligence, does not require a reversal, where the very next instruction fully

and correctly submitted that issue to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Cobb*, 190 S. W. 107.

⚡296(11) (Mo.App.) Refusal of instruction that plaintiff could not recover for permanent insomnia, was not reversible error where the court instructed that plaintiff could not be allowed anything for permanent nervous injuries and shock.—*McDonald v. Central Illinois Const. Co.*, 190 S. W. 633.

⚡296(11) (Tex.Civ.App.) In action for delay in shipment of cattle in transit, deficiency in main charge *held* cured by giving special charge.—*St. Louis Southwestern Ry. Co. of Texas v. Miller & White*, 190 S. W. 819.

VIII. CUSTODY, CONDUCT, AND DE-LIBERATIONS OF JURY.

⚡306 (Ark.) It is duty of jury to apply law as declared by court to facts which they find established by evidence and decide issues of fact in accordance with preponderance of evidence.—*Twist v. Mullinix*, 190 S. W. 851.

IX. VERDICT.

(A) General Verdict.

⚡329 (Mo.App.) Verdict for \$2,000 in favor of president of bank, to whom cashier agreed to pay \$50 per month as salary, and who served, with absences, from August, 1907, to August, 1912, *held* based on an express contract and not on quantum meruit, in view of instruction directing deduction for time of absence from duty.—*Wingate v. Bunton*, 190 S. W. 948.

(B) Special Interrogatories and Findings.

⚡350(3) (Tex.Civ.App.) In action for death of plaintiffs' minor intestate employed by defendant, submission of special issue as to whether deceased was, at time of his death, acting in course of employment as miller in defendant's building *held* not error.—*Southwestern Portland Cement Co. v. Presbitero*, 190 S. W. 776.

⚡350(6) (Tex.Civ.App.) In action for death of plaintiffs' minor intestate employed by defendant, where explanatory portion of charge defined negligence, proximate cause and ordinary care, submission of question, "Do you find that it was negligence to permit said collar to be in such condition?" *held* not error.—*Southwestern Portland Cement Co. v. Presbitero*, 190 S. W. 776.

⚡351(2) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, a judgment for plaintiff on special issues, which did not include assumption of risk, is not improper, where no issue on assumption of risk was submitted by defendant.—*Kansas City, M. & O. Ry. Co. of Texas v. Finke*, 190 S. W. 1143.

⚡365(1) (Tex.Civ.App.) In an action for injuries to a roadmaster who ran his motorcar into an open switch, special issues as to rule of a custom to leave the switch open *held* not to submit issue of assumption of risk under either the Texas or federal court rules.—*Kansas City, M. & O. Ry. Co. of Texas v. Finke*, 190 S. W. 1143.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

⚡368 (Mo.App.) An agreed statement of facts is like a special verdict, and must contain every essential element without any omission and without any doubt or ambiguity to support the judgment.—*Goben v. Murrell*, 190 S. W. 986.

TRIAL DE NOVO.

See Criminal Law, ⚡260; Justices of the Peace, ⚡171-188.

TRIAL OF RIGHT OF PROPERTY.

See Depositions, ⚡88.

TROVER AND CONVERSION.

See Carriers, ¶91; Sheriffs and Constables.

II. ACTIONS.

(C) Evidence.

¶48(8) (Ark.) In action for conversion of crop of peaches, conflicting evidence held to sustain finding that plaintiff's grantor had not lost his interest in crop by abandoning premises in violation of his contract.—*Crigler v. Alma Cash Store*, 190 S. W. 99.

(E) Trial, Judgment, and Review.

¶66 (Ark.) In action in justice court for conversion of crop of peaches conflicting evidence as to whether plaintiff's grantor had lost his interest in crop by abandoning the premises in violation of his contract held for jury.—*Crigler v. Alma Cash Store*, 190 S. W. 99.

TRUST COMPANIES.

See Banks and Banking, ¶816.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUST FUNDS.

See Corporations, ¶617.

TRUSTS.

See Limitation of Actions, ¶102; Taxation, ¶608; Witnesses, ¶139.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

¶17, 18(5) (Tex. Civ. App.) Where legal title is taken in the name of the purchaser with the understanding that the equitable title shall vest in persons promising to support the purchaser until his death, such parol agreement, when executed, constitutes a valid enforceable trust notwithstanding the statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4).—*Ryan v. Lofton*, 190 S. W. 752.

¶49 (Ky.) In action to set aside and cancel a deed of trust executed by plaintiff after her renunciation of the trust provisions of her husband's will, whereby she retained substantially the same rights in the income from his estate, held to show that it was procured by undue influence of trustee, etc.—*Beard v. Beard*, 190 S. W. 703.

¶58 (Ky.) Where an instrument creating a trust is not in terms revocable by the maker, it cannot be altered except by consent of the cestui que trust.—*Beard v. Beard*, 190 S. W. 703.

¶59(1) (Ky.) Where an instrument creating a trust is not in terms revocable by the maker and is not procured by undue influence, it cannot be revoked without the consent of all the parties to it.—*Beard v. Beard*, 190 S. W. 703.

(B) Resulting Trusts.

¶86 (Mo.) The presumption that a person who purchases and pays for real estate purchases it for his own use, although title be taken in name of a third party, should be considered in construction of an ambiguous deed.—*Tennison v. Walker*, 190 S. W. 9.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

¶160(2) (Ky.) Testamentary trust in favor of remaindermen would not be allowed to fail upon

life tenant's declaration to serve as trustee, but on proper application a trustee would be appointed and required to execute a bond for forthcoming of the property to remaindermen.—*Kelly v. Anderson*, 190 S. W. 1101.

¶161 (Ky.) On life tenant's declaration to serve as trustee for remaindermen, a trustee will be appointed and required to execute a bond for forthcoming of property to remaindermen.—*Kelly v. Anderson*, 190 S. W. 1101.

¶167 (Mo.) The unsuccessful defendant in a suit to remove a testamentary trustee for fraud cannot have costs and expenses charged to the fund because construction of the will is necessary.—*Cornet v. Cornet*, 190 S. W. 333.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

¶191(1) (Ky.) Will construed, and held that testator's daughter, one of his seven children, was given income from one-seventh of his estate for life, with remainder in corpus over to her children, and should she qualify as trustee for them, the power to sell and reinvest the estate, keeping the corpus intact.—*Kelly v. Anderson*, 190 S. W. 1101.

¶217(1) (Mo.) A trustee who invests trust funds in his own name becomes personally liable.—*Cornet v. Cornet*, 190 S. W. 333.

¶217(3) (Mo.) Direction in will to trustee to make fund productive as he may deem safe and advantageous does not authorize investment in improper class of securities.—*Cornet v. Cornet*, 190 S. W. 333.

The rule requiring only such prudence of a trustee in conducting the trust's affairs as a man would employ in his own affairs does not apply to classes of security in which he may invest.—*Id.*

The bonds of a state of Mexico were not a proper investment for trust funds at any time between 1900 and 1906, or during those years.—*Id.*

It is not sound discretion for a trustee to invest trust funds in mere personal security.—*Id.*

For a trustee to invest trust funds in a new enterprise, the results of which are necessarily experimental, as a company to construct an independent railroad bridge, is not sound discretion.—*Id.*

¶219(2) (Mo.) Though funds of trust when they could not be loaned were banked in name of trustee's firm, held he would be charged only the interest received from the bank.—*Cornet v. Cornet*, 190 S. W. 333.

Trustee held not liable for compound interest on loan on proper security to a corporation, the stock of which was owned by him and his partner, on theory of use of money by himself.—*Id.*

¶231(1) (Mo.) The trustee held not liable for brokerage commissions on loan of trust funds, where none was received, though made through his brokerage firm, to a corporation the stock of which was owned by him and partner.—*Cornet v. Cornet*, 190 S. W. 333.

A testamentary trustee not entitled under the will to brokerage fees on loans of trust funds, will be charged with such commissions received by the firm of which he was a member.—*Id.*

¶231(2) (Mo.) A trustee cannot buy his individual property for purpose of the trust.—*Cornet v. Cornet*, 190 S. W. 333.

¶243 (Mo.) The successor of a trustee who has been removed is not required to accept an improvident investment made by the removed trustee.—*Cornet v. Cornet*, 190 S. W. 333.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

¶316(1) (Mo.) Provisions of a will for deduction by trustee of expenses and compensa-

tion before quarterly payment of income held to bar him when removed for fraud from commission on corpus.—*Cornet v. Cornet*, 190 S. W. 333.

—316(2) (Mo.) The trustee, though removed for fraud, may, with the trust fund restored to a productive condition, be allowed a commission on the gross amount of income during his administration.—*Cornet v. Cornet*, 190 S. W. 333.

—330 (Mo.) A trustee removed for fraud is not entitled to have the costs incident to the accounting taxed against the trust fund.—*Cornet v. Cornet*, 190 S. W. 333.

UNDUE INFLUENCE.

See Contracts, —96; Deeds, —72; Release, —19; Trusts, —49.

UNLIQUIDATED CLAIMS.

See Compromise and Settlement, —6.

USAGES.

See Customs and Usages.

USURY.

See Pleading, —148.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

—20 (Tex.Civ.App.) Usury may be paid in property.—*Stewart v. Briggs*, 190 S. W. 221.

Where amount of interest note was usurious, held that, where cotton was received in payment and value of cotton did not exceed amount of lawful interest that could be charged, no usury was paid within Rev. St. art. 4982.—*Id.*

—57 (Ky.) Commission paid by mortgagors to the agent for procuring the loan is not usury.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

(B) Rights and Remedies of Parties.

—110 (Tex.Civ.App.) The joint and several obligors with defendant on contracts claimed to be usurious were necessary parties to an action to recover usurious interest paid.—*First Nat. Bank v. Herrell*, 190 S. W. 797.

VACATION.

See Judgment, —139, 143.

VALUE.

See Courts, —231; Evidence, —543; Homestead, —66; Larceny, —31, 46.

VENDOR AND PURCHASER.

See Damages, —81; Descent and Distribution, —8; Dower, —26; Evidence, —280; Exchange of Property; Executors and Administrators, —330-358; Guardian and Ward; Infants, —37-39; Judicial Sales; Life Estates, —27; Limitation of Actions, —148; Lis Pendens, —25; Logs and Logging, —3; Sales; Specific Performance; Taxation, —698-788.

I. REQUISITES AND VALIDITY OF CONTRACT.

—33 (Tex.Civ.App.) Fact that seller of land, in describing it to buyer, merely repeated what another had told him of it, did not relieve him of liability for rescission to the buyer if the repeated statements amounted to representation of character of land that induced buyer to take it.—*Barbian v. Grant*, 190 S. W. 789.

—36(1) (Tex. Civ. App.) Where town-site company sold lots stating a railway would build its depot opposite the lots, the buyer held

not entitled to rescind when the railway located its depot elsewhere.—*Ore City Co. v. Rogers*, 190 S. W. 226.

—45 (Tex.Civ.App.) In action for rescission by party who purchased realty, fact that defendants denied fraud charged to them, and denied making representations, merely presented conflict in testimony which it was jury's province to determine.—*Barbian v. Grant*, 190 S. W. 789.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

—98 (Tex.Civ.App.) Ordinarily vendor of land cannot rescind contract in whole or in part without tendering back all paid him by buyer, and ordinarily partial rescission and recovery of part of land cannot be had.—*City of Ft. Worth v. Reynolds*, 190 S. W. 501.

(C) Rescission by Purchaser.

—118 (Tex.Civ.App.) Where plaintiff was induced to purchase tract of state school land by fraud, and such land was not forfeited to state for failure to pay interest until after institution of plaintiff's suit for rescission wherein a reconveyance was tendered defendants, forfeiture by state was no defense to action.—*Barbian v. Grant*, 190 S. W. 789.

—123 (Tex.Civ.App.) In suit for rescission by buyer of realty who gave notes and conveyance of his land, whether certain defendants were jointly interested in and participated with another defendant in the acquisition of plaintiff's property held for jury.—*Barbian v. Grant*, 190 S. W. 789.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

—130(2) (Tex.Civ.App.) A good marketable title is one that is free from reasonable doubt, and not necessarily one free from every possible suspicion.—*Nelson v. Butler*, 190 S. W. 811.

That judgment setting apart land describes it as having been rendered in one county, when it was rendered in another, does not prevent the title being a good marketable one.—*Id.*

—130(6) (Tex.Civ.App.) Error in description of land in deed held not to prevent a good marketable title; the deed referring to the recorded deed to the grantor for full description.—*Nelson v. Butler*, 190 S. W. 811.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

—230(3) (Ark.) A subsequent purchaser of land must take notice of the recital of a deed in the line of his title, and a recital that the purchase money is unpaid is sufficient to put all parties upon notice.—*Beard v. Bank of Osceola*, 190 S. W. 840.

Recital in deed of a consideration of \$1,500 to be paid by a note for \$250, and the balance ten years from date, the notes bearing interest until paid, and of the retention of a lien, payment was sufficient to show that there was unpaid purchase money due to the extent of \$1,500.—*Id.*

—240 (Mo.) A subsequent grantee from one who had contracted to sell to another must plead in a suit by the prior purchaser that he was an innocent purchaser for value before he can rely on that defense.—*McQuitty v. Steckdaub*, 190 S. W. 590.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

—246 (Ark.) A vendor's lien is not a creature of contract, but of equity, and arises by operation of law out of the contract for the payment of the purchase price.—*Beard v. Bank of Osceola*, 190 S. W. 849.

↪254(1) (Tex.Civ.App.) In absence of distinct waiver, equity raises lien by implication in favor of a vendor to secure unpaid purchase money.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

↪261(2) (Ark.) Under Kirby's Dig. § 510, providing that a lien possessed by the vendor of realty when expressed upon or appearing from the face of the deed shall inure to the assignee of the note, the lien passes by the assignment of the notes, though not expressly reserved.—Beard v. Bank of Osceola, 190 S. W. 849.

↪261(4) (Ark.) The fact that vendor's lien notes were assigned to secure antecedent indebtedness does not impair the right of the assignee to assert claims of an innocent holder of the notes.—Beard v. Bank of Osceola, 190 S. W. 849.

↪265(4) (Ark.) Bona fide purchasers of vendor's lien notes, after execution of the deed of original grantor merely reciting execution of notes but not expressly reserving a lien, in view of Kirby's Dig. § 510, had a lien superior to that of innocent purchasers of property subsequent to execution of deed releasing vendor's lien.—Beard v. Bank of Osceola, 190 S. W. 849.

↪267 (Tex.Civ.App.) The release of a parcel of a tract from a vendor's lien released the parcels previously sold, and therefore entitled to have the released parcel first applied from the lien to the extent of the value of the parcel released.—Wiggins v. Wagley, 190 S. W. 736.

The release from a vendor's lien of a part of a tract of land whose value was sufficient to pay the amount then due discharges parcels previously sold from the lien, though before foreclosure suit the amount of the lien has been increased to more than the value of the property released.—Id.

↪278 (Tex.Civ.App.) The extension of a vendor's lien note, not recorded as required by Vernon's Sayles' Ann. Civ. St. art. 5695, does not authorize foreclosure after the expiration of the limitation period fixed by articles 5693, 5694, even as between the parties.—Adams v. Harris, 190 S. W. 245.

↪279 (Ark.) The wife of the purchaser is not a necessary party to a suit to foreclose a vendor's lien, since she can have no dower or homestead right therein, and therefore cannot intervene in such suit and redeem the property from the sale.—Bothe v. Gleason, 190 S. W. 562.

↪280(1) (Tex.Civ.App.) In landowner's suit against city for part of price of realty and to foreclose implied lien, prayer of petition held broad enough to cover any legal or equitable relief to which plaintiff was entitled.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

In suit by vendor of lands to city to foreclose implied lien on part of them for part of price, description of lands, in petition, as all "above high-water mark," held sufficient.—Id.

↪285(2) (Tex.Civ.App.) In suit by vendor of lands to city to foreclose implied lien on part of them for part of price, description of lands, in judgment foreclosing lien, as all "above high-water mark," held sufficient.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

↪285(3) (Tex.Civ.App.) City which purchased land for reservoir, but used only part and failed to pay part of price, cannot complain of judgment foreclosing seller's lien on part of lands not actually in use.—City of Ft. Worth v. Reynolds, 190 S. W. 501.

↪289 (Ark.) There is no statutory right of redemption under a sale to foreclose a vendor's lien.—Bothe v. Gleason, 190 S. W. 562.

VENDORS' LIENS.

See Dower, ↪26; Vendor and Purchaser, ↪246-289.

VENUE.

See Criminal Law, ↪1144; Pleading, ↪110.

VERDICT.

See Appeal and Error, ↪990-1017; Criminal Law, ↪878, 1159; Judgment, ↪256; Master and Servant, ↪297; New Trial, ↪72; Trial, ↪169, 329-365.

VERIFICATION.

See Bills and Notes, ↪485; Injunction, ↪122; Pleading, ↪302.

VEXATIOUS APPEAL.

See Appeal and Error, ↪367.

WAGES.

See Master and Servant, ↪80.

WAIVER.

See Appeal and Error, ↪1078; Estoppel; Execution, ↪245; Highways, ↪55; Insurance, ↪388; Liens, ↪16; Parties, ↪96; Pleading, ↪110, 212, 406-423; Principal and Agent, ↪105; Sales, ↪121; Witnesses, ↪219.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

See Carriers, ↪191.

WARRANT.

See Municipal Corporations, ↪906.

WARRANTY.

See Insurance, ↪268, 379; Sales, ↪273.

WATERS AND WATER COURSES.

See Drains; Eminent Domain, ↪75; Levees; Railroads, ↪113.

II. NATURAL WATER COURSES.

(A) Riparian Rights in General.

↪38 (Tex.Civ.App.) A creek flowing through a well-defined channel, with banks and bed fed by rains falling within its watershed outside of defendants' land and through which water flows only after a rainfall, held not water flowing in a water course to which riparian rights attach.—Hoefs v. Short, 190 S. W. 802.

V. SURFACE WATERS.

↪115 (Tex.Civ.App.) A creek flowing through a well-defined channel, with banks and bed fed by rains falling within its watershed outside of defendants' land, and through which water flows only after a rainfall, was not diffused surface water flowing across defendants' land which could be regarded as their absolute property.—Hoefs v. Short, 190 S. W. 802.

VI. APPROPRIATION AND PRESCRIPTION.

↪130 (Tex.Civ.App.) Where water in a creek flows through a well-defined channel, with banks and bed fed by rains falling within its watershed outside of defendants' land and through which water flows only after a rainfall, held that title remains in state and the water is subject to appropriation under Acts 33rd Leg. c. 171, § 1.—Hoefs v. Short, 190 S. W. 802.

↪152(11) (Tex.Civ.App.) Decree enjoining use of surface waters flowing in a well-defined channel beyond a certain amount held not to require defendants to maintain works to deliver water

or to impose an easement upon land.—Hoefs v. Short, 190 S. W. 802.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

—171(1) (Tex.Civ.App.) A railroad company is not liable for alleged damages to land from overflow, though caused by its negligent construction or maintenance of embankments and culverts, diverting the natural flow of surface or creek waters, if such overflow occurred when natural conditions would have caused the same damages.—Scott v. Northern Texas Traction Co., 190 S. W. 209.

—179(6) (Tex.Civ.App.) In action against railroad for damages to land from flood caused by negligent construction or maintenance of its embankment and culverts, the question whether the damages were caused by such embankment and culverts or would have occurred from natural conditions is for the jury.—Scott v. Northern Texas Traction Co., 190 S. W. 209.

WAYS.

See Easements; Highways.

WEAPONS.

—3 (Mo.) Rev. St. § 4498, prohibiting carrying of concealed weapons, is not in conflict with Const. U. S. Amend. 2, since that amendment is a limitation upon powers of the national government only.—State v. Keet, 190 S. W. 573.

Rev. St. § 4498, prohibiting carrying of concealed weapons is not in conflict with Bill of Rights of the state Constitution (article 2, § 17), which provides that right of a citizen to bear arms in defense of person or property, etc., shall not be called in question, and which contains further provision that nothing therein is intended to justify wearing concealed weapons.—Id.

Under Const. art. 2, § 17, preserving right of citizens to keep and bear arms in defense of home, person, or property, and providing that nothing therein contained is intended to justify practice of wearing concealed weapons, the word "practice" refers to an existing practice more or less general among citizens.—Id.

The provision exempting persons who carry weapons in self-defense contained in Rev. St. 1879, § 1275, was expressly repealed by Laws 1909, p. 452, and the plea that concealed weapons are carried for self-defense is no justification.—Id.

—10 (Tex.Cr.App.) A pistol carried in the box of a buggy seat is carried "about the person" of the driver.—Emerson v. State, 190 S. W. 485.

WEIGHTS AND MEASURES.

—2 (Mo.) Laws 1913, p. 354, relative to inspection of hay and grain, including provisions relative to weighing and grading of grain by state inspectors, and section 63 (page 372), prohibiting issuance of weight certificates except by bonded state weigher, etc., are valid as proper exercise of police powers.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

—8 (Mo.) Laws 1913, p. 354, relative to inspection of hay and grain, does not permit weighing and certifying of weights of grain both by state's bonded weigher and a private warehouseman.—State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S. W. 903.

WIDOWS.

See Dower; Ejectment, —9.

WILLS.

See Appeal and Error, —1152; Descent and Distribution; Executors and Administrators; Homestead, —59; Judgment, —743; Trusts.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

—1 (Mo.) The law favors the right of testamentary disposition subject to the common interests pertaining to the marriage relation.—La Vaulx v. McDonald, 190 S. W. 604.

III. CONTRACTS TO DEVISE OR BEQUEATH.

—57 (Mo.App.) A contract of decedent to make an illegitimate child his heir if she would move to America is to be determined by the law of the state into which she moved, that being the place of performance.—Buck v. Meyer, 190 S. W. 997.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) Jurisdiction, Limitations, and Laches.

—255 (Mo.) A will cannot be contested unless the property devised and its ownership are before the court.—Wilson v. McDaniel, 190 S. W. 3.

(G) Petitions, Objections, and Pleadings.

—281 (Mo.) The petition in a will contest may refer to lands devised in a general way without particular description.—Wilson v. McDaniel, 190 S. W. 3.

VI. CONSTRUCTION.

(A) General Rules.

—439 (Mo.) The intention of the testator governs the construction of the will.—La Vaulx v. McDonald, 190 S. W. 604.

—455 (Mo.) While the rules of testamentary construction may be considered in arriving at testator's intention, the language of the will, when explicit, must govern.—La Vaulx v. McDonald, 190 S. W. 604.

—470 (Mo.) The intention of the testator is to be gathered from the whole will and all its parts.—La Vaulx v. McDonald, 190 S. W. 604.

(E) Nature of Estates and Interests Created.

—814(6) (Ky.) Will construed, and held that testator's daughter was given income from one-seventh of his estate for life, with remainder to her children.—Kelly v. Anderson, 190 S. W. 1101.

(F) Vested or Contingent Estates and Interests.

—630(13) (Mo.) When income was directed to be divided equally between widow and children, and upon widow's death her share of income to be divided among children, and upon death of a child with issue the trust as to that child's share to cease and his issue "immediately" take title to decedent's share of the trust property, held, that no interest vested in the issue of testator's children at his death, and upon widow's death the corpus set apart to pay her share of income passed to surviving child of testator, and that descendants of testator's deceased children, having received their share would not take a further share therein.—La Vaulx v. McDonald, 190 S. W. 604.

(H) Estates in Trust and Powers.

—687(5) (Ark.) Under will held, that plaintiff acquired estate in fee simple upon reaching his majority; provisions for gift over applying only in event of his death before reaching majority.—Wilkins v. Eanes, 190 S. W. 99.

—693(3) (Ark.) Under a will devising to testator's surviving wife and to her children by testator all his property both real and personal, and appointing her executrix, and giving her power to sell and convey realty by warranty deed and to use proceeds for her own benefit, she was authorized to convey realty.—Thurman v. Symonds, 190 S. W. 106.

⚡633(5) (Ark.) Under will vesting a fee in surviving wife and her heirs by testator, appointing her executrix, and giving her power to sell and convey, a conveyance by her in her individual capacity, and not as executrix, was valid.—*Thurman v. Symonds*, 190 S. W. 106.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(G) Debts of Testator and Incumbrances on Property.

⚡837 (Ky.) A will devising personal property and household goods to testator's wife and his real estate to his wife and his son for life, with remainder to his son's bodily heirs after payment of just debts, gives testator's debts precedence over both life estates and remainders.—*Todd's Ex'r v. First Nat. Bank*, 190 S. W. 468.

WINDING UP.

See Corporations, ⚡619.

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WITNESSES.

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II. COMPETENCY.

(A) Capacity and Qualifications in General.

⚡37(4) (Tex.Cr.App.) Witnesses whose opinion that deceased generally went armed was based solely on facts they personally knew are not qualified to testify to the general reputation of deceased, as a man who went armed.—*Becker v. State*, 190 S. W. 185.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⚡139(9) (Tex.Civ.App.) As to community property, the title to which is cast on survivor by Rev. St. 1911, art. 2469, the surviving widow is not an "heir" within article 3690, relating to testimony as to transactions with persons since deceased, and hence in an action against the widow to declare a trust in favor of plaintiffs as against an absolute deed to the deceased husband, both parties may testify.—*Briggs v. McBride*, 190 S. W. 1123.

⚡159(8) (Mo.App.) Under Rev. St. 1909, § 6354, the testimony of a defendant relative to an agreement made by him with a person since deceased was properly excluded.—*Moore v. McCutchen*, 190 S. W. 350.

(D) Confidential Relations and Privileged Communications.

⚡219(5) (Mo.App.) In action on life policy, where insured's physician was placed on stand, and plaintiff's counsel, interposing general objection, propounded to him questions to lay foundation for objection to competency, plaintiff did not waive privilege of Rev. St. 1909, § 6362.—*Hicks v. Metropolitan Life Ins. Co.*, 190 S. W. 661.

Beneficiary of life policy held not to have waived privilege to claim incompetency of decedent's physician as witness, under Rev. St. 1909, § 6362, by filing certificate of physician as part of proofs of death, pursuant to clause in policy.—*Id.*

III. EXAMINATION.

(A) Taking Testimony in General.

⚡237(3) (Mo.) Where questions propounded to witness assumed a damaging state of facts

not proven, they were properly excluded.—*Bonslett v. New York Life Ins. Co.*, 190 S. W. 870.
⚡240(4) (Ky.) In prosecution for willful murder, question to defendant as to whether he shot deceased in his own necessary self-defense to protect himself from great bodily harm or death as he believed, was leading, and properly excluded.—*Cavanaugh v. Commonwealth*, 190 S. W. 123.

⚡244 (Tex.Cr.App.) In trial for rape of accused's daughter, it was not error to permit the prosecutor to ask other children of accused leading questions and call their attention to their written and signed testimony before the grand jury and also before the county attorney; witnesses being hostile to the state.—*Marion v. State*, 190 S. W. 499.

⚡255(5) (Tex.Civ.App.) One who loaded cars with goods sold and shipped, and furnished the memoranda thereof to the bookkeeper, may refresh his memory from a statement drawn from the books, and testify to its correctness.—*Cobb v. Riley*, 190 S. W. 517.

⚡257 (Mo.App.) In action for breach of contract to sell and deliver flour, carrier's books of original entry, showing time of arrival, storage, notice to consignees, etc., the entries being made by various clerks in the usual course of business, were admissible as aids to testimony of a witness who had general charge and supervision of the books.—*Schwall v. Higginsville Milling Co.*, 190 S. W. 959.

(B) Cross-Examination and Re-Examination.

⚡274(1) (Mo.) Witnesses who had testified that deceased was of a rash and violent disposition were properly permitted, on cross-examination, to state that so far as they personally knew him he was a quiet and peaceable man.—*State v. Fletcher*, 190 S. W. 317.

⚡274(2) (Mo.) Upon cross-examination of witnesses testifying to accused's general reputation for peacefulness, it was error for the state to show an old affray in which accused was cut; it appearing that he was not prosecuted for his part therein, but his opponent was.—*State v. Dixon*, 190 S. W. 290.

⚡277(4) (Mo.) Under Rev. St. 1909, § 5242, cross-examining defendant as to discharging his pistol at another time and place than the homicide, not referred to in his testimony, held improper.—*State v. Swarengin*, 190 S. W. 268.

⚡277(5) (Mo.) Statement of defendant in burglary that he had never committed a crime does not authorize cross-examination as to having issued bad checks as any evidence as to bad check was irrelevant and had no tendency to prove or disprove the crime charged.—*State v. Kinney*, 190 S. W. 306.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

⚡330(1) (Mo.App.) Cross-examination of a witness as to what he said after plaintiff was hurt held proper on the ground of contradicting him.—*Haire v. Schaff*, 190 S. W. 56.

(B) Character and Conduct of Witness.

⚡337(5) (Tex.Cr.App.) It is always permissible to impeach an accused to show by him on his examination that he had been indicted or convicted of any felony if not too remote.—*Sapp v. State*, 190 S. W. 489.

It was not permissible to require an accused to state whether he had committed any other offense and whether he had been arrested on complaint therefor, if sufficient time had in fact elapsed to show that grand jury had had an opportunity to investigate and had not found a bill of indictment.—*Id.*

—338 (Ky.) Under Civ. Code Prac. § 597, defendant in prosecution for willful murder had the right to impeach the moral character of an adverse witness.—Cavanaugh v. Commonwealth, 190 S. W. 123.

—340 (3) (Tex.Cr.App.) Evidence of misconduct of witness for the state was irrelevant.—Marion v. State, 190 S. W. 499.

—344(2) (Tex.Cr.App.) It is not permissible to impeach a witness by showing that he has committed a certain crime, but only by showing that he has been indicted or convicted for such crime.—Hawthorne v. State, 190 S. W. 184.

—344(2) (Tex.Cr.App.) In prosecution for selling intoxicants in prohibition county, court properly excluded proposed impeaching testimony by defendant that state's main witness had made single sale of intoxicants; offense being merely misdemeanor, and witness having been neither indicted nor prosecuted therefor.—Waggoner v. State, 190 S. W. 493.

—347 (Mo.) While the fact that a girl under 14 years of age made no outcry or complaint is no defense to a charge of rape, it is admissible as affecting her credibility where she testified. defendant used force.—State v. Davis, 190 S. W. 297.

—350 (Tex.Cr.App.) Any witness can be impeached by the adverse party by proving by the witness on cross-examination that within a period not too remote he had been indicted or convicted of a felony or misdemeanor imputing moral turpitude.—Hawthorne v. State, 190 S. W. 184.

—350 (Tex.Cr.App.) The state can properly ask a witness for the defense whether he had ever been indicted.—Deisher v. State, 190 S. W. 729.

—361(1) (Tex.Cr.App.) Where one accused of unlawful sale of liquors in prohibition territory variously attacked the state's principal witness, whose testimony made out the offense, it was proper for the court to permit the sheriff to testify that the principal witness assisted him in ferreting out violations of the local option law.—Dupree v. State, 190 S. W. 181.

—362 (Ky.) The jury may determine from an attack on either a witness's reputation for untruthfulness or upon his moral character, as permitted by Civ. Code Prac. § 597, if it be successfully made, whether the witness is worthy or unworthy of belief.—Cavanaugh v. Commonwealth, 190 S. W. 123.

(C) Interest and Bias of Witness.

—370(2) (Tex.Cr.App.) Upon trial for rape of accused's daughter, testimony, tending to show hostility of daughter, testifying for the state, against another daughter, was irrelevant.—Marion v. State, 190 S. W. 499.

—372(2) (Tex.Cr.App.) The cross-examination of a witness for accused as to his friendship for, and assistance rendered to, accused, held proper to show the witness' interest.—Deisher v. State, 190 S. W. 729.

(D) Inconsistent Statements by Witness.

—379(1) (Tex.Cr.App.) The state may impeach defendant's witness by proving that she had made declarations prior to her testimony different from what she made along the same line at other times prior thereto.—Sapp v. State, 190 S. W. 489.

—379(1) (Tex.Civ.App.) In action to rescind purchase price of land, testimony of defendant's conversation with witness held admissible as contradictory of defendant's testimony.—Barbican v. Grant, 190 S. W. 789.

—379(2) (Tex.Civ.App.) Declarations by defendant subsequent to his claimed transfer of a note to his wife, held admissible to contradict

his testimony showing a gift.—Earhart v. Agnew, 190 S. W. 1140.

—379(3) (Tex.Cr.App.) In prosecution for murder, testimony of state's witnesses as to statements of defendants' witness at the time wife of one of defendants was lying dead, to the effect that defendant had had her killed, held admissible to impeach defendants' witness.—Sapp v. State, 190 S. W. 489.

—380(2) (Ark.) Where accused voluntarily goes upon the witness stand, he subjects himself to the ordinary tests of credibility, and evidence of conflicting statements made by him before grand jury are admissible as impeaching testimony.—Pinkerton v. State, 190 S. W. 110.

—380(5) (Tex.Civ.App.) A party cannot impeach a witness called by him by showing statements made by the witness contrary to his testimony where there is no claim that the witness misled or deceived the party.—Lane v. Herring, 190 S. W. 778.

—392(1) (Tex.Cr.App.) It was proper for the state to introduce for impeaching purposes a written statement of a witness which contradicted some of his testimony on the trial; the proper predicate having been laid.—Porter v. State, 190 S. W. 159.

—394 (Tex.Cr.App.) Where accused had been impeached as a witness in his own behalf by proof of contradictory statements, he can introduce evidence of his reputation for truth and veracity.—Becker v. State, 190 S. W. 185.

Where defendant had been impeached by proof of contradictory statements as to a material issue, the mere withdrawal of the impeaching evidence does not justify excluding evidence of defendant's reputation for truth and veracity.—Id.

—394 (Tex.Civ.App.) Where on the third trial of a case one party impeached witness by showing that on a former trial he had testified to facts in conflict with his testimony on the third trial, it was error to permit in corroboration a showing that on another former trial he testified as he did on the third trial.—Gulf, O. & S. F. Ry. Co. v. Sullivan, 190 S. W. 739.

(E) Contradiction and Corroboration of Witness.

—398(3) (Tex.Cr.App.) Where a state's witness was asked on cross-examination by defendants' attorney whether or not she was a common prostitute, and she denied that, none of the officers could testify that her reputation was that of a common prostitute.—Sapp v. State, 190 S. W. 489.

—406 (Mo.) The rejection of defendant's offer of depositions of his own witness who was present and testified to contradict his testimony on cross-examination, where part of deposition did not concern matters referred to in cross-examination, and defendant does not point out anything specifically material in deposition which was excluded, was proper.—Bonslett v. New York Life Ins. Co., 190 S. W. 870.

—414(1) (Mo.App.) In action for libel by charging plaintiff with having obtained registration of hogs by forging pedigrees, notations on a defendant's private hog register, as to what he did with certain pigs, etc., held properly excluded, where the purpose was to corroborate defendant's testimony.—Byrne v. News Corp., 190 S. W. 933.

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